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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

-----X
SAKI BACHA and
MOHAMMED JAWAD, et al.,

Civil Case No. 05-2385

Petitioners

v.

BARACK OBAMA, et al,

Respondents,

-----X
Washington, D.C.
Thurs., July 16, 2009
2:10 P.M.

TRANSCRIPT OF HEARING
BEFORE THE HONORABLE ELLEN SEGAL HUVELLE
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PETITIONERS: Jonathan L. Hafetz, Esq.
Arthur Spitzer, Esq.
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
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[REDACTED]

FOR THE RESPONDENTS: Daniel Barish, Esq.
Kristina A. Wolfe, Esq.
U.S. DEPARTMENT OF JUSTICE
20 Massachusetts Avenue,
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[REDACTED]

Court Reporter: Lisa Walker Griffith, RPR
U.S. District Courthouse
[REDACTED]
Washington, D.C. 20001
[REDACTED]

Proceedings recorded by mechanical stenography, transcript
produced by computer.

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P R O C E E D I N G S

THE DEPUTY CLERK: This is Civil Action 05-2385,
Saki Bacha, et al. versus Barack Obama, et al.

MR. HAFETZ: Jonathan Hafetz of the ACLU for the
petitioner Mohammed Jawad joined by Art Spitzer.

THE COURT: Good afternoon.

MS. WOLFE: Kristina Wolfe on behalf of the
respondents and I'm joined today by Daniel Barish.

THE COURT: Good afternoon. Let us just bring
ourselves up to date.

The motion to suppress is now going to be granted as
conceded because the government filed on the 15th the
respondent's, meaning the government, do not oppose
petitioner's motion. Then you ask that we continue the
status conference but I'm not willing to continue the status
conference because I don't know what I'm continuing it for.

Ms. Wolfe, what is it -- you say this additional
time will allow respondents to consult internally to
determine how respondents will proceed in connection with
this habeas.

I have now suppressed every statement attributable
to the defendant as the government has failed to oppose. The
way I look at this is your books of material facts upon which
you are proceeding. If I calculate it right, about
90 percent of it is statements attributable to the

1 petitioner. So they're out. So what is there to think
2 about?

3 MS. WOLFE: Well, there is other evidence in the
4 factual return and in the statement of material facts that is
5 not comprised of petitioner's statements. At this juncture
6 we're consulting internally to determine how we'll proceed.

7 THE COURT: There are 11 statements attributed to
8 Afghanistan officials and to the Americans. The Americans
9 did not see anything and there may or may not be an Afghani
10 who saw something.

11 You can't prevail here without a witness who saw it.
12 I mean, let's be frank. You can tell your superiors that.
13 You can't. There is no evidence otherwise. You have nothing
14 here other than statements attributable, there are
15 potentially three people. So that's your only way to
16 proceed. And I don't see how you can do it.

17 Who do you have to consult with about this? Who are
18 the powers that be?

19 MS. WOLFE: The relevant decision-makers, Your
20 Honor, are both within our client agencies as well as within
21 the Department of Justice.

22 THE COURT: It is a very short trial, you don't have
23 any witnesses. Without a witness, I don't understand this
24 case. The prosecutor here went to try to find the witnesses
25 I thought, the prosecutory in the military commission, right?

1 What is his name, Mr. Van--

2 MS. WOLFE: Vandeveld?

3 MR. HAFETZ: Yes, Vandeveld, Your Honor.

4 THE COURT: Spell it please for the reporter.

5 V. A. N. D. E. V. E. L. D. He is the prosecutor who quit.

6 When will you be able to tell me what exact evidence
7 you intend to rely on to prosecute this case?

8 MS. WOLFE: We would like to submit an amended
9 statement of material facts on Friday, August 7.

10 THE COURT: We have trial. I'm not going to put off
11 the trial. This is the only day that I can do it. And we're
12 going forward with this. I am going to finish this case as
13 predicted.

14 This, to me -- I don't disagree with the
15 government's position here. I'm conceding that the
16 statements are inadmissible. We have trial on the fifth.

17 MS. WOLFE: Your Honor, my understanding is that was
18 a suppression hearing; it was not a merits proceeding.

19 THE COURT: We're having a merit proceeding very
20 swift here. I'm not putting it off. This guy has been there
21 seven years, seven years. He might have been taken there at
22 the age of maybe 12, 13, 14, 15 years old. I don't know what
23 he is doing there. Without his statements, I don't
24 understand your case. I really don't. You cannot expect an
25 eyewitness time of account to rely on the kind of hearsay you

1 have here.

2 MR. BARISH: Your Honor, if I may add. Your Honor,
3 we just filed as you know our non-opposition to the motion
4 suppress yesterday.

5 THE COURT: You should have figured this out months
6 ago, years ago frankly in the military commission, but be
7 that as it may -- the answer is we're going forward full
8 blown on the fifth. You can participate or not. You have
9 the burden here.

10 MR. BARISH: Your Honor, again, as explained, we
11 need time to evaluate how to proceed. We need to do a motion
12 to amend the statement of facts.

13 THE COURT: It's granted.

14 MR. BARISH: We've not done it yet, Your Honor.

15 THE COURT: Sir, the facts can only get smaller, not
16 bigger.

17 MR. BARISH: That's not correct, Your Honor. There
18 is additional evidence that we've identified that we wish to
19 include in an amended statement of facts if that's how we
20 choose to do so.

21 THE COURT: Then you'll have to move faster than you
22 are planning. I'm not the least bit apologetic. We're going
23 forward. When can you file your statement of facts? They
24 have a right to have this habeas decided. If you are not
25 relying on the gentleman's statements anymore, face it, this

1 case is in trouble. I'm not going to wait to grant a habeas
2 until you gear up a military commission. That's what I'm
3 afraid of. Let him out. Send him back to Afghanistan.

4 MR. BARISH: Your Honor, had we not opposed the
5 motion to suppress, there was going to be a reply brief on
6 July 22. We were going to have a suppression hearing on
7 August 5 and 6.

8 THE COURT: I don't need that.

9 MR. BARISH: I understand. But the point is we're
10 not delaying the case as it was up until yesterday.

11 THE COURT: But your case has been gutted, Mr.
12 Barish. I don't need to put too fine a point on it. The
13 case, without the statements, has been gutted. I don't know
14 what you've, you've got three Afghanistan officials. They
15 have witnesses to contest it unless you decide -- You tell
16 your superiors, I want a live witness on this one. I'm not
17 going to put up--

18 There are live witnesses within your control. This
19 is going to be a real trial. And it's going to start before
20 this Court on the fifth. Do your best. Seven years he has
21 been there. You are not going to convince me to change. I'm
22 converting the motion to suppress into a merits hearing. If
23 you would like to add some more evidence, I don't know why
24 it's so late, then you'll have to file a motion.

25 MR. BARISH: So we may file a motion to amend the

1 statement of facts prior to the--

2 THE COURT: You can file the motion, yeah.

3 MR. BARISH: You are setting the hearing for when?

4 THE COURT: The fifth. I don't know what evidence
5 you are putting in front of me. I'm very interested to know.
6 I'm baffled. This is a case unlike every other case. You
7 have an eyewitness account. You can't rely on the
8 petitioner. So, either there is a witness who is going to
9 put this guy there subject to real cross examination like a
10 real case instead of all of this intelligence and attributing
11 it to people who are either cooperators, unknown,
12 unidentified.

13 There's not a problem. The real people can show up.
14 You can bring them to me in whatever form. If you have to go
15 to Afghanistan to take a deposition, fine. But seven years
16 and this case is riddled with holes. And you know it. I
17 don't mean you. The United States Government knows it is
18 lousy. If you can't rely on the guy's statements, you have
19 lousy case.

20 MR. BARISH: Your Honor, this is a war time habeas
21 proceeding. So it is not a normal situation where you call
22 live witnesses.

23 THE COURT: Fine, don't.

24 MR. BARISH: There are immense burdens involved.

25 These are intelligence reports we rely on. We don't want to

1 argue the merits here. But I think you under estimate, with
2 all due respect, the burdens involved in having to call
3 witnesses, remove people off the battlefield and from
4 Afghanistan.

5 THE COURT: There is nobody on the battlefield. The
6 only people that you can dredge up here are Afghanistan
7 people. There is nobody else. I'm not aware of you having
8 an American that could conceivably offer real testimony.
9 Maybe I'm missing something.

10 MR. BARISH: Your Honor, if I could have a moment.

11 THE COURT: You are welcome to try. I'm telling you
12 to discuss this case quickly among your superiors. There is
13 a problem with this case. You've known about it for years.
14 You've known about it since -- when was the military
15 commission? If that didn't wake anybody up there. Then I
16 get this report, I hope it is not classified. This July 1,
17 it is under seal.

18 MS. WOLFE: Your Honor, that was submitted ex parte
19 and cannot be discussed in these proceedings.

20 THE COURT: Okay. Fine. I'm going forward on the
21 fifth. Take it to the Court of Appeals.

22 Let's hear from you. Do you have any live
23 witnesses? We have procedures if you want to call your
24 client and all that, we have to be in a special courtroom.
25 The government will have a -- we'll find out if they have any

1 evidence. This is an unbelievable case.

2 MR. HAFETZ: Your Honor, I couldn't agree more.
3 Just briefly, we believe that we're ready to go forward with
4 the hearing August 5. We believe that on the current record,
5 the government has no case. They can't sustain that he threw
6 the grenade.

7 And Judge, there is another deficiency which I don't
8 think we have addressed which cannot be established without
9 his statements. Under the legal definition, the government's
10 legal definition, on its own or as interpreted by Judge Bates
11 and others, the Act has to be substantial support, has to be
12 a link to either al-Qaeda, the Taliban or the Associated
13 Force. They don't have that either.

14 THE COURT: We don't know what they have. The case
15 is in shambles.

16 MR. HAFETZ: Your Honor, we ask that, if the
17 government is going to be able to amend, that they be given a
18 date so that we can prepare for the hearing.

19 THE COURT: All right. I just want to make sure I
20 get all this. Mr. Hafetz, I have this motion here. I don't
21 know that it is a real problem anymore anyway. You don't
22 have any problem with treating as protected, they call them,
23 these headings.

24 MR. HAFETZ: Your Honor, we do, we're going to
25 oppose that motion. We'll submit a brief. But the issue,

1 because the issue is not, even though they're not relying on
2 his statements. They're relying on two others. It is total
3 nonsense.

4 THE COURT: I don't have time for nonsense. I have
5 another trial. You didn't do it in a timely fashion. Why
6 should I have to put up with this?

7 MR. HAFETZ: I'm sorry. The motion to--

8 THE COURT: -- Confirm Designation of Certain
9 Information from--

10 MR. HAFETZ: Our response is due the 20th, Your
11 Honor. It is 11 days. The motion was filed on the eighth.
12 So it will be a short response, Your Honor. I would like to
13 be able to put that in. I mean, it is certainly not the
14 priority.

15 THE COURT: It is never going to happen. They're
16 not using this information. We've just taken all of it out.
17 We're left with six documents basically. And I have no idea.
18 If they want to go forward, I have to know what the evidence
19 is.

20 MR. HAFETZ: Your Honor, we just want the date for
21 the amended, so we can be prepared. But we're ready to go
22 forward on the fifth.

23 THE COURT: You have no witnesses, right?

24 MR. HAFETZ: That's not true. We may call one
25 witness, possibly two. We may call Major Montalvo whose

1 statement is in evidence with our traverse. We can certainly
2 provide Your Honor with any witness list in advance. I just
3 want to be able to confer with Major Frakt.

4 THE COURT: I'm reluctant here to rely on rank
5 hearsay. So, this is a different kind of case. So don't you
6 think you're going to get away with it if I'm not going to
7 allow them to--

8 MR. HAFETZ: I understand, Your Honor. Our view is
9 the government has the burden. They're not going to be able
10 to establish their burden.

11 THE COURT: I'm interested in what the real people
12 have to say, the people that were on the ground at the time.
13 There are three of them. You can cross-examine them if they
14 get them here or they get them to appear.

15 The government, if they want to amend their
16 statement of facts, I don't get it. This case has gone to a
17 military commission. There are 6,000 pieces of paper they're
18 going to produce, I believe, to the -- what is his name?

19 MR. HAFETZ: Major Frakt.

20 THE COURT: This is the most discovered case in the
21 world. The idea that you should think that you have new and
22 different that you want to put in front of everybody is
23 shocking to me, absolutely shocking. There is not one fact
24 about this guy's statements that are new to the government.
25 If they think for one minute that I am going to delay this

1 thing so they can come up with some other alternative to
2 going forward with the habeas and pull this rug from under
3 the Court at the last minute by saying, oh, he is going to
4 the Southern District of New York, don't bother, or whatever
5 idea you come up with.

6 Let me just tell you, we're going forward. I'll
7 rule from the bench if I have to. You can't keep up for
8 seven years and then finally someone says, oh, you really
9 can't fight the fact that his statements are the function of
10 torture.

11 Okay. The government, if they want to file an
12 amended statement of facts, they can do it. But they have
13 got to file. You'll have a chance to oppose it.

14 They have until the 24th to file and get it in my
15 office.

16 MS. WOLFE: Your Honor, as I explained to the Court
17 when we were here last, as I have made emphatically clear, I
18 am on family vacation beginning tomorrow. I will not
19 return to the District until Wednesday, which is the 22nd.

20 THE COURT: Do you think that you could share what
21 conceivable evidence, we have the evidence you have. We know
22 what it is. Why is it that, at this late date, somebody
23 could possibly say to me, Judge, we need to amend it?

24 MS. WOLFE: Number one, without the addition or
25 without relying on the statements, it is difficult to parse

1 out from our statement of material facts what exactly,
2 sentence by sentence, was attributable to a statement and
3 what was attributable to a third party witness.

4 Moreover, during our Court-ordered task force search
5 discovery, we did discover some inculpatory evidence that
6 you, yourself, acknowledged that that is something that could
7 have occurred any time you do additional discovery in these
8 cases. It is the result of that task force search that we
9 would like the opportunity to amend our statement of material
10 facts.

11 THE COURT: When is the first possible date you can
12 get it in?

13 MS. WOLFE: I would ask for Friday the 31st.

14 THE COURT: I can't do it. We're starting on the
15 5th. You'll have to do it before you leave, the 22nd. I'm
16 sorry, we're all killing ourselves.

17 MS. WOLFE: I'm leaving tomorrow, Your Honor.

18 THE COURT: Then somebody will have to step in.
19 This case is an outrage to me. I'm sorry. This is an
20 outrage. I'm not going to sit up here and wait for you to
21 come up with new evidence at this late hour. There is only
22 one question here, did the guy throw a grenade or didn't he
23 throw a grenade. That's the issue. Right? If he didn't do
24 that, you can't win. If you can't prove that, you can't win.

25 I'm not going to have people running around trying

1 to figure out a way to get this case out of the Court's
2 jurisdiction for some other reason. You have to come to
3 grips with your cases. This guy, my understanding is the
4 Afghanistan courts want him back. And nobody here objects.

5 That's his home. That's where he comes from. They
6 wouldn't take a minute to get him back to where he came from.
7 So somebody has to decide. I don't know what your
8 inculpatory evidence is but somebody has looked at it at
9 least before July 1. So, either you can do it in a timely
10 fashion or you can't.

11 MR. BARISH: Your Honor, just so you understand, the
12 additional inculpatory evidence that Ms. Wolfe referred to,
13 our understanding is that is evidence that has already been
14 received in the military commission case by defense counsel,
15 Mr. Frakt. So it is not going to be some surprise.

16 THE COURT: Great. So then you should have no
17 trouble making a motion here to tell me why you want to
18 amend.

19 You did a statement here, which is a pretty good
20 argument you just made for why you shouldn't be able to
21 amendment. You made a filing where you listed your evidence.
22 So, that was done, your statement of material facts was done
23 way back. And you are telling me that whatever you knew, you
24 knew before that. You didn't include it. So why should we
25 have to put up with this now? Give me one good reason.

1 MS. WOLFE: Your Honor, we discovered the
2 inculpatory information during our Court ordered search of
3 the task force materials.

4 THE COURT: That's not what you just said. You mean
5 because you didn't discover it, but --

6 MS. WOLFE: I'm not employed by the Office of
7 Military Commission. I do not have access to their files.
8 We, Mr. Barish and myself discovered this information during
9 our Court-ordered search of the task force materials.

10 THE COURT: I want an affidavit to indicate that you
11 discovered it after June One. That's when you filed the
12 statement of facts. June One, respondent's statement of
13 material facts on which they intend to rely. 90 percent of
14 this is his statements. So the time has come to face the
15 music.

16 You can file your motion before you leave or you
17 cannot, that's your choice. I don't have any desire to
18 interfere with your vacation but for seven years, the guy sat
19 down there, being subjected to the conditions that the United
20 States Government has subjected him to since the day they
21 picked him up in Afghanistan.

22 If you are asking me put this off to see whether you
23 can come up with more inculpatory stuff when he can go and
24 face charges in Afghanistan -- you know that as well as I do.

25 If you don't like their system for charging him,

1 that's too bad. We have not had a system for him. We don't
2 have anything for him other than this court. So, we have to
3 worry about whether or not -- the problem is we have to know
4 whether we're going to have any live witnesses and whether I
5 need to have him brought in by video conferencing, in
6 courtroom 15 and all this stuff.

7 So if I give you a continuance, all we do is put off
8 the date where the government has the figure this out. They
9 can figure it out now. It is time to figure it out. You
10 should have figured out this business about his statements a
11 long time ago.

12 A judge ruled in the military commission, this is
13 all public information, Judge Henley, Colonel Steven Henley.

14 What year did the rulings come down? 2008. He
15 suppressed the statements on November 19 and October 28. So,
16 we've now, we're getting to about a nine month mark where
17 you've already known that your evidence is in serious
18 trouble. And it wouldn't have taken anybody with criminal
19 law course 101 to know it was collateral estoppel.

20 So at that point then, the only legal question for
21 this Court would have been whether or not the taint had been
22 dissipated by being in Guantanamo and Bagram. So, it is not
23 fair to keep dragging this out for no good reason. So you'll
24 have to file by that Wednesday before you leave if you want
25 to amend.

1 If you knew all this stuff before, I want to know
2 when you knew it, but the government obviously knew it.
3 We're not going to wait and wait until you come up with
4 another piece of evidence and another piece of evidence. The
5 time has come.

6 I'll give you until the 24th.

7 Then the other side, you'll have to tell me what
8 you're going to do by the 29th.

9 When do you return, Ms. Wolfe?

10 MS. WOLFE: I return on the 22nd.

11 THE COURT: The 24, you'll move to amend. Doesn't
12 mean I'll grant it. In the motion by the 24th, the
13 Government will move to amend and designate what additional
14 information.

15 Second of all, I want to know what precisely -- will
16 they call witnesses or are they going to relying on something
17 else to make their case. Will it only be what they have in
18 their motion to amend, or do they expect to have real, live
19 witnesses?

20 Then you are going to file the following, the 29th
21 to tell me what your rebuttal is if any. I have seen these
22 declarations, et cetera.

23 This is a case unlike all the rest of them. This
24 does not involve intelligence. This does not involve any
25 particular high level government agency doing the

1 intelligence at all.

2 Did anybody see him do it or didn't they see him do
3 it?

4 If you have a legal argument, put it in your brief
5 on the 29th. You are arguing simply a question of whether or
6 not he meets the definition to be held. Is that what you're
7 saying?

8 MR. HAFETZ: Yes, Your Honor. I mean, there is no
9 lawful basis to detain him, first is the factual
10 inadequacies, second, relatedly there is some legal argument
11 but we'll put them all in our papers on the 29th.

12 THE COURT: That's fine.

13 Any reply that the government to file will have to
14 be here on the third. We'll have a conference call on the
15 30th. I want the papers to be filed in time so that I can
16 get them delivered. That means they have to get to the
17 security officer by 4:00 in order to get to chambers.

18 So, by the 24th by 4:00. The government will file
19 motion to amend and they will specify specifically what
20 they're going to rely on. I am going to look at the evidence
21 that they're going to give me. We may land up on the papers.
22 Whether or not they get to amend--

23 And as part of this, I want to know exactly when the
24 people who are seated here learned about this because it is
25 clear that the military commission, I don't know what kind of

1 government we have that the military commission produces the
2 stuff back in -- when was the hearing down there? Was it in
3 '08?

4 MR. HAFETZ: The hearing was all in '08. There
5 hasn't been any proceedings in the trial court in '09. Your
6 order, Your Honor, after the status conference where you
7 asked the government, your scheduling order was that they
8 needed at that time to produce all evidence they were going
9 to rely.

10 THE COURT: They, over here, the government doesn't,
11 the right hand doesn't know what the left hand is doing. I
12 want to know what the right hand knew as of June One when
13 they filed this thing. They're telling me they didn't know,
14 "they" the prosecutors here, or the counsel for the
15 respondents. So as part of this, if they want me to consider
16 something, I'd like to know who knew what, when? You know
17 the question: Who knew what, when?

18 MR. HAFETZ: Yes, Your Honor. There is one
19 government holding Mr. Jawad. In addition, even after the
20 material was produced, there was no motion to amend at that
21 points. Now, it's only when they realize that their
22 statements are inadmissible that they're now trying to drum
23 up new reasons.

24 THE COURT: They're going to have their fair
25 opportunity to try to do it. But they filed on June 1, 2009,

1 an amended -- at that point, it was a reduced statement of
2 facts. They had the opportunity then.

3 It appears that all they're relying on is stuff that
4 the military people knew. And they're saying we didn't know
5 about it, Ms. Wolfe and Mr. Barish. That's hardly
6 compelling. It better be good evidence.

7 But the level of trustworthiness of a piece of
8 evidence is going to be determined. It is not my job to give
9 advice but I think you'd better go consult real quick with
10 the powers to be, because this is a case that's been
11 screaming to everybody for years. I only learned about it
12 when it was transferred to me from Judge Urbina. But the
13 U.S. Government has certainly known about the problems
14 through the military commission. This was months ago.

15 There are no surprises to some people, including,
16 there is a prosecutor from the military commission who quit
17 and wrote a 20 page affidavit. He investigated. They had
18 defense counsel for the military, who investigated and wrote
19 affidavits, appeared at the military commission.

20 Astounding kinds of things happened at that military
21 commission. I read all of this because I thought we were
22 having a Motion to Suppress. So I read every piece of paper
23 before today. I mean, the idea that people would go to the
24 military commission and say, "I'll only testify if you put a
25 hood on me," is unbelievable. This is our government.

1 Your case fell apart back then. So now, somebody
2 ought to face the music and figure out how you can make a
3 case. How can you do it? Boumedine says you have to make a
4 case. You've got the burden, you'll have to satisfy the
5 standard -- which is not as high as a criminal case -- that
6 you have a basis to continue to detain a young person for
7 more than seven years based on, I don't know what, people who
8 say that they didn't see what they said they saw. I mean,
9 it's time.

10 Sorry about -- I don't mean to impose a great
11 personally burden. But there are thousands of people within
12 the Department of Justice. Find one of them to do something
13 about this case.

14 So, we have our dates. I'll issue an order.

15 If the government learns something about what
16 they're going to do, please let us know. Don't just let us
17 hang out there and prepare. I mean, I read all of this
18 stuff, all of it.

19 We work hard, and so do you. If you need me to call
20 your superiors to wake them up to this case -- I don't
21 understand. It is awful. There are reports in the press all
22 the time. It looks like this case is being ignored in some
23 way. It is not being ignored. It is not that -- I only got
24 it recently.

25 Have you read the blogs on this case? It's just --

1 everything is public. Everybody knows about it. Fine. You
2 can file your opposition to this. But I'm much more
3 interested in the case and not this other stuff.

4 Is there anything further at this time? I realize
5 it is going to be a difficult time to get together. But if
6 the government is forced to do something, lo and behold, they
7 often look at it and come to the right conclusion, sooner
8 than later. It is now the time to figure out whether you can
9 actually go forward with the habeas.

10 I'd be surprised.

11 Anything further?

12 MR. HAFETZ: No, Your Honor.

13 MS. WOLFE: No, Your Honor.

14 (Whereupon, at 2:41 P.M., the hearing concluded.)

15

16

ooOoo

17

CERTIFICATE OF REPORTER

18

19

20

21

22

Lisa Walker Griffith, RPR

Date

23

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25