UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	)	
v.	)	**No. 1:08-CR-215-CKK**
EMERSON V. BRIGGS,	)	
Defendant.	)	

DEFENDANT'S EXPEDITED MOTION FOR RELEASE PENDING SENTENCING

Pursuant to Federal Rule of Criminal Procedure 46(c) and 18 U.S.C. §§ 3143(a) and 3145(c), Defendant Emerson V. Briggs, through counsel, respectfully moves for an order that he be released pending sentencing, on the conditions recommended by the Pretrial Services Agency (including electronic monitoring).

FACTUAL AND PROCEDURAL POSTURE

Pursuant to a binding plea agreement under Federal Rule of Criminal Procedure 11(c)(1)(C), Mr. Briggs has pled guilty to one count of knowing receipt of child pornography, in violation of 18 U.S.C. § 2252A(a)(2)(A). He has been detained pending sentencing under 18 U.S.C. § 3143(a)(2), subject to the Court's indicated willingness to consider his written motion for release under 18 U.S.C. § 3145(c).

Pretrial Services has recommended that Mr. Briggs be released subject to High Intensity Supervision, *i.e.*, electronic monitoring. Mr. Briggs has no criminal history. Pretrial Services has found that he qualifies for the High Intensity Supervision program.

PERTINENT STATUTES

18 U.S.C. § 3143(a), titled "Release or detention pending sentence," provides in pertinent part as follows:

> (2) The judicial officer shall order that a person who has been found guilty of an offense in a case described in [§ 3142(f)(1)(A), (B), or (C)] and is awaiting imposition or execution of sentence be detained unless—
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> (A) (i) . . .
>
> (ii) an attorney for the Government has recommended that no sentence of imprisonment be imposed on the person; and
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> (B) the judicial officer finds by clear and convincing evidence that the person is not likely to flee or pose a danger to any other person or the community.

18 U.S.C. § 3142(f)(1)(A), referenced above, includes "a crime of violence" as defined by statute. 18 U.S.C. § 3156(a)(4) defines "crime of violence" to mean:

> (A) an offense that has [as] an element of the offense the use, attempted use, or threatened use of physical force against the person or property of another;
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> (B) any other offense that is a felon and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense; or
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> (C) any felon under chapter 109A, 110, or 117[.]

18 U.S.C. § 3145(c), titled "Appeal from a release or detention order," provides that detention orders may be directly appealed under 28 U.S.C. § 1291 and 18 U.S.C. § 3731, and further provides:

> A person subject to detention pursuant to section 3143(a)(2) . . . and who meets the conditions of release set forth in section 3143(a)(1) or (b)(1) [*i.e.*, no flight or safety risk], may be ordered released, under appropriate conditions, by the judicial officer, if it is clearly shown that there are exceptional reasons why such person's detention would not be appropriate.

ARGUMENT

A. Mr. Briggs Presents No Flight or Safety Risk

Mr. Briggs is a first-time offender, with no prior criminal history of any kind. His offense conduct, downloading child pornography, was, as a factual matter, nonviolent.[1] In light of his status as a first-time nonviolent offender who poses no risk of flight or danger, Mr. Briggs respectfully requests that he be permitted to remain on release pending sentencing, subject to the conditions recommended by Pretrial Services, including electronic monitoring. *See United States v. Reboux*, No. 5:06-CR-451 (FJS), 2007 WL 4409801 (N.D.N.Y. Dec. 14, 2007) (granting release pending sentencing under § 3145(c) to child pornography defendant who posed no risk of flight or danger); *see also United States v. Brown*, No. 2:07-mj-0290, 2008 WL 1990358, at *1-*4 (S.D. Ohio May 1, 2008) (same, pretrial release).

That Mr. Briggs presents no flight risk, and no threat to public safety, is shown clearly and convincingly by the fact that the government has permitted him to remain free during the more than two years between the time his computer was turned over to the FBI and the time he was charged by information in this case. During those two years, Mr. Briggs has not fled, has not committed any offenses, and has not posed any threat to anyone else. He appeared voluntarily for arraignment, knowing that the government would seek his immediate detention. The Government's concern, expressed at arraignment, that Mr. Briggs might pose a risk of viewing additional pornography or of some hands-on offense is based on pure speculation. The Government has never contended it had any indication of additional misconduct of any kind by Mr. Briggs. It never sought his arrest or detention in more than two years prior to arraignment,

[1] Other than receiving child pornography—the seriousness of which we do not minimize—Mr. Briggs has never had or attempted any inappropriate contact with a minor, online or otherwise.

and has never sought to impose any kind of restriction on Mr. Briggs (such as restricting computer access or any other form of pretrial supervision).

This case is similar to *Reboux*, where the defendant admitted upon his first contact with the FBI that he did not dispute having downloaded child pornography images. 2007 WL 4409801, at *1. Here, as discussed at the arraignment and plea hearing, when this matter first surfaced in May 2006, Mr. Briggs, through counsel, immediately contacted the Department of Justice and indicated his desire to resolve the case expeditiously and without trial. Were there any concern, then or now, about Mr. Briggs's dangerousness or flight, it is unlikely the Government would have waited more than two years to attempt to curtail Mr. Briggs's liberty. Nonetheless, here as well as in *Reboux*, more than two years passed between the first contact with the FBI and the government's first effort to have the defendant detained. *Reboux*, 2007 WL 4409801, at *1. In the interim, in *Reboux* as here, "[t]here is no indication that, during this period of years, Defendant sought out or accessed child pornography. Nor does it appear that Defendant has ever approached or contacted a child for illicit purposes. Moreover, Defendant has been exceedingly cooperative and has not attempted to flee." *Id.* Based on these facts, the *Reboux* court found by clear and convincing evidence that the defendant posed no risk of flight or danger. On nearly identical facts, the same finding is appropriate here.

B. This Court Should Order Mr. Briggs Released Under § 3145(c), Because Exceptional Reasons Show That Mandatory Detention Is Not Appropriate

Ordinarily, when the Court finds by clear and convincing evidence that a defendant poses no risk of flight or danger to the community, the Court "shall order the release of the person" pending sentencing, subject to appropriate conditions. 18 U.S.C. § 3143(a)(1). The offense to which Mr. Briggs has pled—receipt of child pornography, 18 U.S.C. § 2252A(a)(2)—does not involve violent conduct. However, because it is contained within Chapter 110 of Title 18, it has

been defined to be a "crime of violence" under 18 U.S.C. § 3156(a)(4)(C). Because of this definition, release or detention in this case is governed by § 3143(a)(2), not (a)(1).[2]

Section 3143(a)(2) directs that a person found guilty of such an offense be detained unless, in relevant part, the government has recommended no sentence of imprisonment—a condition not satisfied here. § 3143(a)(2)(A)(ii). Section 3143(a)(2) must be read, however, in conjunction with § 3145(c), which contains a safety valve. Under § 3145(c), a person subject to detention under § 3143(a)(2), who is found to pose no risk of flight or public safety, "may be ordered released, under appropriate conditions, if it is clearly shown that there are exceptional reasons why such person's detention would not be appropriate."

1. This Court May Order Release Under § 3145(c)

Section 3145(c) "was included as an avenue of relief from the mandatory detention provisions" of the Bail Reform Act. *United States v. Herrera-Soto*, 961 F.2d 645, 647 (7th Cir. 1992). Although it "appears in a section titled 'Appeal from a Release or Detention Order,' this provision should be read in conjunction with the portion of the statute outlining the general procedures for release pending appeal." *Id.* Significantly, "the majority of courts—including every court of appeals—that have considered the question have concluded that section 3145(c) allows district courts to release a defendant" in the first instance. *United States v. Chen*, 257 F. Supp. 2d 656, 658 & n.8 (S.D.N.Y. 2003).[3]

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[2] Section 3143(a)(2) applies to defendants found guilty of offenses described in, *inter alia*, § 3142(f)(1)(A), which includes "crime[s] of violence" defined under § 3156(a)(4).

[3] The Second, Seventh, Eighth, Ninth, and Tenth Circuits have all concluded that a district court may order a defendant released under § 3145(c) where "exceptional reasons" make detention inappropriate. In addition to *Herrera-Soto*, *supra*, see *United States v. DiSomma*, 951 F.2d 494 (2d Cir. 1991); *United States v. Carr*, 947 F.2d 1239, 1240 (5th Cir. 1991) (per curiam); *United States v. Mostrom*, 11 F.3d 93, 94-95 (8th Cir. 1993); *United States v. Jones*, 979 F.2d 804, 806 (10th Cir. 1992) (per curiam); *see also United States v. Koon*, 6 F.3d 561, 562 &

(Continued …)

Despite its placement, reading § 3145(c) to give authority to district courts as well as appellate courts makes sense textually, jurisprudentially, and as a matter of legislative intent. First, the text of § 3145(c) authorizes "the judicial officer" to order release upon the appropriate conditions and findings. "Judicial officer" is defined to mean "any person or court authorized pursuant to [18 U.S.C. § 3041], or the Federal Rules of Criminal Procedure, to detain or release a person before trial or sentencing . . . ," and includes any "judge of the United States." 18 U.S.C. § 3041. Second, it would make little sense to authorize release by appellate judges under a standard more lenient than the district judge is permitted to apply in the first instance. It is more consonant with sound jurisprudence and judicial economy to read the statute as setting one standard for release, which applies equally in the trial court and on appeal. Finally, courts have recognized that section 3145(c)'s "exceptional reasons" safety valve was added at the same time as § 3143's mandatory detention provision, and was intended to ameliorate the harshness of § 3143(a)(2) by allowing courts to consider cases where exceptional circumstances make detention inappropriate. *See Herrera-Soto*, 961 F.2d at 647; *see also United States v. Carr*, 947 F. 2d 1239, 1240 (5th Cir. 1991); *United States v. DiSomma*, 769 F. Supp. 575, 576-77 (S.D.N.Y.), *aff'd*, 951 F.2d 494 (2d Cir. 1991).

Section 3145(c) does not define the "exceptional reasons" that would make detention inappropriate. Instead, "'exceptional reasons' is a fact intensive inquiry within the discretion of the district court." *United States v. Koon*, 6 F.3d 561, 563-64 (9th Cir. 1993) (Rymer, J., concur-

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n.1 (9th Cir. 1993) (Rymer, J., concurring in denial of en banc review); *United States v. Cantrell*, 888 F. Supp. 1055 (D. Nev. 1995) (describing and following Ninth Circuit's decision in *Koon*); *United States v. Pope*, 794 F. Supp. 372, 373 (S.D. Fla. 1992). As this Court has noted, the question is open in the D.C. Circuit. *United States v. Sharp*, 517 F. Supp. 2d 462, 464 n.2 (D.D.C. 2007). A minority of district courts have concluded otherwise. *See Chen*, 257 F. Supp. 2d at 660-63.

ring in denial of rehearing en banc). As this Court has noted, "courts have generally read the phrase to mean circumstances that are 'clearly out of the ordinary, uncommon, or rare.'" *United States v. Sharp*, 517 F. Supp. 2d 462, 464 (D.D.C. 2007) (quoting Judge Rymer's concurrence in *Koon*, *supra*); *see also Reboux*, 2007 WL 4409801, at *2 (noting dictionary definition of "exceptional" as "being out of the ordinary" or "uncommon, rare"). "Finding circumstances that are 'out of the ordinary' is not an onerous hurdle to surmount. 'Exceptional' does not mean 'extreme' or 'novel,' but simply 'infrequent' or 'uncommon.'" *Reboux*, 2007 WL 4409801, at *2 (citing *United States v. DiSomma*, 951 F.2d 494 (2d Cir. 1991)).

We respectfully submit several exceptional reasons here make mandatory detention inappropriate: Mr. Briggs's binding plea agreement under Rule 11(c)(1)(C); the categorically nonviolent nature of the offense as a factual matter; and the more than two year delay in prosecution during which Mr. Briggs has remained free and has posed no danger of any kind.

2. Mr. Briggs's Conditional Guilty Plea Under Rule 11(c)(1)()

Mr. Briggs has pled guilty pursuant to a binding plea agreement under Rule 11(c)(1)(C). Because he will be entitled to withdraw his plea if the Court rejects the agreement, in effect the plea is conditional. *See* Rule 11(d)(2)(A); *United States v. Hyde*, 520 U.S. 670, 675-76 (1997) ("This provision implements the commonsense notion that a defendant can no longer be bound by an agreement that the court has refused to sanction."); *United States v. Goodall*, 236 F.3d 700, 703 (D.C. Cir. 2001); *see also United States v. Battle*, 499 F.3d 315, 321 (4th Cir. 2007) (noting "the inherently conditional nature of guilty pleas under Rule 11"), *cert. denied*, 128 S. Ct. 1121 (2008). If the Court were to reject the plea agreement and Mr. Briggs withdrew his plea, he would stand in the same position as if not yet charged. He would be detainable only if, first, a grand jury voted an indictment, and then only if "the Government demonstrate[d] by clear and convincing evidence after an adversary hearing that no release conditions 'will reasonably assure

. . . the safety of any other person and the community." *United States v. Salerno*, 481 U.S. 739, 741 (1987) (quoting § 3142(e)). We respectfully submit the Government would not be able to meet that burden, in light of: (a) the fact that the Government has permitted Mr. Briggs to remain free, without restrictions, during the two years since his computer was first discovered; (b) Mr. Briggs has no criminal history or history of violence whatsoever, and (c) Pretrial Services has recommended release with electronic monitoring. *See* Sec. A, *supra*; *see also Brown*, 2008 WL 1990358, at *3-*4 (concluding government had not met burden to show by clear and convincing evidence that child pornography defendant posed public safety risk that could not be addressed by release subject to strict supervision by Pretrial Services).

We should emphasize that, as Mr. Briggs stated at arraignment, he has knowingly and voluntarily entered his plea pursuant to a good faith agreement with the Government, and he respectfully hopes and anticipates the Court will accept the plea agreement. Nothing said here should be taken to indicate a desire for anything other than acceptance of the plea agreement. Nonetheless, if the Court were to reject the agreement, Mr. Briggs would be entitled to withdraw his plea, and if he did he would be entitled to release pending trial. In that circumstance, if release on conditions is not granted, he would have served a period of several months' detention that would otherwise be unavailable absent trial and conviction.

3. The Factually Non-Violent Nature of Simple Receipt Under § 2252A(a)(2)

Section 3143(a)(2)'s mandatory detention provision is directed at defendants convicted of "crimes of violence." § 3142(f)(1)(A); § 3156(a)(4). "Crimes of violence," both in the statutory definition and in ordinary layman's language, are crimes that involve the actual or likely use of physical force. *See* § 3156(a)(4)(A), (B). In this case, however, Mr. Briggs's offense was downloading child pornography—an activity that does not remotely involve violence or force

under any ordinary understanding of those terms. (Whether or not the *images* contain depictions of violent or forceful conduct *by others*, there is nothing violent or forceful about downloading them, which is done alone, with the click of a mouse.) Indeed, Pretrial Services' conclusion that the offense here was not a crime of violence (citing 18 U.S.C.§ 3142(f)(1)(E)), though it overlooked the definition in § 3156(a)(4), is entirely understandable and reinforces the common sense notion that there is nothing remotely violent about downloading prohibited images.

Mr. Briggs's offense conduct qualifies as a "crime of violence" only because Congress broadly included within its definition of "crimes of violence" "any felony under chapter 109A, 110, or 117" of Title 18. § 3156(a)(4)(C). A survey of those covered chapters—"Sexual Abuse," Chapter 109A; "Sexual Exploitation of Children," Chapter 110; and "Transportation for Illegal Sexual Activity and Related Crimes," Chapter 117—shows they are directed at conduct involving direct harm to victims of sexual abuse. Chapter 109A covers aggravated sexual abuse, § 2241; sexual abuse, § 2243; sexual abuse of a minor or ward, § 2244; abusive sexual contact, § 2244; and sexual abuse resulting in death, § 2245. Chapter 117 covers transporting persons for prostitution, § 2421; coercing or enticing individuals into prostitution, § 2422; transporting minors for illegal sexual activity, § 2423; offenses related to harboring immigrants for prostitution, § 2424; and enticing minors to engage in illegal sexual activity, § 2425. Chapter 110, applicable here, covers sexual exploitation of children (*i.e.*, using children to produce child pornography), § 2251; selling or buying children, § 2251A; and trafficking in child pornography, §§ 2252, 2252A. In particular, the provisions of § 2252A, governing child pornography, go far beyond the simple receipt offense of which Mr. Briggs was convicted—they cover those who mail, ship, transport, distribute, advertise, promote, possess with intent to sell, or distribute to minors any child pornography. § 2252A(a)(1), (2), (3)(B), (4)(A), (B), (6). All of these traffick-

ing activities—as well as the actual sex abuse covered under Chapter 109A, and the trafficking in individuals covered under §§ 2251, 2251A, and Chapter 117—may be said to impose the same harms on victims as the use of physical force, *see* § 3156(a)(4)(A), (B).

The same is not true of simple receipt of child pornography under § 2252A(a)(2)(A) (or simple possession of child pornography under § 2252A(a)(5)). Downloading, receiving, and possessing images of child pornography, though wrongful, does not pose the same danger as producing it, trafficking in it, or engaging in actual sexual abuse of children. As the *Reboux* court explained: "although the possession of child pornography . . . is labeled a 'crime of violence' . . . under § 3156(a)(4)(C), Defendant's conduct was not violent. He did not have sexual contact with any child, nor did he attempt to communicate with any child for illicit purposes. Obtaining child pornography for private sexual gratification, although wrongful, is not in and of itself an act of violence under any ordinary definition of that term." *Reboux*, 2007 WL 4409801, at *2. The same is true here.

The fact that the broad statutory definition of "crimes of violence" sweeps into its ambit offenses such as the downloading of images here is an extraordinary circumstance which makes automatic mandatory detention under § 3143(a)(2)—with no individualized consideration of the risks posed by this defendant—not appropriate. *See Reboux*, 2007 WL 4409801, at *1-*3. Here, the simple fact of Mr. Briggs's guilty plea to downloading prohibited images does not, standing alone, establish the same risks supporting detention that would be supported by conviction of offenses involving actual or likely use or force, or any offense covered by the other sex abuse or exploitation provisions contained in Chapters 109A, 110, and 117.

The fact that this distinction between offenses involving direct risk to children and simple receipt or possession would apply to any defendant guilty of a receipt or possession offense does

not make it insufficiently "extraordinary" under this Court's decision in *Sharp*.[4] Rather, the broad and rather arbitrary reach of § 3156's definition of "crime of violence," to reach offenses that are not, under any conceivable stretch of ordinary language, violent, is both "out of the ordinary" and "uncommon"—two of the general definitions of "extraordinary." *Sharp*, 517 F. Supp. 2d at 464. Indeed, although offenses involving receipt of child pornography are regrettably not rare, statutes that irrebuttably define conduct to be what it is not (in this case, violent) are sufficiently rare to be considered extraordinary. Treating simple receipt or possession offenses differently than the many direct-harm offenses under Chapters 109, 110 and 117 for purposes of mandatory detention under §§ 3156(c)(4) and 3143(a)(2) would not read mandatory detention entirely out of the statute, permitting release for any defendant who presents no flight or safety risk. *See Sharp*, 517 F. Supp. 2d at 464 (citing *United States v. Devinna*, 5 F. Supp. 2d 872, 873 (E.D. Cal. 1998)). Rather, it would simply ameliorate the hardship of *per se* mandatory detention, and permit individual consideration, of defendants whose simple receipt or possession offenses, without more, do not constitute crimes of violence under any ordinary sense of the word.

United States v. Cook, 526 F. Supp. 2d 10 (D.D.C. 2007) is not to the contrary. Although Judge Huvelle rejected Cook's contention that his conviction for violating a defendant's civil rights under 18 U.S.C. § 242 was "not the type of crime contemplated to require detention pending sentencing," she did not conclude that the inclusion of a non-violent offense within the defi-

[4] The fact that this Court rejected Sharp's claimed extraordinary reasons (relating to rehabilitation and the prospect of government assistance) on the facts of that case does not preclude consideration of the arbitrary reach of § 3156(c)'s definition as constituting an extraordinary reason here. *See, e.g., Stapf v. United States*, 367 F.2d 326, 330 & n.10 (D.C. Cir. 1966) ("Questions neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.") (quoting *Webster v. Fall*, 266 U.S. 507, 511 (1925)).

nition of "crimes of violence" could never be an exceptional reason warranting an exception from mandatory detention. Instead, she concluded that defendant Cook's crime—which "involved kicking and/or punching [a detainee] while he was bound to the other detainees arriving at Superior Court, resulting in injuries"—was a crime of violence fully warranting pre-sentencing detention. *Id.* at 19.

In sum, the fact that Mr. Briggs's offense conduct—downloading images—involved no violence or *direct* harm, and was swept within the statutory definition of "crime of violence" only because of the broad inclusion of all Chapter 110 offenses, is an exceptional reason showing that *per se* mandatory detention (as opposed to detention based on an individualized assessment of risk) is not appropriate.

4. The More Than Two Year Delay in Prosecution Is an Exceptional Circumstance

Finally, the more than two year delay between the discovery of Mr. Briggs's offense and the Government's request for detention, a period during which Mr. Briggs committed no additional wrongdoing and posed no risk of flight or danger, is an exceptional reason militating against detention. As already noted, the facts of this case parallel *Reboux* in this regard: the defendant notified the FBI in his first contact that he did not dispute downloading images. Here, the defendant, through counsel, indicated to the Department of Justice a desire to resolve the case expeditiously. In both cases, the next contact with the Government, and the first request for detention, came more than two years later, with the defendant having committed no wrongdoing in the interim. *See Reboux*, 2007 WL 4409801, at *1; Sec. A, *supra*. As the *Reboux* court explained:

> To say that the delay in prosecuting Defendant was 'uncommon' or 'rare' is an understatement. The FBI first obtained Defendant's admission statement

> on February 17, 2004, but did not arrest him until October 16, 2006, two years and eight months later.[5] During that time, Defendant . . . does not appear to have committed any additional offense. He . . . has made no attempt to flee.
>
> . . . Defendant's cooperation with authorities has been complete and unconditional.[6] . . . Although Defendant's cooperation did not produce the kind of societal benefits that an informant, who exposes criminal activity under threat of harm, might have provided, his substantial cooperation should be considered along with other factors pointing toward release.

Reboux, 2007 WL 4409801, at *3. The more than two-year delay in this case, nearly identical to *Reboux*, during which the Government made no attempt to detain Mr. Briggs and Mr. Briggs engaged in no wrongdoing, is an exceptional circumstance showing mandatory detention would not be appropriate in this case.[7]

CONCLUSION

For all of the foregoing reasons, under § 3145(c)'s "exceptional reasons" safety valve, this Court should find that Mr. Briggs poses no risk of flight or public danger, and should allow Mr. Briggs to remain on release pending sentencing, subject to the conditions recommended by Pretrial Services.

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[5] In this case, Mr. Briggs's law firm turned over his computer to the FBI in May 2006, and counsel reached out to the Department of Justice shortly thereafter to indicate a desire to resolve the case expeditiously. The next contact from the Government came on April 21, 2008, nearly two years later. Both sides promptly and in good faith negotiated the plea agreement, which was entered in early July 2008.

[6] In *Reboux*, the defendant gave the FBI a signed statement admitting downloading child pornography, and turned his computer over for inspection. 2007 WL 4409801, at *3. Here, Mr. Briggs's firm had already turned over his computer, but Mr. Briggs, through counsel, reached out to the Government to indicate a desire to resolve the case promptly and without trial.

[7] To be clear, Mr. Briggs does not fault the Government for taking the time to investigate the evidence, or contend that the delay constituted a violation of rights in any way. Nor does he seek to punish a good deed by faulting the Government's decision not to detain him earlier. He only points out, as did the *Reboux* court, that the fact that he has remained free and unrestricted for a period of years, and that he has not engaged in wrongdoing during that time, is strongly indicative of the lack of any risk, from both his and the Government's point of view.

Respectfully submitted,

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