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STATE OF WASHINGTON

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NO. 78355-1

BY G.S. HERRITT

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SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

GORDON BERGSTROM,

Petitioner.

SUPPLEMENTAL BRIEF OF RESPONDENT

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A. ISSUES

1. May a sentencing court refuse to continue sentencing where the prosecutor and defense counsel agree on the standard sentence range, where there is no evidence to suggest that the lawyers are mistaken, but where the defendant belatedly suggests that his range may be lower?

2. When a defendant asserts on appeal that his trial counsel agreed to an erroneous standard sentence range, should he be required to show that his trial counsel was mistaken?

3. If remand for resentencing is required, should the State be permitted to prove that the prior convictions are separate and distinct convictions where the trial judge and the prosecutor relied at sentencing on defense counsel's written acknowledgement of the offender score, and where the defendant had, at an earlier hearing, personally acquiesced to that offender score?

B. FACTS

Gordon Bergstrom was convicted by a jury of unlawful possession of a firearm in the first degree on April 15, 2004. Sentencing was rescheduled a total of four times between June and October. Supp. CP 47-58.¹ Each time, sentencing was continued at Bergstrom's request or based

¹ A motion to supplement the clerk's papers has been filed with this brief regarding this sequence of hearings. Sentencing hearings were scheduled but stricken on the following dates: June 11th, July 30th, August 27th, September 24th.

on his failure to appear. *Id.* Sentencing hearings were finally held on two dates: November 5th and 17th, 2004.

On November 3, 2004, two days before sentencing, Bergstrom's lawyer, Ms. Cathy Gormley, filed a presentence report listing Bergstrom's standard sentence range as 87-116 months, and asking for an exceptional mitigated sentence. CP 35-46. On November 5, 2005, seven months after conviction, the first of two sentencing hearings was held. The prosecutor began by noting that Bergstrom had "an offender score of 11, [on] a seriousness level of 8 crime, a standard range of 87 to 116 months." 5RP 3. Consistent with the position taken in her presentence report, Gormley did not dispute the offender score or sentence range but, instead, she argued that her client's medical condition justified an exceptional sentence. 5RP 3-6. Bergstrom then personally told the court:

I don't have a speech prepared or anything like that. We all know the circumstances and what, in fact, it was a flare gun, and I was -- *the guidelines are clear on the time that is to be served under my prior history, prior criminal history and such, and I'm aware of that*, and I understand the suffering and the conditions of being incarcerated.

5RP 6 (italics added). Gormley then asked that Bergstrom be placed on electronic home detention (EHD) instead of straight incarceration. 5RP 7. Although the parties could not agree on whether EHD was legally available, Gormley never claimed that Bergstrom faced a sentencing range

with a minimum sentence lower than 87 months. She simply argued that there might be case law authority that permitted an EHD sentence for that term. 5RP 8-11.

The Court expressed doubts about an EHD sentence but asked how counsel wanted to proceed. 5RP 11. The prosecutor responded:

I hate to say this on an April trial, but if counsel wants to brief this, I won't object to another week's continuance *just to brief that one issue*, and I can brief it as well. I hadn't know [sic] she was making the separate argument for a standard range sentence with EHD.

5RP 11 (italics added). The court noted that it did not want "to preclude considering alternatives" so it granted a short continuance. 5RP 11.

The second sentencing hearing was held on November 17, 2004. At the beginning of that hearing, the prosecutor and Gormley both told the court that EHD was not legally available. 6RP 3-4. Gormley then said:

My client has just handed me sections of the SRA and I believe he believes that his -- some of his priors count as same criminal conduct. I've actually looked at this issue, and I'm not going to take a position contrary to my client's. I'll let him make his argument.

6RP 4. The court asked whether Bergstrom was raising an offender score challenge and both Gormley and Bergstrom confirmed that he was.

6RP 5. The following exchange then took place:

Court: All right. And we have an offender's score of 11, is what's been calculated. Anything else you wanted to add Ms. Gormley?

Ms. Gormley: No, your Honor.

6RP 5. The court asked Bergstrom to explain his position. He argued that, pursuant to RCW 9.94A.589, the court could count certain prior convictions as one offense instead of two offenses. 6RP 6. He singled out multiple convictions from 1989 and 1994 and argued that they should count for only one point each in his current offender score. Id.²

The State objected to Bergstrom's argument on several bases. First, the prosecutor argued that the court should presume that the prior convictions were not the same criminal conduct if the prior sentencing court had counted them separately. 6RP 7. Because the prosecutor had relied on Gormley's sentencing brief, however, he had not brought the relevant judgments to court, and, thus, he believed he was unable to further address the issue. Second, the prosecutor noted that the objection was untimely, "given that we have all been operating under the presumption that we agreed on the offender score." 6RP 7. Third, the prosecutor noted that Bergstrom could not present pro se motions while represented by an attorney. 6RP 8. Finally, the prosecutor argued that

² This would apparently lower his offender score from "11" to below "9," but the precise offender score would depend on whether all -- or any -- of the prior convictions were determined to be the "same criminal conduct."

because the 1989 and 1994 sentencing judges had not found the convictions to be the same criminal conduct, the current sentencing court should presume that they were separate and distinct, unless there was some evidence to believe otherwise. 6RP 9.

The sentencing court rejected Bergstrom's argument for a mixture of reasons, but primarily because there was no evidence to support his claim that his offender score was less than 11, and based on the court's unwillingness to continue the hearing yet again. 6RP 10. The court then found that all of Bergstrom's prior convictions counted separately pursuant to RCW 9.94A.525(5). CP 26 (Judgment at Section. 2.3); CP 31 (Judgment, Appendix B). He was sentenced to the bottom of the standard range. CP 28.

On appeal, Bergstrom claimed that his offender score was erroneously calculated.³ The Court of Appeals did not reach this claim, instead remanding the case for resentencing at which the sentencing court could hold an evidentiary hearing to determine how to score Bergstrom's previous convictions. State v. Bergstrom, No. 55374-7, slip op. at 4-5

³ "THE TRIAL COURT MISCALCULATED MR. BERGSTROM'S OFFENDER SCORE, REQUIRING REMAND FOR RESENTENCING." Appellant's Opening Brief at i (Table of Contents).

(Wash. Ct. App. November 28, 2005). Bergstrom filed a petition for review, and this Court granted review.⁴

C. ARGUMENT

1. BERGSTROM HAS NOT DEMONSTRATED THAT HIS LAWYER ERRED IN AGREEING TO THE SENTENCE RANGE; THUS, HE IS NOT ENTITLED TO RESENTENCING, ESPECIALLY A RESENTENCING WHERE THE COURT MAY NOT EXAMINE THE PRIOR JUDGMENTS.

Bergstrom argues that he is entitled to a resentencing with certain unspecified prior convictions removed from his offender score. His argument should be rejected. This Court should hold that before a defendant can successfully challenge an offender score calculation agreed to by the prosecutor and defense counsel at sentencing, the defendant must show that he received ineffective assistance of counsel. Bergstrom has not even tried to show that his lawyer was mistaken in agreeing to a standard range sentence of 87-116 months. He simply notes that the court chose to presume his lawyer was competent, claims that his offender score was wrong, and asks for remand for sentencing with a lower offender score.

Even if he is entitled to a remand for resentencing, the State should be allowed to present evidence so that the resentencing court can make an

⁴ The State has filed a motion with this brief asking this Court to clarify the scope of review on the sentencing issue.

informed decision. The original sentencing court and the prosecutor relied on defense counsel's acknowledgment -- and Bergstrom's statement in the first sentencing hearing -- that the offender score was correct. Under established law, the State did not have a burden to prove the offender score where it was acknowledged, and the State should not be penalized for relying on that law.

- a. If Defense Counsel And The Prosecutor Agree As To The Standard Range, A Trial Judge Should Be Permitted To Impose Sentence On That Range Unless The Defendant Shows Some Reason To Believe His Lawyer Is Mistaken.

The rhetoric of Bergstrom's petition for review suggests that the prosecutor and the trial judge ran roughshod over his rights and "shamelessly" failed to supply proof of his prior convictions.⁵ His rhetoric does not fairly characterize the proceedings below in at least three respects.

First, the trial court bent over backwards to give Bergstrom a fair sentencing hearing, granting him numerous continuances over more than seven months so that he could marshal his sentencing arguments. Supp. CP 47-58. The prosecutor acquiesced to a number of these continuances.

⁵ Pet. for Rev. at 14.

Id.; 5RP 11. Thus, it is clear that both the court and the prosecutor granted Bergstrom wide latitude to present his claims.

Second, Bergstrom's petition for review obscures the fact that both he and his lawyer told the court at the November 5th sentencing hearing that his standard sentencing range was 87-116 months. CP 35; 5RP 6. His lawyer adhered to this position even at the November 17th hearing. 6RP 5. So, it is hardly surprising that the trial court and the State believed that the sentencing range was acknowledged.

Third, Bergstrom's petition fails to acknowledge a fundamental fact which -- to be fair to the trial court and counsel below --- must be taken into consideration in this case. When a defendant belatedly raises a new legal argument that conflicts with the legal position taken by his lawyer, all participants are placed in an awkward position. It is the lawyer, not the client, who has the authority to advance legal arguments. The record in this case clearly illustrates the difficulty that arises when the usual rule is not applied. 6RP 4, 7-8.

This Court has consistently held that it is the lawyer, not the client, who analyzes the legal and strategic questions that arise at trial. For example, in In re Personal Restraint of Stenson, 142 Wn.2d 710, 16 P.3d 1 (2001), this Court observed that the Sixth Amendment right to counsel does not include the right to force counsel to argue meritless claims. PRP

of Stenson, 142 Wn.2d at 734. See also State v. Cross, 156 Wn.2d 580, 606, 132 P.3d 80 (2006). The United States Supreme Court has observed that:

For judges to second-guess reasonable professional judgments and impose on appointed counsel a duty to raise every “colorable” claim suggested by a client would disserve the very goal of vigorous and effective advocacy Nothing in the Constitution or our interpretation of that document requires such a standard.

Jones v. Barnes, 463 U.S. 745, 751, 754, 103 S. Ct. 3308, 77 L. Ed. 2d 987 (1983). In the same vein, the Supreme Court has said:

Although there are basic rights that the attorney cannot waive without the fully informed and publicly acknowledged consent of the client, the lawyer has-and must have-full authority to manage the conduct of the trial. . . . Putting to one side the exceptional cases in which counsel is ineffective, the client must accept the consequences of the lawyer's decision to forgo cross-examination, to decide not to put certain witnesses on the stand, or to decide not to disclose the identity of certain witnesses in advance of trial.

Taylor v. Illinois, 484 U.S. 400, 417-18, 108 S. Ct. 646, 98 L. Ed. 2d 798 (1988) (footnote omitted). See also United States v. Wadsworth, 830 F.2d 1500, 1509 (9th Cir.1987) (“appointed counsel, and not his client, is in charge of the choice of trial tactics and the theory of defense”) (citing Henry v. Mississippi, 379 U.S. 443, 451, 85 S. Ct. 564, 13 L. Ed. 2d 408 (1965) (counsel's deliberate choice of strategy is binding on his client)).

Trial counsel is presumed competent and that presumption may be overcome only upon a strong showing to the contrary. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); State v. Brett, 126 Wn.2d 136, 198, 892 P.2d 29 (1995). If sentencing judges cannot, like appellate judges, presume trial counsel's competence, then trial courts can never know when to grant a continuance requested by the defendant to argue a legal claim already conceded by the lawyer. As this Court has recognized:

To assure the defendant of counsel's best efforts then, the law must afford the attorney a wide latitude and flexibility in his choice of trial psychology and tactics. ...

Counsel is not, at the risk of being charged with incompetence, obliged to raise every conceivable point, however frivolous, damaging or inconsequential it may appear at the time, or to argue every point to the court and jury which in retrospect may seem important to the defendant ...

... For many reasons, therefore, the choice of trial tactics, the action to be taken or avoided, and the methodology to be employed must rest in the attorney's judgment.

State v. Piche, 71 Wn.2d 583, 590, 430 P.2d 522 (1967).

In light of the presumption of counsel's competence, and since counsel should be permitted to choose which arguments are meritorious and which are not, a defendant who opposes his lawyer's position on a same criminal conduct issue should be required to show some reason to

believe that his lawyer is mistaken before a trial judge must continue the case for an evidentiary hearing. And, when the claim is brought post-conviction, the defendant should be required to show that his lawyer was wrong before he can compel resentencing. Otherwise, sentencing courts will be required to entertain frivolous, uninformed motions by defendants, even though such motions have been deemed meritless by trial counsel.

This case is a good example. Bergstrom's assertion -- at sentencing and on appeal -- that the trial court miscalculated his standard range necessarily includes the claim that his lawyer *erred* in agreeing to that standard range. But, Bergstrom's counsel at sentencing, Ms. Cathy Gormley, is entitled to the same presumption of competence that is afforded any other lawyer. She zealously represented Bergstrom by obtaining continuances to investigate his medical condition, she prepared a sentencing report asking for an exceptional sentence, and she strongly advocated for a less restrictive sentencing alternative -- EHD -- until it was determined to be legally unavailable.

Moreover, she clearly had investigated Bergstrom's prior convictions before the November 5th sentencing hearing, as she filed a presentence report listing his standard range as 87-116 months. CP 35. At the second hearing, Bergstrom personally suggested that some of his prior convictions might be same criminal conduct. He said: "Its been pointed

out to me that RCW 9.94A.589(1)(a) [is relevant to my assessing my prior convictions]."⁶ 6RP 5. Gormley then specifically told the sentencing court, "I've actually looked at this issue..." 6RP 4. When pressed, she refused to contradict her presentence report. See 6RP 5 (declining the court's invitation to argue against an offender score of 11). Yet, since she did not want to argue against her client, she stepped aside to let him address the court personally. 6RP 4.

After a trial, the prosecutor has the burden to prove criminal history by a preponderance of the evidence, but an express acknowledgement of criminal history relieves the State of its burden. RCW 9.94A.530(2); In re Personal Restraint of Cadwallader, 155 Wn.2d 867, 873, 123 P.3d 456 (2005); State v. Ross, 152 Wn.2d 220, 230-31, 95 P.3d 1225 (2004); State v. Ford, 137 Wn.2d 472, 483 n.5, 973 P.2d 452 (1999).⁷ Under the circumstances presented in this case, it was reasonable

⁶ Although Bergstrom did not say who "pointed out" this provision, his argument was clearly of recent vintage, as he had told the court just two weeks earlier that "...the guidelines are clear on the time that is to be served under my prior history, prior criminal history and such, and I'm aware of that..." 5RP 6. Also, Bergstrom apparently made this new same criminal conduct argument without reviewing the judgments entered nearly a decade before, since he asked whether his lawyer could get copies. 6RP 10.

⁷ The first stated purpose of the Sentencing Reform Act is to "[e]nsure that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender's criminal history." RCW 9.94A.010(1). The second and third stated purposes focus on providing just punishment which is *commensurate* with that imposed on others committing similar offenses. RCW 9.94A.010(2), (3). These purposes can be accomplished only if the court is provided accurate information about a defendant's criminal history. Thus, in the context of a guilty plea, both the prosecutor and defense

for the sentencing court to accept the standard range sentence calculated by the prosecutor and expressly acknowledged in writing by defense counsel. There was no reason to believe that both the prosecutor and Gormley were mistaken as to the offender score calculation; Bergstrom appeared to acquiesce at the first sentencing hearing, he appeared uncertain on the point at the second sentencing hearing, and he could supply no concrete evidence suggesting that his lawyer was mistaken. Thus, there was no reason for the sentencing judge to continue the hearing yet again. 6RP 10.

Moreover, the information given to the sentencing court strongly suggested that Gormley and the prosecutor were correct in treating the prior convictions as separate and distinct because the term of incarceration imposed in 1989 and in 1994 could not have been imposed had either court made a "same criminal conduct" finding.⁸ This analysis of the documents presented to the sentencing court on November 5th and 17th

counsel have an obligation to supply the court with their understanding of the defendant's criminal history. RCW 9.94A.441.

⁸ On the 1989 cause number, sentences of five and six months in the King County Jail would be possible only if the other current offenses were counted against each other, meaning the sentencing judge determined they were not the same criminal conduct. The same is true of the 1994 cause number. A sentence of 18 months in prison would be possible only if the convictions from 1989 and the other current offenses in the 1994 cases were all treated as separate and distinct. See Supp. CP 66-67 (State's Presentence Report -- Appendix B).

supports the court's finding that the prior convictions should have been separately counted.

In addition, the trial judge correctly told Bergstrom at the November 17th hearing that he could attack the sentence post-conviction by supplying evidence to support his claim. Id. In State v. McFarland, supra, this Court authorized a defendant to file a personal restraint petition relying on evidence outside the appellate record, if needed to support his claim. Also, In re Personal Restraint of Goodwin, 146 Wn.2d 861, 50 P.3d 618 (2002), authorizes vacation of a judgment and sentence based on an offender score calculation that is plainly erroneous. There is no reason to believe the sentencing court -- or an appellate court -- would have refused to entertain such an attack if it had been made.

Thus, existing remedies are sufficient to protect defendants from improperly calculated offender scores. This Court need not place an obligation on sentencing courts to investigate and expressly reject every pro se motion brought by a represented defendant, any more than a trial court has an obligation to entertain every pro se motion from a represented defendant mid-trial, absent some showing that trial counsel was providing deficient representation.

A similar analysis should apply on appeal. A defendant who challenges the calculation of his offender score on appeal has an

obligation to show that error has occurred. State v. Ross, 152 Wn.2d at 231-32.

To invoke the waiver analysis set forth in Goodwin, a defendant must first show on appeal or by way of personal restraint petition that an error of fact or law exists within the four corners of his judgment and sentence....Here, neither [petitioner] has met this initial threshold requirement since pursuant to our decision in Ford, neither has shown that the sentencing court committed *any* arguable factual or legal error [in calculating the] offender score.

Id. (italics in original). The same is true here. Bergstrom has done nothing -- on appeal or by filing a personal restraint petition -- to substantiate his claim that his sentence range should be lower than 87 months. He has thus failed to show that error has occurred. This Court should not compel resentencing.

Instead, this Court should hold that where defense counsel and the prosecutor agree that the defendant's prior convictions constitute separate and distinct conduct, and where counsel has investigated the matter, the defendant's unsupported personal disagreement with counsel's decision is not sufficient to delay a sentencing hearing for further inquiry. The defendant must produce some evidence that his lawyer is mistaken before the sentencing court has a duty to grant a delay and investigate the matter, and before an appellate must grant relief in the form of a resentencing.

Finally, there is an additional passage in the trial court record that should be addressed. Near the end of the November 17th hearing, when the sentencing court asked whether Gormley was objecting to her client's position, Gormley said:

I've really never been in this situation before, your Honor.
I feel like I cannot take a position contrary to my client's.
In such a case I could be – I could be wrong about the same
criminal conduct regarding the forgeries.

6RP 7. This statement appears to have been caused by Gormley's desire to avoid a direct conflict with her client. It was not a repudiation or qualification of her earlier position regarding the standard range. As noted above, Gormley had stated the score in writing, CP 35, she said she had looked into the matter, 6RP 4, she refused to retract her position when directly invited by the judge to elaborate, 6RP 5, and her assessment of the defendant's criminal history comports with the documents submitted to the court. CP 31; Supp. CP 66-67. Thus, her comment should not be viewed as a retraction of her acknowledgement as to the offender score and the standard range.

If, however, the comment *had been* a retraction of counsel's earlier arguments, then the trial court should have granted a continuance for further inquiry. But, the trial court was in the best position to judge the import of Gormley's comment since the court could see Gormley's body

language and assess the tone of voice she used. Because the court did not appear to view her comment as a retraction of her earlier position -- it did not follow up with more pointed questions -- this Court should not, from a cold record, disturb the sentencing court's judgment.

b. The State Should Be Permitted To Prove The Nature Of Bergstrom's Prior Convictions On Remand.

If resentencing is ordered in this case, the State respectfully asks that it be with an order to impose the correct sentence, based on evidence of Bergstrom's prior judgments presented to the sentencing court. As noted above, the purposes of the SRA -- especially its focus on commensurate punishment -- can be fulfilled only if the sentencing court is permitted to determine a defendant's *actual* offender score.

Whether this Court has allowed the State to prove prior convictions at a resentencing hearing depends on a number of factors. If the conviction was not even alleged at the first sentencing hearing, the State may not allege it and prove it upon resentencing. In re PRP of Cadwallader, supra, (State had never alleged prior conviction that would have prevented washout of prior most serious offense). Clearly, Cadwallader does not apply to this case because the State alleged Bergstrom's prior convictions, and alleged that they should all count as separate and distinct convictions. See CP 3 (supplemental certification for

determination of probable cause listing convictions for purposes of setting bail); Supp. CP 66-67 (prosecutor's presentence report listing Bergstrom's prior convictions for sentencing); 5RP 3 (stating offender score and range).

If the State failed to prove a prior conviction where the defendant, through his lawyer, contested its existence, that conviction may not be proved at a subsequent resentencing. State v. Lopez, 147 Wn.2d 515, 519, 55 P.3d 609 (2002) (State did not supply certified copy of prior conviction for most serious offense when defense counsel objected). Lopez, too, is distinguishable, because in this case, Gormley expressly agreed in writing with the prosecution's scoring, CP 35, and Bergstrom, too, personally agreed initially to the stated offender score. 5RP 6.

If the defendant fails to object to the calculation of his criminal history, the State may prove that history on remand. State v. Ford, 137 Wn.2d 472, 485-86, 973 P.2d 452 (1999). Moreover, if a defendant affirmatively agreed to his offender score, he may not challenge it at all on appeal. State v. Nitsch, 100 Wn. App. 512, 997 P.2d 1000, review denied, 141 Wn.2d 103 (2000).

In light of the presumption of competence that is afforded to counsel, this case is more similar to Ford and Nitsch than it is to Lopez. Although Bergstrom personally challenged his offender score, his

challenge did not come until after he conceded the issue at the first sentencing hearing, 5RP 6. Moreover, his belated challenge conflicted with the judgment of his lawyer, and the lawyer affirmatively told the sentencing court that the standard sentence range was correct. 6RP 5; CP 35. Under these circumstances, the State was entitled to rely on Gormley's acknowledgment of the offender score, and on her professional judgment that the score accurately applied the law to the facts of her client's situation. It can hardly be said that the State was placed on "notice" where, seven months after conviction, both the defendant and his lawyer conceded the offender score. CP 35; 5RP 6. Bergstrom's belated argument simply cannot be equated with the circumstances in Cadwallader or Lopez, especially where the available evidence suggested that the offender score was properly calculated. See discussion supra, at 14 n.7.

Finally, a review of the entire record should establish that the rhetoric in Bergstrom's petition for review is unwarranted. Neither the State nor the sentencing court "shamelessly" tried to avoid their legal obligations. The State and the court simply relied on Gormley's acknowledgment that she had looked into the same criminal conduct issue and determined that his sentence range was 87 - 116 months. There is no need to "punish" the State under these circumstances.

D. CONCLUSION

For the foregoing reasons, the State respectfully asks this Court to affirm Bergstrom's judgment and sentence or, in the alternative, to remand the case to the superior court for resentencing where the court can consider proof regarding the nature of Bergstrom's prior convictions.

DATED this 29th day of November, 2006.

Respectfully submitted,

NORM MALENG
King County Prosecuting Attorney

FILED AS ATTACHMENT
TO E-MAIL

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Certificate of Service by Mail

Today I sent by electronic mail and deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Jason Saunders, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Supplemental Brief of Respondent, in STATE V. GORDON BERGSTROM, Cause No. 78355-1, in the Supreme Court of the State of Washington.

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

Name
Done in Seattle, Washington

Date 11/29/06

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