THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. **SUPERIOR COURT**

Pamela Smart

v.

State of New Hampshire, et al.

Case No. 217-2026-CV-00014

RESPONDENTS' REPLY TO PETITIONER'S RESPONSE IN OBJECTION TO MOTION TO DISMISS

The respondents, the State of New Hampshire and the New Hampshire State Prison for Women, hereby reply to the petitioner's response in objection to the respondents' motion to dismiss.

For the reasons set forth in the memorandum of law in support of the respondents' motion to dismiss (or "opening brief"), and for the reasons provided below, the respondents respectfully request this Court to dismiss the petitioner's petition for a writ of habeas corpus in its entirety. The respondents additionally request the Court to deny the petitioner's request for a hearing, and in particular any request for an evidentiary hearing, as a hearing would not aid the Court in ruling on the motion to dismiss. If, however, the Court chooses to hold a hearing, it should be limited to legal argument on the motion to dismiss.

The purpose of this reply is to respond to arguments set forth in the petitioner's response to the respondents' motion to dismiss. Any issue not specifically addressed herein should not be construed as an adoption of, or concession to, the petitioner's

position. Rather, the respondents believe their opening brief sufficiently and correctly addressed the matter.[1]

I. INTRODUCTION

The petitioner's objection fails to meaningfully address the arguments set forth in the respondents' opening brief, or even to clarify the basis for her claim that the jury's decision 35 years ago finding her guilty of murder – which she has unsuccessfully sought to challenge in the New Hampshire Superior Court through her petition for a new trial, the New Hampshire Supreme Court on direct appeal and appeal from the denial of her petition for a new trial, the United States Supreme Court, and the state and federal habeas courts, as well as unsuccessfully sought relief from the State Governor (the denial of which she also petitioned the New Hampshire Superior Court)[2] – may now be reevaluated. *Cf. State v. Smart*, 136 N.H. 639 (1993), *cert. denied*, 510 U.S. 917 (1993); *Smart v. Goord*, 2002 U.S. Dist. LEXIS 20733 (D. N.H. Sept. 30, 2002) (denying federal

[1] The respondents no longer rely upon their claim identifying the late J. Albert Johnson, Esq. as "the petitioner's sole appellate counsel" on page 28 of their opening brief. Although it appears that Mr. Johnson was the petitioner's principal appellate counsel, and is the sole appellate counsel listed in the notice of direct appeal, *see* Exhibit A to Resps.' Memo. of Law in Support of the Mot. to Dismiss, additional scrutiny of documents related to this case shows that two additional attorneys, Thomas J. May and Francis E. Hartig, appeared in the petitioner's direct appeal before the New Hampshire Supreme Court. The respondents have no information about the role either Attorney May or Attorney Hartig played in the petitioner's appellate representation. The respondents' counsel, the New Hampshire Department of Justice, acknowledges the error and apologizes to this Court and the petitioner for any confusion, difficulty, or inconvenience the error may have caused.

[2] *See*, *e.g.*, *State v. Smart*, 136 N.H. 639, 643 (1993), *cert. denied*, 510 U.S. 917 (1993); *Smart v. Goord*, 2002 U.S. Dist. LEXIS 20733, *2 (D.N.H., Sept. 30, 2002) (unpublished); *Petition of Smart*, 175 N.H. 656, 657 (2023).

habeas petition and noting previous state habeas petition); *In re Smart*, 175 N.H. 656 (2023) (dismissing mandamus petition to order Governor and Executive Council to reconsider denial of hearing on commutation petition).

Tellingly, the petitioner fails to explain the legal relevance of the centerpiece of her habeas petition, *viz.*, a study manufactured specifically for her case concerning transcripts of tape-recorded conversations the petitioner had with one of the prosecution's multiple witnesses, Cecelia Pierce. The petitioner claims her study is of "monumental" significance, and that it identifies "at least eleven sections of the transcript that are facially inaccurate." PR 27-28.[3]

The legal relevance of the petitioner's study is elusive. Not only does she fail to identify the inaccuracies in the recording transcripts she alleges, in rejecting her direct appeal, the New Hampshire Supreme Court found that the superior court had repeatedly instructed the jury it must determine what was said in the tape-recorded conversations at issue based on what the jurors heard, not read, and cautioned them that, in the event of a conflict, the recordings controlled. *State v. Smart*, 136 N.H. 639, 666 (1993).

The petitioner's study, by its terms, does not show that the jury failed to follow the superior court's instructions (contrary to the well-settled presumption under New Hampshire law). Nor does it show that the jurors misheard or misunderstood the recordings during deliberations. Indeed, even assuming the jury used the transcripts

[3] As used in this reply, "PR" refers to the petitioner's response in objection to the respondents' motion to dismiss. "Pet." refers to the petitioner's petition (or "complaint") for a writ of habeas corpus.

during deliberations to help determine the content of the recorded conversations, the study does not show the transcripts were inaccurate in those specific instances; nor does it show that the jury did not disregard any allegedly inaccurate portions of the transcripts in reaching their verdict.

Perhaps in recognition of the logical gap at the center of her petition, the petitioner attempts to fill it by quoting three or four snippets from another post-verdict source, the transcript of the juror-misconduct hearing held by the superior court held on August 15, 1991. This attempt to sprinkle a handful of post-verdict needles into the haystack of the trial proceedings does nothing to show her conviction may now be challenged collaterally.

As an initial matter, the petitioner, unsurprisingly, has elected not to include the hearing transcript she quotes as part of the record of this case. The court, accordingly, cannot consider it. *See Chasan v. Village Dist. of Eastman*, 128 N.H. 807, 813 (1987) (affirming dismissal of complaint based on documents outside of pleadings when plaintiffs provided documents to trial court); *DiFruscia v. N.H. Dep't of Pub. Works & Highways*, 136 N.H. 202, 204 (1992) (explaining that motion to dismiss normally will be decided on the pleadings only, unless "additional evidence is submitted, without objection"). More fundamentally, though, the fragments of one juror's testimony that the petitioner now quotes in no way suggest that the juror (or any juror, for that matter) failed to follow the superior court's instructions concerning the transcripts of the recorded conversations. They thus provide no basis for reevaluating the jury's guilty verdict 35 years after it was returned and after multiple layers of judicial review.

II. PETITIONER'S CLAIMS ARE PROCEDURALLY BARRED.

As the respondents explained in their opening brief, virtually all the petitioner's claims are barred at the outset. It is well-established that she cannot use a petition for a writ of habeas corpus as a vehicle to relitigate issues that the New Hampshire Supreme Court previously resolved against her, or to litigate issues she could (and should) have litigated on direct appeal.

The petitioner now attempts to argue that New Hampshire law does not foreclose her claims and, if it does, the rules should be waived for her. Focusing on her ineffective assistance of counsel claims, she invites the court to upend decades of New Hampshire case law holding that evidentiary challenges cannot be collaterally relitigated under the guise of ineffective assistance of counsel claims. The court should decline the invitation.

By way of background, in her direct appeal to the New Hampshire Supreme Court, the petitioner argued that "the trial court erred in submitting to the jury transcripts of her tape-recorded conversations with Pierce [and] the transcripts were neither accurate nor authenticated." *Smart*, 136 N.H. at 666. The Court looked to the trial transcript to evaluate the viability of these claims. *Id.* Regarding authentication, the Court found that "[n]o objection was made that the transcripts were not authenticated, and thus none is preserved for review." *Id.* In contrast, the Court reviewed the petitioner's challenge to the accuracy of the transcripts to the extent that her trial counsel had objected that "the transcripts were 'misleading' because they allegedly failed to account for the 'doubling' of voices that occurs when two parties speak at once." *Id.* The Court rejected that

challenge, explaining that the trial court had repeatedly instructed the jury that only the recordings, not the transcripts, were of evidentiary significance. *Id.*

New Hampshire law, moreover, squarely bars the petitioner from collaterally relitigating issues previously decided by the state's highest court as ineffective-assistance claims. *See Grote v. Powell*, 132 N.H. 96, 100-01 (1989) ("The petitioner challenged this evidentiary ruling in his original appeal. Because we upheld the trial court's ruling, we will not now entertain a collateral challenge to that ruling under the guise of an ineffective assistance of counsel claim."); *Martineau v. Perrin*, 119 N.H. 529, 532 (1979) (holding, in the context of resolving state habeas corpus petitions, that "[w]e have firmly and consistently required that objections and exceptions be taken at trial to preserve issues for our consideration, especially with regard to jury instructions" and that "[a]lthough the requirement is relaxed in certain situations, these cases do not come within any recognized exception to the general rule."); *cf. Roy v. Perrin*, 122 N.H. 88, 100 (1982) ("The time to object to any perceived irregularities in the sentencing procedure was at the sentencing hearing. That this is a proceeding upon a petition for writ of habeas corpus does not affect the applicability of the rule.").

The petitioner nonetheless contends that New Hampshire law does not bar her ineffective-assistance claims based on her previously rejected evidentiary challenges. In particular, the petitioner seeks to challenge the constitutional adequacy of her trial counsel regarding "the use of the manufactured and inaccurate transcripts depriving [the petitioner] of her constitutional due process rights." PR 15. More specifically, she seeks to challenge her trial counsel's "failure to make appropriate and particularized objections

to the use of the transcripts on the grounds of their violating [the petitioner's] constitutional rights … constituting improper hearsay, not being authenticated, being overly prejudicial, and being sent back into the deliberation room despite not being entered into evidence." *Id.*

Apparently latching on to the word "precise," the petitioner argues that *Humphrey v. Cunningham*, 133 N.H. 727 (1990), *State v. Fecteau*, 140 N.H. 498 (1995), and *Mallard v. Warden*, 175 N.H. 565 (2023), permit her to raise ineffective-assistance claims based on previously decided evidentiary challenges as long as her new claims are not "exact[ly]" the same as the previous challenges. PR 15.

That is not the law, and none of the cases the petitioner cites support it. Under *Humphery*, *Fecteau*, and *Mallard*, a state habeas petitioner is not precluded from collaterally challenging the effectiveness of her trial counsel regarding a previously litigated claim of error when the new claim is based on issues or facts that are readily distinguishable from those the petitioner previously litigated. *See Humphrey*, 133 N.H. at 733 (finding "prejudice due to the loss of the photographic array" not the same as "whether a motion to dismiss on speedy trial grounds would have been successful"); *Fecteau*, 140 N.H. at 501-02 (finding claim that trial counsel's "remarks opened the door to the admissibility of the defendant's burglary arrest" not the same as whether "the evidence was admitted <u>*because*</u> of … trial counsel's conduct") (emphasis in original); *Mallard*, 175 N.H. at 571 (finding claim that "trial counsel was ineffective for failing to object to a curative instruction and for failing to cross-examine the victim about certain

text messages" not the same as claim that "trial counsel was ineffective for referring to [petitioner] as a 'big, menacing black guy'").

The claims the petitioner now seeks to raise as ineffective-assistance claims are not readily distinguishable from the challenges she raised on direct appeal. In fact, they are identical in substance to her previous challenges, save for being recast in constitutional terms. For example, the petitioner's overarching claim that her trial counsel was constitutionally ineffective based on "the use of … inaccurate transcripts" is a straightforward transposition of her previously litigated challenge that "the transcripts were [not] accurate." *Smart*, 136 N.H. at 666.

The same is true of the petitioner's more particularized claims. For instance, her claim that her trial counsel was ineffective because he the failed to object "to the use of the transcripts on the grounds of … not being authenticated" simply recasts her previous challenge that "the transcripts were … [not] authenticated" as an ineffective-assistance challenge. *Id.* And her claim that defense counsel was ineffective because the transcripts "went back into the deliberation room despite not being entered into evidence" is likewise a straightforward recasting of her previous challenge that "the trial court erred in submitting to the jury transcripts of her tape recorded conversations." *Id.*

The petitioner's claims that her trial counsel was ineffective because he failed to object to the transcripts on hearsay grounds and as "overly prejudicial" fare no better. The transcripts were not evidence, and an objection based on hearsay would have been frivolous. *See State v. Cable*, 168 N.H. 673, 685 (2016) ("Failing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel.")

(quotation, citation omitted). Moreover, the transcripts could only have been "overly prejudicial" to the petitioner if they were inaccurate. *Cf. State v. Addison*, 160 N.H. 493, 501 (2010) ("Unfair prejudice is not, of course, mere detriment to a defendant from the tendency of the evidence to prove guilt, in which sense all evidence offered by the prosecution is meant to be prejudicial.") (citation omitted). In other words, at bottom, her claim merely repackages her previous challenge to the transcripts' accuracy, wrapping it in different language.

In sum, the petitioner mischaracterizes New Hampshire law. State law does not permit her to collaterally relitigate her previously ruled-upon evidentiary challenges merely because she intones the words "ineffective assistance of counsel" and articulates wordier versions of the same challenges. Her argument, if accepted, would allow state habeas petitioners to collaterally relitigate virtually any previously decided claims, effectively rendering *Grote*'s holding that the habeas court will not "entertain a collateral challenge to [a prior] ruling under the guise of an ineffective assistance of counsel claim" a dead letter. 132 N.H. at 101.

III. PETITIONER FAILS TO STATE A CLAIM ON WHICH RELIEF MAY BE GRANTED.

The petitioner provides no meaningful response to the respondents' argument that virtually all her claims fail because she nowhere identifies the portions of either the trial transcripts or the recording transcripts that she claims defense counsel should have objected to or were inaccurate, respectively. While she contends that she "offered well-pled grounds

that when assumed as true would warrant relief," PR 22, her claims of error and prejudice are mere general allegations, untethered to the specifics of her trial.

That is not sufficient under State pleading standards. Rather, to avoid dismissal, the petitioner must plead sufficient facts to form a basis for the cause of action asserted. *See Mt. Springs Water Co. v. Mt. Lakes Vill. Dist*., 126 N.H. 199, 201 (1985). In assessing the sufficiency of her pleadings, the Court may not "assume the truth or accuracy of any allegations which are not well-pleaded, including the statement or conclusions of fact and principles of law." *ERG, Inc. v. Barnes*, 137 N.H. 186, 190 (1993).

Nor has the petitioner provided any meaningful answer to the respondents' argument that her evidentiary claims regarding the recording transcripts are unprecedented. She fails to identify a single jurisdiction that prohibits juries from using transcripts as aids while listening to recorded evidence. Instead, she takes issue with the respondent's case citations, arguing, for instance, that the respondent mischaracterized the Virginia Court of Appeals' holding in *Arnold v. Commonwealth*, 356 S.E.2d 847 (1987). Her attacks are misguided and, in any event, entirely unresponsive.

First, the petitioner misreads *Arnold.* She claims *Arnold* "unequivocally stated that, before a transcript can be employed, its accuracy must be stipulated to by both parties, or the trial judge must otherwise [verify the transcript]." PR 27 (citation omitted). In fact, in affirming the trial court's ruling, *Arnold* noted expressly that "the trial judge did not make a factual determination of the accuracy of the transcript by actually comparing the transcript to the recorded conversation." *Arnold*, 356 S.E.2d at 279; *cf. People v. Brown*, 225 Cal. App. 3d 585, 597 (Cal. Ct. App. 1990) ("Although the better

practice in determining a transcript's accuracy and reliability would be for a court to inquire into who prepared the transcript and how it was prepared and itself compare the transcript with the tape recording the failure by the trial court to do so here was not error."). Nor did the parties in *Arnold* stipulate to the accuracy of the transcripts. *See* 356 S.E.2d at 279.

The petitioner also tries to distinguish *Arnold* on the grounds that she objected to the accuracy of the transcripts and the superior court allowed the transcripts to be present in the jury room during deliberations. These distinctions get no traction. As noted, the New Hampshire Supreme Court previously found her objections to the accuracy of the transcripts lacked merit. Moreover, the respondent is unaware of any jurisdiction in which it is *per se* reversible for a trial court to allow such transcripts in the jury room during deliberations. *See*, *e.g.*, *Brown*, 225 Cal. App. 3d at 599 (holding, where transcript not admitted into evidence, the trial court "did not abuse its discretion in allowing the jurors to use the transcript [during deliberations] as a guide while listening to the tape."); *State v. Frazier*, 99 Wn.2d 180, 188, 661 P.2d 126 (Wash. 1983) ("[A] tape recorded statement of the defendant and a properly authenticated transcript thereof may, within the sound discretion of the trial court, be … reviewed by the jury during its deliberations."); *State v. De Bellis*, 174 N.J. Super. 195, 199 (N.J. App. Div. 1980) ("It has been recognized in New Jersey that a transcript may be used as an aid for understanding a tape recording.") (citation omitted); *People v. Coca*, 40 Colo. App. 440, 443 (Co. Ct. App. 1978) ("We … disagree with the defendant's contention that it was reversible error to permit the jury to take the tape and transcript into the jury room."); *cf.*

People v. King, 2008 Colo. App. LEXIS 3890, *9 (Colo. Ct. App. Dec. 11, 2008) (unpublished) ("[T]he trial court did not abuse its discretion in allowing the audio tape recording and the transcript of J.M.'s 911 call into the jury deliberations.").[4]

Second, the petitioner endeavors to make much of the respondent's "*See*, *e.g.*" citation to *United States v. Thompson* and *United States v. McMillan* for the proposition that, even when parties dispute the accuracy of transcripts of recorded conversations, many jurisdictions allow juries to use such transcripts during their deliberations (assuming the trial court instructs the jury that the jury's interpretation of the recordings is controlling, as was done here). This attack is likewise misguided and unresponsive. There is no question that the respondents' claim is correct. *See*, *e.g.*, *United States v. Holton*, 116 F.3d 1536, 1541 (D.C. Cir. 1997) (explaining procedure for when "the parties cannot agree," and noting that "it might well confuse the jurors to permit them to use transcripts as a guide during trial, but not during deliberations. Moreover, without a transcript to guide them, the jury could find itself involved in repetitious and time consuming replaying of unintelligible recordings.") (citing *United States v. Young,*105 F.3d 1, 10-11 (1st Cir. 1997); *United States v. Delpit*, 94 F.3d 1134 (8th Cir. 1996); U*nited States v. Elder*, 90 F.3d 1110, 1129 (6th Cir. 1996)); *United States v. Hogan*, 986

[4] *See generally United States v. Placensia*, 352 F.3d 1157, 1165 (8th Cir. 2003); *United States v. Ademaj*, 170 F.3d 58, 65 (1st Cir. 1999); *United States v. Elder*, 90 F.3d 1110, 1130 (6th Cir. 1996); *United States v. Crowder*, 36 F.3d 691, 697 (7th Cir. 1994); *United States v. Rosa*, 17 F.3d 1531, 1548 (2d Cir. 1994); *United States v. Taghipour*, 964 F.2d 908, 910 (9th Cir. 1992); *United States v. Costa*, 691 F.2d 1358, 1362-63 (11th Cir. 1982).

F.2d 1364, 1376 (11th Cir. 1993) (explaining process when parties dispute accuracy of transcript of recorded conversation).

Third, the petitioner attempts to attack the respondents' citation to *State v. Cook*, for the proposition that "the New Hampshire Supreme Court has previously held that it is harmless error to permit a transcript not admitted into evidence to accompany a recording into the jury deliberation room." But it is beyond dispute that *Cook* held "the presence of the transcript could not have affected the verdict and was harmless error." 148 N.H. 735, 743 (2002). Indeed, multiple jurisdictions have so concluded based on harmless-error review in analogous circumstances. *See*, *e.g.*, *Gutierrez v. State*, 967 So. 2d 322, 326 (Fla. Ct. App. 2007) (holding it was harmless error, where defense counsel objected, to allow jury to use transcript during deliberations, noting "[t]he transcript was relevant to help the jury in listening to the recorded conversation, in which [the defendant] incriminated himself three times."); *State v. Overton*, 279 Kan. 547, 548 (Kan. Ct. App. 2005) (holding it was harmless error "for the trial court to allow the jury to use a transcript of a recorded conversation during its deliberation); *cf. State v. Shelton*, 2021 SD 22, ¶ 32 (S.D. Supr. Ct. Apr. 14, 2022) (unpublished) (holding "the error was not prejudicial," where transcript of recording of defendant selling drugs erroneously provided to jury for deliberations).

In sum, the petitioner's attacks miss their mark. She has not cited any decision from any jurisdiction, let alone New Hampshire, supporting her argument that a trial court may never permit a jury to use a transcript as an aid while listening to a transcript

when the parties disagree as to what was said in the recording. Nor has she shown that it is not harmless error to permit the jury to take such transcripts to the jury room.

IV. PETITIONER'S CLAIM THAT THE JURY FAILED TO FOLLOW THE SUPERIOR COURT'S INSTRUCTIONS IS UNSUPPORTED.

Notwithstanding the superior court's repeated instructions to the jury regarding the transcripts of the recorded conversations, the petitioner urges this Court to abandon the presumption that the jury followed the superior court's instructions and instead presume the opposite. She contends that "presentation of the transcripts" was error because the jury could not follow the superior court's instructions, and that in instructing the jury that the transcripts were not evidence, the superior court "assigned an unrealistic capacity" to the jury to follow such instructions. PR 41-42.

This argument gets the law backwards and, if accepted, would call into question the constitutional underpinnings of jury trials in all criminal cases. It is, moreover, wholly speculative. The petitioner cites no factual or legal support for granting habeas relief on the grounds that jurors cannot understand and follow run-of-the-mill trial court instructions distinguishing the evidence from an interpretation of the evidence.

The presumption that jurors understand and follow trial courts' instructions is a fundamental tenant of our constitutional system of jury trials. *See*, *e.g.*, *United States v. Rivera-Gomez*, 67 F.3d 993, 999 (1st Cir. 1995) ("Our system of trial by jury is premised on the assumption that jurors will scrupulously follow the court's instructions."); *Refuse & Envtl. Sys., Inc. v. Industrial Serv. of Am., Inc.*, 932 F.2d 37, 40 (1st Cir. 1991) ("A

basic premise of our jury system is that the jury follows the court's instructions."). Four decades ago, the U.S. Supreme Court observed:

> A crucial assumption underlying that system [of trial by jury] is that juries will follow the instructions given them by the trial judge. Were this not so, it would be pointless for a trial court to instruct a jury, and even more pointless for an appellate court to reverse a criminal conviction because the jury was improperly instructed.

Parker v. *Randolph*, 442 U.S. 62, 73 (1979).

To be sure, there are instances in which "the bell cannot be unrung" and our legal system presumes providing the jury a curative instruction would not be sufficient to ameliorate prejudice to the defendant. When, for example, a witness inappropriately and unambiguously discloses the defendant's prior criminal history to the jury, the trial court must declare a mistrial. *See*, *e.g.*, *State v. Kerwin*, 144 N.H. 357, 359 (1999); *State v. Carbo*, 151 N.H. 550, 554 (2004) (addressing "[t]he proper inquiry … for determining whether the defendant was so substantially prejudiced that the remedy of mistrial was required"). Such cases, however, have no bearing on this case, as the petitioner is not challenging a curative instruction.

Here, the superior court's instructions were frequent, forceful, timely, and comprehensive. The Court found:

> The court overruled the defendant's objection to the use of the transcripts, and instructed the jury before the first tape was played as follows:
>
> "To the extent, if any exists, that the tape itself differs from what you are reading along in the transcript, you will use the tape in your consideration of the evidence in this case and not the transcript."
>
> The court instructed the jury again, after the second tape was played, to "use what you hear and not what you read" if there was any discrepancy, and

> several times during its final charge the court again told the jury that the tapes must govern over any inconsistency that might appear in the transcripts.

Smart, 136 N.H. at 666.

The petitioner also argues that the wording of the superior court's instructions biased the jury against her. She claims, "the suggestion 'if any exists' disaffirms the reality that a difference did exist," and that "the transcripts themselves diluted the jury's ability to sus out that the tape itself differed from what was being read." PR 42. But objections and exceptions to jury instructions must be raised contemporaneously at trial, and the failure to do so precludes later habeas corpus review. *See, e.g.*, *Avery*, 131 N.H. 138, 143 (1988); *Martineau*, 119 N.H. at 532-33 ("We have firmly and consistently required that objections and exceptions be taken at trial to preserve issues for our consideration, especially with regard to jury instructions.").

Regardless, this argument is premised on a mischaracterization of the role of the trial court in jury trials. The superior court was not the factfinder; the jury was. The court, accordingly, could not affirm the alleged "reality that a difference did exist." That was for the jury to decide for itself. In other words, far from a basis for habeas relief, the petitioner's argument amounts to complaining that the superior court did not usurp the jury's factfinder role. Further, the petitioner's suggestion that the transcript lulled or otherwise blunted the jury's ability to determine "that the tape itself differed from what was being read" is pure conjecture that is contradicted by the court's repeated, clear instructions that the jury must determine what was said during the recorded conversations on the basis "of the evidence in this case and not the transcript." *Smart*, 136 N.H. at 666.

Any attorney who has reviewed the accuracy of a transcript of imperfectly recorded dialogue (*e.g.*, of body-camera footage, or trial testimony reviewed on appeal) understands that whatever initial bias the transcript may introduce, it can be overcome readily through diligent and attentive listening.[5] The petitioner provides no reason to suppose the jurors were not diligent, attentive listeners who followed the trial court's express instructions on this point.

V. PETITIONER FAILS TO ALLEGE ACTUAL PREJUDICE.

The petitioner appears to claim she met her burden to plead facts showing prejudice by tendering the aforementioned study prepared for this case. To establish prejudice based on a claim of constitutionally ineffective assistance of counsel, a "defendant must demonstrate actual prejudice by showing that there is a reasonable probability that the result of the proceeding would have been different had competent legal representation been provided." *State v. Marden*, 172 N.H. 258, 263 (2019) (citation omitted). The petitioner errs.

The study allegedly involved test subjects listening to the audio recordings played for the jury. The petitioner claims the test subjects – who, unlike the jurors, listened to limited portions of the recordings (or "audio clips," Pet. 41-42) without any background context or familiarity with the case and without the ability to confer with one another in the jury room − were susceptible to suggestion regarding 11 words (or short phrases) on

[5] The same might be said of anyone who has watched an English-language movie with subtitles on. While the subtitles may introduce initial bias, careful listening can (and not infrequently does) reveal mistakes in the subtitles.

the recordings when they were provided recording transcripts. PR 46; *see* Pet. 41-42 (words in bold text).

The study does not establish actual prejudice. As a threshold matter, the petitioner fails to allege facts showing how the study even bears on the prejudice inquiry. On its face, the study did not replicate the trial environment in which the jury participated, including during deliberations. Further, the petitioner does not identify the portions of the recordings the test subjects listened to in the study. Nor does she allege how or why those portions were selected. She says nothing explaining whether the 11 audio clips were cherry-picked to yield her desired result, or whether she instead contends the audio clips typified (or were otherwise fairly representative of) the recordings as a whole, and, if so, the basis for that contention. Consequently, she failed to allege sufficient facts to show the study is relevant to anything beyond what may be 11 limited, idiosyncratic, and substantially immaterial portions of the recordings. This falls far short of establishing a reasonable probability that the jury would not have found her guilty absent deficient representation.

Separately, the petitioner fails to adequately identify the prejudice she alleges. Her specific claims regarding prejudice are vague, and she vacillates. At some points, the petitioner seems to suggest she was prejudiced because the study calls into question the recordings in their entirety. Pet. 43 ("Ultimately, the study revealed that the audio from the tapes is so degraded and of such a low quality that what was said cannot be objectively and accurately determined."). Purely as a matter of common sense, however, her inferential leap from 11 words on 11 audio clips to every word of the recordings is

unreasonable. The petitioner's own description of the study suggests the transcripts were largely understandable based on the recordings. For example, the charts in her petition suggest the number of words on the audio clips that the test subjects heard and were ***not*** called into question greatly outnumber the 11 the petitioner claims were.[6] Pet. 41-42.

More importantly perhaps, the trial transcript reflects that the superior court, counsel, and the jury were able to understand the recordings. To the extent the petitioner imagines the trial participants were hoodwinked by their suggestibility to the transcripts into falsely believing the recordings were understandable, the study does not support that. It is, in any event, undercut by the fact that the superior court excluded at least one recording on the grounds that it was difficult to understand, as well as by defense counsel's aforementioned objection to the recording transcripts regarding voice-doubling on portions of the recordings. The former occurred prior to the creation of the transcripts, showing the superior court demarcated a line between recordings that were understandable and recordings that were not.[7] The latter directly challenged the accuracy of parts of the transcripts, suggesting counsel believed other parts of the transcripts could be understood and verified based on the recordings.

At other points, the petitioner seems to suggest the more limited claim that she was prejudiced because the study shows that the inculpatory portions of the transcripts

[6] It is also difficult to see how, as a practical matter, the study could have been conducted if the test subjects were uncertain of the meaning of significant numbers of words on the audio clips.

[7] In addition to listening to the recordings and excluded one as inaudible, Resps.' Memo. of Law in Supp. of Mot. to Dismiss, Exhibit C, the superior court explained that it had found "very few" portions of the recordings it could not follow, and the court ultimately found the recordings audible and useful to the jury. *Id.*, Exhibit D, Tr. Vol. XV at 1289.

were inaccurate. PR 47 ("The results of the Study indicate that the State was able to manufacture inculpatory statements, that were not otherwise perceivable, and convince the jurors they were accurately hearing incriminating statements."). But the study does not show that, much less that the State *actually* "manufacture[d] inculpatory statements." Nor, as noted, does the petitioner pinpoint, or even generally explain, which inculpatory statements in the transcripts she believes were inaccurate. She likewise fails to identify any specific parts of the trial transcript she alleges were inaccurate.

Fundamentally, the murkiness of the petitioner's prejudice claim reflects that, even drawing all reasonable inferences in her favor, her study at most suggests *possible* prejudice. It plainly does not plead actual prejudice. In truth, her actual prejudice claim is a bare, unsupported assertion. Bare assertions, however, are insufficient to carry her pleading burden. *See Jay Edwards, Inc. v. Baker*, 130 N.H. 41, 47 (1987) (affirming dismissal when "[r]eferences to conspiracy and conspiratorial conduct are set forth in the plaintiff's petition, and yet when used they are mere legal assertions, unsupported by factual content."); *cf. State v. Brooks*, 162 N.H. 570, 584 (2011) (finding no prejudice where "[b]eyond … bare assertions, the defendant fails to articulate the nature of the prejudice suffered from the pretrial publicity ….").[8]

[8] Notable in this connection is that the petition relies on research from 2011 into contextual biases in the interpretation of auditory evidence. Pet. 48-50. Although 15 years have passed since the study was published, the petitioner is unable to cite a single jurisdiction finding actual prejudice, let alone granting habeas relief, based on any such research findings. Moreover, it is difficult to see how the petitioner can claim ineffective assistance of counsel by her trial counsel in 1991 based on research from 2011.

VI. PETITIONER'S WITNESS-TAMPERING CLAIM FAILS.

The petitioner fails to respond meaningfully to the respondents' argument that her claim that defense counsel declared her guilty of witness tampering to the jury is: (a) procedurally barred; (b) based on a misreading of the trial transcript; and (c), premised on her neither credible nor supported contention that she was surprised defense counsel conceded factual elements. Instead, she merely reiterates her assertion that when defense counsel argued in closing to the jury that she had "engaged in acts *that constitute witness tampering*," counsel thereby conceded she was guilty of witness tampering. PR 48 (emphasis in petitioner's brief).

As the respondents' opening brief showed, however, that assertion is an unreasonable reading the trial transcript and misconstrues counsel's argument. Defense counsel argued that, although the petitioner committed the act-element of witness tampering, she did not commit witness tampering because she lacked the requisite *mens rea*. *See* Ex. F, Tr. Vol. XIX at 1895 (counsel arguing in closing, "I'm telling you two things. I'm telling you the acts are there, and that you shouldn't find her guilty because of the factors and what was going on in her mind.").

The petitioner cites *McCoy v. Louisiana*, 584 U.S. 414 (2018), for the proposition that "counsel's error is not determined by whether counsel admitted his client's guilt in its entirety or partially with qualifications." PR 49. She mischaracterizes *McCoy*. Contrary to her suggestion, in *McCoy*, "defense counsel … concede[d] guilt over the

defendant's intransigent and unambiguous objection." 584 U.S. at 420. Counsel told the jury in his opening statement the evidence against his client was "unambiguous" and "my client committed three murders." *Id.* at 420. "In his closing argument, [counsel] reiterated that McCoy was the killer." *Id. McCoy*, consequently, provides no support for the petitioner's claim that conceding a factual element of a crime is tantamount to conceding guilt. *See*, *e.g.*, *United States v. Rosemond*, 958 F.3d 111, 122 (2d Cir. 2020) ("[T]he right to autonomy is not implicated when defense counsel concedes one element of the charged crime while maintaining that the defendant is not guilty as charged."); *United States v. Wilson*, 960 F.3d 136, 144 (3rd Cir. 2020) ("*McCoy* distinguished counsel's concession of factual guilt from a 'strategic' decision 'to concede an element of a charged offense.'"); *State v. Johnson*, 265 So. 3d 1034, 1049 (La. App. 2019) (similar).

The petitioner cites Justice Alito's dissenting opinion in *McCoy*, but far from bolstering the petitioner's position, it undercuts it. The dissent disagreed with the majority's factual findings, arguing they were inaccurate. *See* 584 U.S. at 429 ("[W]e do not have the right to simplify or otherwise change the facts of a case in order to make our work easier or to achieve a desired result.") (Alito, J. dissenting); *id.* at 430 ("The real case is far more complex."). In the dissent's view, the factual record established that counsel merely conceded the defendant "committed one element of that offense, *i.e.*, that he killed the victims," but did not concede that the defendant had "the intent (the *mens rea*) required for the offense." *Id.* at 429.

As applied here, if the petitioner's legal claim were correct that conceding a factual element of a crime is tantamount to conceding guilt, the *McCoy* majority could have, and presumably would have, simply agreed with the dissent's account of the facts. Doing so would have had no bearing on the majority's analysis. Differently stated, the very fact that Justice Alito dissented on factual grounds in *McCoy* strongly suggests that the majority agreed with him that merely conceding the factual element of a crime is not the same as conceding guilt.[9]

The petitioner also mischaracterizes the respondents' argument regarding witness tampering, erroneously claiming they argued she "implicitly authorized" her counsel to concede the factual element of the offense. PR 50. In fact, the respondents argued that petitioner provided no factual support for her assertion that she was surprised by counsel's argument, and that her assertion is not credible in view of her unambiguous testimony that she repeatedly attempted to stop Cecelia Pierce from providing information to the police.

VII. PETITIONER'S CLAIM BASED ON ADVERSE PUBLICITY FAILS.

The petitioner provides no plausible argument to support her objection to the respondents' argument that her claim based on a journalist's interview with a juror, the late Charlotte Jefts, should not be dismissed. The petitioner claims that "[t]he bottom line

[9] The petitioner also cites *State v. Henderson*, 141 N.H. 615 (1997), for the proposition that conceding a factual element of a crime is the same as conceding guilt. PB 50. For the reasons the respondents discussed in their opening brief, *Henderson* is not apt.

is that a juror, Charlotte Jefts, expressly admitted to convicting [the petitioner] based on extra-judicial tabloid headlines." PR 53. She is mistaken.

The crux of the petitioner's argument hinges on a single sentence in an interview with Ms. Jefts that was conducted in 2005. Ms. Jefts, speaking with the journalist about the jury votes, said:

> Jefts - and then finally when the last one … it was 12 guilty … there was no way, she was possibly getting out of this 'cause she thought nothing of murdering anybody … she tried to get and when she was in jail awaiting trial she had a friend there whose husband agreed to kill one of the girls who was testifying against her[.]

Pet. Exhibit 2, p. 1.

The petitioner suggests this sentence is significant because, "[a]ccording to the interview, the juror raised the information contained in the media story *in the same sentence* as when she was discussing what led the jury to ultimately vote guilty." PR 54 (emphasis in petitioner's brief).

The petitioner overreaches. The mere fact that, while speaking with a journalist a decade and a half after the guilty verdict, a juror mentioned media information in the same sentence as the jury's final vote does nothing to show that the former caused the latter. By the plain terms of the quotation, Ms. Jefts did *not* say that the jury's decision was affected by the media information.

Further, the petitioner does not − and cannot − provide any information about when Ms. Jefts learned the media information. It would hardly be surprising if Ms. Jefts learned additional information about the petitioner from media sources during the many years that passed between the jury's vote and the 2005 interview. But even if she learned

the media information pre-verdict, jurors are not required to be ignorant of the facts and issues in a case. *Smart*, 136 N.H. at 647. Ms. Jefts cannot be asked to clarify her remark.

In brief, the petitioner's argument concerning Ms. Jefts fails because it depends upon drawing unreasonable inferences from a late juror's ambiguous and truncated response to a journalist's question more than a decade after the jury found the petitioner guilty.

VIII. PETITIONER'S REMAINING JURY-INSTRUCTION ERROR CLAIMS FAIL.

As explained in the respondents' opening brief, the superior court's jury instructions were clear, accurate, and complete. The petitioner's objections to them uniformly fail under long-established New Hampshire law.

A. The Jury Was Correctly Instructed on Accomplice Murder.

The superior court instructed the jury on the *mens rea* of accomplice murder in part by explaining that the jury was required to find that the petitioner shared the premediated-and-deliberate intent of the murder principal. The petitioner argues this was error because jury instructions on the elements of a crime "simply cannot be trusted to imprecise suggestions and indirect allusions," and "at no time did the Trial Court actually state in its instructions that premeditation and deliberation were required for accomplice liability." PR 57.

Her argument fails as a matter of blackletter law. Contrary to her legal assertion, under New Hampshire law, the superior court was not tied to a formalistic statement of the elements of accomplice murder when instructing the jury. Rather, the superior court

was required "to state and explain to the jury, in clear and intelligible language, the rules of law applicable to the case." *State v. Etienne*, 163 N.H. 57, 70 (2011) (citing *State v. Hernandez*, 159 N.H. 394, 400 (2009)). Jury instructions are sufficient when "a reasonable juror would have understood them, and in light of all the evidence in the case." *State v. Harris*, 177 N.H. 473, 482 (2025) (citing *Etienne*, 163 N.H. at 70). Moreover, a trial court's jury instructions are not reversible "'unless the jury charge fails to cover fairly the legal issues in the case.'" *Harris*, 177 N.H. at 482 (quoting *Evans*, 150 N.H. at 420); *see State v. Dedrick*, 135 N.H. 502, 505 (1992) (same).

Although the petitioner's challenge appears to be to the manner in which the superior court instructed the jury on the *mens rea* of accomplice murder, to whatever extent she also challenges the sufficiency of that instruction, her challenge also fails. As explained in the respondents' opening brief, based on the superior court's jury instructions, any reasonable juror would have understood that to find the petitioner guilty of accomplice murder, her actions had to be premediated and deliberate. The court carefully instructed the jury on the elements of first-degree murder, including intent. *See*, *e.g.*, Resps.' Memo. of Law in Supp. of Mot. to Dismiss, Exhibit F, Tr. Vol. XIX at 1981-82 ("The State must prove beyond a reasonable doubt that the individual acted with premeditation and deliberation."). The court then carefully instructed the jury that to be guilty of accomplice murder, the petitioner needed to share that same intent. *See*, *e.g.*, *id.*, Exhibit F, Tr. Vol. XIX at 1985 ("The defendant must share the same criminal intent as the principal."). A challenge to the sufficiency of the court's instruction would clearly be meritless.

The petitioner compares this case to *State v. Prevost*, 141 N.H. 559 (1997), but that case is inapposite. *Prevost* concerned a challenge to jury instructions that expanded the scope of the indictment by allowing the jury to find the defendant guilty under statutory elements not charged by the grand jury. *Id.* at 560-61. The trial court, in effect, usurped the grand jury's charging authority by unilaterally adding a charge into the jury instructions that the grand jury had declined to bring. *Id.*

Here, in contrast, the petitioner challenges the manner in which the superior court instructed the jury on the intent element of accomplice liability (and possibly its sufficiency). She does not contend that the superior court's jury instructions allowed the jury to find her to guilty by finding entirely separate statutory elements that were absent from the operative charging documents. *Prevost*, accordingly, provides no support to the petitioner.

B. Petitioner's Claim Based on the Superior Court Not Reminding the Jury to Decide the Case on the Evidence Fails.

The petitioner does not attempt to respond to the respondents' argument that she failed to provide a factual basis for her claim that she was prejudiced by the superior court not reminding the jury prior to deliberation that it (the jury) must decide the case based on the trial evidence. Although the superior court doggedly reminded the jurors throughout *voir dire* of their duty to decide the case based on the evidence, the petitioner now argues that differences between *voir dire* and trial (such as atmosphere and relative levels of formality) undermined the impact of the court's *voir dire* instructions on the jurors. She suggests the jurors might have forgotten or neglected their duties, and she

complains that "[a] simple standard jury instruction to consider only evidence admitted during trial could have ensured a fair trial." PR 63.

This is pure speculation. There is no reason to believe the jurors were forgetful or negligent. In fact, at one point in giving the final jury instructions, the superior court told the jury to remember what it had said during *voir dire*. Resps.' Memo. of Law in Supp. of Mot. to Dismiss, Exhibit F, Tr. Vol. XIX at 1976. The jury was thus on notice that the court's *voir dire* instructions remained pertinent; and, for its part, the superior court clearly believed the jurors could remember what it had instructed. Indeed, every time the trial court instructed the jury on the use of the recording transcripts was a reminder to the jury to decide the case based solely on the evidence. The petitioner's argument to the contrary is baseless. *Cf. Dedrick*, 135 N.H. at 505 ("A claim that the trial court erroneously instructed or refused to instruct the jury … must be evaluated in the context of the entire charge and all of the evidence.").

C. Petitioner's Claim That the Superior Court Intruded on the Province of the Jury Fails.

With the exception of the respondents' discussion of the case on which the petitioner chiefly relies, *State v. King*, 136 N.H. 674 (1993), the petitioner fails to respond to the respondents' argument that the superior court did not make "a second closing argument for the State." Regarding *State v. King*, the petitioner claims that "the State attempts to distinguish *King* in that the trial court's comments in *King* were responsive to a jury question, and in [the petitioner's] case the excessive force was applied to the jury

instructions more broadly." PR 64. This characterization of the respondents' argument is erroneous and self-serving.

King cannot bear the weight the petitioner places on it. The material facts animating that decision were not present here. In *King*, the jury was stuck. After deliberating for days without reaching a verdict, the jury asked the trial court for guidance. 136 N.H. at 675 (explaining jury note "indicated that the jury wanted to know what it could consider."). In response, the court reinstructed the jury regarding the testimony of the prosecution's witnesses, saying in pertinent part as follows:

> [M]y recollection of the testimony in terms of how this injury allegedly took place, there were some conflicts. I think one witness said the victim was standing and the defendant burst into the room and there was some contact. I think one witness said that the victim was on the floor, you know, so there is a disagreement as to how this happened. My recollection is one witness said that the defendant's hand was raised like this (indicating) in an upward motion. Another witness said that the injury occurred as a result of a punching motion.

Id. at 676. The trial court did not mention the exculpatory testimony given by the defendant. *Id.* at 678.

Defense counsel objected, *inter alia*, on the grounds that "that the court's recollection of the testimony was an invasion of the province of the jury." *Id.* at 677. In response, the court said that it understood the danger of swaying the jury but overruled the objection anyway. *Id.*

The Supreme Court reversed. It found as follows:

> [T]he trial court summarized the testimony of several of the State's witnesses but failed to mention the exculpatory testimony of the defendant. In doing so the court improperly focused the jury's attention on whether the victim had

> been stabbed with a knife and away from the defendant's claim that there had been no assault.

Id. at 678.

The petitioner's case was very different from *King*. As an initial matter, in *King*, the trial court's reinstruction of the jury was not lengthy, *id.* at 675-76, raising the risk that the court's recitation of the prosecution's evidence would be especially impactful to the jury. In the petitioner's case, in contrast, the paragraph or so of the jury instructions the petitioner challenges was a very small part of the extensive set of instructions the superior court gave the jury. The risk of adversely impacting the jury was thus lower.

Additionally, *King* involved a jury that had deliberated extensively, failed to reach a verdict, and then returned to the trial court for additional guidance. In those circumstances, focusing the jury's attention on the testimony of the prosecution's witnesses heightened the risk that the jury would understand the court's guidance to be to consider the prosecution's case. The petitioner's case, in contrast, did not involve any such circumstances.

Further, unlike the trial court in *King* which took no steps to dispel the risk created by its lobsided emphasis on the prosecution's case, the superior court here took affirmative steps to dispel any such risk. Specifically, the superior court explained to the jury why it had said what it said, and it called the jury's attention to the petitioner's side of the case. Immediately after telling the jury the actions alleged in the indictment, the superior court instructed the jury as follows:

> Now, in this and in the other conspiracy definition that I gave you, I listed certain acts that the State alleges and certain acts in this one that the State

> alleges. Those are allegations by the State. Those come from the indictment, and the indictment is not evidence. They are, and these acts alleged are, what the State charges, what the defendant did. That's what the State says the defendant did. The defendant has said she is not guilty and has pled not guilty and has testified she is not guilty.

Resps.' Memo. of Law in Supp. of Mot. to Dismiss, Exhibit F, Tr. Vol. XIX at 1985.

In view of the clear differences between the petitioner's case and *King*, *King* provides no support for her claim. It should be dismissed.

D. Petitioner's Claim She Was Not Subject to a Mandatory Life Sentence Fails.

The petitioner does not respond to the respondents' argument concerning her mandatory life sentence. Briefly, the respondents argued that under New Hampshire's statutory provision governing accomplice liability, RSA 626, 8, I, II(c)," "an accomplice to an offense is guilty of the offense itself." *State v. Abbis*, 125 N.H. 646, 647 (1984). The jury found her guilty of being an accomplice to first-degree murder, and the penalty for first-degree murder is a mandatory life sentence. The petitioner was thus subject to a mandatory life sentence.

Unable to assail this reasoning, the petitioner instead claims that the respondents' argument renders New Hampshire law an "anomaly" because "[n]o jurisdiction in our fifty states and territories enables a conviction on a crime never charged." PR 65. She is mistaken. Her claim rests on a false premise and, in any event, is abundantly contradicted by well-established, longstanding legal authorities. *Cf. Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 189-90 (2007) ("[E]very jurisdiction − all States and the Federal Government –

has 'expressly abrogated the distinction' among principals and aiders and abettors[.]") (quoting 2 W. LaFave, Substantive Criminal Law § 13.1(e) (2d ed. 2003)).

First, the petitioner does not, and cannot, contend that she was "never charged" with being an accomplice to first-degree murder. Her suggestion that she was convicted of "a crime never charged" is revisionist history based on the fact that the penalty she received was the same as the penalty for first-degree murder. *Cf. State v. Moore*, 16 Ohio St. 3d 30, 33 (Oh. Supr. Ct. 1985) (holding that, under Ohio law, "appellant is criminally culpable to the same degree as the principal offender and, in fact, may be prosecuted for the principal offense.").

Second, far from being an "anomaly," New Hampshire's vicarious liability law is fully consistent that of other jurisdictions. For example, under 18 U.S.C. § 2, the federal statute governing aiding and abetting liability, "all who shared in [the overall crime's] execution … have equal responsibility before the law, whatever may have been [their] different roles." *United States v. Johnson*, 319 U.S. 503, 515, 515 (1943).[10]

[10] The same is true of many state jurisdictions. *See, e.g.*, *State v. Carrillo*, 2021 ME 18, ¶ 43 (Me. Supr. Ct. 2021) ("[T]he court was bound to sentence Carrillo to twenty-five years to life, whether Carrillo was a principal or an accomplice."); *State v. McChristian*, 158 Wn. App. 392, 407 (Wash. Ct. App. 2010) ("[I]t is clear that the legislature intended to punish accomplices to a crime in the same manner as the principal."); *In re D.A.C.*, 337 N.J. Super. 493, 496-497 (N.J. Ct. App. 2001) ("It is well-established in New Jersey law that distinctions between the culpability and punishment of a principal and accomplice have been abolished, and that an accomplice has equal culpability and is subject to the same punishment as a principal in the crime's commission."); *Boston v. United States*, 939 F.3d 1266, 1271 (11th Cir. 2019) (explaining that Florida law "punishes aiders and abettors the same as principal offenders") (citing Fla. Stat. § 777.011 ("Whoever commits any criminal offense against the state . . . or aids, abets, counsels, hires, or otherwise procures such offense to be committed, and such offense is committed or is attempted to be committed, is a principal in the first degree and may be charged, convicted, and punished as such ….")).

Because the petitioner fails to establish a legitimate legal basis for her claim, it should be dismissed.

CONCLUSION

The respondent's respectfully request the Court to dismiss the petitioner's petition in its entirety without a hearing.

Respectfully Submitted,

THE STATE OF NEW HAMPSHIRE &
THE NEW HAMPSHIRE STATE PRISON
FOR WOMEN, WARDEN

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May 26, 2026

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CERTIFICATE OF SERVICE

I, Anthony J. Galdieri, hereby certify that I am emailing a copy of this reply memorandum to petitioner's counsel this day consistent with an agreement between the parties for email service of such court filings.

May 26, 2026 */s/ Anthony J. Galdieri*
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