

five years in the Community without being Convicted of another Felony. In 1995, the Legislature amended the law such that C Felonies would not be calculated into an Offender Score if, following release from confinement the Offender had spent five years in the Community without committing another Crime, including Misdemeanors and gross Misdemeanors. The legislature did not explicitly provide for Retroactive application of the amendments and the amendments are neither Remedial nor Curative.

Did the Trial Court deprive Mr. Day of Due Process of law by Retroactively applying the 1995 amendment and Counting one C Felony that Washed out prior to the 1995.

A Trial Court can not Retroactively apply amendments to RCW 9.94A.525 so as to Revive previously Washed out Convictions.

Prior to July 23, 1995, RCW 9.94A.525 (2) excluded C Felony Convictions from an Offender Score if the Offender had spent five years in the Community and had not been Convicted of any Felonies. An amendment to this Statute in 1995 changed it to exclude C Felony Convictions from an Offender Score only if the Offender had spent five years in the Community with out Committing any Crimes, including Misdemeanors and gross Misdemeanors. Laws 1995, ch.316, § 1. RCW 9.94A.525 (2).

A Statutory amendment may only be applied Retroactively where (1) the legislature expresses its intent for Retroactive application of the law; (2) it is Curative; or (3) it is

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Remedial provided such Retroactive application does not run afoul of Constitutional prohibitions.

STATE V. SMITH, 144 Wn.2d 665, 673, 30 P.3d 1245 (2001).

Legislative intent for Retroactive application must be found in the express language of the Statute.

STATE V. CRUZ, 139 Wn.2d 186, 191, 985 P.2d 384 (1999);

Landgraf V. USI Film Products, 511 U.S. 244, 268, 117 S.Ct. 91, 137 L.Ed.2d 63 (1997). An amendment to the Washout provisions of RCW 9.94A.525 can not Revive offenses which have previously Washed out, unless the amendment is applied Retroactively.

SMITH, 144 Wn.2d at 673-74, N.2; CRUZ, 139 Wn.2d at 193.

The principles of Smith should be followed to prevent the Retroactive application of the 1995 amendment to RCW 9.94A.525 (2) in this case. As in Smith, the language of RCW 9.94A.525 (2) as amended in 1995 lacks any expression of legislative intent to Retroactively apply the 1995 amendment. The 1995 amendment also is not Curative or Remedial, and thus can not automatically apply Retroactively. Therefore, if the 1995 amendment is to apply Retroactively, it must do so through the Retroactive application of RCW 9.94A.345. Just as Smith concluded that nothing in this Statute or its statement of intent expressed a legislative intent to apply the 1997 amendment Retroactively, There is also nothing in this Statute or its statement of intent which expresses a legislative intent specifically to apply the 1995 amendment Retroactively.

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Smith, 144 Wn.2d at 672. Thus, according to the reasoning in Smith, the 1995 amendment should not apply Retroactively.

Smith, stated that the language of RCW 9.94A.360 (2) (now RCW 9.94A.525 (2)) as amended in 1997 lacks any expression of legislative intent to Retroactively apply the 1997 amendment. Smith, 144 Wn.2d 762.

In Mr.Days' judgment and Sentence, regarding his Criminal History, Case Cause No. 06-1-02286-8, Mr.Day's Criminal History Count's a Washout as a point. Crime Date: 05/31/1995, and Crime of: ASLT 4th/ DV, at page 2 of 10.

Because the Trial Court erroneously included Mr.Days' 1995 C Felony Conviction, (Fourth Degree Assault-Demistic Violence) RCW 9A.36.041, dated: May 31,1995, This Court must Remand for Resentencing.

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ADDITIONAL GROUND # 2

A. The Trial Court exceeded its jurisdiction by abusing its authority.

The Trial Court abused its discretion, which occurs when the Trial Court's discretion is "Manifestly unreasonable, or exercised on untenable Grounds, or for untenable reasons".

B. The Trial Court Sentenced Mr.Day to a "No-Contact Order for " Life".

Mr.Day was not Sentenced to a "Life" term in the Pierce County Superior Court in the Case Cause No. 06-1-02286-8.

However, in his Judgment and Sentence at page 4 of 10, Section 4.9 NO-CONTACT, Mr.Day was Ordered No-Contact for the Rest of Larry Day's Life (per Judge Order).

C. Mr.Day claims that his Judgment and Sentence is invalid on its face. The invalidity is obviously apparent and no further elaboration is needed.

Mr.Day challenges his Sentence and Judgment as it is unconstitutionally invalid on its face. In re Pers.Restrict of Goodwin, 146 Wn.2d 861, 866, 50 P.3d 618 (2002). A judgment and Sentence is invalid on its face if it evinces the invalidity without further elaboration. Goodwin, 146 Wn.2d at 866.

Mr. Days' Judgment and Sentence disclose facial invalidity in the judgment and Sentence itself. In re Pers. Restraint of Turay, 150 Wn.2d 71,82, 74 P.3d 1194 (2003) (citing In re Pers. Restraint of Hemenway, 147 Wn.2d 529, 55 P.3d 615 (2002)).

" Constitutionally invalid on its face means a Conviction which without further elaboration evidences infirmities of a Constitutional magnitude. " State V. Ammons, 105 Wn.2d 175,187-88, 713 P.2d 719, Cert. denied, 497 U.S. 930 (1986).

D. The Trial Court imposed an Exceptional Sentence upward without a determination by a jury to go beyond the Sentencing Standard Range.

Pursuant to the laws of the State of Washington's Revised Code of Washington (RCW), amending RCW 9.94A.530 and 9.94A.535; adding a new Section to chapter 9.94A. RCW; The legislature intends to conform the Sentencing Reform Act, chapter 9.94A. RCW Senate Bill #5477; to comply with the Ruling in BLAKELY, V. Washington, 542 U.S. ... (2004). In That case the United States Supreme Court held that a Criminal defendant has a Sixth Amendment Right to have a jury determine beyond a **REASONABLE** doubt any aggravating fact, other than the fact of a prior Conviction, that is used to impose greater punishment than the Standard Range or Standard Conditions. The legislature intends that aggravating facts, other than the fact of a prior

Conviction, will be placed before the jury.

In BLAKELY, V. WASHINGTON, 542 U.S.____(2004) The Supreme Court found that for a judge to impose an exceptional Sentence without the necessary jury **finding** is a Violation of the Sixth Amendment of the Constitution Right to a Trial by jury stating: " Our commitment to APPRENDI, in this context reflects not just the respect for longstanding precedent, but the need to give intelligible content to the Right of jury Trial. That Right is no mere procedural formality, but a fundamental reservation of power in our Constitutional structure.

Therefore, This Court should Remand this case back to the Trial Court to Vacate the illegal Sentence of the Life-Time NO_Contact Order in this matter.

The Trial Court is not in conformity with United States Federal Supreme Court Ruling of BLAKELY V. WASHINGTON,

Mr.Day has a State and Federal Constitutional Right to a fair Trial in this Case.

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ADDITIONAL GROUND #3.

1. MR. DAY RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.

During trial defense counsel failed to call a material Witness who would have testified to matters having a Connection to and with the consequential facts of the case.

This material Witness would have countered the States Witness (Mellissa McCleary) with proof of her testimony being perjury.

A. Mr. Day was entitled to effective representation during trial.

The Sixth and Fourteenth Amendments to the United States Constitution guarantees a Criminal defendant the effective assistance of counsel, an individual must demonstrate: (1) counsel's performance was deficient, ie. it fell below an objective standard of reasonableness; (2) counsel's deficient performance resulted in prejudice to the appellant.

STRICKLAND V. WASHINGTON, 466 U.S. 668, 687, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984); STATE V. McFARLAND, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

B. Counsel's representation of Mr. Day was deficient.

There can be no reasonable explanation for counsel's failure to object to, much less agree to, the prosecutions witness who perjured her self on the Stand (Mellissa Cleary) and not call defense's key material Witness to counter the

State's Witness Ms. Cleary her perjured testimony, by calling Mr. Greg Bridges, who would have proven that the State's Witness Ms. Cleary was lying on the stand to his personal knowledge. There is no reasonable nor plausible explanation for such action by defense counsel.

Because the actions of counsel were so unreasonable, they can not be construed as merely a tactical decision. ROE V. Flores-Ortega, ___ U.S. ___, 120 S.Ct. 1029, 1037, 145 L.Ed.2d 985 (2000). In any event, there is no tactical reason to not object to, or agree with, and not counter the State's Witness who lied on the stand and not call the defense's key Material Witness who would have provided the jury with a complete and truthful statement of facts of the defendant's innocence.

The State's Witness claimed that she had no knowledge of the gun's, but in fact, her deceased husband's best friend Mr. Greg Bridges was her husband's hunting partner and would have stated to that, and to the fact that he could identify the weapons in question. Mr. Day's Sworn Affidavit reveals knowledge of his own that Ms. Cleary is lying and further more directs the Court to reads part's cited by Mr. Day to the lies by Ms. Cleary in the Verbatim Report of Proceedings.

Defense counsel's representation of Mr. Day was deficient.

C. Counsel's deficient performance prejudiced Mr.Day.

The prejudice to Mr.Day by defense counsel's actions is clear. Mr.Day was entitled to effective assistance of counsel. McFarland, 127 Wn.2d at 333, ('asserted error must be 'manifest'. The facts are in the Verbatim Report of Proceedings, SEE: Mr.Day's Sworn Affidavit in Support. The prejudice to Mr.Day is apparent.

Every defendant has the right to a fair trial, which is guaranteed both by the Federal and State Constitutions. U.S. Const.amend. 6, and Wash. Const. art. 1, §22.

The failure to call Mr.Greg Bridges who is a corroborating Witness to support defendant's innocence, deprived defendant of a fair trial and constitutes ineffective assistance of counsel. Williams V. Stewart, No.01-99015, (9th Cir.04/18/2006) at [108]; "[t]he Compulsory process **CLAUSE** guarantees a Criminal defendant the right to present relevant and material Witness in his defense. ... " Alcala V. Woodford, 334 F.3d 862, 879 (9th Cir. 2003); SEE Chambers V. Mississippi, 410 U.S. 284, 302 (1973); Washington V. Texas, 388 U.S. 14, 17-19 (1967). A material Witness is "[a] Witness who can testify about matters having some logical connection with the consequential facts, esp. if few others, if any, know about those matters". Black's Law Dictionary.(8th ed.2004).

Therefore, Mr.Day asks this Court to vacate his Sentence and allow him a new trial due to the lies (Perjury Committed by the States Witness) which would provide him an adequate and Professional Counsel who would possibly be in compliance with his Constitutional Rights and be provided a fair trial under the State and Federal CONstitutional Rights of an accused defendand who has been lied against in a Washington State Court.

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ADDITIONAL GROUND # 4

1. THE BONNY LAKE AND THE SUMNER COUNTY POLICE DEPARTMENT'S
ILLEGALLY SEARCHED AND SEIZED MR.LARRY DAYS'S HOME.

Mr.Day has United States Federal Constitutional Rights of the Fourth Amendment, which states in part:

The right of the people to be secure in their persons, house, papers, and effects, against unreasonable searches and seizures, shall not be violated, No Warrants shall issue, but upon probable cause. U.S. Const.amend IV.

Washington State Constitutions Article I, section 7, prohibits unlawful government intrusion into one;s home or private affairs without express limitation.

On May 19th,2006, Mr.Day's home was illegally invaded, and searched by both Police department's (Bonny lake and Sumner), without a Search Warrant or having any justifiable cause of action to do so, at the time of the search and seizure..

Mr.Day did not commit any crimes prior to the illegal Search, and did not violate any "No-Contact" Orders issued by any Court of law prior to the illegal Search and Seizure.

The mentioned Police department's only wanted to speak to Mr.Day nothing more, upon attempting to locate Mr.Day, they (Police Officer's) Searched and Seized items, and eventually used to prosecute and convict Mr.Day. SEE: Mr.Day's Sworn Affidavit, addressing parts of the Verbatim Report of Proceedings of direct-examination of Sergeant Thomas Longtine.

Under Washington State law, RCW § 10.79.015, " Any ... Magistrate, when satisfied that there is reasonable cause, may also, upon like complaint made on Oath, issue [a] search for and seize any evidence material to the investigation or prosecution of any homicide or any Felony".

CrR 2.3 authorizes a superior Court to issue a search warrant upon application by a prosecutor or police officer. CrR 2.3 (a). It provides, in relevant part:

AA Search Warrant maybe issued only if the Court determines there is probable cause for the issuance of a Warrant. There must be an ~~affidavit~~, a document as provided in RCW § 9A.72.085, or any law amendatory thereto, or Sworn Testimony establishing the grounds for issuing the warrant The evidence in support of the finding of probable cause shall be preserved and shall be subject to Constitutional limitations for such determinations, and maybe hearsay in whole or in part. CrR 2.3 (c).

The Rule further requires that the Warrant particularly describes the place of the search and the person or items to be seized. In this case all the above was absent.

Mr. Day's defense counsel throughout the direct-examination of Mr. T. Longtine, did not object to the evidence that was admitted by the State, which was illegally Seized by both the Police departments mentioned in this Ground.

SEE: State V. Avila-Avina, 99 Wn.App. 9, 991 P.2d 720 (2000) at [26]; When Police obtain physical evidence or a defendant's confession as the direct result of an unlawful Seizure, the evidence is " TAINTED " by the illegality and must be excluded. Wong Sun V. United States, 371 U.S. 471, 484-85, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963); State V. Gonzales, 46 Wn.App. 388, 397-98, 731 P.2d 1101.

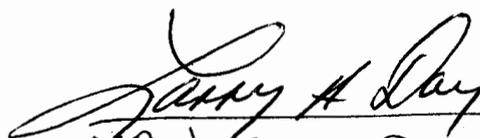
In this case, the phisical evidence illegally confiscated as a result of an unlawful Seizure, is now "Tainted" and must be " EXCLUDED ".

CONCLUSION:

This Court must **DISMISS** all charges relating to the evidence (weapons) that were illegally Seized at Mr.Day's Residence which is clearly tainted by both Police departments, which resulted in the Violation of Mr.Day's State and Federal Constitutional Rights being violated, The Search and Seizure being illegal.

The Police department's did not have any knowledge or any information to any facts that occured after the the facts of this case. Therefore, they illegally took without a search warrant and seized property of Mr.Day's and used it to prosecute him. As for his Defense Counsel she was a sell out who provided more assistance for the Prosecution than the one being accused and prosecuted.

DATED: MAY 9, 2008.


MR. LARRY A. DAY, #307673
5000 191 CONSTANTINE WAY
Aberdeen, WA 98520

FILED
COURT OF APPEALS
DIVISION II

08 MAY 19 PM 1:17

STATE OF WASHINGTON
BY: *[Signature]*
DEPUTY

WASHINGTON STATE COURT OF APPEALS

DIVISION II

LARRY A. DAY,

Defendant

vs.

STATE OF WASHINGTON.

Respondent

Case No.: 36639-8-II.

AFFIDAVIT OF : LARRY DAY.

Mr. Larry Day, On oath says:
(name)

The following is statement's made by a **state**. Witness name Mellissa Cleary, who I believe Planted Evidence that was used against me to convict me in the Superior Court, Case No. 06-1-02286-8, of Pierce County. The Pierce County Police searched my Vehicle (Honda Prelude), and found tapes that was used against me to convict me. However 8 Months later Ms. Cleary searched the same vehicle and claims to have found a store receipt that also was used to convict me she claims to have turned this receipt in to the Bonnylake Police Department. I have the following excerpts from my Verbatim Report of proceedings, Volume 7 of 14, Pages 573-709, at page: 579-580.

Lines: 21-25.

Q.A. XXX Did you find anything during your inspection of the Vehicle ?

A. Yes. I found a Home Depot receipt.

Q. Handing you what's been marked as Exhibit 46, could you identify Exhibit 46.

Page 580. Lines: 1,2, 17,-20

A. Yes. This is the Home Depot receipt that was on the Floorboard.

Q. What did you do with that Home Depot receipt ?
I took it up to the Bonney Lake Police Department.

Q. Who did you give it to ?

A. Oh, I think it was Detective Wolschleger.

I now show how I was prejudiced against in my Trial by the Prosecuting attorney in this case.

Verbatim Report of Proceedings ,Volume 14 of 14, Pages 977-1022
(SENTENCING HEARING)

AT PAGE: 1013, Lines: 9-13,

In 1982, he had an involuntary manslaughter that got vacated,
"He had a fresh start".

Ms.High: Your Honor, I am going to object to this. This is not properly before the Court for consideration. This is, again, try to load it.

Line: 22,

He had a 1995 domestic Violence assault.

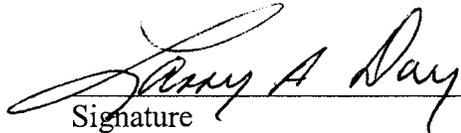
These are clearly prejudicial statements made by the prosecutor in this Case.

I hope that the things that I have stated in this Affidavit are enough to show that I was lied against and evidence was planted against me and used to convict me and the Prosecutor stated things that were not suppose to have been mentioned which was a deliberate act against me.

I, LARRY A.DAY, am over the age of majority and am also a U.S. citizen competent to testify and herein attest under penalty of perjury that all statements contained herein is the absolute truth. (RCW 9A.72.085)

Affidavit pursuant to 28 U.S.C. § 1746 and UNITED STATES v. KARR 928 F.2d 1138 (9th Cir. 1991), sworn as true and correct under penalty of perjury has full force of and is not required to be verified by notary public. RCW § 9A.72.085.

Dated this 9 day of MAY, ~~2007~~ 2008.


Signature

LARRY A.DAY 307673
Printed Name DOC#

Stafford Creek Corrections Center
191 Constantine Way, Unit # G-1
Aberdeen, WA. 98520

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is True and Correct.

MAY 9, 2008
(Date)

191 CONSTANTINE WAY
(Address)
Aberdeen, WA. 98520

Larry A. Day
(Signature)

LARRY A. DAY
(Printed Name)

I, John S. Thompson, Notary Public in and for the State of Washington, do hereby certify that on this 9 day of May, 2008, personally appeared before me, Larry Day, to me known to be the individual described in and who executed the within instrument and acknowledges that he/she signed the same as his /her free voluntary act and deed for the use and purpose herein mentioned.

GIVEN UNDER MY HAND AND OFFICIAL SEAL this 9 day of May in
The year of 2008.



John S. Thompson
Notary Public in and for the State of
Washington, residing at: _____

Shelton

My Commission expires: 6 / 6 / 10

STATE OF WASHINGTON)
) SS.
County of Grays Harbor)

AFFIDAVIT

Mr. LARRY A. DAY, On oath says:
(Name)

I make this Affidavit in support of my Statement of Additional Grounds that I have been allowed to file with the Washington State Court of Appeals Division II, Case Cause No. 36639-8-II. I have reviewed several of my transcripts (Verbatim Report of Proceedings) and am citing several areas to direct the Court to facts stated in the Records of Proceedings. Specifically, issues that I am claiming are either lies by certain named Witnesses or statements made contradicting thier own statements, and or statements that are truthfull. Herein: (statements of Melissa Cleary) as follows:

VERBATIM REPORT OF PROCEEDINGS

VOLUME 6 of 14

PAGES 467-572

AT PAGE 483, Line: 13-19,

Q. Now, do you own any Guns ?

A. Right now ?

Q. yes.

A. Personally, I--I don't. I'm not an avid Gun collector, but my husband is. He has quite a few. So, I can't even really say many he has. I don't keep track. But we have quite a few.

AT PAGE 484, Line 11-15,

A. I still have that gun.

Q. were you aware of there being any hunting rifles or shot guns , that were owned by your former husband, your deceased husband.?

A. No, I am Not.

AT PAGE 485, Line 4-9.

Q. Did your concern for your child's safety mean that if you were aware of guns at the Larry Day/Johnson household, you would have asked that they be secured ?

A. Oh, yes, definitely.

Q. To your knowledge, were there any guns in that household?

A. I never saw any guns or heard of any guns there.

AT PAGE 510, Line 24-25.

Q. Okay, do you know if he was acquainted with a **GREG BRIDGES** ?

AT PAGE 511, Line 1.12.

A. Yes.

Q. and Greg was one of his friends; is that right ?

A. I would say he grew up with John.

Q. and so it's your recollection today that your husband did not have any hunting guns ? And when I say "your husband", Im sorry, your prior husband.

A. Correct.

Q. and you don't recall seeing any ?

A. I don't.

Q. and you don't recall after his tragic death asking
Larry Day to take some guns from your home ?

A. No.

VERBATIM REPORT OF PROCEEDINGS
VOLUME 5 OF 14
PAGES 332-466

By Ms. Fitzer, Direct-Examination of: Sergeant Thomas Longtine
May 30, 2007.

At Page 359, Lines: 17-24

As a result of the events of May 18th and 19th, 2006, did
you in fact collect property ?

A. Yes, I did.

Q. At my request-- what happen after you collected that property ?
Where did it go ?

A. It went into the property room-- or, excuse me, I transferred
it to Officer or to Detective Darren Wolschleger, and he put it
into property.

At Page 365, Lines: 20-24,

A. After I reviewed the Order and the report associated with it,
I decided that we needed to go to the Day residence and attempt
to locate Mr. Day. So, we-- "we" being myself and the other three
Officer's, Officer Boyle, Morrow and Rice-- all went to the Day
RESIDENCE ON 70th Street East.

At Page 371, Lines: 8-9,

A. ...Decided we should look through there to see if he was in there, too.

At Page 371, Line: 13

A. ... we came in right here,

At Page 371, Lines: 21-22

A. These are all views of the inside of the Garage at the Day Johnson residence.

At Page, 374, Lines: 19-25

Q. Did you find anything else in the Garage ?

A. Yes. We also found another Shotgun and Two Rifles that were out in the open, leaning against the east wall of the Garage, which would be directly across from the man door that we went in at.

Q. Handing you what's been marked as State's Exhibit 4, could you identify State's Exhibit 4 ?

At Page 375, Lines: 1-2

A. It's a Ruger 30.06 bolt action Rifle, and this is one of the firearms that we found in the Garage.

At Page 375, Line: 10

A. ... Officer Tony Rice advised me that when he took the weapons from me he found that it-- they were in fact loaded when we recovered them.

At Page 375, Lines: 24-25

A. This is a Remington Wingmaster Model 870, 12 Gauge Shotgun. It is a Pump action Shotgun.

At Page 376, Lines: 19-22

A. This is a Winchester-- I believe it is Model 250-- Model 250. It is a .22 Caliber Rifle, lever action.

Q. Where this item located ?

A. This was also located in the Garage.

At Page 377, Lines: 13-16

Q. What was done with these Guns once you located them ?

A. Well as we went into the Garage to recover the Rifles, Officer Kiblinger-- Chad Kiblinger from the **Sumner Police Department**--had arrived on scene at the time to assist.

08 MAY 19 PM 1:17

DECLARATION OF SERVICE BY MAIL
GR 3.1(c)

STATE OF WASHINGTON

BY _____
DEPUTY

I, LARRY A. DAY, declare that, on this

16 day of MAY, 2008, I deposited

the foregoing documents:

STATEMENT OF ADDITIONAL GROUNDS, RAP 10.10, AND

(Name of document(s))

SWORN NOTORIZED AFFIDAVIT IN SUPPORT.

or a copy thereof, in the internal legal mail system of:

STAFFORD CREEK CORRECTIONAL CENTER

(Name of institution)

and made arrangements for postage, addressed to:

Clerk, Court of Appeals Div.2) Pierce Co. Prosecutor's Off'

(Name & Address of court or other party)

) Gerald A. Horne
930 Tacoma Ave, South
Tacoma, WA 98402

950 Broadway, Suite 300

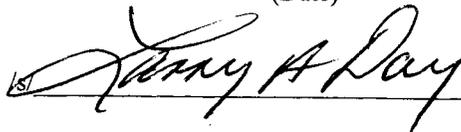
Tacoma, WA 98402

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED at Aberdeen, Washington on _____

(City & State)

16 MAY , 2008
(Date)



307673