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March 28, 2024

Honorable Justices of the Supreme Court of New Jersey
Richard J. Hughes Justice Complex
P.O. Box 970
Trenton, New Jersey 08625

Re: State of New Jersey (Plaintiff-Appellant)
v.
Juan Hernandez-Peralta (Defendant-Respondent)

Criminal Action: On Motion for Leave to Appeal from the Appellate Division's Interlocutory Order Affirming in-Part and Reversing in-Part an Order Granting a Motion for Post-Conviction Relief in the Superior Court of New Jersey, Law Division, Ocean County

App. Div. Docket No. A-3292-22

Sat Below:
Hon. Arnold L. Natali Jr., J.A.D.
Hon. Michael J. Haas, J.A.D.

Honorable Justices:

Please accept this letter in lieu of brief on behalf of the State of New Jersey in support of the State's appeal of the lower court's order granting Defendant's petition for post-conviction relief

Shiraz Deen, Assistant Prosecutor
On the Brief sdeen@co.ocean.nj.us

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PROCEDURAL HISTORY[1]

On June 19, 2019, Defendant, Juan Hernandez-Peralta, was indicted under Ocean County Indictment No. 19-06-0946 with burglary (3rd degree), contrary to N.J.S.A. 2C:18-2a(1), and count two, theft (3rd degree), contrary to N.J.S.A. 2C:20-3a. (Sa 19-21).

On September 4, 2019, Defendant was indicted under Ocean County Indictment No. 19-09-1370. Count one charged Defendant with burglary (3rd degree), contrary to N.J.S.A. 2C:18-2a(1); count two charged Defendant with criminal mischief (4th degree), contrary to N.J.S.A. 2C:17-3a(1); count three charged Defendant with robbery (2nd degree), contrary to N.J.S.A. 2C15-1; count four charged Defendant with burglary (3rd degree), contrary to N.J.S.A. 2C:18-2a(1); count five charged Defendant with theft (3rd degree), contrary to N.J.S.A. 2C:20-3a; count six charged Defendant with aggravated assault on a law enforcement officer (3rd degree), contrary to N.J.S.A. 2C:12-1b(5)(a); count seven charged Defendant with criminal mischief (4th degree), contrary to

[1] Sa refers to the State's appendix
PSR refers to the presentence report
1T refers to the plea transcript dated November 22, 2019
2T refers to the sentence transcript dated December 10, 2019
3T refers to the violation of probation transcript dated, February 24, 2020
4T refers to the violation of probation transcript dated, August 17, 2020
5T refers to the PCR evidentiary hearing transcript dated, April 4, 2023
6T refers to the PCR evidentiary hearing transcript dated, May 23, 2023

N.J.S.A. 2C:17-3a(1); count eight charged Defendant with resisting arrest (3rd degree), contrary to N.J.S.A. 2C:29-2a(3); count nine charged Defendant with resisting arrest (4th degree), contrary to N.J.S.A. 2C:29-2a(2). (Sa 22-26).

On November 22, 2019 Defendant appeared before the Honorable Steven F. Nemeth, J.S.C., to enter a guilty plea to count one of indictment 19-06-0946 and counts one, three, and four of indictment 19-09-1370. In exchange for Defendant's guilty plea, the State agreed to recommend a sentence of five years of Drug Court probation with an alternative sentence of 5 years incarceration subject to NERA on indictment 19-09-1370, concurrent to five years incarceration flat on indictment 19-06-0946. In addition, the State agreed to dismiss the remaining counts of both indictments. (Sa 27-33; 1T 3-9 to 4-10).

On December 10, 2019, Defendant appeared before Judge Nemeth for sentencing. In accordance with the plea agreement, Judge Nemeth sentenced Defendant to five years of Drug Court probation with an alternative sentence of 5 years incarceration subject to NERA on indictment 19-09-1370, concurrent to five years incarceration flat on indictment 19-06-0946 (2T 6-18 to 7-14; Sa 34-41).

Defendant failed to comply with the terms of probation and his Drug Court probation was terminated. On August 17, 2020, he was sentenced to the

alternate sentence of 5 years incarceration subject to NERA on indictment 19-09-1370, concurrent to five years incarceration flat on indictment 19-06-0946. (Sa 42-48).

Defendant did not file a direct appeal.

On July 5, 2022, Defendant filed this petition for PCR. (Sa 53-57).

On March 15, 2023, The Honorable Guy P. Ryan, J.S.C., determined that oral argument on the PCR was unnecessary in light of the briefs submitted and ordered an evidentiary hearing on Defendant's PCR petition. (Sa 50).

On April 4, 2023, an evidentiary hearing was conducted on Defendant's PCR petition with PCR counsel calling Defendant as the sole witness. (5T) At the close of the hearing, the Court determined that it needed to hear from prior plea and sentencing counsel before ruling on the application and directed PCR counsel to call those witnesses at a subsequent continuation of the evidentiary hearing. (5T 47-21 to 51-21).

On May 23, 2023, the evidentiary hearing was continued and PCR counsel called prior plea and sentencing counsel as witnesses. (6T). The Court granted Defendant's petition at the conclusion of the hearing by oral decision and reversed Defendant's convictions on both indictments. (6T 72-22 to 114-15; Sa 51).

On June 12, 2023, the State filed a motion for leave to appeal with the

Appellate Division.

On July 3, 2023, the Appellate Division granted the State's motion for leave to appeal.

On July 6, 2023, the PCR Court filed a written amplification of its previous decision.

On March 8, 2024, the Appellate Division issued a decision affirming in part and denying in part the PCR Court's decision. The panel found that the PCR Court properly found that sentencing counsel was ineffective pursuant to prong one of Strickland for failing to investigate Defendant's citizenship and warn him of potential deportation, but the PCR Court failed in its analysis of prong two of the Strickland test by failing to consider a Slater analysis in determining prejudice. The panel ultimately remanded the matter to the PCR Court for re-evaluation of prong two of the Strickland test.

STATEMENTS OF FACTS

Indictment 19-06-0946

On April 14, 2019, at approximately 11:56 p.m., Lakewood police officers responded to The Donor's Fund at 328, 3rd St in Lakewood, NJ, in response to a reported burglary. The officers spoke with the owner of the business, Yakov Travis, and his partner Ahron Schlesinger, and they reported

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that they were alerted to the possible burglary when their motion detector – installed after a previous burglary a week prior – detected motion in their office. The owners arrived at the business and observed three young males walking near the municipal parking lot and police headquarters. Schlesinger recognized one of the males from the still images captured by the security system during the burglary that occurred the week prior. The pair confronted the three men, and all parties ended up walking into the Lakewood PD lobby where officers intervened. Schlesinger pulled up the footage from The Donor Fund's security cameras that was captured just earlier on his Iphone and showed the officer that the suspect who made entry into the business was wearing the exact same clothing as one of the young men, Defendant. (Sa 3).

The officers walked the perimeter of the business and noticed a broken window on the first floor and broken glass on the floor inside the building by the window. They were able to access the security footage for the business which captured the suspect walking through the building, rifling through items, before walking out the front door. Based on the fact that only one suspect was captured on the video and that Defendant was wearing an exact match of the clothing of the suspect, he was arrested and the other two males were released. (Sa 3-4).

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Indictment 19-09-1370

On June 27, 2019, at approximately 1:01 a.m., officers were called to The Donor Fund again for a report of a burglary in progress. Upon the officers' arrival, the suspect had already fled. They began canvassing the area when an officer heard a crash indicative of glass breaking near Clifton Avenue. The officer observed a Hispanic male who was shirtless with a red hat on exiting the rear of a building on Clifton Avenue. The male picked up a large rectangular box and began to flee, ignoring the officers' commands to stop. He was eventually apprehended and identified as Defendant. One of the officers reported that Defendant had thrown the rectangular objects, later identified as two cash registers, at him during the arrest. (Sa 11).

The officers made contact with an owner of the business, Yosef Michael, who was able to show them the security footage of the incident which showed Defendant using a tire iron to break a window to enter the building, stealing two cash registers, then exiting through the broken window. A search of Defendant's person after arrest uncovered the keys to the building's thermostat and a gray item of clothing that was on a rack in the business. (Sa 11).

PCR Facts

On November 22, 2019, immediately before entering his plea, the plea

Court asked Defendant if he was a US citizen and he responded affirmatively, and when asked where he was born, he responded that he was born in New York. (1T 5-8 to 5-14)

On April 4, 2023, Defendant testified before the PCR court at the evidentiary hearing in connection with his PCR petition. Defendant stated that at the time of his plea he believed he was a US citizen because he had a green card and social security number, and his family and other unnamed persons gave him the impression that these were akin to citizenship. (5T 10-2 to 10-12). He stated that he knew he was born in Mexico, traveled to the USA when he was 1 or 2, and spent most of his life growing up in New York until he moved to New Jersey. (5T 10-22 to 11-20). He said he did not learn that he was not a US citizen until deportation proceedings were brought against him in 2022. (5T 18-3 to 18-14).

Defendant stated that when he met with plea counsel, Michael Vito, he told Vito that his concern was that he didn't want to go to jail and that Vito told him he could probably get him into Drug Court because he was a first time offender. Defendant found this option to be agreeable at the time. (5T 13-23 to 14-17). Defendant testified that he did not discuss his nationality or citizenship with Vito, but he couldn't remember filling out question 17 on the plea form. (5T 14-18 to15-8). Upon being presented with the plea form,

Defendant's recollection was refreshed and he remembered going over the plea form with counsel and directing "one of the persons that was on the case" to fill out the answers on the plea form as he reviewed it. (5T 18-22 to 20-18).

When Defendant was asked on cross-examination why he told the plea Court that he was born in New York, he answered that he just decided to say that and forgot where he was born at the time:

> MR DEEN: Why did you answer it you were born in New York when you knew you were born in Mexico?
>
> DEFENDANT: I have no idea. I just – I was raised in New York my whole life. So I just – I kind of forgot and just decided to say that.
>
> MR DEEN: So you're saying you just – you forgot where you were born during this question and you just answered –
>
> DEFENDANT: Yeah.
>
> MR DEEN: because you were raised here in New York; is that right?
>
> DEFENDANT: Yes, sir.
> (5T 22-1 to 22-12).

Upon questioning by the Court, Defendant admitted that he misled the plea Court about being born in New York because he was "paranoid at that time." (5T 26-10 to 26-18). It was only at the PCR evidentiary hearing that Defendant testified and revealed that his actual immigration status at the time was that he had a green card and a social security number (5T 10-6 to 10-10).

Defendant also admitted that he never told either plea or sentencing counsel about his lie to the plea court regarding being born in New York as opposed to Mexico, or that he had a green card. (5T 41-1 to 41-9; 43-21 to 44-7).

Plea counsel, Michael Vito, testified at the continuation of the evidentiary hearing on May 23, 2023. Vito stated that at the time of his representation of Defendant, he was the Drug Court attorney for the Office of the Public Defender in Ocean County and was covering the case for Carol Wentworth, sentencing counsel, who was unavailable at the time, and that Defendant's trial counsel was previously Frank McCarthy, Esq., who went over the discovery with Defendant and transferred him to Vito for the Drug Court plea process. (6T 4-20 to 5-16). Vito testified that he recalled that Defendant told him prior to the plea being entered in open court that Defendant was born in New York and that he was a US citizen. (6T 6-1 to 6-20). Despite Defendant's allegations of citizenship, Vito said that consistent with his custom and practice, he still went over the remaining questions on the plea form – regarding the effect of guilty pleas for non-citizens – with Defendant and crossed them out one by one as he did so. (6T 6-20 to 7-2). Vito stated that if he received an ambiguous response from a client regarding their citizenship status, he would ask further questions of the client in order to be sure of their citizenship for the plea. (6T 9-13 to 9-22). Vito stated that

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Defendant never mentioned any concern about immigration consequences to him, nor did any family member or other third party. (6T 10-24 to 11-12).

Carol Wentworth, sentencing counsel, testified that she was a Recovery Court attorney with the Office of the Public Defender in Ocean County during the time she represented Defendant at his sentencing before Judge Nemeth. (6T 32-15 to 33-8). She did not have the opportunity to meet with Defendant prior to sentencing, but she was able to go over the presentence report (PSR) with him for about ten minutes. (6T 33-17 to 34-21). She testified that she did have the opportunity to review Defendant's immigration status with him by asking for his social security number – which was blank on the plea forms – to which Defendant responded that he didn't recall what it was. (6T 35-1 to 35-25). She asked him if he was a US citizen that was born in Mexico, as was indicated on the PSR, and he responded that that was accurate. (6T 37-16 to 37-24). Wentworth stated that this was not alarming to her because she had often represented clients who are citizens despite being born in other countries, and that she did not have a custom or practice of suspecting that her own clients are lying to her. (6T 36-20 to 37-22). She further stated that incomplete information on the PSR was commonplace with her clients. (6T 47-2 to 47-17) She stated that she had no evidence or documentation reflecting that Defendant had lied at the plea hearing about his place of birth,

but she would have investigated further had she known of such evidence (6T 50-19 to 51-5).

Significantly, Defendant was questioned about his citizenship status during his subsequent violation of probation in 2020, and in both the plea and sentencing transcripts he states under oath that he is a citizen of the United States and he was born in Mexico. Vito appeared at the plea and Wentworth appeared at sentencing. (3T 4-6 to 4-11; 4T 4-21 to 4-24).

The PCR Court found Vito and Wentworth's testimony to be credible. (6T 76-14 to 76-18, 108-6 to 108-7). The Court also found that Defendant was untruthful with Vito and the plea Court. (6T 96-5 to 96-8).

Ultimately, the Court concluded that Defendant had failed to establish a claim of ineffective assistance of counsel with respect to plea counsel, Vito, because Defendant's false statements about being born in New York to Vito and the plea Court deprived Vito of any evidence to suspect that Defendant not a US citizen in connection with this case. See (6T 112-6 to 112-11). However, the Court found that sentencing counsel, Wentworth, was ineffective because she had a duty to investigate the citizenship of Defendant based on incomplete information in the PSR coupled with Defendant's birthplace being listed as Mexico:

> So at this point I find there was an obligation triggered by all the facts and circumstances at the time of

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> sentencing to require Ms. Wentworth to make some type of inquiry and then to rectify that inquiry on the record. While I'm troubled by the fact that the defendant has been untruthful, including continuing to be untruthful when he got to the point of his violations of Probation, the Court finds that there was sufficient information in possession of Ms. Wentworth and in her knowledge as sentencing counsel to trigger a duty to advise the defendant of the mandatory deportability of the conviction under so-called prevailing professional norms as those are discussed in the Gaitan and Padilla cases.
> (6T 110-1 to 110-14)

LEGAL ARGUMENT

POINT ONE

LEAVE TO APPEAL SHOULD BE GRANTED TO RESOLVE A SPLIT IN THE APPELLATE COURTS' DECISIONS ON THIS MATTER AND TO PREVENT THE UNJUSTIFIED EXPANSION OF THE *GAITAN* STANDARD TO CASES INVOLVING INTENTIONAL DECEPTION BY THE DEFENDANT. (6T 72-22 TO 114-15).

The State seeks leave to appeal from the interlocutory judgment of the Appellate Division affirming in-part the PCR Court's conclusion that a preponderance of the evidence supported a finding of ineffective assistance of sentencing counsel for failing to provide immigration advice. In particular, the State challenges the Appellate Division's conclusion that the PCR Court properly found that sentencing counsel satisfied prong one of the Strickland/Fritz test for ineffective assistance of counsel which examines if

defense counsel was "truly deficient, with such grievous errors that counsel was not functioning as the 'counsel' guaranteed the Defendant by the Sixth Amendment." Strickland v. Washington, 466 U.S. 668, 694 (1984); State v. Fritz, 105 N.J. 42, 58 (1987).

"Appeals may be taken to the Supreme Court by its leave from interlocutory orders: . . . (b) Of the Appellate Division when necessary to prevent irreparable injury[.]" "Leave to appeal is 'highly discretionary' extraordinary relief and granted only to consider a fundamental claim which could infect a trial and would otherwise be irremediable in the ordinary course." State v. Alfano, 305 N.J.Super. 178, 190 (App. Div. 1997)(citing State v. Reldan, 100 N.J. 187, 205 (1985).

Here, leave to appeal is necessary to resolve ambiguities of law which have resulted in a split of contradictory appellate panel decisions on two key issues: (1) How does a defendant's intentional misrepresentation of his immigration status affect a defense attorney's duty to provide immigration advice under State v. Gaitan, 209 N.J. 339 (2012); and (2) does sentencing counsel have a duty to investigate a defendant's immigration status, even when there is no contradictory information regarding citizenship on the PSR. These errors are not remediable in the ordinary course because if this Court does not grant leave to appeal, the State would be procedurally barred from challenging

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these issues in any future appeal, and if, on remand, the PCR Court rules in Defendant's favor on prong two of the Strickland/Fritz test for ineffective assistance of counsel, then Defendant's convictions would be wrongly reversed. See Reldan, 100 N.J. at 203.

In the absence of any published decision on this issue, PCR courts and reviewing appellate panels have applied various contradictory legal standards in their attempt to reconcile the Strickland/Fritz test for ineffective assistance of counsel to the recurring issue of providing immigration advice to defendants who intentionally misrepresent their immigration status to defense counsel and the courts.

For example, in the pre-Gaitan case of State v. Lawrence, No. A-1559-12T2 (App. Div. Apr. 14, 2015)(Slip op. at *3)(Sa 112), the Appellate Division concluded that "defendant's misrepresentation under oath of his citizenship status constituted invited error, which he cannot challenge on this appeal." Ibid. Similarly, State v. Salem, No. A-5752-10T3 (App. Div. July 29, 2013)(Slip op. at *3)(Sa 109), an appellate panel held that it was "absolutely reasonable for an attorney to assume that his or her client was being truthful about citizenship" and that "it would be unreasonable to impose an obligation on counsel to independently investigate the assertion."

In contrast, here, despite the PCR Court's finding that Defendant was untruthful to both the plea court and plea counsel when he said he was a US citizen who was born in New York, the panel upheld a finding of ineffective assistance of sentencing counsel because "had sentencing counsel inquired further of defendant as to how or when he became a citizen, she likely would have discovered that he was, in fact, a green card holder rather than a citizen." State v. Hernandez-Peralta, No. A-3292-22 (App. Div. Mar. 8, 2024) (Slip op. at *8); (Sa 100). This hindsight analysis is particularly troubling considering that sentencing counsel directly asked Defendant to confirm that he was a U.S. citizen who was born in Mexico at the time of sentencing and he responded affirmatively. (6T 37-16 to 37-24). The panel explicitly rejected the relevance of the invited error doctrine, instead affirming the PCR Court's reasoning which itself primarily relied on unpublished authority. See (Sa 106).

These decisions clearly reflect the lower courts' confusion regarding what legal standards apply when a client is intentionally dishonest with his defense counsel. Gaitan and its progeny placed an obligation on defense counsel to provide accurate immigration advice regarding the risk of deportation when the immigration consequences of a plea are clear, see Gaitan, 209 N.J. at 372-73, but the question is to what extent that obligation survives when, as here, it is unequivocally defendant's own intentional

misrepresentations that precluded his receipt of proper immigration warnings at the time of the plea.

The State would submit that the Salem and Lawrence courts correctly decided that the invited error doctrine -- or other similar principle of fair play -- applies because it would be a manifest injustice to hold a defense attorney ineffective for failing to uncover his own client's intentional duplicity. See State v. A.R., 213 N.J. 542, 561 (2013)("Under that settled principle of law, trial errors that 'were induced, encouraged or acquiesced in or consented to by defense counsel ordinarily are not a basis for reversal on appeal'"). With respect to invited error, this Court has held that "[t]he doctrine is implicated 'when a defendant in some way has led the court into error'" and that it "is meant to 'prevent defendants from manipulating the system." Ibid. Even if the doctrine doesn't apply, there is no principle of law or fairness in our jurisprudence or Constitution that mandates counsel to provide accurate advice when a defendant has actively deceived his own attorneys and the Court on an issue. Attorneys are entitled to trust a defendant's representations on matters on which a defendant is presumed to have complete knowledge, such as the place of his birth, and the lower courts' holdings effectively reward defendants for committing frauds upon the court and their own attorneys in the plea process.

The second erroneous conclusion in the Appellate Division's decision is that it substituted the long-held standard in Gaitan for providing immigration advice with one which is far more onerous. Instead of requiring an attorney to simply "point out to a non-citizen clients that they are pleading to a mandatorily removable offense," Gaitan, 209 N.J. at 380, the panel expanded sentencing counsel's obligations to include investigating a defendant's immigration status when the PSR provides "suspicions," as opposed to direct evidence, that Defendant is not a citizen. (Sa 100). To be clear, the PSR did not directly indicate in any way that Defendant was not a US citizen: it simply had a blank box with respect to citizenship, and as sentencing counsel testified, PSR's often have blank boxes for certain information which are not viewed as "inaccuracies" as the PCR Court concluded. (6T 47-2 to 47-25). Nevertheless, the PCR court held that there were "discrepancies" on the PSR which any reasonable defense attorney should have investigated; namely, the defendant's birthplace in Mexico combined with his inability to remember certain identification information like driver's license number and social security number. (6T 97-23 to 98-17). Requiring an attorney to suspect a client is not a citizen when they unambiguously insist that they are, and without any direct evidence to the contrary, imposes an obligation on

sentencing counsel that has never been established and is arguably discriminatory against foreign-born citizens on its face.

Moreover, requiring such an investigation at the sentencing stage places an untenable burden on sentencing attorneys who are reasonably assuming that incomplete, as opposed to incorrect, information on the PSR does not render the PSR inaccurate for the purposes of sentencing. The State is unaware of any published decision holding that a PSR is insufficient simply on the basis of blank entries, particularly on subject matters that were explored in-depth at the plea stage, like citizenship status. Indeed, the Appellate Division decision renders the lengthy plea discussions and in-court colloquy on a defendant's immigration status a nullity and places the burden on sentencing counsel to fully investigate all immigration issues anew – solely prompted by suspicions based on inferences – at a procedural stage when they have limited time and resources to do so.

The illogical nature of the lower courts' decisions is revealed when considering whether it would still have been ineffective assistance of counsel had sentencing counsel simply asked the Court to mark the citizenship box of the PSR as "U.S." by citing to the fact that this was indicated on the PSR and her client had just confirmed that he was a citizen. (6T 41-17 to 42-19). The lower courts seemed to baselessly assume that the sentencing court would have

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required an investigation had this been pointed out but there is no reason to believe that the sentencing court would have required any further verification or investigation beyond the defendant's personal confirmation that he was a citizen, particularly considering the fact that the sentencing judge reviewed is presumed to have reviewed the PSR as well and proceeded with sentencing despite these blank entries. It is important in this context to recognize that PSRs are not generated by any official executive branch authority that verify the information therein; they are the product of judiciary probation officers relying largely on self-reported information by the defendant during an interview. See N.J.S.A. 2C:44-6. As such, when Defendant's interview with a probation officer resulted in blank boxes for certain information like citizenship status, it begs the question how it could have been unreasonable for sentencing counsel to rely on the functional equivalent of the PSR interview by simply questioning her client and having him confirm that he was a U.S. citizen, as was indicated on the plea forms?

Moreover, there is no published authority which mandates an attorney to investigate the citizenship of their clients based purely on *suspicions* of alien status. The appellate panel's only cited legal authority which was purportedly in support of such a duty was a quote from State v. L.G.-M. which merely stated that Padilla and Gaitan also apply to cases which didn't originate in

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guilty pleas; it said nothing about a sentencing counsel's duty to investigate in any capacity. See State v. L.G.-M., 462 N.J.Super. 357, 366 (App. Div. 2020); Hernandez-Peralta, No. A-3292-22 (Slip op at *8)(Sa 101). Expanding sentencing counsels' minimum responsibilities under the Sixth Amendment to include investigating suspicions based on inferences introduces an impossible standard for them on what was previously a narrow and well-defined process.

CONCLUSION

For the foregoing reasons, the State asks this Court to grant the State's motion for leave to appeal.

Respectfully Submitted,

/s Shiraz Deen

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