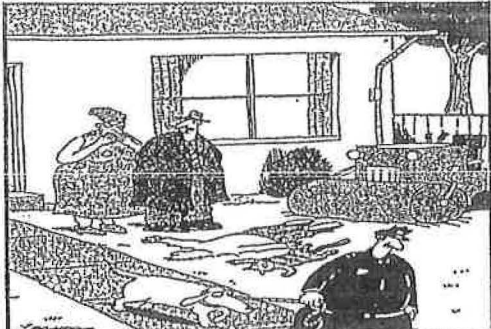


DOJ's Export Enforcement Initiative & Some Observations on Export Control/Embargo Laws
May 2008

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Criminal Law Axiom #1

- The Number 1 and most important axiom of the criminal law (including export control law),
 - Do Not Be in the Wrong Place at the



"Your dog had both motive and opportunity, ma'am: He hated the cat and he's had training in operating heavy machinery: ... Your husband, we feel, was just in the wrong place at the wrong time."

Today's Aim in 45 Minutes

- 1. To provide information concerning the DOJ/National Security Division's export enforcement initiative.
- 2. To provide a very brief legal background concerning the investigation and prosecution of export & embargo violations.

Outline of Topics

- 1. DOJ Export Enforcement Initiative & Counter-Proliferation Task Forces
 - Why is this important to US?
 - What is it?
- 2. What are the Laws?
 - -- Brief Outline of the Legal Bases to Investigate & Prosecute Export and Embargo Violations
 - -- Some Historical Context
 - -- What makes an Export or Embargo Violation a CRIMINAL Violation?
 - -- "Willful" Conduct
 - -- How to Prove a Willful Violation?

I. The DOJ Export Enforcement Initiative – Why is this Important to US?

- Among other reasons:
 - 1. U.S. v. Asher Karni – A proliferation threat often where not expected.
 - 2. Iran, North Korea, Sudan, China . . .
 - 3. A Flexible and Effective Hammer/Tool
 - 4. Sources & Intelligence
 - 5. FBI Windbreakers – Real Deterrence

The WHY – A Quick Reminder

U.S. v. Asher Karni U.S. v. Humayun Khan

- Defendant Karni was the principal in an import/export business known as Top-Cape Technology.
- In July 2003, agents from Commerce and DHS learned that Karni was in the process of acquiring 200 triggered spark gaps (shown in photo) from a company in Massachusetts and that he planned to have the triggered spark gaps sent to Top-Cape in South Africa, from where the items, at his instruction, would be re-exported to Pakistan.
- Triggered spark gaps are high-speed electrical switches that are capable of sending synchronized electronic pulses.
- They can be used as detonators of a nuclear device.



The WHY—A Quick Reminder

U.S. v. Asher Karni U.S. v. Humayun Khan

- U.S. export laws and regulations require the issuance of a license for the export of triggered spark gaps to Pakistan.
- At the request of investigating agents, the manufacturer agreed to disable the triggered spark gaps before they were shipped to Karni's company in South Africa through a broker.
- In Oct. 2003, Karni's company illegally sent the triggered spark gaps to Islamabad, Pakistan via Dubai, UAE.
- Karni was arrested on Jan 1, 2004, in Denver, CO, when he arrived for a ski vacation. He was detained pending trial.
- In Sept. 2004, Karni pled guilty and cooperated. Karni acted as a middle man for Khan, a Pakistani, in illegally shipping both triggered spark gaps and oscilloscopes to Pakistan.
- Khan was indicted in April 2005.
- Karni received credit for his cooperation and was sentenced to 36 months in prison in August 2005.



Why important?

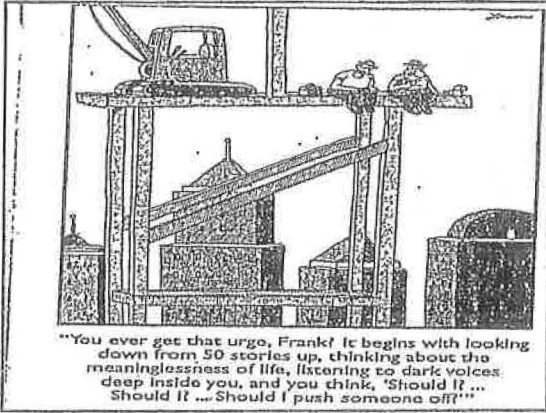
- Among other reasons:
 - Iran, North Korea, Sudan, China . . .
 - November 5, 1979, October 23, 1983, June 25, 1996
 - Nasir bin Hamid al-Fahd – May 2003
 - A Flexible and Effective Hammer/Tool
 - U.S. v. Battle (Oregon) (IEEPA—Services prohibited to or from al-Qaeda and the Taliban)
 - U.S. v. Alameoudi (E.D. Va.) (IEEPA—OFAC's Libyan regulations)
 - U.S. v. Li (San Diego)—Accelerometers to China
 - U.S. v. Chi Mak (L.A.)—U.S. naval submarine technology to China

Why are investigations & prosecutions of export and embargo violations important?

▫ Among other reasons:

▫4. Human Sources & Intelligence

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"You ever get that urge, Frank? It begins with looking down from 50 stories up, thinking about the meaninglessness of life, listening to dark voices deep inside you, and you think, 'Should I ... Should I ... Should I push someone off!'"

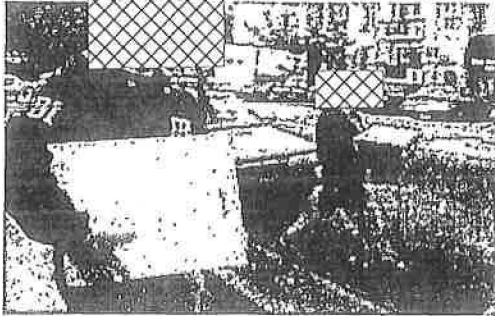
Why are investigations & prosecutions of export and embargo violations important?

▫ Among other reasons:

- 5. Raid Windbreakers – Real Deterrence: "Reputational Risks," thus a listening audience
 - Merger & Acquisition Due Diligence – Goldman Sachs
 - Client Alerts
 - Weekly Seminars
 - Internet Blogs and Newsletters
 - Greater Leverage than you realize when you knock on the door with a grand jury subpoena or simply to "chat"

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Raid Jackets – Folks Listening



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b7C FBI

DOJ Export Enforcement Initiative

- How did it come about? – Some Context
- What is it?

DOJ National Security Division

- National Security Division – Origins and Purpose
 - Three Sections: Approximately 150 lawyers
 - Office of Intelligence and Policy Review (FISAs)
 - Counterterrorism Section
 - Counterespionage Section – Export/Embargo Enforcement, Espionage, Foreign Agents Registration, Misuse of Classified Info, Advice & Counsel
 - March 31, 2005 Commission on the Intelligence Capabilities of the U.S. regarding WMD (Judge Silberman & Senator Robb)
 - One A.A.G. as "single focal point on all national security matters"
 - "In an era when it is becoming increasingly incumbent upon organizations like the FBI to balance both their law enforcement and intelligence responsibilities, more thoughtful, innovative, and constructive legal guidance is in high demand."
 - With a NSD, it will "highlight that [DOJ] attorneys are not just there to advise the [FBI and others] if a matter becomes a criminal investigation."

DOJ Export Enforcement Initiative – What is it?

- 1. Training – AUSAs and Agents
- 2. Greater Coordination with Licensing & Investigative Agencies
- 3. Promotion of Information Flow to Intelligence Community
- 4. Counter-Proliferation Task Forces

Training

- Training Talks/Seminars
 - – Whenever & Wherever
 - – As needed – Tailored for your bailiwick or focus (e.g., China, Iran, etc.)
 - – General Aim: Make AUSAs & Investigators more efficient and better able to spot potential violations (whether to identify criminal defendants or potential sources)
 - – The Substance of Training:
 - The legal elements of export and embargo violations
 - Investigative tips and suggestions for this context
 - Problematic areas

Greater Communication with Licensing & Investigative Agencies

- 1. Regular Meetings to Discuss Issues of Mutual Concern
- 2. Open Telephone line to receive suggestions, recommendations, complaints, and even compliments regarding USAOs/AUSAs
 - – Informal resolution ahead of crisis time
 - – Licensing Determinations
- 3. Leveraging Resources, e.g., possible office space for resident agent, etc.
- 4. Inter-agency HQs Working Group – DCIS

Increased Information Flow to Intelligence Community

18 Increased Reporting of Information to Intelligence community:

- 1. Self-Disclosures to DDTC, BIS & OFAC
- 2. Task Forces

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Counter-Proliferation Task Forces – What are they?

- District based Task Forces to investigate and prosecute export control violations: Counter-Proliferation Task Forces
 - Principal Investigative Agencies: ICE, FBI, Commerce, DCIS
 - All U.S. Attorneys Offices Invited to participate
 - Public Announcement by DOJ/NSD October 2007
 - Design and Practice of the Task Forces controlled by needs of particular District
 - Frequency of Meetings?
 - Form or Structure of Group?
 - Co-Locate Agents? Over time; Case specific; District determination.
 - Funding? Forfeiture funds.

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Ultimate Goals of the - CounterProliferation Task Forces

In Summary: Identify, Investigate, and prosecute violations of export control laws and Disrupt domestic and foreign proliferation networks.

1. Share Information and Resources among the Investigative Agencies: Leverage all the investigative agencies to obtain better – more comprehensive, coordinated, and complete – investigations and prosecutions.
2. Use the Information and assets of the Intelligence Community to target investigative and enforcement efforts upon the most dangerous illegal proliferation and export threats and the most active illegal export networks.
3. Provide the Intelligence Community with potential information, sources, and possible tools which arise from our investigations and prosecutions.

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Counter-Proliferation Task Forces

- A few more details:
 - AUSA in each district
 - Dispute resolution / coordination among the investigative agencies
 - To Focus Investigative/Prosecution Resources
 - To Improve Inter-Agency Communication of Tips, Leads & Intelligence
 - S.D. of N.Y. Model (AUSA Ed O'Callaghan)
 - District of Maryland Model (AUSA Jim Warwick)

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Principal Investigative Agencies -- CounterProliferation Task Forces

- Immigration and Customs Enforcement (ICE)
- Federal Bureau of Investigation (FBI)
- Commerce Department – Bureau of Industry and Security (BIS)
- Defense Criminal Investigative Service (DCIS)

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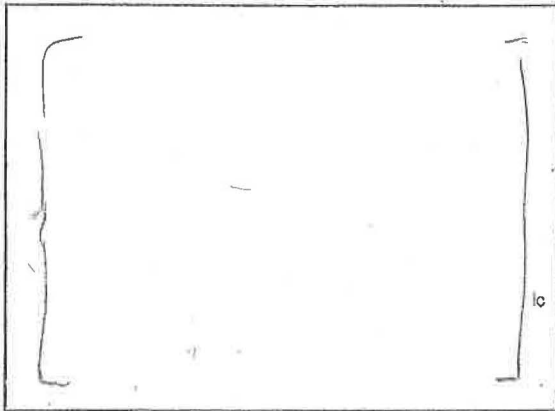
Other Investigative Agencies

- *Depending on the district:*
 - Naval Criminal Investigative Service (NCIS)
 - Air Force Office of Special Investigation (AFOSI)
 - Army Criminal Investigations Division (CID)

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Other Investigative Agencies

- Depending upon the district:
- Defense Department
 - Defense Security Service
 - Defense Logistics Agency (DLA)
- State Department -- Diplomatic Security Service



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Legal Outline of U.S. Export & Embargo Violations

- 1. Historical Context: A 200-Year Anniversary
- 2. Although a new initiative, this is not new Stuff.
- The Embargo Act of December 22, 1807
 - "That an embargo be . . . laid on all ships and vessels in the . . . Jurisdiction of the United States, . . . and that no clearance be furnished to any ship or vessel bound to such foreign port or place, except vessels under the Immediate direction of the President . . ."

Take Home Messages on the Law

- A. Four General Areas of Export Control Laws
 - –Munitions – State Department
 - –Dual Use Items – Commerce Department
 - –Country Sanctions – Treasury Department
 - –Designated Individuals – Treasury Department
- B. To prove a Criminal Offense in this context, we need to show Willful Conduct
- C. How to Prove Willful Conduct?: Consciousness of Guilt Evidence – Use the 3-Cs in your investigations
- D. You are NOT on an Island: Plenty of available resources, prior examples and models. Among others to call: Office 202 353-4386; 24/7 202 514-5000.

II. Legal Outline of U.S. Export & Embargo Violations

- 1. Munitions/Arms – Arms Export Control Act
- 2. Dual Use Goods – Export Administration Regulations & International Emergency Economic Powers Act (IEEPA)
- 3. Country Sanctions – Specific Country Trade Sanctions (Iran, Cuba, North Korea, Libya, Syria, Sudan)
- 4. Prohibited Persons/Organizations Sanctions – Specific designated actors: WMD Proliferators and their Supporters; Terrorists/FTOs; Drug Traffickers

Outline of U.S. Export & Embargo Violations

- THE GENERAL PROHIBITION (stated over broadly solely to illustrate the principle):
 - Without a license, thou shall not willfully export goods, services or technical information to, or engage in any transaction with, Country X, a National of Country X, or a specifically Designated Foreign National or Foreign Group.

The Federal Licensing Agencies

- Munitions: State Department – Directorate of Defense Trade Controls
- Dual-Use Goods: Commerce Department – Bureau of Industry & Security
- Country & Group Embargoes: Treasury Department – Office of Foreign Assets Control

The Crimes – Statutory Bases to Prosecute

- Arms Export Control Act, 22 U.S.C. § 2778(c): "Any person who willfully violates any provision of this section or section 2779 of this title, or any rule or regulation issued under either section, . . . shall upon conviction be fined . . . or imprisoned . . ."
- International Emergency Economic Powers Act, 50 U.S.C. § 1705(b): "Whoever willfully violates, or willfully attempts to violate, any license, order, or regulation issued under this chapter shall, upon conviction, be fined . . . or . . . may be imprisoned . . ."

Munitions – Arms Export Control Act

- **General Prohibition:** Thou shall not export or broker the export of a defense article or defense service without a license
 - The Licensing Agency: U.S. State Department, Directorate of Defense Trade Controls
 - Key Terms and Concepts:
 - Defense Articles – any item or technical data designated on the U.S. Munitions List ("USML")
 - Defense Services – Assistance to foreign person in the design, repair, modification, manufacture, use or training of defense articles
 - Technical Data – Information required for design, development, repair, testing or modification of defense articles
 - Regulations/Rules of the Road: International Traffic in Arms Regulations or ITAR, 22 C.F.R. Sections 120-130
 - Investigative Authority: ICE, FBI, DCIS/DOD



CHINA & Arms Embargo

ITAR:

◦ "It is the policy of the United States to deny licenses and other approvals for exports and imports of defense articles and defense services, destined for or originating in certain countries. . . . This policy also applies to countries with respect to which the United States maintains an arms embargo (e.g., . . . China)."

◦ 22 C.F.R. Section 126.11(a)

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Dual Use Items – IEEPA & Export Administration Regulations

▪ **General Prohibition:** Thou shall not export an item on the Commerce Control List without a license

- The Licensing Agency: U.S. Commerce Department, Bureau of Industry & Security (BIS)
- Key Terms and Concepts:
 - CCL Items – Commerce Control List (CCL)
 - Deemed Exports –
- Regulations/Rules of the Road: Export Administration Regulations or EAR, 15 C.F.R. Sections 730–774; Export Administration Act expired but EAR made effective by IEEPA
- Investigative Authority: Commerce, ICE, FBI, DCIS/DOD

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Embargoes or Sanctions against Countries or Designated Persons/Groups -- OFAC

▪ **General Prohibition:** Thou shall not engage in dealings or transactions with Country X, a resident national of Country X, or a designated foreign person or group without a license

- The Licensing Agency: U.S. Treasury Department, Office of Foreign Asset Controls ("OFAC")
- Key Terms and Concepts:
 - Each embargo, regulation, or sanctions is unique.
 - President uses targeted sanctions for national security and foreign policy purposes.
 - WMD Proliferation Sanctions – Executive Order 13382
- Regulations/Rules of the Road: Executive Orders and OFAC Regulations at Title 31 of C.F.R.
- Investigative Authority: ICE, FBI, Commerce

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When is an export or embargo violation a CRIMINAL violation?

- To obtain a criminal conviction, U.S. Export Control Laws and Embargo Sanctions require the government to show that the defendant "willfully" violated the law.
 - Negligent violations, accidental violations, and other violations will not do.

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What does "Willfully" mean in an export licensing statute?

- The Issue: Does a "willful" violation require proof that the defendant knew that his conduct was unlawful, or does it also require proof that he knew of the federal licensing requirement?
- Answer: Proof that the defendant knew that his conduct was unlawful.

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When is a Violation Willful?

- Factors Considered by Prosecutors -

- **The Three C's**
- Factors considered by prosecutors in determining whether a person acted "willfully" in violating an export control statute, regulation or license:
 - (1) **Concealment** of the export or related activities;
 - (2) **Cash or Exorbitant Prices** (unusual payment terms used); or
 - (3) **Circuitous route** in shipment before arrival at the ultimate destination.
- In Summary: **Consciousness of Guilt Evidence**

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How to Prove Willful Conduct

- The Commerce Department has provided in the EAR and on-line a listing of "RED FLAGS"
- Red Flags to recognize when customers or business associates may be seeking to export or trans-ship an item illegally to a prohibited destination or to divert the an item to an undisclosed destination or user.
- See 15 C.F.R. Part 732 Supp.3 ("BIS's 'Know Your Customer' Guidance and Red Flags").

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"RED FLAGS" of Diversions

- DOC/BIS provides legitimate businesses with a listing of "RED FLAGS"
 - Indications that an unlawful diversion might be planned by a customer or a third-party.
 - Displayed upon BIS's webpage and in EAR.
 - Relied upon extensively by legitimate exporters.
- The RED FLAGS and similar factors or indicators serve well as a checklist for identifying evidence of willful conduct.
- For instance, the RED FLAGS may be a checklist in interviewing a cooperative witness to ensure that we obtain any and all factual details indicative of willful conduct.
- Likewise, in reviewing documents, keep looking for factual tidbits reflecting these "RED FLAGS."

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Red Flags – Proof of Willful Conduct

- "Possible indicators that an unlawful diversion might be planned by your customer include the following:"
 1. The customer or purchasing agent is reluctant to offer information about the end-use of a product.
 2. The product's capabilities do not fit the buyer's line of business; for example, a small bakery places an order for several sophisticated lasers.
 3. The product ordered is incompatible with the technical level of the country to which the product is being shipped. For example, semiconductor manufacturing equipment would be of little use in a country without an electronics industry.

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Red Flags – To Prove Willful Conduct

- 4. The customer has little or no business background.
- 5. The customer is willing to pay cash for a very expensive item when the terms of the sale call for financing.
- 6. The customer is unfamiliar with the product's performance characteristics but still wants the product.
- 7. Routine installation, training or maintenance services are declined by the customer.

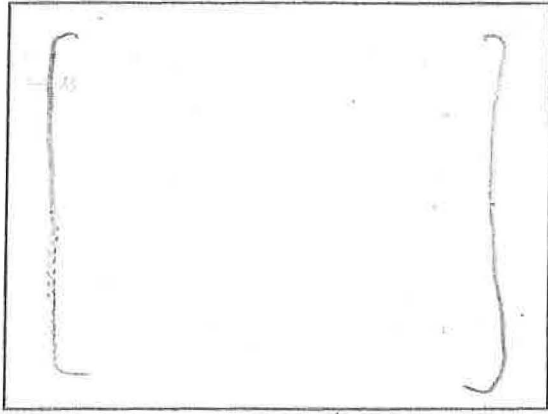
Red Flags – Proof of Willful Conduct

- 8. Delivery dates are vague, or deliveries are planned for out-of-the-way destinations.
- 9. A freight forwarding firm is listed as the product's final destination.
- 10. The shipping route is abnormal for the product and destination.

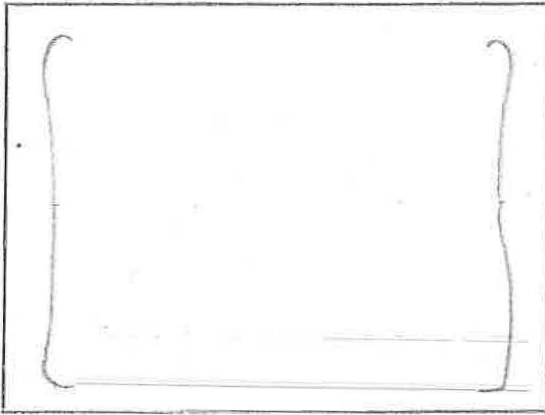
Red Flags – How to Use Them

- 11. Packaging is inconsistent with the stated method of shipment or destination.
- 12. When questioned, the buyer is evasive or unclear about whether the purchased product is for domestic use, export or reexport.* 15 C.F.R. Part 732 Supp.3.
- USE Them:
 - In Interviews of witnesses and cooperators to obtain information
 - In Reviewing Documents
 - In Interviewing the subject
 - In Assessing a Case
 - In Convincing a Blockhead Prosecutor of the Merits of a Case

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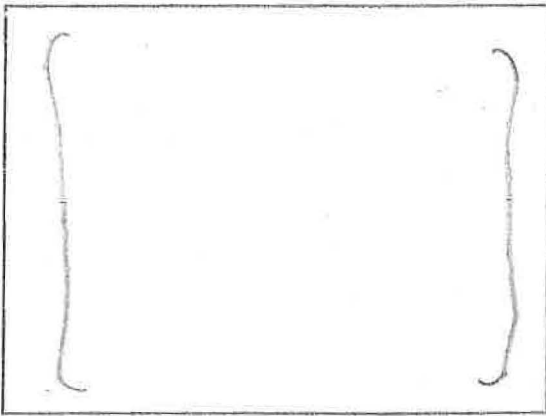


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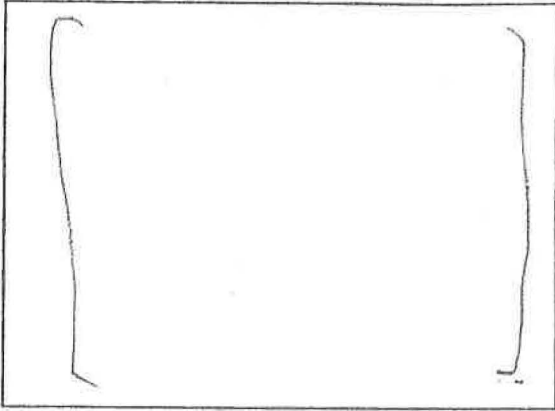
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QUESTIONS & IDEAS???

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▪ Steve Pelak - [

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