No. 07-1529

IN THE

Supreme Court of the United States

JESSE JAY MONTEJO,
Petitioner,
v.
STATE OF LOUISIANA,
Respondent.

On Writ of Certiorari to the Louisiana Supreme Court

SUPPLEMENTAL BRIEF OF *AMICI CURIAE* THE PUBLIC DEFENDER SERVICE FOR THE DISTRICT OF COLUMBIA, THE NATIONAL LEGAL AID & DEFENDER ASSOCIATION, AND THE NATIONAL ASSOCIATION OF FEDERAL DEFENDERS IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE* [1]

The Public Defender Service for the District of Columbia provides and promotes quality legal representation to indigent people facing a loss of liberty in

[1] The parties have consented to the filing of this brief. Counsel of record for all parties received timely notice of *amici's* intention to file this brief. No counsel for any party authored any part of this brief, and no person or entity, other than *amici*, has made a monetary contribution to the preparation or submission of this brief.

the District of Columbia. The National Legal Aid and Defender Association, the nation's oldest and largest nonprofit association of equal justice professionals, includes in its membership the majority of the nation's public defender offices, coordinated assigned counsel systems, and legal services agencies. The National Association of Federal Defenders is a nationwide, nonprofit organization whose membership includes federal public and community defenders authorized under the Criminal Justice Act, 18 U.S.C. § 3006A, and whose mission is to enhance the representation provided under the Act and the Sixth Amendment.

In *Michigan v. Jackson,* 475 U.S. 625, 636 (1986), the Court held that the state violates the Sixth Amendment when it initiates an interview after a defendant requests appointment of counsel after his right to counsel has attached. But as the Court subsequently acknowledged in *Patterson v. Illinois*, 487 U.S. 285, 290 n.3 (1988), the prohibition on state-initiated interviews post-charging also applies "[o]nce an accused has a lawyer." *Amici* presume it is the *Jackson* rule as interpreted by *Patterson* (hereinafter the "*Jackson* rule") that the Court is reconsidering. *Amici* write to explain why this rule is essential to our ability to fulfill our constitutional obligation to provide effective assistance and to ensuring the fundamental fairness of our adversarial system.

SUMMARY OF ARGUMENT

At its inception, the *Jackson* rule was criticized as layering prophylaxis (the *Edwards* rule) on prophylaxis (*Miranda* warnings) in order to protect against a specific danger, coercion, that was thought to be unlikely in the context of a post-charging interview of a represented defendant. *Jackson*, 475 U.S. at 637-

42 (Rehnquist, J., dissenting). But this criticism was as unfair then as it is now. The rule articulated in *Jackson* has independent justification in the Sixth Amendment that is not merely prophylactic and that has nothing to do with coercive interrogation techniques.

The *Jackson* rule precludes the state from initiating an interview with a represented defendant before his attorney has been able to meaningfully communicate with him, investigate his case, obtain discovery, and assess the legal issues presented – all actions that an attorney must take before she can reasonably counsel her client about the advisability of communicating with the state either to persuade the state of his innocence or to negotiate a disposition of the charges. The *Jackson* rule thus ensures that a defense lawyer is able to fulfill her constitutional obligation to provide effective assistance to her client and that her appointment is not a meaningless formalism.

Indeed, given what is involved in making a counseled decision to speak to state agents post-charging, the Court should acknowledge that an invitation by police or prosecutors to a represented defendant to participate in a post-charging interview is a trial-like confrontation that is itself a critical stage in a prosecution warranting Sixth Amendment protection. This conclusion is further supported by the fact that all fifty states and the District of Columbia have ethical rules that, with the aim of promoting fairness in our adversarial system, prohibit prosecutors and their agents from contacting a represented defendant post-charging.

ARGUMENT

I. THE *JACKSON* RULE ENSURES THAT COURT-APPOINTED COUNSEL ARE ABLE TO FULFILL OUR SIXTH AMENDMENT OBLIGATION TO PROVIDE EFFECTIVE ASSISTANCE OF COUNSEL TO OUR CLIENTS.

The *Jackson* rule prevents police and prosecutors from initiating contact with represented defendants at any time post-charging – from the beginning of the prosecution up to and at trial. But given ethical rules that prohibit attorneys and their agents from contacting represented parties and that apply equally in civil and criminal cases, *see* Point III *infra*, the true force of the *Jackson* rule is felt at the earliest stages of a criminal case, just after counsel is appointed or retained. By requiring police and prosecutors to use counsel as the medium to communicate with the defendant, the *Jackson* rule ensures that counsel will have the time needed to adequately advise her client about speaking to state agents post-charging, and thus ensures that her appointment or retention has force and meaning. *See Spano v. New York*, 360 U.S. 315, 326 (1959) ("'[T]he denial of opportunity for appointed counsel . . . to consult with the accused and to prepare his defense, could convert the appointment of counsel into a sham . . . .'") (Douglas, J., concurring) (citation omitted).

Ours is an adversarial system of criminal justice. On one side is the prosecutor, who, within the bounds of doing justice, "may prosecute with earnestness and vigor" and "use every legitimate means to bring about a just" conviction. *Berger v. United States*, 295 U.S. 78, 88 (1935). On the other side is the defendant, who, once charged, is guaranteed the assistance of

counsel to compensate for his lack of "'skill in the science of law'" and "to minimize imbalance in the adversary system" with "a professional prosecuting official." *United States v. Ash*, 413 U.S. 300, 307, 309 (1973) (citation omitted); *see also* U.S. Const. Amend. 6. Defense counsel is charged with zealously advocating for his client within the bounds of the law and is deemed "to best serve[] the public . . . by advancing 'the undivided interests of his client.'" *Polk County v. Dodson,* 454 U.S. 312, 318-19 (1984) (citation omitted); *see also* ABA Standards for Criminal Justice, Defense Function ["ABA Stnd."] 4-1.2 Commentary p. 126 (3d ed. 1993) ("[O]ur adversary process of justice requires that counsel be guided constantly by the obligation to pursue the client's interests."). "The system assumes that adversarial testing will ultimately advance the public interest in truth and fairness." *Polk County,* 454 U.S. at 318. Within this construct, both sides generally prepare their respective cases outside of the view of the other and only disclose information when required by law or when it promotes some strategic advantage.

After the state has filed charges against a defendant, the decision to speak to police or prosecutors is a critical one. At this point the state has determined that the defendant has committed a crime, and police or prosecutors will not be "trying to solve a crime or even absolve a suspect . . . . [R]ather [they will be] concerned primarily with securing a statement from defendant on which they . . . [can] convict" him. *Spano*, 360 U.S. at 324-25. Speaking to police or prosecutors carries great risks, but there are also significant potential benefits. This is why defense counsel, consistent with our role as advocate, routinely advise our clients to participate in interviews

with or make proffers to the state and negotiate the terms of such interactions.

But before an attorney can reasonably assess the advisability of speaking to police or prosecutors post-charging, she must have adequate knowledge of the facts and the law of the case. As part of her constitutional duty to "function as assistant to the defendant," counsel must be able to advise her client intelligently and "advocate the defendant's cause." *Strickland v. Washington*, 466 U.S. 668, 688, (1984). "Prevailing norms of practice as reflected in . . . ABA Standards for Criminal Justice . . . ('The Defense Function'), are guides to determining what" counsel "reasonabl[y]" must do to fulfill this obligation pre-trial. *Id.* at 688; *see also Rompilla v. Beard*, 545 U.S. 374, 387 (2005) (quoting *Strickland*).

To begin with, counsel must quickly establish a relationship with her client such that she can act as an effective advocate. *See* ABA Stnd. 4-3.1. She must meet with her client soon after appointment, and without interference from police, prosecutors or other state agents. *Id.* 4-3.1(b) (noting the "essential" need for "privacy" to facilitate "confidential communications"). At this meeting, counsel may begin to develop possible defenses and investigative leads; to assess the client's ability to participate in his defense; and to learn of any constitutional violations that may have occurred. She must also attempt to advise her client to forestall the loss of important rights, including his right against self-incrimination. *See id.* 4-3.6 Commentary p. 171 ("One of the lawyer's most significant tasks is to inform the client of the nature, extent and importance of constitutional and legal rights and to take the procedural steps necessary to protect them. This includes advice concerning the privilege against self-incrimination and the appropri-

ate responses to be made to a[n] . . . interrogation . . . ."); *see also* ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 69 (2003) (noting the particular importance in death penalty cases for counsel "to try to prevent uncounseled confessions or admissions").

In addition to communicating with her client, counsel must "conduct a prompt investigation of the circumstances of the case and explore all avenues leading to the facts relevant to the merits of the case and penalty in the event of conviction." ABA Stnd. 4-4.1(a); *see also Rompilla,* 545 U.S. 374 (discussing counsel's duty to investigate). The importance of fact investigation cannot be overstated. It "form[s] the basis of effective representation." ABA Stnd. 4-4.1 Commentary p. 181. It is essential for competent representation at trial, but it also "may avert the need for courtroom confrontation," *id.* at 181-82, and is indispensible "to conduct plea negotiations effectively." *Id.* at 183.

Lastly, counsel must determine whether "the prosecution can establish guilt *in law*, not in some moral sense." *Id.* 4-4.1 Commentary p. 182. Accordingly, "[c]ounsel must . . . promptly undertake whatever legal research is necessary to assure vindication of . . . her client's rights." *Id.* 4-3.6 Commentary p. 172; *see also id.* 4-5.1 Commentary p. 197-98 (emphasizing an attorney's duty to be informed given the client's likely ignorance of criminal law and procedure).

Only "after [counsel has] inform[ed] . . . herself fully on the facts and the law" should counsel "advise the accused . . . concerning all aspects of the case, including a candid estimate of the probable outcome." *Id.* 4-5.1(a); *see also id.* 4-6.1(b) (requiring "appropriate investigation and study of the case . . . including

an analysis of controlling law and the evidence likely to be introduced at trial" before counsel recommends a guilty plea).

Part of this conversation should include whether it would be possible or advisable to talk to police or prosecutors either to persuade them of the defendant's innocence or lesser involvement in the crime; or to assist the prosecution of others; or to admit guilt and negotiate a disposition of the case. *Id.* 4-6.1 Commentary p. 205 (an attorney has both the "obligation to explore the possibility of disposition by plea when . . . [she] concludes that conviction of some kind is likely" and a "duty to try to seek dismissal of the charges if . . . [she] concludes that the accused is not guilty or ought not be convicted."). If counsel and her client determine speaking to police or prosecutors is in the client's best interest, it is counsel's obligation to negotiate the terms of any information exchange, *e.g.,* whether the prosecutor would give the client immunity for other revealed crimes, or, in exchange for information, pursue lesser offenses or punishment. *See id.* 4-1.2(b) (counsel's function is "to serve as the accused's counselor and advocate").

Thus, although "an attorney's role at postindictment questioning" may appear "rather . . . unidimensional," limited to advising her client to refrain from making any statements or "advising h[er] client as to what questions [not] to answer," *Patterson*, 487 U.S. at 294 n.6; *see also id.* at 300 (describing counsel's role as "relatively simple and limited"), this appearance is misleading. In fact much must be done by counsel, in consultation with her client, to determine whether and on what terms to submit to an interview with the state post-charging. Counsel must have full knowledge of the facts and law of the case and must have adequately prepared to leverage that

knowledge with the prosecution. In other words, counsel must "bring to bear" the same "skill and knowledge" needed to "render the trial a reliable adversarial testing process." *Strickland*, 466 U.S. at 688; *cf. Hill v. Lockhart*, 474 U.S. 52 (1985) (right to effective assistance applies to counsel's advice to plead guilty).

All of this work takes time, which is precisely what the *Jackson* rule gives defense counsel. Under *Jackson*, the state cannot initiate contact with a represented defendant post-charging. Thus the state agents who seek a defendant's conviction cannot press him to precipitously speak to them and thereby interfere with counsel's efforts to determine the best course of action for her client. Accordingly, the *Jackson* rule safeguards the Sixth Amendment right to effective assistance of counsel itself. *Maine v. Moulton*, 474 U.S. 159, 176 (1985) (The Sixth Amendment "guarantee includes the State's affirmative obligation not to act in a manner that circumvents the protections accorded the accused by invoking this right.").

II. A POST-CHARGING OVERTURE BY POLICE OR PROSECUTORS TO A REPRESENTED DEFENDANT TO PARTICIPATE IN AN INTERVIEW IS ITSELF A CRITICAL STAGE OF OUR ADVERSARIAL PROCESS THAT WARRANTS SIXTH AMENDMENT PROTECTION.

To ensure the functioning of our adversarial system, the Sixth Amendment right to counsel is guaranteed at all "critical stages" of a criminal prosecution, not simply at trial. *Ash*, 413 U.S. at 310-311; *id.* at 312 (the right to counsel extends "to trial-like confrontations" where counsel is needed to "act as a spokesman for, or advisor to, the accused"); *see also*

United States v. Wade, 388 U.S. 218, 227 (1967) ("The presence of counsel at such critical confrontations, as at the trial itself, operates to assure that the accused's interests will be protected consistently with our adversar[ial]" sytem). A critical stage may be "formal or informal, in court or out." *Wade*, 388 U.S. at 226. What is dispositive is whether counsel may be of meaningful assistance – or as explained last term in *Rothgery v. Gillespie County, Tex.*, 128 S. Ct. 2578, 2591 (2008), "what makes a stage critical is what shows the need for counsel's presence." *See also Patterson,* 487 U.S. at 298 ("[W]e have defined the scope of the right to counsel by a pragmatic assessment of the usefulness of counsel . . . .").

The complexity of the decision whether a defendant should speak to police or prosecutors post-charging, *see* Point I *supra*, demonstrates that any overture to a represented defendant is itself a "trial-like confrontation" and a critical stage of a prosecution where counsel's assistance is needed.

Such a conclusion is compelled by this Court's decision in *Estelle v. Smith*, 451 U.S. 454 (1981). In *Estelle*, the prosecution engaged an expert to conduct a psychiatric evaluation of a represented capital defendant without notifying his counsel that it intended to use this evaluation at sentencing to establish future dangerousness. The Court held the state violated the Sixth Amendment because the defendant had a "right to the assistance of counsel *before* submitting to the pretrial psychiatric interview." 451 U.S. at 469 (emphasis added). Specifically, the Court observed the decision to participate in the interview was "'difficult . . . even for an attorney' because it requires 'a knowledge of what other evidence is available, . . . [and] of possible alternative strategies

at the sentencing hearing.'" *Id.* at 471 (citation omitted). Accordingly, the Court held the defendant was entitled to "the assistance of his attorneys in making the significant decision of whether to submit to the examination and to what end the psychiatrist's findings could be employed." *Id.*

"It follows logically from . . . [the Court's] precedents that a [represented] defendant should not be forced to resolve" a similarly if not more "important issue" of whether to submit to a post-charging interview with police or the prosecutors "without 'the guiding hand of counsel.'" *Id.* (quoting *Powell v. Alabama*, 287 U.S. 45, 69 (1932)).

Recognizing that an overture by police or prosecutors to a represented defendant to participate in an interview is a critical stage at which a defendant is entitled to counsel's assistance in no way impinges on a defendant's "free choice" to speak. *Cf. Texas v. Cobb,* 532 U.S. 162, 175 (2001) (Kennedy, J., concurring) (expressing concern about "a Sixth Amendment rule" that would "invalidate a confession given by . . . free choice" in a case where counsel repeatedly gave police permission to interview his client).

As discussed above, counsel may well advise that accepting an invitation for an interview *is* in the client's best interest. But even where counsel advises his client against speaking to police or prosecutors post-charging, her advice is only that – advice. *Ash,* 413 U.S. at 312 (counsel is "an advisor to the accused"). If the defendant wants to speak to police or prosecutors, he can always reject counsel's "guiding hand," *Powell*, 287 U.S. at 69, and initiate contact, just as he can always reject advice regarding other decisions that are ultimately his to make, *e.g.,* the decision to testify at trial or to waive trial and plead

guilty. *See* ABA Stnd. 4-5.2 Commentary p. 201 ("because of the[ir] fundamental nature . . . , so crucial to the accused's fate, the accused must make the[se] decisions himself"). The *Jackson* rule simply ensures a defendant is given the opportunity to receive counsel's advice; in other words, it simply ensures a defendant's free choice is knowing and intelligent.

By contrast, allowing the government to circumvent a defendant's counsel and approach him directly with a request for an interview protects nothing more than his "right" to make an uninformed and perhaps ill-advised decision. This is precisely why a defendant is afforded a right to counsel – in order to ensure that he is not "misled by his lack of familiarity with the law or overpowered by his professional adversary." *Ash,* 413 U.S. at 317. Moreover, it is paradoxical to argue that the only way to preserve a defendant's free choice is to circumvent his counselor-advocate and afford police and prosecutors – parties directly adverse to him – unmonitored access. If *that* is the only way to ensure a defendant's free choice, then the very foundation of the Sixth Amendment right to counsel and our adversarial system is subject to question.

III. THE LONG-STANDING ETHICAL RULE PROHIBITING ATTORNEYS FROM CONTACTING REPRESENTED PARTIES IN *BOTH* CIVIL AND CRIMINAL CASES IS FURTHER EVIDENCE THAT THE *JACKSON* RULE ENSURES FUNDAMENTAL FAIRNESS IN OUR ADVERSARIAL SYSTEM.

At oral argument, there appeared to be a misconception that the ethical rule prohibiting attorneys

from contacting represented persons applies only in civil cases. *See* Oral Argument Transcript, *Montejo v. Louisiana*, 2009 WL 76296 at *10, 32 (Jan. 13, 2009). In fact, ABA Model Rule of Professional Conduct ["ABA Rule"] 4.2 (Feb. 2009) and its state counterparts apply equally in the civil and criminal context and reflect a long-standing consensus about the unfairness of circumventing a represented person's counsel, particularly in a criminal case post-charging. Indeed, this universally accepted ethical rule is further evidence that the *Jackson* rule operates to ensure fundamental fairness in our adversarial justice system and is thus compelled by the Sixth Amendment.

Admonitions in England and the United States against contact with represented parties date back at least to the early nineteenth century. For example, in *In re Oliver*, 111 Eng. Rep. 239, 240 (K.B. 1835), the court, in evaluating the legitimacy of a document signed by a woman in the absence of counsel, disregarded conflicting arguments made about her competence, sophistication in matters of business, and whether or not she had indicated need for her solicitor's assistance. Instead, the chief judge held that "[t]his rule must be made absolute. When it appeared that Mrs. Oliver had an attorney . . . it was improper to obtain her signature, with no attorney present on her part. If this were permitted, a very impure, and often fraudulent, practice would prevail." *Id.* A year later, David Hoffman, "one of the foremost legal educators of the early American Bar," James M. Altman, *Considering the A.B.A.'s 1908 Canons of Ethics*, 2008 Prof. Law. 235, 261, proclaimed, "I will never enter into any conversation with my opponent's client, relative to his claim or defence, except with the consent, and in the presence of his

counsel." ABA Formal Op. 95-396 (1995) *2 (citation omitted). The ABA relied heavily on Professor Hoffman's treatise when it drafted its first set of ethical rules for lawyers, ABA Canons of Professional Ethics (1908), which included a no-contact rule, *id.* Cannon 9, the progenitor of modern ABA Rule 4.2. Altman, *supra*, at 239-240; ABA Formal Op. 124 (1934).

ABA Rule 4.2 prohibits a lawyer and his agents from "communicat[ing] about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order." ABA Rule 4.2; *id.* Comment 4. The rule's comments specifically provide that "[w]hen communicating with the accused in a criminal matter, a government lawyer must comply with this Rule in addition to honoring the constitutional rights of the accused." *Id.* Comment 5; *see also* ABA Formal Op. 95-396 at *3 ("[I]t is clear that Rule 4.2 applies to the conduct of lawyers in criminal as well as civil matters. . . ."). Indeed, the ABA has acknowledged that "there are perhaps stronger policy considerations" for the application of the no-contact rule in criminal cases. ABA Formal Op. 1373 (1976). The ABA has accordingly incorporated into its ethical rules for prosecutors a no-contact provision specifically prohibiting them from interacting with defendants at initial appearances absent a waiver of counsel. *See* ABA Criminal Justice Standards, Prosecution Function, 3-3.10 (a); *see also id.* Commentary p.79-80 (noting the "consisten[cy]" of this rule "with the spirit of both ABA model [Rule 4.2 and its predecessor].").

All fifty states and the District of Columbia include in their rules of professional responsibility some form of "no contact" rule, which at the very least prohibits prosecutors and their agents from contacting represented criminal defendants post-charging, and the overwhelming majority have simply adopted the text of ABA Rule 4.2. *See* Appendix of State Rules of Professional Responsibility. Almost all federal district courts have rules directing attorneys to abide by local ethical rules or the ABA rules. *See* Appendix of Federal District Court Rules Regarding Rules of Professional Responsibility.[2]

The purpose of this "no-contact" rule has nothing to do with concerns about coerced statements, and everything to do with ensuring fairness in our adversarial system of civil and criminal justice and, as a means to that end, preserving the attorney-client relationship. Its "fundamental premise" is that "[t]he legal system in its broadest sense functions best when persons in need of legal advice or assistance are represented by their own counsel." ABA Model Code of Professional Responsibility EC 7-18 (1983)[3]; *see also* ABA Formal Op. 95-396 at *3 (the purpose of Rule 4.2 is to "protect represented persons against

[2] In the 1980s, the Department of Justice ["DOJ"] challenged its obligation to abide by state no-contact rules pre-charging, while accepting no-contact rules post-charging. *See* Ethical Restraints of the ABA Code of Professional Responsibility on Federal Criminal Investigations, Office of Legal Counsel, 1980 WL 20955 *10 (Apr. 18, 1980) (distinguishing the two scenarios). DOJ ultimately lost the pre-charging no-contact battle with the passage of the McDade-Murtha Citizens Protection Act, 28 U.S.C. § 530A.

[3] Ethical Consideration 7-18 preceded ABA Rule 4.2 and "set[] out the central proposition on which all of the anti-contact rules have rested." ABA Formal Op. 95-396 *3.

overreaching by adverse counsel, safeguard the attorney-client relationship from interference, and reduce the likelihood that clients will disclose . . . information harmful to their interests").

Indigent defendants are not denied the benefit of this ethical rule simply because counsel was appointed for them by the Court. Rather, to conform with "the letter and the spirit of the canons of ethics," "once a criminal defendant has either retained an attorney or had an attorney appointed for him by the court," a prosecutor must notify the defendant's attorney of any interview and "give[] [the attorney] a reasonable opportunity to be present." *United States v. Thomas*, 474 F.2d 110, 112 (10th Cir. 1973).

Prosecutors and their agents have long been bound by ethical rules prohibiting contact with represented parties with no adverse effect. *Amici* do not argue that the Sixth Amendment right to counsel is coextensive with these no-contact rules, which "serve separate, albeit congruent purposes."[4] *United States v. Hammad*, 858 F.2d 834, 839 (2d Cir. 1988). But, consistent with these rules, the Sixth Amendment must at least guarantee represented defendants the core protection against state-initiated interviews post-charging, which has long been considered essential to the functioning and fairness of our adversarial system.

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[4] These rules vary in scope, *see* Appendix, and apply in civil proceedings. Moreover, some state rules preclude a lawyer from communicating with a represented defendant pre-charging or even when the defendant initiates contact. The Sixth Amendment does not extend so far. *See Rothgery*, 128 S. Ct. at 2592; *cf. Brewer v. Williams*, 430 U.S. 387, 405-06 (1977); *see also* p. 11-12 *supra*.

CONCLUSION

Even as police were pressing Mr. Montejo for more information to use to convict him, his court-appointed counsel was trying to meet him for the first time so they could begin work on his case. *See* Petitioner's Brief at 9-10. Without the *Jackson* rule, it will become commonplace for police to race to interview a represented defendant before he can obtain meaningful advice from counsel about whether and on what terms he should speak to state agents. Whether there is, as here, a gap between appointment and a defendant's first meeting with counsel because public defenders' offices cannot afford to send attorneys to staff initial appearances, or whether a defendant has had a "hurried interchange," *Minnick v. Mississippi*, 498 U.S. 146, 153 (1990), with counsel in a crowded courthouse lockup, a defendant's Sixth Amendment right to a counselor and advocate post-charging and pre-trial will be significantly diminished. Accordingly, *amici* respectfully urge the Court to reaffirm *Michigan v. Jackson*.

Respectfully submitted,

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