

2001

Kenneth W. Gibb v. Earl N. Dorius : Response to Petition for Rehearing

Utah Supreme Court

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IN THE
SUPREME COURT

DEC 6 1975

OF THE
STATE OF UTAH

BRIGHAM YOUNG UNIVERSITY,
Reuben Clark Law School

KENNETH W. GIBB,
Plaintiff-Respondent,

-vs-

EARL N. DORIUS, Director, Driver
License Division, State of Utah,
Defendant-Appellant.

Case No.
13626

BRIEF IN SUPPORT OF APPELLANT'S
PETITION FOR REHEARING

PETITION FOR REHEARING FROM THE
DECISION OF THE SUPREME COURT OF
UTAH SUSTAINING THE JUDGMENT OF
THE THIRD JUDICIAL DISTRICT COURT,
IN AND FOR SALT LAKE COUNTY, STATE
OF UTAH, THE HONORABLE D. FRANK
WILKINS, JUDGE, PRESIDING.

FILED

APR 14 1975

Clerk, Supreme Court, Utah

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IN THE
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OF THE
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-vs-

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Defendant-Appellant.

} Case No.
13626

BRIEF IN SUPPORT OF APPELLANT'S
PETITION FOR REHEARING

STATEMENT OF THE BRIEF IN SUPPORT
OF THE PETITION FOR REHEARING

The appellant requests the Court's rehearing of the following materials as set forth under the headings in support of the allegations of the appellant.

RELIEF SOUGHT ON REHEARING

The appellant respectfully requests the Court to review the attached brief in support of the petition for

rehearing and based thereon grant an opportunity for appellant and respondent to reargue the matter and/or reverse the Court's finding or remand the case back to the trial court for the ascertaining of additional facts in order to render a more complete opinion, to give greater clarification and amplification to the decision previously rendered, for the following reasons:

1. To afford an opportunity for counsel for appellant and respondent to further argue the issue as to what if any credence the court must grant to Chapter 53, Laws of Utah 1967, the Federal Highway Safety Act of 1966, and any amendments thereto, including but not limited to the Highway Safety Program Manual, Volume 8, transmittal 9, dated January 17, 1969, a portion of the same abstracted and included in the appendix attached to this brief; further, Sections 26-15-4(1), (3), (10), (11), (12), and (20) granting certain rights and responsibilities to the State Department of Health; and further to the Rules and Regulations as promulgated by the State of Utah, Department of Social Services, State Division of Health, dated December 30, 1969, relating to the rules and regulations for approval to perform blood alcohol examinations.

2. To afford an opportunity, if so ordered by the court to remand the matter back to the trial level, to ascertain additional facts if deemed necessary by the court, relative to whether or not Mr. Davis at the time and place in question was acting in the scope of his employment as a technician for the Salt Lake City-Coun-

ty Health Department, and whether said laboratory in the Salt Lake City-County Health Department, was within the purview of the regulations of December 30, 1969, promulgated by the Utah State Board of Health, a "qualified" or "certified" laboratory to participate in the performance of blood alcohol examinations.

ARGUMENT

POINT I

THE COURT ERRED IN FAILING TO SET FORTH IN THE OPINION WHAT RECOGNITION SHOULD BE GIVEN TO THE STATUS OF THE SALT LAKE CITY-SALT LAKE COUNTY HEALTH DEPARTMENT, AND ITS PHYSICIAN-DIRECTOR (DR. HARRY GIBBONS), OR TO THE UTAH DIVISION OF HEALTH, AND ITS DIRECTOR, (DR. LYMAN OLSON), OR TO THE RULES AND REGULATIONS OF THE DEPARTMENT OF SOCIAL SERVICES, STATE DIVISION OF HEALTH, IN AND FOR THE STATE OF UTAH, AS PROMULGATED DECEMBER 30, 1969, WHICH ARE PUBLISHED AND A MATTER OF PUBLIC RECORD AND SHOULD HAVE BEEN TAKEN INTO ACCOUNT BY THE COURT IN

ADDITION TO AND IN CONNECTION WITH THE MEDICAL PRACTICES ACT, IF SAID ACT IS CONTROLLING.

The Utah Code provision, Section 41-6-44.10(f), Utah Code Annotated (1953), as amended, the last sentence thereof, which is the grant of immunity, is conditioned upon the test being administered according to standard medical practice. The full import of that language is that if the blood test as *taken* (emphasis ours) is contested, and if in fact it was not administered according to standard medical practice, either the person performing or administering the test, or that facility at which it was done, could not avoid immunity if they failed to follow standard medical practice. In this case, no test was taken; no improper procedure is claimed.

For the court to infer as broadly as it has that the drawing of any blood or administering of any medication that requires the puncturing of the skin of a human being can only be done under the "direct supervision of a physician" leaves a question as to the practice within this jurisdiction, in nursing homes, hospitals, laboratories, by the paramedics, or anyone acting within the scope of their authority.

Does the majority opinion mean "within the presence of a physician," or something he later approves, or in accordance with his direction but not in time or prox-

imately, within his presence? None of these questions are clarified.

The question appears to be whether their authority is a direct line to a physician. For the court to say that such is the case for any registered nurse, or any practical nurse, but not for a laboratory technician who may be acting directly under the supervision of a physician, strains the interpretation of the statute. The question is not answered properly by the majority opinion as to whether or not a person is by education and experience and qualification able to perform the act of administering the test. The court suggests it is merely a question of authority. Since the criteria within the statute was set up for physician, registered nurse, or practical nurse, that authority was assumed by the statute to be implicit within the requirements and regulation and rules of practice laid down by the qualifications requisite to obtaining licensing for those three categories. To give full and fair meaning to the term "duly authorized laboratory technician" such a laboratory technician could only be either directly authorized by a physician or one authorized by the State of Utah to so act pursuant to Utah Code Ann. §§ 26-15-4(10) or 26-15-4(20) (1953, as amended. The court and the public at large are on notice by way of public records that there is a differentiation, and there was at the time of the passing of the legislation, a differentiation between *authorized* laboratory technicians and *unauthorized* laboratory technicians in the view of the State Division of Health, whose respon-

sibility it is to see to the public good and welfare and the health of the populous at large. (Emphasis ours.)

The legislature has clearly spoken that each of the four categories were able and capable and subject to direction by a peace officer to comply with the statute in the taking of a blood sample for analysis and communicating said results to the law enforcement agency involved.

A duly authorized laboratory technician could be one acting, as the majority opinion suggests, directly under the supervision of a properly licensed physician within the State of Utah. However, a "duly authorized laboratory technician" in appellant's view, could equally as well be a properly certified, educationally qualified, technician acting within the scope of his authority and employment in a properly qualified laboratory as certified to by the State Division of Public Health, who could and should, in the language of the federal Act and its regulations, "collect, identify, preserve, store, and hold in custody, blood, breath or other body materials for analysis for alcoholic content."

Pursuant to those guidelines, the statutes set forth, and the regulations further promulgated by the State Division of Public Health meet the qualifications and said Division is as set forth therein, regularly certifying, re-evaluating, recertifying and communicating to law enforcement agencies and other required bodies the information relative to the laboratories which meet their requirements and regulations in addition to the technol-

ogists and the type of alcohol examination which may be administered at the particular institution specified. (Attachment A, II, pg. 2.)

To hold otherwise, than as suggested by the appellant herein, giving some credence to the Division of Health and the regulations and statutes thereunder and to their compliance with the Federal Highway Safety Act Regulations and Rules as amended 1966, would be equally as much in error on the part of the court as for the court to, in its own view, in the majority opinion, fail to take into consideration the Utah Medical Practices Act.

POINT II

THE COURT ERRED IN FAILING TO TAKE INTO CONSIDERATION SECTION 26-15-4 (10) AND (20), IN ADDITION TO THE MEDICAL PRACTICES ACT AND FURTHER THE FEDERAL SAFETY ACT OF 1966 AND THE LEGISLATIVE ENACTMENTS OF THE LEGISLATURES OF 1967 AND 1969, TO COMPLY WITH THE ABOVE FEDERAL ACT; AND THE STATUTES OF THE STATE SO ENACED AND ANY RULES AND REGULAIONS PROMULGATED THEREUNDER, SETTING FORTH THE CRITERIA FOR

INDIVIDUALS AND PHYSICAL
FACILITIES FOR TESTS AND TEST-
ING OF BLOOD SAMPLES IN AND
FOR THE STATE OF UTAH, AND
FOR ANY POLITICAL SUBDIVI-
SIONS THEREOF.

The Federal Highway Safety Act of 1966 and amendments thereto require the State to comply with federal standards in order to participate in the Highway Safety Program. In compliance therewith, Chapter 53, Laws of Utah 1967, passed February 17, 1967 which became effective on May 9, 1967, was passed enabling and empowering the Governor of the State to coordinate, to contract and to do all other necessary things in behalf of the State to secure the full benefits of the Highway Federal Safety Act of 1966 and any amendments thereto. In compliance with the Chapter 53, the legislature and the Governor by legislation and by regulations of the executive branch so acted. As part of that, the 1967 legislature added subsection (22) to 26-15-4, which sets forth the responsibility and obligation as follows:

“26-15-4. State department of health—
Powers and duties—The state department of
health shall have and exercise the following
powers and duties in addition to all other
powers and duties imposed on it by law:

- (1) To exercise all the administrative

authority heretofore vested in the state board of health.

(2) To protect and promote physical and mental health of the people.

(3) To administer and enforce state health laws, regulations and standards.

* * *

(10) Establish, maintain laboratories and make available laboratory services through purchase of such services from other approved laboratories and conduct research and such other laboratory investigations and examinations as it may deem necessary or proper for the protection of the public health.

(11) Make, approve and establish standards for diagnostic tests for communicable and infectious diseases by any laboratories operated or maintained by any county, city, institution, person, firm or corporation, and require such laboratories to conform thereto.

(12) To establish and maintain chemical laboratory and engineering facilities to meet the needs for conducting field investigations and laboratory analysis in the study of occupational health hazards and air pollution.

* * *

(22) To establish, maintain and enforce a procedure requiring that the bodies of adult pedestrians and all drivers of motor vehicles killed in highway accidents be examined for the presence and concentration of alcohol; to

provide the commissioner of public safety with statistics reflecting the results of the examinations on a monthly basis; to provide adequate safeguards so that information derived from the examinations is used for no other purpose than compilation of statistics authorized herein."

Subsection (22) of 26-15-4 was subsequently in 1969 amended to replace the second word on the second line "bodies" to "blood" and as such has remained in tact.

Subsection (10) of 26-15-4 specifically provided that the powers and duties of the Department of Health included as follows:

"(10) Establish, maintain laboratories and make available laboratory services through purchase of such services from other approved laboratories and conduct research and such other laboratory investigations and examinations as it may deem necessary or proper for the protection of the public health."

This was a direct result of legislation as follows:

CHAPTER 53

S. B. No. 24 (Passed February 17, 1967.
In effect May 9, 1967)

FEDERAL SAFETY ACT— COMPLIANCE WITH

An Act Providing for Compliance by the State

with Requirements of the Federal Highway Safety Act of 1966.

Be it enacted by the Legislature of the State of Utahs

Section 1. Governor Empowered to Coordinate Act.

The governor, in addition to other duties and responsibilities conferred upon him by the constitution and laws of the state of Utah is hereby empowered to contract and to do all other things necessary in behalf of the state to secure the full benefits available to this state under the Federal Highway Safety Act of 1966, and any amendments thereto, and in so doing, to cooperate with the federal and state agencies, agencies private and public, interested organizations, and with individuals, to effectuate the purposes of that enactment, and any and all subsequent amendments thereto. The governor shall be the official having the ultimate responsibility for dealing with the United States government with respect to programs and activities pursuant to the Federal Highway Safety Act of 1966, and any amendments thereto. To that end he shall be responsible for activities of any and all departments and agencies of this state and its subdivisions, relating thereto. He may designate an appropriate person, commission or board to assist him in coordinating the activities and programs contemplated under this subsection.

Section 2. Legislature Authorizes Political Subdivisions.

The legislature of the state of Utah hereby authorizes the political subdivisions of this state to participate in the state highway safety program as contemplated by the Federal Highway Safety Act of 1966, and any amendments thereto, and to do all things necessary to secure benefits available under that act.

Approved February 27, 1967.

In addition, the Highway Safety Program Manual promulgated Volume 8 "Alcohol in Relation to Highway Safety" Transmittal No. 9, headed "Program Development and Operations" dated January 17, 1969. As part of this Manual of Instructions the Federal Highway Safety Program Manual sets forth in Chapter 4 of Volume 8, the major elements that should constitute a statewide program of alcohol in relation to highway safety. In paragraph 3 thereof, under chemical tests, it states as follows:

"3A(1). Promulgate regulations concerning the *collection*, identification, custody, preservation and storage of blood, breath, or other body materials obtained for analysis for alcohol content." (Emphasis ours.)

All of chapter 4 is attached by way of attachment B to this brief.

Under subparagraph 3, chemical tests, subparagraph A2, the regulation further suggests that the state

implement a suitable program for the evaluation of laboratories, agencies and individuals performing chemical tests for alcohol and that the performance reports should be maintained and prepared as public records.

In the spirit of compliance, the 1967 legislature further amended Section 41-6-44, U.C.A. (1953, as amended), to provide for the .08 level in lieu of 0.15 percent in subsection C. In the same legislative session through House Bill 217 the legislature amended Section 41-6-44.10(a) U.C.A. (1953, as amended), to include the second sentence thereof designating that the arresting officer shall determine within reason which of the aforesaid tests shall be administered. At the same time the legislature inserted "registered nurse, practical nurse" in the first sentence in the former subsection C (present F) *and added the third sentence relative to immunity in said sentence.*

POINT III

THE COURT ERRED IN THAT THE OPINION IN CHIEF FAILS TO CLARIFY THE DISPUTED QUESTION ARGUE DAT THE TRIAL LEVEL AS TO THE AUTHORITY OF THE PERSON TO TAKE THE BLOOD SAMPLE, AND THEREBY CONFUSED THE ISSUE AS TO WHO A "DULY AUTHORIZED LABORATORY TECHNICIAN" IS, OR

SHOULD BE, OR WHEN, BY WHOM, OR WHERE, SAID BLOOD SAMPLES MAY BE DRAWN PURSUANT TO SECTION 41-6-44.10, UTAH CODE ANNOTATED 1953, AS AMENDED; AND THE COURT FURTHER FAILED TO DISTINGUISH THE "DULY AUTHORIZED LABORATORY TECHNICIAN" FROM THE UNAUTHORIZED LABORATORY TECHNICIAN, WHOMEVER OR WHEREVER HE MAY BE.

It does not logically follow from the majority opinion that pursuant to Section 58-12-38 or Section 58-12-40 of the Utah Code Annotated (1953, as amended), that "medical assistant" as a category, would exclude properly authorized laboratories or any duly qualified laboratory technician within such laboratory acting within the scope of his employment and therefore meet the criteria of the statute cited and interpreted by Justice Maughan.

Such an individual within one of the qualified laboratories certified by the Utah State Department of Health would meet the criteria set forth by Justice Maughan as an "individual acting under the direction and supervision of a licensed physician." Such a technician, acting in the Salt Lake City-County Health Department Laboratory, or the LDS Hospital, the Bureau of Laboratories, Utah State Division of

Health, the Logan LDS Hospital, the Valley View Medical Center Laboratory, or any other lab that had at the time in question been certified as approved by the Division of Helth as such a place, would be a "duly authorized laboratory technician."

A duly authorized laboratory technician is one who meets the minimum standards set forth in the rules and regulations for approval to perform blood alcohol examinations adopted by the Utah State Board of Health on December 30, 1969, in accordance with its authority under Section 26-15-5(1) and Section 26-20-12 of the Utah Code. Section 3 of the Rules and Regulations sets forth specific personnel qualifications of a duly authorized technician. These personnel qualifications state as follows:

Minimum educational requirements for a person or persons performing chemical examinations for the determination of blood alcohol levels shall be a recognized Bachelor of Arts of Bachelor of Science degree or equivalent degree issued after a full course of resident instruction in one or more established and accredited institutions of higher education, with major work for such a degree in one or more fields of chemistry, as shown by a transcript of credits. Major work in the biological sciences may be accepted where related work experience has been acquired and providing that the earned degree includes a minimum of twenty-five (25) quarter hours of courses in chemistry. In addition to the baccalaureate degree or

equivalent, the supervising chemist shall have demonstrated proficiency in blood alcohol determinations as gained by attendance at pertinent courses or the equivalent in practical clinical chemical laboratory training and experience.

Persons who have successfully completed a regular four years course in an established and accredited college or university, with major work leading to a degree in medical technology, providing such a course shall have included not less than twenty-five (25) quarter hours of chemistry, may also meet the minimum personnel requirements, providing subsequent training has been acquired in the field of clinical chemistry.

A person who is and who has been performing blood alcohol determinations for not less than two years at the time of the adoption of these standards, but who does not meet the above requirements, may also be qualified providing that, as determined by the Advisory Committee for Laboratory Standards, such person has completed not less than one year of pertinent education beyond the high school level, or has received training through an acceptable training program, providing such a person is shown to be competent to perform these examinations as demonstrated by an examination and satisfactory participation in a proficiency testing program offered or authorized by the Division of Health, and providing that such a person is employed under the full-time supervision of a person meeting the quali-

fications presented in the preceding paragraphs.

Registration by nationally recognized certifying boards may be accepted by the director, on recommendation of the Advisory Committee for Laboratory Standards, in lieu of the baccalaureate degree.

Technical personnel unable to meet these requirements may assist in the preparation and processing of specimens but may not be responsible for any of the definitive analysis.

A properly approved laboratory is one which meets the criteria of the State pursuant to their rules and regulations promulgated December 30, 1969 (Attachment A attached hereto) and qualifies as such a facility with approval of the State Division of Health. Any personnel properly certified by the lab, which laboratory had been approved by the state, acting within the scope of their employment, would meet the criteria of "duly authorized laboratory technician."

There are laboratories within the State and facilities not approved by the State Division of Health for the taking and testing of blood pursuant to Sections 26-15-4(10), 26-15-5(1), 26-20-12, Utah Code Annotated (1953), as amended. These do not comply with the regulations and criteria of the Utah State Division of Health promulgated December 30, 1969.

However, in each of the above cases noted, said certified laboratory and their personnel acting within

the scope of their employment would be acting under the direction of a licensed physician. That would be Dr. Olson, head of the Utah State Division of Health. In the case of the county laboratory as in Salt Lake County, such a technician would be, in addition, acting under the direction of Dr. Harry Gibbons, director of that combined facility. Both men are licensed physicians.

Appellant respectfully submits that the Court further failed, in its majority opinion, to take into account the fact that in the fourth category, the laboratory technician may not only administer the test by way of drawing the blood but if duly authorized may likewise run the analysis thereon. This dual role on the part of the laboratory technician who is a duly authorized technician, is not always the case with the other three categories: the physician, registered nurses and practical nurse. These other individuals who draw said sample, generally leave the analysis to a laboratory testing facility that meets the requirements and criteria both professionally and physically as is mandated by both federal and state regulations.

POINT IV

THE COURT FAILED TO DETER-
MINE WHETHER A DULY AU-
THORIZED LABORATORY TECHNI-
CIAN WOULD BE A QUALIFIED

**EMPLOYEE, ACTING WITHIN THE
SCOPE OF HIS EMPLOYMENT,
WITHIN OR UNDER THE DIREC-
TION OF A DULY CERTIFIED LAB-
ORATORY UNDER THE UTAH DIVI-
SION OF HEALTH.**

The state by regulations of December 30, 1969, Attachment A, sets forth definitions in Section 1, authorization and administration in section 2, minimum Standards and methods to be employed in section 3, and legal basis for laboratory approval in section 4 thereof.

In synopsis, the regulation provides that the director can grant approval to a laboratory for one calendar year subject to annual renewal provided that the laboratory continues to perform satisfactorily and continues to meet the minimum standards as established by the regulations both as to physical facilities and technical performance. It sets forth who may conduct tests and what personnel qualifications by way of education exist, and sets forth the minimum laboratory equipment, supplies, and further the type of tests that will be recognized for minimal technical standards.

Persons acting within the scope of their employment within a properly approved laboratory facility either in or out of a hospital approved by the State Division of Health would be acting within the terms of the statute, the State Health Department regulations in

line with the criteria set down by the Federal Highway Safety Act, Regulation, January 17, 1969, subparagraph 3(a) (1) et al.

POINT V

THE COURT FURTHER ERRED IN THAT IF AS THE OPINION IN CHIEF SUGGESTS, THERE WAS A QUESTION ABOUT THE AUTHORITY OF MR. DAVIS, THEN THE CASE SHOULD BE REMANDED TO THE TRIAL COURT TO MAKE A FACTUAL DETERMINATION AS TO WHETHER MR. DAVIS WAS ACTING WITHIN THE SCOPE OF HIS EMPLOYMENT WHEN HE WAS PRESENT AT THE JAIL, PREPARED TO TAKE A BLOOD SAMPLE, AT THE DIRECTION OF THE PEACE OFFICER, PURSUANT TO THE STATUTE, SECTION 41-6-44,10, UTAH CODE ANNOTATED 1953, AS AMENDED.

Appellant asserts there may be a need to remand the case back to the trial court for additional factual determination relative to the issue of whether Lynn Davis was acting within the scope of his authority or within the scope of his employment, which fact was not adduced. It is conceded that were he not so acting within

the scope of his employment at the time and place in question, the ultimate result of this case would not change.

It is incumbent upon the court to so render a decision, with clarity and guidelines, on an issue so important to the health and welfare of the people of this state, to the public who deserve safe highways, who deserve the safety of driving and surviving, that the full responsibilities, rights and obligations of Section 41-6-44.10 be complied with. Accordingly, the appellant is hereby urging in this brief in support of its petition for rehearing that the court meet the issue head on as to whether or not there is such a thing as a "duly authorized laboratory" under the Utah State Department of Public Health as against duly unauthorized laboratories and technicians within the state as set forth by statutes and regulations.

Whether or not the laboratory technician is a duly authorized laboratory technician is in truth a question of fact left as such by the legislature. Further, that information, if contested at the time of a hearing or court test, is one that can be adduced by testimony. Whether said laboratory technician is a "duly authorized" one, or whether the person performing or administering such a test in accordance with Section 41-6-44.10, Utah Code Annotated (1953), as amended, is in fact a practical nurse, registered nurse, or physician, the other three categories, is likewise a question of fact. If their *qualifications or their procedures in so administer-*

ing the test do not comply with the Utah Medical Practices Act as to any of the four in this general category, then the same may be challenged, and criminal liability could then lie should their failure to meet said standards occur. (Emphasis ours.)

CONCLUSION

Therefore, it is respectfully requested that the court afford an opportunity for counsel for appellant and respondent to further argue the issue, as to what if any credence the court must grant to Sections 26-15-4(10) and 26-15-4(20) granting certain rights and responsibilities to the State Department of Health; and further to the Rules and Regulations as promulgated by the State of Utah, Department of Social Services, State Division of Health, dated December 30, 1969; and additionally, or in the alternative, to remand the matter back to the trial level to ascertain additional facts if deemed necessary by the court, relative to whether or not Mr. Davis at the time and place in question was acting in the scope of his employment as a technician for the Salt Lake City-County Health Department. Further, whether said laboratory, in the Salt Lake City-County Health Department, was within the purview of the regulations of December 30, 1969, promulgated by the Utah State Board of Health, a "qualified" or "certified" laboratory, which appellant asserts was the case.

In the case at bar, the Court, in the majority opinion, did not have an issue whether (1) a test was admin-

istered, (2) the validity of that test was being challenged, (3) the authority of the technician was challenged, or (4) the constitutionality of the statute was challenged as to what "duly authorized laboratory technician" meant.

The Court did have a situation where the trial court made a ruling that was not based on the evidence but was wholly collateral, and speculative, since no test was given, and Mr. Gibb made no objection to Mr. Davis or his authority at the time of the incident. Mr. Gibb's only objection was to Mr. Davis' memory and that notes were taken by him of the incident, and comment, damaging to Mr. Gibb, which Mr. Gibb made, and Mr. Davis recorded, and to which he testified.

Mr. Davis' testimony of the refusal of Mr. Gibb, and his comments, were properly receivable and as valid as if given by another officer and not a laboratory technician.

The court did not review the case on appeal on the facts or the merits, therefore erred, and the matter should be remanded for a new trial.

Respectfully submitted,

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