

FILED  
Court of Appeals  
Division II  
State of Washington  
4/12/2019 12:10 PM  
NO. 97066-1

FILED  
SUPREME COURT  
STATE OF WASHINGTON  
4/12/2019  
BY SUSAN L. CARLSON  
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SUPREME COURT OF THE  
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

AMANDA CHRISTINE KNIGHT, RESPONDENT

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Appeal from the Superior Court of Pierce County  
The Honorable Rosanne Nowak Buckner

No. 10-1-01903-2

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**Motion for Discretionary Review**

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A. IDENTITY OF PETITIONER.

The State of Washington, respondent, in the Court of Appeals.

B. COURT OF APPEALS DECISION.

The petitioner seeks review of *In re Knight*, No. 49337-3-II. The Court of Appeals issued an Order Granting Motion for Reconsideration and Withdrawing their original Opinion.

C. ISSUES PRESENTED FOR REVIEW.

1. SHOULD THIS COURT ACCEPT REVIEW WHEN THE COURT OF APPEALS ERRED IN FINDING THAT DEFENDANT'S FELONY MURDER CONVICTION MERGES WITH HER FIRST DEGREE ROBBERY CONVICTION? THIS IS AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST AND IS A SIGNIFICANT QUESTION OF LAW UNDER RAP 13.4(B)(3) AS TO HOW TO CONDUCT A DOUBLE JEOPARDY ANALYSIS AND MERGER DOCTRINE IN PARTICULAR.

D. STATEMENT OF THE CASE.

1. PROCEDURE

Defendant was convicted by a jury of first degree felony murder, two counts of first degree robbery, two counts of second degree assault and first degree burglary all of which included firearm enhancements. RP 1060-61, CP 376-381. Sentencing was held on May 13, 2011. RP 1070, CP 502-516. Defendant argued that the two assault convictions merged with the robbery convictions and that all of the crimes were the same

criminal conduct. RP 1072-77, CP 400-433. Defendant also argued that the burglary anti-merger doctrine was discretionary. RP 1078, CP 400-433. The court denied defendant's motions and found defendant's offender score to be a 10. RP 1089-91, CP 502-516. The trial court adopted the State's recommendation and sentenced defendant to the high end of the standard range. RP 1111, CP 502-516.

On May 13, 2011, defendant filed a direct appeal challenging the two second degree assault convictions arguing that there was insufficient evidence to support the convictions and that they constituted double jeopardy because "(1) the jury instructions were ambiguous, and (2) the assaults should have merged with her first degree robbery convictions committed against the same two victims." CP 455-456. The Court of Appeals rejected defendant's arguments and affirmed her convictions and sentence in a published opinion. *State v. Knight*, 176 Wn. App. 936, 309 P.3d 776 (2013).

On July 14, 2016, defendant filed a personal restraint petition alleging *inter alia* that (1) her conviction for first degree robbery of James Sanders merged with the felony murder conviction because the jury instructions did not require the jury to specify which first degree robbery was the predicate offense for the felony murder conviction and (2) the Court of Appeals should reconsider their prior decision rejecting her

double jeopardy argument regarding the two assault convictions because *State v. Whittaker* changed the way the court analyze the merger doctrine. *In re Knight*, 6 Wn. App.2d 1029 (2018). The Court of Appeals rejected defendant's arguments and affirmed her convictions in an unpublished opinion. *Id.*

On December 21, 2018, defendant filed a Motion for Reconsideration of the Court of Appeals' decision to dismiss her personal restraint petition. The Court of Appeals granted the motion for reconsideration and withdrew their opinion on March 14, 2019. *In re Knight*, WL 1231402 (Wn. App. 2019). The Court of Appeals concluded that the felony murder conviction merged with the robbery conviction, but rejected her argument regarding the way *Whittaker* affected the merger doctrine. *Id.*

## 2. STATEMENT OF FACTS

James and Charlene Sanders had been married since December of 2002. RP 573. They lived at their home in Edgewood with Mr. Sanders' fourteen-year-old son, J.S. and Mrs. Sanders' eleven-year-old son C.K. RP 572, 575, 617-18, 635. On April 28, 2010, Mr. Sanders put a wedding ring from a previous relationship on Craigslist and told Mrs. Sanders a woman had called and said she wanted to buy it. RP 574. The family watched a movie upstairs as they waited for the interested buyer. RP 618,

635-36. Around nine or ten in the evening, the defendant and her accomplices arrived. RP 619. Mr. Sanders went downstairs to meet them. RP 578, 620, 636. He called up for Mrs. Sanders to come downstairs because the people who wanted to buy the ring had questions. RP 579, 620, 637. When she got downstairs, Mrs. Sanders saw a man and a woman with the ring. RP 578. The man and the woman were later identified as Higashi and defendant. RP 612. Mrs. Sanders took the ring, answered their questions and then handed the ring back to defendant. RP 579. Higashi asked defendant if she wanted the ring and defendant said yes. RP 579. Higashi then pulled out a wad of cash and said, "How's this?" RP 580. He then said, "How about this?" and pulled out a gun. RP 580. Both Mr. and Mrs. Sanders told them to take whatever they wanted and they kept repeating that to Higashi and defendant. RP 580-81. Mrs. Sanders was concerned for her children and wanted them just to take everything and go. RP 584-85. Instead, Higashi zip tied Mr. Sanders and defendant zip tied Mrs. Sanders. RP 581. Their hands were tied behind their backs. RP 582, 614. Mrs. Sanders does not remember Higashi ordering defendant to do anything, the two of them just started moving. RP 615. Mrs. Sanders indicated that at this point, defendant's eyes got cold and mean and her demeanor changed. RP 582. Defendant scared Mrs. Sanders. RP 615. Defendant told Mrs. Sanders to get down on the

floor. RP 583, 614. Mrs. Sanders observed something dangling from defendant's ear that could have been a Bluetooth. RP 616. While she was bound on the floor her wedding ring was ripped off of her hand. RP 610-11, 693. Mr. Sanders' wedding ring was also taken from his hand. RP 693.

The two boys were then brought downstairs at gunpoint by two other men. RP 585, 620, 637. The men had bandanas covering half of their faces. RP 621, 637. The boys were told not to run or they would be shot. RP 622. The two boys were also told to lay face down with their hands behind their backs. RP 585, 622, 639. Defendant ransacked the house as the family was tied up downstairs. RP 625.

Berniard held a gun to the back of Mrs. Sanders' head and demanded her to disclose the location of her safe. RP 585, 586, 625, 641. 625. He then threatened her and kicked her in the head. RP 586, 627, 640. He also called her a bitch and threatened to kill both her and the kids. RP 586, 640. J.S. described Berniard as brutal. RP 625. Berniard kicked Mrs. Sanders so hard her head went up and then hit the ground. RP 587, 627. The zip ties were so tight that she felt like her hands had been cut off. RP 586. Berniard asked where the safe was, said he was going to kill her and then counted down from three. RP 588, 627. Mrs. Sanders told them that they had a safe. RP 588. Mrs. Sanders then saw Higashi and

Reese pick up Mr. Sanders. RP 589. The safe was located in the garage.  
RP 590.

C.K. stood up and J.S. went over by the laundry room. RP 591.  
Mrs. Sanders then saw an arm with a gun in the hand come down on J.S.  
RP 592. J.S. was hit in the head. RP 592. Mrs. Sanders then heard  
scuffling and then a gunshot. RP 597. C.K. testified that Mr. Sanders  
began to fight the intruders. RP 641-42. J.S. testified that Mr. Sanders  
began to beat Bernard and that Mr. Sanders was then shot in the ear. RP  
628. J.S. jumped on Bernard and tried to choke him. RP 628, 642.  
Bernard hit J.S. on the head with the gun multiple times. RP 628. There  
was a lot of movement and then two more gunshots. RP 597-98. Mr.  
Sanders was drug away and then shot several times. RP 630, 641-42. The  
intruders then ran out of the house, jumped in a car and left. RP 630. Mr.  
Sanders was all white, had his eyes closed and was gasping for air. RP  
600. It looked like his ear had been shot off. RP 600. Mr. Sanders later  
died at the scene. RP 603-4.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED.

1. THE COURT OF APPEALS ERRED IN FINDING THAT DEFENDANT'S FIRST DEGREE ROBBERY CONVICTION OF JAMES SANDERS MERGED WITH HER FELONY MURDER CONVICTION WHERE THERE WAS AN INDEPENDENT PURPOSE FOR EACH UNDERLYING ROBBERY CHARGED.

The double jeopardy clause guarantees that no person shall “be subject for the same offense to be twice put in jeopardy of life or limb.” U.S. Const. Amend. V. The double jeopardy clause applies to the states through the due process clause of the Fourteenth Amendment, and is coextensive with article I, § 9 of the Washington State Constitution. *State v. Gocken*, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995) (citing *Benton v. Maryland*, 395 U.S. 784, 794, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969)). Washington’s double jeopardy clause offers the same scope of protection as the federal double jeopardy clause. *State v. Adel*, 136 Wn.2d 629, 632, 965 P.2d 1072 (1998) (citing *Gocken*, 127 Wn.2d at 107). The double jeopardy clause encompasses three separate constitutional protections:

It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same crime.

*Gocken*, 127 Wn.2d at 100.

Appellate courts “review questions of law such as merger and double jeopardy de novo.” *State v. Zumwalt*, 119 Wn. App. 126, 129, 82 P.3d 672 (2003), *aff’d sub nom. State v. Freeman*, 153 Wn.2d 765, 108 P.3d 753 (2005). When addressing a double jeopardy challenge, the court first considers whether the legislature intended cumulative punishments for the challenged crimes. *State v. Freeman*, 153 Wn.2d 765, 771, 108 P.3d 753 (2005). Legislative intent can be explicit as in the antimerger statute where it provides that burglary may be punished separately from any related crime. *Freeman*, 153 Wn.2d at 772-73; RCW 9A.52.050. However, there can also be sufficient evidence of legislative intent that the court is confident that the legislature intended to separately punish two offenses arising out of the same bad act. *Freeman*, 153 Wn.2d at 772 (citing *State v. Calle*, 125 Wn.2d 769, 777-78, 888 P.2d 155 (1995) (rape and incest are separate offenses)).

If the legislative intent is not clear, then the court will turn to the test from *Blockburger v. United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932) to determine if double jeopardy has been offended by defendant’s multiple convictions. *Freeman*, 153 Wn.2d at 772. Under the *Blockburger* test the court examines each crime to determine if one crime contains an element that the other does not. *Id.* This analysis is not done on an abstract level, but “[w]here the same act or transaction

constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.” *Freeman*, 153 Wn.2d at 772 (quoting *Blockburger*, 284 U.S. at 304). However, the *Blockburger* presumption may be rebutted by other evidence of legislative intent.

Finally, merger is a doctrine of statutory interpretation used to determine whether the legislature intended to impose multiple punishments for a single act that violates several statutory provisions. *State v. Vladovic*, 99 Wn.2d 413, 419 n2, 662 P.2d 853 (1983). “The [merger] doctrine arises only when a defendant has been found guilty of multiple charges, and the court then asks if the Legislature intended only one punishment for the multiple convictions.” *State v. Michielli*, 132 Wn.2d 229, 238-239, 937 P.2d 587 (1997). With respect to cumulative sentences imposed in a single trial, the double jeopardy clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended. *Missouri v. Hunter*, 459 U. S. 359, 366, 103 S. Ct. 673, 74 L. Ed. 2d 535 (1982).

The merger doctrine can be used to determine legislative intent even when two crimes have different elements. Under the merger doctrine, when the degree of one offense is raised by conduct separately

criminalized by the legislature, the court will presume the legislature intended to punish both offenses through a greater sentence for the greater crime. *Freeman*, 153 Wn.2d at 772-73 (citing *Vladovic*, 99 Wn.2d at 419). However, the court may separately punish two crimes that otherwise appear that they should merge if there is an independent purpose or effect to each. *Freeman*, 153 Wn.2d at 773 (citing *State v. Frohs*, 83 Wn. App. 803 807, 924 P.2d 384 (1996), see also *Vladovic*, 99 Wn.2d at 421-22).

Two convictions may stand even when they may formally appear to be the same crime under other tests. *State v. Freeman*, 153 Wn.2d 765, 778, 108 P.3d 753 (2005). This well-established exception to the merger doctrine requires the court to look at the facts of each case. *State v. Whittaker*, 192 Wn. App. 395, 411, 367 P.3d 1092 (2016). Whittaker states:

“Where two offenses would otherwise merge but have ‘independent purposes or effects,’ separate punishment may be applied.” When dealing with merger issues, we look at how the offenses were charged and proved, and do not look at the crimes in the abstract.”

192 Wn. App. at 411. Stated another way, the offenses may be separate “when there is a separate injury to the ‘the person or property of the victim or others, which is separate and distinct from and not merely incidental to the crime of which it forms an element.’” *Freeman*, 153 Wn.2d at 778

(citing *State v. Frohs*, 83 Wn. App. 803, 807, 924 P.2d 384 (1996) (citing *State v. Johnson*, 92 Wn.2d 871, 680, 600 P.2d 1249 (1979))). Here, although the State did not explicitly elect which robbery supported the felony murder, there is no legal authority which requires a specific election. On the contrary, the courts must take a “hard look at each case” based on their facts and charged crimes. *Freeman*, 153 Wn.2d at 774 (emphasis added).

Defendant in the present case was convicted of two counts of first degree robbery, one involving James Sanders and the other involving Charlene Sanders, and one count of first degree murder for the murder of James Sanders. *Knight*, 176 Wn. App. at 944. To convict the defendant of murder in the first degree, the State was required to prove that “the defendant or an accomplice committed Robbery in the First Degree.” CP 325-375 (Instruction No. 9).

In the present case, the force used in the robbery of James Sanders was complete before the force used in shooting James came into being. Higashi pulled out a gun, zip tied James’ hands behind his back, and either he or defendant removed James’ wedding ring from his finger. *Knight*, 176 Wn. App. at 942.; RP 581, 693. Afterwards, Berniard and Reese entered the home and secured the two young boys at gunpoint and all four of the co-defendants took turns gathering items from various places.

*Knight*, 176 Wn. App. at 942-43; RP 585, 625, 918-19. Berniard then held a gun to Charlene's head, assaulted her and demanded to know the location of a safe which she said was in the garage. *Knight*, 176 Wn. App. at 943; RP 586-89, 640-41. Then Berniard forced James into the garage when he broke free of his zip-ties and was shot in his ear. *Knight*, 176 Wn. App. at 943; RP 589, 628. James' body was drug into the living room where he was shot multiple times by either Reese or Berniard which caused fatal internal bleeding. *Knight*, 176 Wn. App. at 943; RP 603-04, 630, 641-42.

Thus, the incident of force used in the robbery of James was an "injury to 'the person or property of the victim or others, which [wa]s separate and distinct from" the incident of force that became the homicide of which the robbery formed an element. *Freeman*, 153 Wn.2d at 778-79. It would be different if the force or fear used to obtain or retain possession of the ring in the robbery of James was one in the same as the force used to kill James. If Higashi obtained or retained possession of the rings by shooting James then the injury at issue would be the same for both the robbery and the murder and the crimes would merge. Here, however, the force used in the robbery of James is "separate and distinct from and not merely incidental to the [the charged felony murder] of which [such

robbery] forms an element.” *Freeman*, 153 Wn.2d 765, 778-79. Thus, the crimes do not merge.

*State v. Peyton* is an example similar to the present situation where felony murder and the predicate robbery did not merge. 29 Wn. App. 701, 630 P.2d 1362, *review denied*, 96 Wn.2d 1024 (1981). There, after a completed bank robbery, the robbers fled in one vehicle, abandoned it, fled again in another vehicle, then shot a deputy sheriff in a gunfight. *Id.* at 720. The court held that the robbery did not merge with the homicide because they were not “intertwined” and the underlying felony was “a separate and distinct act independent of the killing.” *Id.* Likewise, the robbery of James was a separate and distinct act not intertwined with his later murder.

The Court of Appeals erred in relying on *State v. Williams*, in support of its decision that the felony murder and robbery convictions merged. In *Williams*, the defendant was convicted of first degree felony murder, with attempted robbery as the predicate felony. *State v. Williams*, 131 Wn. App. 488, 128 P. 3d 98 (2006). But *Williams* is factually distinct from the present case. In *Williams*, the defendant and others set up a robbery of another individual, thought to be carrying money and jewelry. *Id.*, at 493. They lured the intended victim to an alley and when *Williams* pulled out a gun, the victim became frightened and ran. *Id.* *Williams* then

shot and killed him. *Id.* The Court found that those crimes merged because the robbery was factually integral to the killing. *Id.*, at 499. The exception to the merger doctrine did not apply to the Williams case because there was no independent purpose or effect to the force that was used, it was all related to the attempted robbery. In the present case, the initial force used by Higashi to take James' ring was separate and distinct from the force that Berniard or Reese used in killing him. The act of murdering James' had an independent purpose and effect and was separate and distinct from the act of taking his ring. These facts are not comparable to *Williams*.

The Court of Appeals also improperly applied the "transactional" analysis of robbery in reaching its conclusion that there was not two, but one robbery that occurred. The Court stated:

"based on the transactional view of robbery was not completed until Knight and her accomplices escaped. *In re Knight*, Unpublished Opinion No. 49337-3-II. Therefore, the robbery was not separate and distinct from the felony murder. They were intertwined."

This was an over broad application of the transactional view of robbery. Under Washington's transactional analysis of robbery, the taking of property is "ongoing until the assailant has effected an escape." *State v. Troung*, 168 Wn. App. 529, 535-536, 277 P.3d 74 (2012). The definition of "robbery," thus, includes "violence during flight immediately following

the taking.” *State v. Manchester*, 57 Wn. App. 765, 770 790 P.2d 217 (1990); see also *State v. Robinson*, 73 Wn. App. 851, 856, 872 P.2d 43 (1994) (Pursuant to the transactional view of robbery, a robbery can be considered an ongoing offense so that, regardless of whether force was used to obtain property, force used to retain the stolen property or to effect an escape can satisfy the force element of robbery.”). This was an overbroad application where the transactional view has a limit. In *Johnson*, the defendant abandoned stolen property before punching a security guard. *State v. Johnson*, 155 Wn.2d 609, 611, 121 P.3d 91 (2005). The *Johnson* court, in reversing the robbery conviction, wrote:

[T]he force must relate to the taking or retention of the property, either as force used directly in the taking or retention or as force used to prevent or overcome resistance “to the taking.” Johnson was not attempting to retain the property when he punched the guard but was attempting to escape after abandoning it.”

*Id.*

The Court of Appeals’ overbroad application leads to an absurd result where a defendant may only be charged with one robbery despite committing numerous robberies so long as they all occur within the same time frame. To avoid this very result, this Court in *Tvedt* clarified the unit of prosecution for robbery:

[E]ach separate forcible taking of property from or from the presence of a person having an ownership, representative, or possessory interest in the property, against that person's will.

*State v. Tvedt*, 153 Wn.2d 705, 716-717, 107 P.3d 728 (2005).

Whether multiple robbery convictions violate double jeopardy is a fact specific inquiry. In *Tvedt*, a robber forced a gas station owner and cashier to lie on the floor in the station's office, took a deposit bag full of money, and then forced the station's owner to give him the keys to the owner's truck. *Id.* at 708. The same robber went to a second gas station two days later. *Id.* at 708-709. The robber forced two station employees to lie on the floor, took a bag full of money, and then took an employee's cellular phone. *Id.* at 708-709. On appeal, the defendant contended only one robbery occurred in each gas station. *Id.* at 709. This Court disagreed, holding the taking of the keys at the first station was separate from the taking of the money, and further, the taking of the bag of money at the second station was separate from the taking of the telephone. *Id.* at 719. In *Rupe*, this Court found that a defendant who robbed a bank but forcibly gained possession of the cash from two different bank tellers, each having responsibility and control over the money in their till, committed two robberies and such double convictions did not amount to double jeopardy. *State v. Rupe*, 110 Wn.2d 664, 693, 683 P.2d 571 (1984). Thus, multiple

convictions for robbery may stem from the same incident so long as there are separate facts to support each charge.

Finally, the Court of Appeals erred when it held that *Schorr* stood for the position that the felony murder and robbery convictions merge because defendant was only charged with felony murder as opposed to premeditated murder and robbery in the first degree separately. In *Schorr*, the defendant pleaded guilty to first degree murder under two alternative theories, premeditated murder and first degree felony murder. *In re Schorr*, 191 Wn.2d 315, 422 P.3d 451 (2018). Schorr also pleaded guilty to first degree robbery and first degree theft. *Id.* On appeal, Schorr claimed that his first degree robbery conviction should merge with his first degree murder conviction. *Id.* at 319. This Court held that Schorr's convictions of first degree murder and first degree robbery did not violate the double jeopardy clause because he was charged with first degree murder by two alternative means: premeditated murder and felony murder predicated on first degree robbery. *Id.* at 325. This Court held that the convictions do not merge because the law is clear that when criminal defendants plead guilty to charges in an information, they cannot pick and choose the portions of the charges which they plead guilty. *Id.* *Schorr* did not stand for the proposition, as the Court of Appeals concluded, that felony murder and first degree robbery convictions merge altogether. Rather, *Schorr* is

inapplicable to the case at hand. There was no factual analysis in reaching this Court's holding in *Schorr* where he pleaded guilty to all charges.

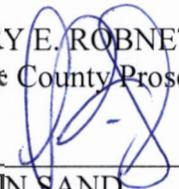
Here, the Court of Appeals failed to make a fact specific inquiry before finding whether merger applied. In the instant case, James Sanders was robbed of two different types of his property at two different times. The force used to rob James Sanders of his wedding ring was completed before and separate from the force later used to shoot him and find the location of the safe. Thus, supporting separate robbery convictions. This is an issue which is likely to arise again in the future as our courts struggle with the application of the merger doctrine and double jeopardy analysis. It is of substantial public interest and a significant question of law for lower courts to have clarity that in conducting a double jeopardy analysis, a fact specific inquiry must be made for each individual case. Because the Court of Appeals, Division II erred when it found that merger applied without doing the requisite analysis, the State urges this Court to accept review.

F. CONCLUSION.

This Court should accept review to not only reverse an erroneous decision by the Court of Appeals, but also because this case represents issues of substantial public interest and significant questions of law regarding the double jeopardy clause and merger doctrine in particular.

DATED: April 12, 2019.

MARY E. ROBNETT  
Pierce County Prosecuting Attorney



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ROBIN SAND  
Deputy Prosecuting Attorney  
WSB # 47838

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

4-12-19   
Date Signature

**PIERCE COUNTY PROSECUTING ATTORNEY**

**April 12, 2019 - 12:10 PM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 49337-3  
**Appellate Court Case Title:** Personal Restraint Petition of: Amanda Christine Knight  
**Superior Court Case Number:** 10-1-01903-2

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**A copy of the uploaded files will be sent to:**

- TimF@mhb.com
- lindamt@mhb.com

**Comments:**

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Sender Name: Therese Kahn - Email: tnichol@co.pierce.wa.us

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