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Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000918-MR

TERRANCE K. DAVIS — APPELLANT

v.

APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE JULIE REINHARDT WARD, JUDGE
ACTION NO. 10-CR-00350

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING IN PART,
AND REVERSING IN PART

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; J. LAMBERT AND VANMETER, JUDGES.

ACREE, CHIEF JUDGE: Terrance Davis appeals his April 24, 2013 judgment of conviction in Campbell Circuit Court for armed robbery. For the reasons stated, we find no merit in Davis's arguments for reversing his conviction and affirm it. However, we conclude that the circuit court's order that Davis pay a partial public-defender fee was error and reverse on that ground.

BACKGROUND

Davis's conviction stems from his role in a May 2010 armed robbery in Newport, Kentucky. Davis's victims, three roommates from Cincinnati, left a restaurant at Newport on the Levee around 1:00 a.m. As the roommates approached their truck parked in the lot at the restaurant, one of them noticed three people sitting in a nearby purple car. When the roommates got in their truck to leave, two men exited the purple car and approached them. One man stood on each side of the truck. The man who stood on the driver's side brandished a pistol and demanded the roommates surrender their cell phones and wallets. The roommates complied, and the men fled in the purple car.

One of the roommates managed to conceal his cell phone. As the robbers drove away, the roommate called 911 and provided dispatchers with the make, model, and license plate number of the purple car.

Shortly after receiving the 911 call, police stopped a purple car matching the roommates' description in Cincinnati. Consistent with the roommates' report of the crime, the purple car contained three people – Davis, who was the driver, and two passengers. A search of the vehicle revealed handguns in the glove compartment. When police brought the roommates across the Ohio River to the car they had stopped, all three roommates recognized and identified Davis as the man who brandished the firearm and who demanded their belongings.

Davis was arrested in Cincinnati and incarcerated at Southeastern Correctional Institution in Lancaster, Ohio. On July 22, 2010, a Campbell County,

Kentucky, grand jury indicted Davis on charges of First-Degree Robbery. Kentucky prosecutors lodged a detainer[1] with Ohio authorities on July 29, 2010.

Davis was presented with a packet of forms designed to assure compliance with the Interstate Agreement on Detainers (IAD) to which both Kentucky and Ohio are parties. Form I notified him of charges pending in Kentucky. Form II, once completed by Davis and delivered to the proper authorities, would serve as his request to dispose of the Kentucky indictment. Form III was to be completed by the warden to certify Davis's inmate status.

Although Davis signed and delivered these forms to Ohio correctional officers on October 6, 2010, he never authorized prison officials to deduct the sum from his prison account necessary to pay the statutorily required postage for certified mail, return-receipt requested, to transmit the forms to the proper Kentucky authorities. KRS[2] 440.450 Art. III (2). Consequently, these forms were never mailed and were never received by the prosecutor or the court.

Eventually, Davis served his time in Ohio. In May 2012, he was brought to Campbell County where his prosecution proceeded. Prior to trial, Davis moved to dismiss his charges, citing a violation of the IAD. The Campbell Circuit Court denied his motion, and Davis faced a jury trial on February 18, 2013.

[1] A detainer "is a request filed by a criminal justice agency with the institution in which a prisoner is incarcerated, asking that the prisoner be held for the agency, or that the agency be advised when the prisoner's release is imminent." *Fex v. Michigan*, 507 U.S. 43, 44, 113 S.Ct. 1085, 1087, 122 L.Ed.2d 406 (1993).

[2] Kentucky Revised Statutes.

During trial, Davis moved for a mistrial. As grounds, Davis pointed to the testimony of Officer Scott Mittermeier. Officer Mittermeier testified that Davis admitted to possessing the guns found in the car. This statement was provided to defense counsel prior to trial. However, Officer Mittermeier also testified that Davis confessed to being the only one of the three alleged robbers ever to have touched the guns. This statement was not provided to the defense before trial. After hearing argument, the circuit court denied Davis's motion for a mistrial. Instead, the court admonished the jury to disregard all testimony as to Davis's second statement that no one else touched the guns.

At the close of proof, Davis requested a jury instruction for the lesser-included offense of criminal facilitation to commit robbery. The circuit court evaluated the evidence, determined a lesser-included instruction was not warranted, and declined to instruct the jury on the lesser-included offense.

The jury convicted Davis of First-Degree Robbery and he was sentenced to imprisonment for ten years. At sentencing, the circuit court ordered Davis to pay a fee of $125 to partially defray the cost of his public defender.

Davis now appeals.

ANALYSIS

Davis presents several arguments on appeal. First, he argues that the circuit court should have dismissed the case because of the government's violation of the IAD. Second, Davis claims a *Brady*[3] violation should have required the court to

[3] *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

declare a mistrial. Third, he argues that the trial court erred by failing to instruct the jury on the lesser-included offense of criminal facilitation. Fourth, Davis urges reversal of the trial court's order that he pay any fee to compensate counsel appointed to defend him. Of these four arguments, we find merit only in the last. We will address each in the order Davis presents them and will state the standard of review in the context of each analysis.

Dismissal of the indictment for noncompliance with the IAD is unwarranted

Claims of noncompliance with the IAD are reviewed by construing its language as codified at KRS 440.450. Such construction presents a legal question subject to *de novo* review, and we need not defer to the circuit court. *Ragland v. DiGiuro*, 352 S.W.3d 908, 912 (Ky. App. 2010).

More significantly, especially in understanding Kentucky's jurisprudence in this area of the law, the IAD is a federal law subject to federal construction with the United States Supreme Court having the final word. *Cuyler v. Adams*, 449 U.S. 433, 442, 101 S.Ct. 703, 708-09, 66 L.Ed.2d 641 (1981); *Bryant v. Commonwealth*, 199 S.W.3d 169, 173 n.2 (Ky. 2006). Furthermore, "[i]t is beyond cavil that '[w]hen [the United States Supreme Court] applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law[,]' [and a]s the issues presented on appeal involve the interpretation of the IAD, which is a matter of federal law, we are bound under the pre-emption doctrine (United States Constitution Article VI) to follow the rule set forth in *Fex*

[*v. Michigan*, 507 U.S. 43, 113 S.Ct. 1035, 122 L.Ed.2d 406 (1993)]." *Wright v. Commonwealth*, 953 S.W.2d 611, 615 (Ky. App. 1997).

By this standard, and contrary to Davis's assertion, neither federal law nor Kentucky precedent required the circuit court to dismiss his charges based on his claim of his substantial compliance with the IAD.

The IAD is a compact entered into by forty-eight states, including Kentucky and Ohio, the United States and the District of Columbia to establish procedures for resolution of one jurisdiction's outstanding charges against a prisoner of another. *See New York v. Hill*, 528 U.S. 110, 111, 120 S.Ct. 659, 662, 145 L.Ed.2d 560 (2000). The provision of the IAD at issue here is the section requiring that Davis:

> be brought to trial within one hundred eighty (180) days after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment . . . .

KRS 440.450 Art. III (1). If the requirements of this paragraph are not satisfied, "the appropriate court of the jurisdiction where the indictment . . . has been pending shall enter an order dismissing the same with prejudice, and any detainer based thereon shall cease to be of any force or effect." KRS 440.450 Art. V (3).

Before proceeding with analysis of Davis's arguments, however, we wish to reiterate one crucial fact – neither the appropriate Kentucky prosecuting official

nor the appropriate Kentucky court ever received Forms I, II, or III as required by the IAD.

Notwithstanding this fact, Davis presents several ways to view his case so as to conclude that Article III (1) of the IAD was violated by the government and, therefore, that his indictment should have been dismissed with prejudice. We consider each of them below, but find merit in none.

Davis's first argument is straightforward. He says that when he placed his request for disposition of his Kentucky indictment in the hands of Ohio correctional authorities on October 6, 2010, he "caused to be delivered [his] written notice" that started the 180-day limitations period. He was not brought to trial within 180 days of that date. Therefore, he argues that the IAD compels that the Kentucky indictment against him "shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice." KRS 440.450 Art. III (4). We disagree.

While Davis acknowledges that federal law controls here, he never cites the controlling federal precedent – *Fex v. Michigan*. In *Fex*, the Supreme Court of the United States focused very narrowly on this very question. The Court's sole task was determining:

> the meaning of the phrase, in Article III(a) [KRS 440.450 Art. III (1)], "within one hundred and eighty days after he shall have caused to be delivered." The issue, specifically, is whether, within the factual context before us, that phrase refers to (1) the time at which petitioner transmitted his notice and request . . . to the . . . correctional authorities [in the state holding the prisoner];

> or rather (2) the time at which the . . . prosecutor and court [in the state seeking to prosecute the prisoner] received that request.

Fex, 507 U.S. at 47, 113 S.Ct. at 1088. The Supreme Court held "that the 180-day time period in Article III (a) of the IAD [KRS 440.450 Article III (1)] does not commence until the prisoner's request for final disposition of the charges against him has *actually been delivered to the court and prosecuting officer of the jurisdiction that lodged the detainer against him*." *Id.* at 52, 113 S.Ct. 1085 (emphasis added). As it must, our own Kentucky Supreme Court abides by this pronouncement. *See, e.g., Rosen v. Watson*, 103 S.W.3d 25, 29 (Ky. 2003) ("In *Fex*, the Court . . . held that the 180-day period was not triggered until the 'appropriate prosecuting official' physically received the prisoner's request."); *see also Ward v. Commonwealth*, 62 S.W.3d 399, 403 (Ky. App. 2001) ("the 180 day period to dispose of outstanding charges would not have been triggered until the prisoner's request for final disposition had been delivered to the court and to the prosecutor"). Davis does not dispute the fact that neither the prosecuting attorney who filed the detainer nor the proper court where he would be prosecuted ever received the IAD forms by which he was to request disposition of the Kentucky indictment. Based on a plain and straightforward reading of *Fex*, it cannot be questioned that this argument must fail.

However, Davis refines his argument claiming, "the Commonwealth was on notice" because "an Assistant Commonwealth's Attorney had been informed by Davis that he had started IAD proceedings." (Appellant's brief, p. 4). This is not

enough: "failure to strictly comply [with the provisions of the IAD] is insufficient to invoke [its] provisions . . . ." *Clutter v. Commonwealth*, 322 S.W.3d 59, 64 (Ky. 2010). Nothing in the IAD authorizes verbal notification. Rather, the statute expressly states that the detainee must "cause[] to be delivered . . . *written* notice of . . . his request for final disposition . . . ." KRS 440.450 Art. III (1) (emphasis added). This first alternate argument, therefore, must also fail, and this time based on a plain and straightforward reading of the governing statute.

Again, however, Davis refines his argument. He argues that *Clutter v. Commonwealth* recognizes an extant exception to the strict compliance requirement of the IAD and that *his* doing all *he* could do, combined with the government officials' thwarting of his efforts, is sufficient to require dismissal of the Kentucky indictment. We believe Davis misreads *Clutter* which merely addressed an argument with which it was presented and that was based on Kentucky's former interpretation of federal law, an interpretation which had already been rejected by the United States Supreme Court in *Fex*, long before *Clutter* was rendered.

Before applying *Clutter* here, we must examine the opinion more closely because it presents an anachronistic analysis. That is to say, our view is that the Kentucky Supreme Court, being respectful of and responsive to the argument that "Clutter substantially complied with the provisions of the interstate agreement on detainers,"[4] courteously engaged in a rhetorical analysis of a defunctive argument

[4] Reply Brief of Appellant at 2, *Clutter v. Commonwealth*, Appellee, Nos. 2008-SC-000747-MR, 2009-SC-000025-MR, 2010 WL 4203391 (Ky. January 25, 2010).

using only the pre-1993 authority Clutter presented to the Court.[5] This is the only explanation why *Clutter* cites none of the controlling and otherwise relevant authority rendered during the 18 years prior to its rendition.

The facts of *Clutter* are somewhat atypical. IAD cases often begin with the defendant already housed in a correctional facility in one state (the sending state) when he is indicted in another state (the receiving state). That was not so in *Clutter*. He was not in custody anywhere when the Kentucky prosecutor indicted him. At least the opinion gives no indication that he was. He was subjected to the jurisdiction of the Kentucky court first, then freed on bond while the prosecution of the indictment against him was proceeding. While awaiting his state court trial, he was arrested by federal authorities and charged with committing a separate, federal crime. He pleaded guilty to the federal charge and was sentenced in June 1999 to ten years' imprisonment in a federal correctional facility.[6] *Id.* at 61.

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[5] We have access only to Clutter's reply brief which cites no authority relating to the IAD. We reach the conclusion that Clutter's other brief cites no authority after 1992 because the opinion itself cites none, a fact we are certain cannot be explained by the Court's lack of research.

[6] The opinion never identifies the federal detention facility where Clutter was incarcerated. However, the judgment of conviction in his federal case, *USA v. Clutter*, No. 2:98-cr-00096-WOB (E.D. Ky. June 10, 1999), includes Judge William O. Bertelsman's incarceration "recommendation to FCI Manchester[,]" *i.e.*, the federal prison in Manchester, Kentucky. This information is available "through the Public Access to Court Electronic Records (PACER) database, . . . an electronic public access service that allows users to obtain case and docket information from Federal Appellate, District and Bankruptcy courts[,] . . . is a service of the United States Judiciary and is operated by the Administrative Office of the United States Court." *Doe v. Golden & Walters, PLLC*, 173 S.W.3d 260, 265, 265 n.20 (Ky. App. 2005). KRS 440.450 Art. II (1) defines the United States of America as a different "state" from Kentucky and, therefore, it was irrelevant whether Clutter was incarcerated in a federal facility within Kentucky or outside its borders. While we refer to the IAD as an inter*state* agreement, it is more accurately called an inter*jurisdictional* agreement on detainers since the United States became a party.

Very soon after his federal incarceration, less than five months after his federal sentencing, "Clutter filed a motion for speedy trial with the Gallatin Circuit Court and informed that court of his status of federal incarceration." *Id.* at 62. The *Clutter* opinion then describes a further series of efforts by Clutter to dismiss the Kentucky indictment or obtain his release for violating his right to a speedy trial. *Id.* at 62-63. Nothing in the opinion indicates that any of these efforts was responsive to the filing of a detainer, or that Clutter used the forms designed for his response under the IAD that we described earlier in this opinion in the context of Davis's appeal. *See also Bryant*, 199 S.W.3d at 170 (describing IAD Form I and Form II).

When, where, or whether a detainer was filed is never stated in *Clutter*. That is unusual because the filing of a detainer is an essential prerequisite to any analysis under the IAD: "the provisions of the Agreement are triggered only when a 'detainer' is filed with the custodial (sending) State by another State (receiving) having untried charges pending against the prisoner[.]" *U. S. v. Mauro*, 436 U.S. 340, 343, 98 S.Ct. 1834, 1839, 56 L.Ed.2d 329 (1978). However, the fact that our Supreme Court undertook the IAD analysis beginning with Clutter's November 1999 request for a speedy trial forces us to presume not only that a detainer was filed, but that it was filed before November 1999. Otherwise, all of *Clutter*'s discussion of IAD jurisprudence would be dicta to the extent it was applied to any speedy trial request that preceded the filing of a detainer. *Id.*

Having surmised the facts necessary to begin understanding the Supreme Court's IAD analysis of Clutter's appeal, we turn to the idiosyncrasies of the analysis itself. Immediately obvious, as previously noted, is the complete absence from this 2010 opinion of any citation to authority more recently rendered than 1992. That means *Clutter* does not cite *Fex*, the decisive, watershed case resolving with black-letter law the splits of authority as to the start of the 180-day period within which the prisoner incarcerated in one state is to be tried in another. It also means *Clutter* does not cite the anchor Kentucky Supreme Court case on the IAD, *Bryant v. Commonwealth*, 199 S.W.3d 169 (Ky. 2006),[7] nor does it mention any other Kentucky Supreme Court case that cites *Fex*,[8] nor does it cite any of the several Kentucky Court of Appeals decisions that apply *Fex* or *Bryant* or both,[9] nor

[7] *Bryant* recognized that *Fex* impliedly overruled *Lovitt v. Commonwealth*, 592 S.W.2d 133, 134 (Ky. 1979), which expressly based its reasoning on *Pittman v. State*, 301 A.2d 509 (Del. 1973), a case *Clutter* cites as recognizing an exception to the delivery requirement of the IAD.

[8] In addition to *Bryant*, there are the Kentucky Supreme Court cases of *Donahoo v. Dortch*, 128 S.W.3d 491, 493 (Ky. 2004), *as modified* (Mar. 26, 2004) (citing *Fex* for definition of "detainer") and *Rosen v. Watson*, 103 S.W.3d 25, 29 (Ky. 2003) (noting that *Fex* "interpret[ed] the 'delivery' requirement of the IAD [as not met] until the 'appropriate prosecuting official' physically received the prisoner's request"), though these cases would not have been as helpful as *Bryant* to the analysis in *Clutter*.

[9] *Ward v. Commonwealth*, 62 S.W.3d 399, 402-03 (Ky. App. 2001), *disc. rev. denied* (Ky. January 9, 2002) (holding speedy trial rights were not triggered because no detainer filed but stating, in dicta, "there was no evidence that the Tennessee authorities [the sending state officials] deliberately or negligently attempted to thwart his rights"); *Wright v. Commonwealth*, 953 S.W.2d 611, 613-15 (Ky. App. 1997), *disc. rev. denied* (October 23, 1997) (recognizing that *Fex* impliedly overruled *Lovitt v. Commonwealth*, 592 S.W.2d 133, 134 (Ky. 1979)); *see also Reed v. Commonwealth*, 2001-CA-001543-MR, 2003 WL 22060178, at *2 (Ky. App. Sept. 5, 2003), *disc. rev. denied* (Ky. June 9, 2004); *Mezo v. Commonwealth*, 2004-CA-001306-MR, 2005 WL 858188, at *5 (Ky. App. Apr. 15, 2005), *disc. rev. denied* (Ky. March 15, 2006); *Hensley v. Commonwealth*, 2005-CA-002176-MR, 2006 WL 2034274, at *1-3 (Ky. App. July 21, 2006), *disc., rev. denied* (Ky. December 13, 2006); *Newell v. Commonwealth*, 2008-CA-000755-MR, 2009 WL 103300, at *1 - *2 (Ky. App. Jan. 16, 2009), *disc. rev. denied* (Ky. Aug. 19, 2009); *Yearby v. Commonwealth*, 2007-CA-001962-MR, 2009 WL 792560, at *3 n.9 (Ky. App. Mar. 27, 2009), *disc. rev. denied* (Ky. October 21, 2009).

does it cite any of the several hundred cases from other state and federal jurisdictions applying *Fex*.[10] As we explain below, we conclude that our Supreme Court was simply using pre-*Fex* law to meet and match, and courteously analyze, Clutter's pre-*Fex* argument to show that he would not qualify for an exception to the IAD's delivery requirement (the "prisoner-did-all-he-could-do" exception) that existed before *Fex*, but no longer exists today. This conclusion is the only viable explanation why *Clutter* cites nothing after 1992. It also explains why *Clutter* neither overrules *Bryant* (or *Wright v. Commonwealth*, the Court of Appeals opinion that presaged *Bryant*) nor explains any incongruity among the cases. Furthermore, Davis's analysis of *Clutter* – that it represents a new or revitalized exception to *Fex* – can only be correct if one accepts the erroneous premise that a state court has the authority to render an opinion that is contrary to the United States Supreme Court's interpretation of a federal law.

It is now time in this opinion, then, to put pre-*Fex*, *Fex*, and post-*Fex* law into context relative to the case before us and relative to *Clutter*.

Anyone possessing a basic familiarity with IAD jurisprudence knows that before 1993 there was a split among the federal circuits and among the states regarding what event or events trigger the 180-day window when a defendant incarcerated in another state must be brought to trial. In those bygone days,

> judicial opinion as to when the 180-day period began to run varied, focusing on three different events: (1) when the inmate made the written request for prompt disposition to the custodian; (2) when the custodian

[10] WestlawNext search shows *Fex* has been cited in more than 300 federal and state cases.

> mailed the written request and the accompanying documentation to the appropriate prosecutor and court[11]; and (3) when the prosecutor and court received the request and other documents. . . . [T]he majority of jurisdictions followed the third view.

Leslie W. Abramson, *The Interstate Agreement of Detainers: Narrowing Its Availability and Applications*, 21 New Eng. J. on Crim. & Civ. Confinement 1, 24-25 (1995) (footnotes omitted).

In 1973, Delaware's highest court interpreted that state's version of the IAD and opted for the first view. *Pittman v. State*, 301 A.2d 509 (Del. 1973). The relevant facts of *Pittman* are that a Maryland prison official misinformed one of his prisoners with pending Delaware criminal charges that Delaware was not a party to the IAD; the Maryland official then refused to provide the prisoner with IAD forms to request disposition of those Delaware charges. *Id.* at 510. The prisoner then sent a handwritten request to prosecution and court officials in Delaware demanding a speedy trial. *Id.* at 511. After the trial court denied his motion to dismiss the charges based on the prosecutor's failure to try him within the IAD time limit, he was tried and convicted.

On appeal, Delaware's high court declared the prisoner's efforts good enough, rejecting the prosecutor's argument "to hold Pittman to strict compliance with the statute" and refusing "to excuse the mistakes of the Maryland official and

[11] Our research reveals that Iowa is the only jurisdiction ever to have adopted this second view. *State v. Wood*, 241 N.W.2d 8, 11-13 (Iowa 1976). Following *Fex*, however, Iowa ascribes to the third view. *State v. Widmer-Baum*, 653 N.W.2d 351, 355 (Iowa 2002) ("prisoner must be brought to trial within 180 days after written notice of the request has been delivered to the prosecutor in the appropriate court of the receiving state" (citing *Fex v. Michigan*, 507 U.S. 43, 52, 113 S.Ct. 1085, 1091, 122 L.Ed.2d 406, 416 (1993)).

the neglect of the [Delaware] Attorney General's office." *Id.* at 514. The court held instead that any "burden of compliance with the procedural requirements of the IAD rests upon the party states and their agents; the prisoner, who is to benefit by this statute, is not to be held accountable for official administrative errors which deprive him of that benefit." *Id.*

In 1979, the Kentucky Supreme Court was faced with facts similar to those in *Pittman*; that is to say, the Court was to judge the rights under the IAD of a prisoner who "did all that the statute required of him to secure a prompt trial as defined in the statute [IAD.]" *Lovitt v. Commonwealth*, 592 S.W.2d 133, 134 (Ky. 1979), *implied overruling recognized by Bryant*, 199 S.W.3d at 174. Without setting forth any independent analysis, the Court resolved the case in a four-paragraph opinion by adopting "the better reasoned cases and in particular *Pittman v. State*, 301 A.2d 509 (Del. 1973)[.]" *Id.* Beginning with that opinion, Kentucky embraced the first view. As we shall see, the embrace would not last.

As it turns out, the Delaware legislature did not agree with its high court's interpretation of the legislation it passed. In 1981, in direct response to *Pittman*, the Delaware lawmakers rejected the first-view approach in favor of the third view by adding a section to its version of the IAD which says:

> Written notice shall not be deemed to have been caused to be delivered to the prosecuting officer and the appropriate court of this State in accordance with subsection (a) of this section until such notice or notification has *actually been received by the appropriate court and by the appropriate prosecuting attorney* of this State, the prosecuting attorney's deputy,

> an assistant or any other person empowered to receive mail on behalf of said attorney.

Del. Code Ann. tit. 11, § 2542(g) (emphasis added).[12] This legislative action eliminated the "prisoner-did-all-he-could-do" exception to the IAD's delivery requirement as a matter of Delaware law. A bit more than a decade later, *Fex* would do the same as a matter of federal law, eliminating this exception both in federal and state jurisdictions including, as *Bryant* recognized, Kentucky.

The language of the holding in *Fex* is similar to the amendment of the Delaware version of the IAD, and the effect is the same:

> We hold that the 180-day time period in Article III(a) of the IAD does not commence until the prisoner's request for final disposition of the charges against him has *actually been delivered to the court and prosecuting officer of* the jurisdiction that lodged the detainer against him.

Fex, 507 U.S. at 52, 113 S.Ct. at 1091 (emphasis added). Other language building up to that holding, as harsh as it may be,[13] left no room for any exception.

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[12] For citation to the supersession, see *Bryant*, 199 S.W.3d at 173 (citing *Pittman v. State,* 301 A.2d 509, 514 (Del.1973), *superseded by statute,* Del.Code Ann. tit. 11, § 2542(g)). For a further explanation of the supersession, see *State v. Farrow*, 2005 WL 1653992, at *2 (Del. Super. June 3, 2005), wherein that court stated:

> The Court in *Pittman* believed that the State should bear the risk of dismissal when there is a mistake in processing a request. *Id.* In 1981, the General Assembly signaled an opposite conclusion. In the House report, *Pittman* is cited as the reason for the amendment which requires actual notice to the prosecutor before a case can be dismissed. Synopsis to H.B. No. 108 of the 131st General Assembly, 63 Del. Laws Ch. 32. In the context of this case, the policy rationale in *Pittman* does not survive this change. The State must bear the risk of dismissal only in cases of actual notice.

[13] Ohio prisoners, including Davis, are not entirely without recourse. A prisoner in Ohio may obtain a writ of mandamus to compel a warden to perform his statutory duty. In *State ex rel. Dehler v. Kelly*, 123 Ohio St. 3d 297, 915 N.E.2d 1223 (Ohio 2009), a prisoner, acting *pro se*, sought a "writ of mandamus to compel a prison warden to provide [him with a pair of] properly fitting shoes . . . ." *Id*. at 297. He apparently obtained the shoes; the appeal was dismissed as

Applying "commonsense[,]" the Court examined "the 'worst-case scenarios' under the two interpretations [the first view and the third view] of the IAD." *Id.* at 49, 113 S.Ct. at 1089. The Court first considered the negative consequences under the view it chose to adopt, the third view – that the 180-day window for prosecuting the prisoner begins when the prisoner's request to prosecute has "actually been delivered to the court and prosecuting officer of the jurisdiction that lodged the detainer." *Id.* at 52, 113 S.Ct. at 1091.

What if, said the Court, "a warden, through negligence *or even malice*, . . . delay[ed] forwarding of the request and thus postpone[d] the starting of the 180-day clock"? *Id.* (emphasis added). "[T]he prisoner (if he has not checked about the matter for half a year) will not learn about the delay . . . [and] will spend several hundred additional days under detainer (which entails certain disabilities . . .), and will have his trial delayed several hundred days. That result is bad, given the intent of the IAD." *Id.* at 49-50, 113 S.Ct. at 1089-90. "[H]owever, the worst-case scenario under petitioner [Fex]'s interpretation [the first view] produces results that are significantly worse[.]" *Id*. at 50, 113 S.Ct. at 1090.

To begin, the Court noted that delay of the trial for these reasons is "no worse than what regularly occurred before the IAD was adopted . . . ." *Id*.

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moot because "[m]andamus will not compel the performance of an act that has already been performed." *Id.* at 298. In Kentucky, and elsewhere, it remains true that among a prisoner's First Amendment rights is the right to seek redress by filing grievances. *See Bruce v. Ylst,* 351 F.3d 1283, 1288 (9th Cir. 2003); *Toolasprashad v. Bureau of Prisons,* 286 F.3d 576, 584 (D.C.Cir. 2002); *Herron v. Harrison,* 203 F.3d 410, 415 (6th Cir. 2000). It seems to this Court that a prisoner has not done all he can do under the IAD until he has exhausted these rights.

More importantly, because it "is self-evidently true" that "no one can have 'caused something to be delivered' unless delivery in fact occurs[,]" then under *every* view the 180-day period can only be calculated "*once delivery has been made*[.]" *Id.* at 47-48, 113 S.Ct. at 1088-89 (emphasis in original). That means "the careless or malicious warden, under petitioner [Fex's third view] interpretation, may be unable to *delay* commencement of the 180-day period, but can *prevent it entirely,* by simply failing to forward the request." *Id.* at 50, 113 S.Ct. at 1090 (emphasis in original). If the official succeeds in preventing delivery entirely, the 180-day period will *never* start and the prisoner will *never* be afforded the benefit of having the charges dismissed. KRS 440.450 Art. V (3) (charges may only be dismissed after the 180-day period has run). The Supreme Court thus concluded that the IAD "is simply not susceptible of" any "reading that would give effect [*i.e.*, require eventual dismissal of an indictment] to a request that is never delivered *at all*." *Id.* at 52, 113 S.Ct. at 1091. This pronouncement eliminates the possibility of an exception based on an official's thwarting of the prisoner's efforts.

Rejecting the first view for the third, the Supreme Court said "[i]t is more reasonable to think that the receiving State's prosecutors are in no risk of losing their case until they have been *informed* of the request for trial." *Id.* at 51, 113 S.Ct. at 1090 (emphasis in original). Then, in the clearest and simplest of terms, the Supreme Court said: "the receiving State's receipt of the request starts the clock." *Id.* at 51, 113 S.Ct. at 1090.

However, the Court continued, making its black-letter ruling even clearer. The Court expressly rejected the prisoner's "policy argument that fairness requires the burden of compliance with the requirements of the IAD to be placed entirely on the law enforcement officials involved, since the prisoner has little ability to enforce compliance[.]" *Id.* at 52, 113 S.Ct. at 1091 (internal quotation marks and citation to Appellant's brief omitted). The Court acknowledged that its approach would mean "it is possible that a warden, *through negligence or even malice*, can delay forwarding of the request and thus postpone the starting of the 180-day clock . . . leaving neither a legal nor a practical limit on the length of time prison authorities could delay forwarding a [request.]" *Id.* at 49, 52, 1089, 1091 (emphasis added). Again, the Court made it clear that it was willing to accept the possibility even that a government official's malice could thwart a prisoner's efforts under the IAD, noting that the "'fairness' and 'higher purpose' arguments are . . . more appropriately addressed to the legislatures of the contracting States, which adopted the IAD's text." *Id*. at 52, 113 S.Ct. at 1091.

And this returns us to the Supreme Court's holding that "the 180-day time period in Article III(a) of the IAD [KRS 440.450 Art. III (a)] does not commence until the prisoner's request for final disposition of the charges against him has actually been delivered to the court and prosecuting officer of the jurisdiction that lodged the detainer against him." *Id.*

Some critics say "*Fex* clearly frustrates inmate rights." Abramson, *supra*, at 27. And while this may be true, the same critics are compelled to acknowledge the

case's effect: "If either the warden of the sending state or the prosecuting authorities of the receiving state fails to comply with their duties under Article III, the inmate's desire to expedite untried charges is defeated and mandatory dismissal is not warranted." *Id.*

Kentucky courts recognized this effect of *Fex*, too.[14] Of greatest import, in chronological order, are *Wright v. Commonwealth*, 953 S.W.2d 611 (Ky. App. 1997) and *Bryant v. Commonwealth*, 199 S.W.3d 169 (Ky. 2006).

In *Wright*, the appellant based his argument on the Kentucky case of *Lovitt* and the Delaware case of *Pittman*. He was attempting to convince this Court to dismiss the Kentucky indictment against him because his Ohio warden had misdirected his IAD request for disposition of the Kentucky indictment to the wrong prosecutor. *Wright*, 953 S.W.2d at 613. Our opinion quoted *Lovitt* and *Pittman* and their exception to the strict compliance requirement of actual delivery, but then we cited *Fex* as "impliedly overruling *Lovitt*[.]" *Id.* at 615. We also rejected Wright's additional argument that there is leeway in *Fex*'s interpretation of federal law that allows for exceptions based on the idea that "the states are free to adopt more restrictive protections for its residents [inmates]." *Id.* We said then, and we now repeat:

> It is beyond cavil that "[w]hen [the United States Supreme Court] applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law. . . ." *Harper v. Virginia Department of Taxation,* 509 U.S. 86, 113 S.Ct. 2510, 125 L.Ed.2d 74 (1993). As the issues presented on appeal involve the

[14] *See* footnotes 7-9, *supra*.

> interpretation of the IAD, which is a matter of federal law, we are bound under the pre-emption doctrine (United States Constitution Article VI) to follow the rule set forth in *Fex, supra.*

Id. Nearly a decade later, our Supreme Court would agree.

In *Bryant*, a Caldwell County prosecutor lodged a detainer and completed and forwarded forms to notify a prisoner in an Illinois correctional center of a Kentucky indictment against him. *Bryant*, 199 S.W.3d at 170. Upon receipt of those forms, the prisoner completed and delivered them to the Illinois warden who then delivered them to the wrong Kentucky officials. *Id.* at 170-71. As did the appellant in *Wright*, the appellant in *Bryant* argued that he "did all that was required of him under the IAD" and that "any error in the delivery of his disposition request could be attributed to the staff at [the Illinois prison] and that it would be unfair to impute that error to him." *Id.* at 171, 173. He also "quote[d] extensively from *Pittman* and state[d] that its 'reasoning was adopted by this Court in *Lovitt, supra,* and it stands as a statement of the law of this Commonwealth.'" *Id.* at 173. In other words, he argued the continuing viability of the "prisoner-did-all-he-could-do" exception. A unanimous Kentucky Supreme Court did not agree, stating:

> this argument ignores controlling case law on this subject, in particular, the United States Supreme Court's opinion in *Fex v. Michigan,* 507 U.S. 43, 113 S.Ct. 1085, 122 L.Ed.2d 406 (1993). The Kentucky Court of Appeals acknowledged as much in *Wright v. Commonwealth,* 953 S.W.2d 611 (Ky. App. 1997), wherein it noted that *Fex*

> impliedly overrul[ed] *Lovitt* by holding that the 180–day time period in Article III of the IAD did not commence until the prisoner's request for final disposition of the charges against him *had actually been delivered* to the court or prosecuting officer of the jurisdiction that had lodged the detainer against him.
>
> *Wright,* 953 S.W.2d at 615. We agree with the Court of Appeals' analysis and note that our decision in *Lovitt* has been overruled to the extent that it would compel a different result than would the Supreme Court's opinion in *Fex.*

Id. at 173-74.

Bryant was rendered when Chief Justice Joseph Lambert presided over the Court.[15] After his retirement, the Chief Justice served as a senior judge on this Court of Appeals and, in that capacity, wrote the only Kentucky opinion, until this one, to cite *Bryant*. *Newell v. Commonwealth*, 2008-CA-000755-MR, 2009 WL 103300, at *2 (Ky. App. Jan. 16, 2009), *disc. rev. denied* (Ky. August 19, 2009). In *Newell v. Commonwealth*, the Chief Justice cited *Wright*, as well as *Bryant*. Then, in two sentences, he succinctly stated what we have taken pages to say: "Kentucky decisions are in accord with the Supreme Court of the United States. *Fex v. Michigan,* 507 U.S. 43, 113 S.Ct. 1085, 122 L.Ed.2d 406 (1993), held that dismissal was not required when delivery was delayed even when the reason was bad faith of the warden." *Id.* That remains the state of the law today.

We have thoroughly examined Kentucky jurisprudence in this area of the law. We can reach no other conclusion under the current iteration of Kentucky's

[15] Kentucky's Chief Justice is the presiding officer of the Supreme Court. Kentucky Supreme Court Rule (SCR) 1.020(1)(b). *Bryant*'s author, however, was Justice John Roach.

version of the IAD, than that once a detainer is lodged, the 180-day time limit on bringing to trial the prisoner of another jurisdiction will never begin running until there is actual "deliver[y] to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction [of] written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information or complaint[.]" KRS 440.450 Art. III (1). Based on this analysis and this conclusion, we are persuaded that there is no merit in Davis's argument that *Clutter* recognizes an exception to strict application of the IAD and *Fex*, as interpreted in *Bryant*, that remains viable *today*. The argument for an exception to the actual delivery requirement when delivery is thwarted by government action requires that we give effect to a request for disposition even when the request is *never* received by the prosecutor; such an exception truly would swallow the rule. That scenario and exception was considered and explicitly rejected in *Fex*. *Fex*, 507 U.S. at 50, 113 S.Ct. at 1090 (implausible that legislature intended a possibility that "the prosecution will be precluded before the prosecutor even knows it has been requested").

Davis tweaks his argument one last time. This one has a separate constitutional aspect to it. He directs the Court to a handwritten note in the record which says Davis "has not paid for cash receipt." The parties understand this as referring to the requirement that Davis's request for disposition of the indictment be delivered "by certified mail, return receipt requested." KRS 440.450 Art. III (2). Davis claims he was indigent at the time he gave to the Ohio warden his

request for disposition of the Kentucky indictment. Based on that assertion, he argues his constitutional right of access to the courts required the warden to provide free postage. In other words, Davis claims his indigency necessarily shifted the burden to the warden to pay the certified mail, return-receipt requested postage and to mail his request for disposition of the indictment. According to Davis's argument, the warden's failure to do so violated his constitutional right of access to the courts and requires dismissal of his Kentucky indictment.

This argument fails for a very basic reason. The record contains no evidence that Davis was indigent while incarcerated in Ohio. Citation in his brief to prove he was indigent at that time directs us only to his counsel's written argument before the circuit court, not to any evidence. The Ohio institution where he was incarcerated does provide "guidelines that ensure inmates have adequate access to courts," including additional postage for indigent inmates.[16] Ohio Dept. of Rehab. and Corr. 1361 I., IV., 1362 VI.D.2. (promulgated pursuant to Ohio Rev. Code 5120.01 and Ohio Admin. Code 5120-9-18). And the guidelines measure indigency based on balances in the inmate's prison account. Ohio Dept. of Rehab. and Corr. 1361 IV. Proof of indigency could have been established by submitting to the circuit court a certified copy of Davis's prison account during the relevant timeframe that met the requirements of the guideline.

We have other doubts that such an argument could succeed. First, "[a]lthough prisoners have right of access to courts, they do not have right to

[16] All inmates, whether or not they are indigent, are entitled to "one free stamped envelope per month[.]" Ohio Dept. of Rehab. and Corr. 1362 VI.D.2.

unlimited free postage." *Ingram v. Jones*, 507 F.3d 640, 645 (7th Cir. 2007). Second, the constitutional right to a speedy trial and the legislatively-created rights afforded prisoner's under the IAD are distinct. *People v. Farmer*, 127 Mich. App. 472, 478, 339 N.W.2d 218, 222 (1983) ("Although the 180-day rule is a legislative embodiment of speedy trial policy, consideration of a constitutional challenge to a delayed trial requires an analysis separate from the 180-day rule issue"). The constitutional right is measured by applying and balancing certain factors. *Barker v. Wingo*, 407 U.S. 514, 530, 92 S.Ct. 2182, 2192, 33 L.Ed.2d 101 (1972); *Tackett v. Commonwealth*, 445 S.W.3d 20, 43 (Ky. 2014) *cert. denied sub nom. Tackett v. Kentucky*, 135 S.Ct. 1852, 191 L.Ed.2d 733 (2015). On the other hand, a prisoner demanding rights under a statutory mechanism for dismissing criminal charges must strictly adhere to the specific means by which those rights must be claimed. There is a reason for requiring this certified mail form of requesting disposition of charges; it provides nearly irrebuttable proof of when the 180-day time period begins in a particular case.[17] The demand that access to the receiving jurisdiction's courts be made easier than the relatively minor cost of certified mail, return-receipt requested is, as *Fex* says, a matter "more appropriately addressed to the legislatures of the contracting States, which adopted the IAD's text." *Fex*, 507 U.S. at 52, 113

[17] The IAD's requirement of certified mail, return-receipt requested delivery to the prosecutor of the prisoner's request is also "[t]he most significant" textual indicator that the prosecutor must actually receive the request before the 180-day time period begins. *Fex*, 507 U.S. at 51, 113 S.Ct. at 1090. "The IAD thus provides for documentary evidence of the date on which the request is delivered to the officials of the receiving State, but requires no record of the date on which it is transmitted to the warden . . . . That would be peculiar if the latter rather than the former were the critical date." *Id.* Similarly, to paraphrase *Fex*, the IAD "requires no record of the date on which" a prisoner has done all he could do under the IAD, an even less definable point in time.

S.Ct. at 1091.

Therefore, we wish to make it clear we are not holding that proof of Davis's indigency while incarcerated in Ohio would persuade us that the IAD was violated. With no proof of the prerequisite fact of indigency, we simply do not reach the legal argument.

We have thoroughly examined all aspects of Davis's argument for dismissing the Kentucky indictment based on the Commonwealth's failure to prosecute him within 180 days of his request under the IAD. Because the request was never delivered to the Kentucky prosecutor, Davis's argument, in its various forms, fails. On this issue, we will affirm the circuit court.

Denial of a motion for mistrial was not an abuse of discretion

Davis next argues that the circuit court erred by denying his motion for a mistrial based on Officer Mittermeier's failure to provide the defense with Davis's incriminating statement that he was the only person to touch the guns discovered in the car. We review a trial court's denial of a motion for mistrial for abuse of discretion. *Cardine v. Commonwealth*, 283 S.W.3d 641, 647 (Ky. 2009). We further note that mistrial is a last resort, used only for errors so egregious and prejudicial that their effect can be removed in no other way than by granting mistrial. *Gould v. Charlton Co., Inc.*, 929 S.W.2d 734, 738 (Ky. 1996). Based on our review of the record, we are persuaded that the court did not abuse its discretion by denying the motion for a mistrial.

In his argument heading, Davis claims mistrial should have been granted because of a *Brady* violation. However, there are several reasons why no *Brady* violation occurred here.

Brady holds that "the suppression by the prosecution of evidence *favorable to an accused* upon request violates due process where the evidence is material either to guilt or to punishment[.]" *Commonwealth v. Bussell*, 226 S.W.3d 96, 99-100 (Ky. 2007), *as modified* (Aug. 30, 2007) (emphasis added). Davis's statement that only he touched the weapons was not exculpatory, but incriminating. "[W]here the undisclosed information is merely incriminating and unfavorable rather than exculpatory or impeaching, *Brady* is inapplicable." *Houchin v. Commonwealth*, 2008-SC-000373-MR, 2009 WL 4251645, at *6 (Ky. Nov. 25, 2009) (cited pursuant to CR 76.28(4)(c) as there is no more direct published opinion on this legal point).

Next, "*Brady* only applies to 'the discovery, *after trial,* of information which had been known to the prosecution but *unknown to the defense.*'" *Bowling v. Commonwealth*, 80 S.W.3d 405, 410 (Ky. 2002) (quoting *United States v. Agurs,* 427 U.S. 97, 103, 96 S.Ct. 2392, 2397, 49 L.Ed.2d 342, 349 (1976) (emphasis original to *Bowling*)). Davis discovered during the trial, not *after trial*, that the prosecution had failed to disclose Davis's statement that only he touched the weapons. Furthermore, for purposes of *Brady*, we can presume the defendant knows what statements he himself makes, especially when the statement is exculpatory, such as *Brady* is intended to cover.

There was no *Brady* violation.

On the other hand, Officer Mittermeier's failure to disclose Davis's statement did violate RCr[18] 7.24(1). *Chestnut v. Commonwealth*, 250 S.W.3d 288, 297 (Ky. 2008) (nondisclosure of a defendant's incriminating oral statement by the Commonwealth during discovery constitutes a violation of the discovery rules under RCr 7.24(1)). A violation of the discovery rules does not rise to the level of the constitutionally-based *Brady* violation. The trial court's action to correct this discovery violation was sufficient to eliminate any need for a mistrial.

Upon the motion for a mistrial, the trial court conducted a hearing outside the presence of the jury to evaluate its options and elected to admonish the jury that they were not allowed to consider Davis's undisclosed statement during their deliberations. The law presumes such an admonition cures the error because jurors are required to follow all court instructions, unless (1) an overwhelming probability exists that the jury will not obey the admonition and instead rely on inadmissible evidence likely to devastate the defense, or (2) a witness is subjected to baseless – but highly prejudicial – questioning. *Johnson v. Commonwealth*, 105 S.W.3d 430, 441 (Ky. 2003). Here, Officer Mittermeier's statements presented neither concern.

Mittermeier's questioning was not baseless, particularly in light of Davis's other incriminating statement: his admission to possessing the guns. Nor was it overwhelmingly likely that the jury would disregard the court's admonition as it

[18] Kentucky Rule of Criminal Procedure.

heard other evidence of Davis's guilt including the roommates' identification of Davis as the robber shortly after the crime was committed and Davis's other incriminating statements. Finally, it is difficult to see how Davis's second, undisclosed, statement would have been sufficient to totally eviscerate his defense in light of his first statement that he was the owner of the guns. A reasonable jury could have inferred that Davis not only owned the guns but had used them in the robbery, even without considering Davis's second, undisclosed statement. Accordingly, we are persuaded that Davis was not entitled to a mistrial; admonition was sufficient in this case.

Refusal to instruct on lesser-included offense was not abuse of discretion

Davis next argues he was entitled to a jury instruction on the lesser included offense of facilitation to commit first-degree robbery. A reviewing court recognizes the trial court's wide latitude in issuing jury instructions for lesser-included offenses and reverses only for an abuse of the court's discretion. *Ratliff v. Commonwealth*, 194 S.W.3d 258, 274 (Ky. 2006). Such abuse occurs when the trial court's decision is arbitrary, unreasonable, unfair, or unsupported by legal principles. *Lawson v. Lawson*, 290 S.W.3d 691, 694 (Ky. App. 2009).

Davis maintains that a reasonable jury could have found that he was merely a willing accomplice, not the man who robbed the roommates. We disagree. A lesser-included-offense instruction is required "only if, considering the totality of the evidence, the jury might have a reasonable doubt as to the defendant's guilt of the greater offense, and yet believe beyond a reasonable doubt that he is guilty of

the lesser offense." *Commonwealth v. Swift*, 237 S.W.3d 193, 195 (Ky. 2007). We do not perceive the evidence here as amenable to such an interpretation.

The record indisputably demonstrates that Davis was driving the car when it was stopped; it is also undisputed that the victims identified him specifically as the man who brandished the gun and robbed them. Finally, Davis admitted to being the sole owner of the guns. Based on that evidence, the trial court did not abuse its discretion by denying Davis's request for an instruction. It is not reasonable, under such facts, that the jury could have harbored doubt as to his guilt regarding the greater offense, but believed him guilty of the lesser.

It was error to impose a partial public-defender fee upon Davis

Finally Davis takes issue with the trial court's levy of public defender fees. We review the circuit court's order that a defendant pay public defender fees for clear error. *Roberts v. Commonwealth*, 410 S.W.3d 606, 611 (Ky. 2013). Clear error exists when the court's findings are "not supported by substantial evidence; that is, evidence sufficient to induce conviction in the mind of a reasonable person." *Turley v. Commonwealth*, 399 S.W.3d 412, 418 (Ky. 2013).

In this case, it was error to order Davis to pay a partial public-defender fee.

During the proceedings, the trial court waived court costs against Davis – something it may only do after determining Davis was a "poor person." A "poor person" is one "who is unable to pay the costs and fees of the proceeding in which he is involved without depriving himself or his dependents of the necessities of life, including food, shelter, or clothing." KRS 453.190. Here the trial court

waived court costs, with the determination that Davis was a "poor person" as a necessary implication. However, the court then levied against Davis a partial public-defender fee. This is not permitted according to recent Kentucky Supreme Court jurisprudence. *See Miller v. Commonwealth*, 391 S.W.3d 857, 871 (Ky. 2013) (holding that a person cannot simultaneously be "poor" under KRS 453.190 and yet able to pay partial legal fees).

Accordingly, we reverse the order to the extent it requires Davis to pay the attorney fee of $125. However, in the interest of judicial economy, we decline to remand this case for any further proceedings. Unlike "court costs [that] are mandatory and not subject to any 'nonimposition,' absent certain statutory findings, . . . [p]artial public-defender fees are different in that they are not mandatory absent an exemption." *Buster v. Commonwealth*, 381 S.W.3d 294, 306 (Ky. 2012). "[W]hile the [public-defender] fee is not mandatory, the determination whether the defendant can pay the fee is[.]" *Id.* Because, based on the record, we have already determined that the defendant cannot pay the fee, remand for that purpose is not necessary.

CONCLUSION

For the foregoing reasons, Davis's conviction is affirmed in its entirety. That portion of the trial court's judgment ordering the payment of a partial public-defender fee, however, is reversed.

J. LAMBERT, JUDGE, CONCURS.

VANMETER, JUDGE, CONCURS IN RESULT ONLY.

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