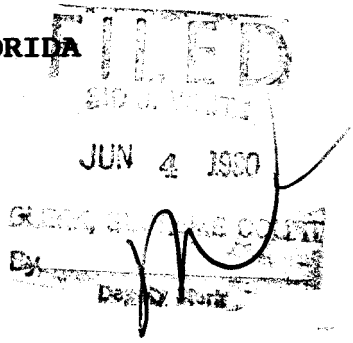
IN THE SUPREME COURT OF FLORIDA



PATRICK MORGANTI,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

Case No. 75,940

PETITIONER'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner was the defendant in the trial court and Appellant in the Fourth District Court of Appeal. Respondent was the prosecution in the trial court and Appellee in the District Court of Appeal.

In the brief, the parties will be referred to as they appear before this Honorable Court.

The following symbol will be used:

R = Record on Appeal

SR = Supplemental Record on Appeal

A = Appendix

STATEMENT OF THE CASE AND FACTS

Petitioner was charged by information filed on January 19, 1984 with robbery, a second degree felony. Said offense was alleged to have occurred on December 26, 1983. R19. On April 2, 1985, Petitioner pled nolo contendere to the charge. He was adjudicated guilty and placed on a 2 year period of probation with special conditions, none of which included payment of a fine. R22-24. An affidavit and warrant for violation of probation were issued on July 18, 1985. R25-26. Petitioner was found in violation of probation after hearing. Petitioner's guideline score placed him in the range of 5½ to 7 years incarceration. R29, 34, 39.

On January 27, 1986, Petitioner was sentenced to a thirty year term of incarceration as a habitual offender. R28, 30. No fine was imposed at that time. R28-30. That sentence however was reversed on appeal by the Fourth District Court of Appeal in Morganti v. State, 498 So.2d 557 (Fla. 4th DCA 1986) approved 509 So.2d 929 (Fla. 1987) hereinafter referred to as Morganti I since a finding of habitual offender status is not a valid basis to depart from the guideline recommended range. The District Court of Appeal also certified a question of great public importance to this Court concerning the retroactive application of Section 27.3455, Florida Statutes, Additional Court Costs, as a violation of the ex post facto clause 498 So.2d at 559. This Court held that a violation occurred where Section 27.3455 was applied to offenses committed prior to its enactment. 509 So.2d at 930. A9-14.

The cause was remanded to the trial court for resentencing. On January 20, 1987, it sentenced Petitioner to a 15 year term of incarceration. Again, no fine was imposed. R33-35. Petitioner sought review of his second sentence in the Fourth District Court of Appeal upon the basis that an upward departure from the guideline recommended range based upon new reasons was inappropriate where the original reason was found invalid upon appeal. The District Court of Appeal rejected that claim but certified a question of great public importance to this Court. Morganti v. State, 510 So.2d 1182 (Fla. 4th DCA 1987) reversed 524 So.2d 641 (Fla. 1988) hereinafter referred to as Morganti II. This Court reversed the 15 year term in accordance with Shull v. Duaaer, 515 So.2d 748 (Fla. 1987) with directions that the Fourth District Court of Appeal order the trial court to sentence Petitioner within the guidelines recommended range. 524 So.2d at 641-642. A4-8.

The cause was again returned to the circuit court for resentencing. On December 2, 1988, the circuit court sentenced Petitioner to serve a 5½ year term of incarceration. R14-15, 40. A consecutive 18 month period of probation was imposed over Petitioner's objection. R15-16. Petitioner was also ordered for the first time to pay a $10,000 fine and a $500.00 surcharge as a condition of probation. R17, 40, SR.

Petitioner appealed his third sentence to the Fourth District Court of Appeal. Petitioner challenged his newest sentence as an enhanced penalty imposed in contravention of double jeopardy principles immortalized in North Carolina v. Pearce, 395 U.S. 711 (1969). Additionally imposition of the $10,000 fine and surcharge as a condition of 18 months probation upon Petitioner, an indigent,

was unlawful as unduly harsh and unrelated to the offense; designed to penalize rather than rehabilitate and ordered without consideration of Petitioner's ability to pay. Finally, Petitioner maintained it was error to force him over specific objection to accept probation in lieu of incarceration.

Petitioner's claims were rejected by the majority of the district court of appeal in Morganti v. State, 557 So.2d 593 (Fla. 4th DCA 1990). A1-3. One member of the panel dissented in part with opinion Id. at 594-595. All however agreed to certification of the following question to this Court as one of great public importance.

> WHETHER THE IMPOSITION OF A FINE FOR THE FIRST TIME ON A RESENTENCING MUST CONSTITUTE AN UNCONSTITUTIONAL ENHANCEMENT OF SENTENCE.

Id. at 594.

Petitioner sought rehearing in the Fourth District Court of Appeal. His motion was denied on March 29, 1990. On April 27, 1990 Petitioner filed his notice to invoke discretionary jurisdiction. In accordance with this Court's order, Petitioner files this brief on the merits.

SUMMARY OF ARGUMENT

Upon violation of probation for the offense of robbery, Petitioner's guideline score indicated a 5½ to 7 year sentence. After two successful appeals, Petitioner received the instant sentence: 53 years incarceration followed by 18 months probation with a special condition that he pay a $10,000.00 fine during the term. Petitioner challenges imposition of the probation and fine upon several bases. First, this third sentence is an enhanced penalty imposed in contravention of double jeopardy and due process principles as delineated in North Carolina v. Pearce, 395 U.S. 711 (1969). Second, the trial court abused its discretion where it imposed as a condition of probation payment of a $10,000.00 fine by Petitioner, an indigent, during a scant 18 months. This requirement is unduly harsh and unrelated to the offense; designed to penalize rather than rehabilitate; ordered without consideration of Petitioner's ability to pay; and unconstitutionally excessive. Last, the probationary term with its onerous condition was imposed over Petitioner's specific objection.

ARGUMENT

THE TRIAL COURT ERRED IN RESENTENCING PETITIONER TO 18 MONTHS PROBATION WITH PAYMENT OF A $10,000.00 FINE AS A SPECIAL CONDITION.

Upon violation of probation for the offense of robbery, Petitioner's guideline score indicated a 5½ to 7 year sentence. R29, 34, 39. Petitioner, declared a habitual offender, however, was sentenced to a 30 year term of incarceration as an upward guideline departure. Said sentence was vacated on appeal in Morganti v. State, 498 So.2d 557 (Fla. 4th DCA 1986) approved 509 So.2d 929 (Fla. 1987). (Morganti I) R28, 30. After remand, Petitioner was resentenced to a 15 year term of incarceration. R33-35. This too was vacated on appeal in Morganti v. State, 510 So.2d 1182 (Fla. 4th DCA 1987) reversed 524 So.2d 641 (Fla. 1988) as imposed in contravention of this Court's holding in Shull v. Dugger, 515 So.2d 748 (Fla. 1987), (Morganti 11). Consequently, Petitioner received the instant sentence: 5½ years incarceration followed by 18 months probation with a special condition that he pay a $10,000.00 fine during the term. R14-15, 17, 40.[1]

Petitioner challenged imposition of the probation and fine upon several bases in the Fourth District Court of Appeal. By written opinion in Morganti v. State, 557 So.2d 593 (Fla. 4th DCA 1990) a divided panel rejected Petitioner's claim that the newest sentence was an enhanced penalty imposed in contravention of the

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[1] At the time of commission of the instant offense the committee note to Florida Rule of Criminal Procedure 3.701(d)(12)(1983) providedthatwhere a split sentence was imposed the combination of probation and incarceration could not exceed the maximum of the guideline recommended range. Thus, the circuit court was limited to a 7 year cap.

principles of double jeopardy as set forth in North Carolina v. Pearce, 395 U.S. 711 (1969). The appellate court did not hold that as a condition of probation, payment of a $10,000.00 fine by Petitioner, an indigent, during a scant 18 months was an abuse of discretion because it was unduly harsh and unrelated to the offense; designed to penalize rather than rehabilitate and ordered without consideration to Petitioner's ability to pay. Last, the appellate court found that the probationary term with its onerous condition in lieu of incarceration imposed over Petitioner's specific objection was lawful. R15-16. One member of the district court dissented in part and agreed that imposition of a $10,000.00 fine for the first time upon a third resentencing was an unconstitutional enhanced penalty.

The majority certified the following question to this Court as one of great public importance:

> WHETHER THE IMPOSITION OF A FINE FOR THE FIRST TIME ON A RESENTENCING MUST CONSTITUTE AN UNCONSTITUTIONAL ENHANCEMENT OF SENTENCE.

Petitioner submits that the answer to the above is yes. Petitioner will address this issue as well as his other two challenges to his unlawful sentence in a sequential fashion.

A. Imposition of a $10,000.00 fine as a condition of probation constitutes an improper enhanced sentence after success on appeal.

Imposition of punishment for the exercise of a legal right to appeal violates principles of double jeopardy and due process. Fifth and Fourteenth Amendments, United States Constitution and Article I, §9, Florida Constitution. Vindictiveness for any reason may not play a role in sentencing.

> To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort...and for an agent of the state to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is "patently unconstitutional."

Bordenkircher v. Haves, 434 U.S. 357, 363 (1978). Where a trial court imposes an increased penalty upon a defendant who has been successful on appeal, the factual basis for the harsher sentence must be apparent of record. North Carolina v. Pearce, 395 U.S. 711, 726 (1969).

At bar, after two successful appeals the trial court for the first time imposed a $10,000.00 fine. R17. Imposition of this fine is an unconstitutional increased penalty.

Florida law has consistently recognized that a court may not vacate a legal sentence and replace it with enhanced penalty. Thus, in Jones v. State, 15 F.L.W. S118 (Fla. March 1, 1990) this Court found that a third sentence of 50 years imprisonment could not stand where a second sentence of 25 years incarceration had been legally imposed. This Court reasoned:

> However, as to this petitioner, the double jeopardy principles set forth in North Carolina v. Pearce, 395 U.S. 711 (1969), prohibit an increase in the sentence imposed at the second sentencing, which the petitioner appealed. The cases relied on by the district court of appeal in Jones III were decided after the trial court imposed the twenty-five year sentence on Jones. Although a change of law subsequently occurred which would have permitted imposition of the initial fifty-year sentence, the district court of appeal would not have had the opportunity to apply that law had petitioner not appealed the second sentence. Double jeopardy prohibits the increase of the sentence.. Brown v. State, 521 So.2d 110 (Fla.), cert. denied, 109 S.Ct. 270 (1988); Troup v. Rowe, 283 So.2d 857 (Fla. 1973); Pearce.

Id. at S118-119. In Brown v. State, 521 So.2d at 110, a capital case, this Court upheld a life sentence imposed due to an erroneous ruling that the death penalty did not apply. Double jeopardy principles barred an enhanced penalty of death even though the lesser sentence arose from a mistake in law since the life sentence was a legal sentence with a sound statutory basis. See also Blackshear v. State, 531 So.2d 956 (Fla. 1988) (Imposition of concurrent life sentences after appeal of illegal 65 year term violates double jeopardy bar where court could accomplish sentencing goal by imposing consecutive term. -- Only intervening event would justify greater sentence) Frederick v. State, 405 So.2d 1344 (Fla. 3d DCA 1981) (sua sponte modification of probationary term illegal as it results in increased punishment); "There is no provision in the rules of criminal procedure for the subsequent enhancement of a legal sentence" Roval v. State, 389 So.2d 696, 697 (Fla. 2d DCA 1980).

Sub iudice Petitioner was originally convicted of robbery pursuant to Section 812.13(1)(2)(c), Florida Statutes which as to penalties provides:

> If in the course of committing the robbery the offender carried no firearm, deadly weapon, or other weapon, then the robbery is a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(emphasis added). While Section 775.082 authorizes a maximum 15 year term of imprisonment and Section 775.084 provides for classification as a habitual felony offender, Section 775.083 concerns fines. These penalties are sentencing alternatives as

Section 812.13(2)(c) uses the term "or". Sparkman v. McClure, 498 So.2d 892, 895 (Fla. 1986).

Section 775.083 provides:

> *775.083* Fines.--
>
> (1) A person who has been convicted of an offense other than a capital felony may be sentenced to pay a fine in addition to any punishment described in s. 775.082; when specifically authorized by statute, he may be sentenced to pay a fine in lieu of any punishment described in s. 775.082. A person who has been convicted of a noncriminal violation may be sentenced to pay a fine. Fines for designated crimes and for noncriminal violations shall not exceed:
>
> (a) $15,000, when the conviction is of a life felony.
>
> (b) $10,000, when the conviction is of a felony of the first or second degree.
>
> (c) $5,000, when the conviction is of a felony of the third degree.
>
> (d) $1,000, when the conviction is of a misdemeanor of the first degree.
>
> (e) $500, when the conviction is of a misdemeanor of the second degree or a noncriminal violation.
>
> (f) Any higher amount equal to double the pecuniary gain derived from the offense by the offender or double the pecuniary loss suffered by the victim.
>
> (g) Any higher amount specifically authorized by statute.
>
> (2) If a defendant is unable to pay a fine, the court may defer payment of the fine to a date certain.

Use of the word "may" establishes payment of a fine as a discretionary penalty. City of Miami v. Save Brickell Ave., Inc., 426 So.2d 1100, 1105 (Fla. 3d DCA 1983). Consequently a sentence

for the offense of robbery may be lawful with or without imposition of a fine.

At bar, in originally pronouncing a prison term upon Petitioner, the circuit court did not impose a fine. Thus, it was set at 0, a legal amount by statute. §812.13(1)(2)(c), Florida Statutes. Only upon resentencing in accordance with this court's opinion did it increase from 0 to $10,000.00 with a $500.00 surcharge. This is an unlawful enhancement of an otherwise legal sentence imposed after success upon appeal unjustified by any intervening misdeed. It cannot stand. Jones; Brown; Blackshear; Pearce.

In Kominsky v. State, 330 So.2d 800 (Fla. 1st DCA 1976) the first district reached precisely this result. Upon conviction for possession of cannabis, Mr. Kominsky was placed on probation for 5 years with the special condition that he pay $10.00 per month to the county fine and forfeiture fund. After Mr. Kominsky filed his notice of appeal, the sentencing court modified the terms of probation in several respects including a fine payment increase to $30.00 per month. The first district found the order to pay additional sum unlawful:

> That part of the modification order raising the amount to be paid into the Escambia County Fine and Forfeiture Fund from $10 to $30 per month, which followed upon the trial court being advised that appellant desired to appeal, cannot be sustained. The trial court clearly violated the opinion of the U.S. Supreme Court in North Carolina v. Pearce (footnote omitted) by penalizing appellant for exercising his constitutional right to appeal.

Id. at 802. The instant increase from $0.00 to $10,000.00 after success on appeal no less than Kominsky's increase from $10.00 to

$30.00 violates the constitutional dictates of North Carolina v. Pearce.

Sub iudice, the majority of the Fourth District Court of Appeal relied upon Johnson v. State, 502 So.2d 1291 (Fla. 1st DCA 1987) as authority for its conclusion that imposition of a $10,000.00 fine upon resentencing is not a forbidden enhanced penalty. Morganti III at 594. Johnson however concerned an entirely distinct issue. In Johnson, the first district held that an amended sentence which imposed $4,500.00 in court costs was not an unlawful enhanced penalty. However, unlike court costs a fine is a penalty. Nash v. State, 434 So.2d 33 (Fla. 2d DCA 1983). It is imposed under the authority of Chapter 775 Definitions; General Penalties, registration of criminals Florida Statutes §775.083, Fla. Stat. As such a fine unlike costs is "...part of the potential sentence." Lona v. State, 540 So.2d 903 (Fla. 2d DCA 1989) (defendant not entitled to specific notice prior to imposition of fine because a fine is a sentence). As a penalty, it is subject to due process and double jeopardy constraints' while court costs need not be treated in a like manner. Thus, Johnson which approved imposition of court costs as part of an amended sentence is distinguishable from the resentencing order at bar requiring payment of a fine. See e.g. Kominsky v. State, 330 So.2d at 802; Cherry v. State, 439 So.2d 998, 1000 (Fla. 4th DCA 1983).

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[2] Imposition of a fine as an additional punishment is subject to ex post facto consideration. See People v. Clarke, 111 A.D.2d 11, 489 N.Y.S. 2d 1 (AD. 1 Dept. 1985).

Although the majority opinion of the Fourth District Court of Appeal at bar acknowledged that no statement is contained in the instant record as to why the fine was not originally imposed it concluded that "...it is not unreasonable to consider that this was related to the length of the initial terms of incarceration and the fact that the initial longer sentences were not coupled with a successive period of probation." Moraanti III at 594. This statement amounts to pure speculation as to the reason for the imposition of the fine upon resentencing. Further, it fails to recognize that the reduction in the length of sentence was required because the longer sentences were illegal Morganti I, Moraanti II. Moreover, a grant of probation is not necessarily a reduction in sentence especiallywhen coupled with such a weighty fine. Solomon v. State, 341 So.2d 537, 538 fn. 3 (Fla. 2d DCA 1977).

The district court sub iudice also wrote "Additionally, the imposition of the fine is not a deviation from the sentencing guidelines" Moraanti III at 594. Although a correct statement of law, one must also consider that the sentencing guideline scheme recognized that the setting of a fine in the first instance is a discretionary act. See committee note to Florida Rule of Criminal Procedure 3.701(d)(8) (1983)("Any presumptive sentence may include the requirement that a fine be paid"). Thus, the failure to order payment of a fine does not render the sentence unlawful. Compare Grice v. State, 528 So.2d 1347 (Fla. 1st DCA 1988) (restitution is a mandatory part of a sentence).

As there was nothing illegal about the circuit court's failure to impose a fine in first sentencing Petitioner, pronouncement of this penalty without any reasons for its appearance for the first

time after Petitioner's successful exercise of his right to appeal constitutes additional enhanced punishment barred by the due process and double jeopardy clauses of the Fifth and Fourteenth Amendments to the United States Constitution. To remedy this constitutional violation, the cause must be remanded with directions to strike imposition of the fine.

B. The trial court abused its discretion where it imposed payment of a $10,000.00 fine as a special condition of probation.

The circuit court is empowered to place a defendant on probation while at the same time impose payment of a fine. S948.011, Fla. Stat. While the court may also fashion conditions of probation, its discretion in this regard is circumspect.

A condition of probation must be reasonably related to the offense. It must relate to the function of probation, rehabilitation rather than serve a purely punitive function. Coulson v. State, 342 So.2d 1042 (Fla. 4th DCA 1977) (special condition prohibiting defendant from collecting unemployment compensation constitutes abuse of discretion because the condition is overly punitive); Williams v. State, 474 So.2d 1260 (Fla. 1st DCA 1975) (no error to require defendant to pay restitution where defendant is able to do so). Moreover, where the condition includes the payment of funds, the court must consider the defendant's present ability to pay in determining the propriety of the condition. Ward v. State, 511 So.2d 1109 (Fla. 5th DCA 1987) (error to require defendant to pay child support in arrears without first determining ability to pay current as well as overdue support). See also Riblett v. State, 445 So.2d 1111 (Fla. 2d DCA

1984) (defendant represented by private counsel at sentencing not insolvent). The defendant's financial status is a factor in deciding whether a condition is excessively punitive and thus unlawful. Walker v. State, 461 So.2d 229 (Fla. 1st DCA 1984) (error to require defendant to purchase merchandise stolen from victim where defendant's financial condition was such as to render condition punitive rather than rehabilitative). Furthermore where the monetary payment is pronounced as a fine, it must withstand the constitutional challenge in that it cannot exceed that which will reasonably redress the wrong. Ferre v. State ex rel Reno, 478 So.2d 1077, 1082-1083 (Fla. 3d DCA 1985).

At bar, Petitioner was adjudged indigent in the circuit court and received the representation of a public defender of the Seventeenth Judicial Circuit at each sentencing hearing. R27, 28, 30, 33, 35, 40. Likewise, he has been declared indigent for appellate purposes and thereby received the services of the public defender in his appeals. R43. Morganti I; Morganti II; Morganti III. Nonetheless, the trial court imposed as a condition of an eighteen month term of probation, the payment of a $10,000.00 fine plus $500.00 surcharge.[3] This was done without inquiry into Petitioner's financial status. Where Petitioner, a convicted felon, has been indigent throughout the long pendency of his cause, was recently released from imprisonment and must support his minor dependents, R15, the requirement of a $555.56 monthly payment not inclusive of the surcharge serves solely a punitive function.

[3] Simple division reveals that eighteen equal monthly payments would require each installment in the amount of $555.56 after tax dollars.

Walker. As such, it is an abuse of discretion to make the payment of the fine a condition of probation warranting resentencing. Id. at 231.

C. Petitioner by his objection rejected the grace of the court.

At bar, when faced with the possibility of probation, Petitioner objected as follows:

> THE DEFENDANT: If it comes down to me getting more probation, if the Court sees it has to give me more probation or probation period after I already had the sentence, you know, I have three children. I have to work. I have to leave the state to have a job in another state. There's no way possibly that I could do a community control in the State of Florida and I don't want it. And I'd rather tell you the truth. If it ever came down to whether I had to take probation I'd rather have more time in prison than I would probation - especially any community control. I plan on taking my family out of state upon release.
>
> I also have 20 months County Jail time and three years in, three and a half years I believe prison time on this robbery charge. Not only three years, I have close to five years and something years on this 7 year sentence.

R15-16. By these words Petitioner, familiar with probation, having violated it once before, flatly refused to accept probation much less the onerous condition of payment of a $10,000.00 fine. Place on probation, in the face of Petitioner's specific objection, should be error. Contra Woods v. State, 542 So.2d 443 (Fla. 5th DCA 1989); Evans v. State, 544 So.2d 1160 (Fla. 5th DCA 1989).

Section 948.01, Florida Statutes authorizes the circuit court to place a felony offender on probation. While the statute affords the court this sentencing alternative as a matter of judicial grace, it requires the defendant's cooperation for its success.

Despite the Woods court declaration that "The trial court, not the defendant, is the one with that ultimate option" the reality is that a defendant can easily violate the standard terms of his probation should he choose to do so. Woods v. State, 542 So.2d at 444. For example, he could refuse to report to his probation supervisor. §948.03(1)(a), Fla. Stat. While the sentencing court would then be free to impose a term of incarceration, this Court has firmly held that its length may not exceed the maximum of the guideline range inclusive of the one cell increase provided for by Florida Rules of Criminal Procedure 3.701. Lambert v. State, 545 So.2d 838 (Fla. 1989); Ree v. State, 14 F.L.W. 565 (Fla. Nov. 16, 1989) (any departure sentence for a probation violation is impermissible if it exceeds the one cell increase permitted by the sentencing guidelines.) Thus, logic dictates that if a defendant, recognizing his inability to comply with court order, wishes to forgo the grace of the court and accept in its stead a term of incarceration which falls within the next higher cell, he should be so sentenced. Probation with its need for voluntary compliance cannot successfully be forced upon him.

At bar despite Petitioner's protestations, probation was thrust upon him when he should have been given a term of incarceration within the parameters of the guidelines. He seeks this Court's order which would sanction that outcome.

CONCLUSION

In sum, the multiple sentencing proceedings to which Petitioner was subject are constrained by the constitutional doctrines established long before the guideline sentencing scheme was created. The principles of due process and double jeopardy serve to preclude enhancement of a penaltybecause one successfully exercises one's right to appeal. These constitutional considerations are of greater importance in the advent of guideline multiple resentencings where a sentencing court has several opportunities to impose sanctions upon a defendant. See e.g. Pope v. State, 15 F.L.W. S243 (Fla. April 26, 1990). New and harsher penalties may not be imposed upon a defendant, no matter how many times he successfully attacks an earlier illegal sentence. As to Petitioner, these doctrines require that the $10,000.00 fine be stricken from his sentence and the certified question be answered in the affirmative. Additionally the term of probation must be vacated.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by courier to Celia Terenzio, Assistant Attorney General, Elisha Newton Dimick Building, Room 240, 111 Georgia Avenue, West Palm Beach, Florida 33401 this 15th day of June, 1990.

Marcia Kurr Allen
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