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In:	**KSC-BC-2020-06** **Specialist Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi**
Before:	**Pre-Trial Judge** Judge Nicolas Guillou
Registrar:	Dr Fidelma Donlon
Filing Participant:	Counsel for Rexhep Selimi
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Public Redacted Version of Selimi Defence Submissions for Thirteenth Status Conference

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I. INTRODUCTION

1. The Defence for Mr. Selimi hereby files submissions in response to the Order of the Pre-Trial Judge scheduling the Thirteenth Status Conference.[1] The Defence reserves the right to develop additional submissions orally at the Status Conference both in relation to the topics addressed herein and others.
2. At the date of filing these submissions, Mr. Selimi had been detained for over twenty months with no likely date for the start of trial in sight. Completion of Rule 102(3) disclosure by the SPO by the deadline ordered by the Pre-Trial Judge is extremely unlikely given the SPO's previous track record in this regard while the Defence is still in the dark regarding the scope of documents covered by Rule 107 and still haven't received the updated Rule 102(3) list, many months after it was promised by the SPO. Coupled with the impact of the recent Decision circumscribing Defence contact with SPO witnesses on the speed and effectiveness of Defence Investigations, concrete steps must be taken now to ensure that the case can proceed to trial at the beginning of 2023.

II. SUBMISSIONS

a. Disclosure

3. The Defence has received a total of 33,725 items disclosed under Rule 102(3). Unfortunately, this number does not equate to how many items out of the 57,328 requested from the Rule 102(3) list have actually been disclosed. The SPO has been providing Rule 102(3) materials to the Defence in a chaotic and inconsistent manner, either disclosing items under ERNs which are completely different from those assigned to them in the Rule 102(3) list or disclosing translations, partial translations and redacted versions of items under ERNs which vary from those

[1] F00863, Order Setting the Date for a Thirteenth Status Conference and for Submissions, 1 July 2022 ("Order").

assigned to them in the Rule 102(3) list.[2] The Defence has repeatedly asked to be provided with the item numbers as per the Rule 102(3) list for the disclosed documents in order to be able to cross-reference them.[3] Eventually, the SPO only yesterday provided to the Defence such lists of items covering just twenty out of thirty seven Rule 102(3) disclosed batches.[4] Evidently it is too late to review such lists before filing these submissions.

4. Based on the experience before previous status conferences, it is also expected that the SPO will file further batches of Rule 102(3) materials in between this filing and the date of the status conference.

5. The Pre-Trial Judge issued an Oral Order at the Twelfth Status Conference which ordered the SPO:

> "in relation to currently pending Defence requests for the disclosure of Rule 102(3) material, to, first, finalise its processing of these requests; second, request protective measures or submit materiality challenges; and third, disclose all material not subject to protective measures requests or materiality challenges by 30 September 2022."[5]

6. This Order reflected the specific submissions of the SPO which requested the deadline of 30 September 2022[6] in opposition to the Defence's request that such disclosure take place by 22 July 2022.[7]

7. In these circumstances, when the deadline ordered by the Pre-Trial Judge is the deadline which was specifically requested by the SPO, it would be wholly surprising if the SPO was unable to complete disclosure of pending Rule 102(3)

[2] Addressed in the email from the Selimi Defence to the SPO, Rule 102(3) disclosure issues, 11 April 2022.
[3] Ibid. *See* also Transcript of Status Conference, 20 May 2022, page 1264, Transcript of Status Conference, 24 March 2022, pages 1077-1078. The same request was put forward by all Defence teams to the SPO during the LegalWorkflow Forum on 15 March 2022.
[4] Email from the SPO to the Selimi Defence, Rule 102(3) Disclosure packages 215-334, 7 July 2022.
[5] Oral Order, 20 May 2022, page 1323 line 16 to page 1323 to line 25.
[6] Transcript of Status Conference, 20 May 2022, page 1275.
[7] Transcript of Status Conference, 20 May 2022, page 1256.

requests by this deadline. Any indication by the SPO that this would be the case should be carefully scrutinised by the SPO to determine the reasons justifying such a failure.

8. As to the implementation of the Order, it is noteworthy that despite the Selimi Defence having requested all items it required from the Rule 102(3) list well before the previous Status Conference, no requests for protective measures or challenges to the materiality of any of these documents have been filed since that date.

9. Therefore, the Defence is concerned that it will be flooded with requests for protective measures or challenges to materiality just before the expiration of the Rule 102(3) deadline, to which it will have to respond at the same time that the Defence is completing its pre-trial brief which is due by 21 October 2022.

10. Further, as the SPO has previously confirmed that "97% of the items on the original Rule 102(3) notice have now been requested by at least one defence team"[8] and that given the number of requests submitted by each of the teams, it is assumed that many of the challenges to materiality or requests for protective measures will affect documents sought by several teams. It is vital therefore that all Defence teams who have requested such documents be given sufficient opportunity to be heard on the necessity and proportionality of such measures or challenges to materiality.

11. In addition, the Defence notes the previous admission from the SPO at the Eleventh Status Conference that:

> "For the requests that are complete, we will be providing the relevant Defence teams with consolidated spreadsheets in relation to those requests. And with respect to the submissions made by the Veseli Defence on tracking where particular items might been disclosed, especially under a different

[8] F00805, Prosecution submissions for twelfth status conference, 18 May 2022, para. 8.

rule, this is information which we specifically include in the spreadsheets that we provide to facilitate tracking."[9]

12. As yet, none of these consolidated spreadsheets on the disclosure history of Rule 102(3) items have been provided to the Defence.

13. Finally, the Defence notes that the original Rule 102(3) list was filed on 31 July 2021, almost a year ago. Since then, on 17 December 2021, the SPO informed the Defence that "less than 100 items on the Rule 102(3) Notice have been identified which cannot be disclosed because of Rule 107 restrictions" but that the SPO "had been actively pursuing Rule 107 clearance for a larger number of items since well before provision of the Rule 102(3) notice and is pursuing clearance of Rule 107 items whether they have currently been requested or not."[10]

14. Similarly, on 17 December 2021 the SPO informed the Defence that:

> "There are less than 1,000 documents for which Rule 107 clearance remains in discussion. The urgency of the matter has been continuously reinforced to Rule 107 information providers, and we expect to receive batch clearances over the coming months. Based on progress to date, the SPO expects that clearance will be received for most if not all of these items, in whole or in part."[11]

15. As of the date of filing, limited further information has been provided in relation to the "less than 100 items" falling under Rule 107 for clearance. Nor has the Defence been provided with a supplement to the existing Rule 102(3) list which would include those "less than 1000 items" or those of them which have been already cleared by the provider under Rule 107(2) or any other relevant evidence from the *Mustafa*, *Haradinaj and Gucati* and *Shala* cases or other SPO investigations which should also be added to this supplementary list. While the SPO confirmed on 5 July 2022 in response to a request from the Veseli Defence,

[9] Transcript of Eleventh Status Conference, 24 March 2022, p. 1074.
[10] Email from the SPO to the Selimi Defence, Rule 107 in relation to Rule 102(3) list, 17 December 2021.
[11] Ibid.

that around 400 items under Rule 107 still required clearance from the information providers it is wholly unclear to the Defence to which documents this relates and under what disclosure rule.

16. The Defence therefore requests that in relation to documents requested from the Rule 102(3) list:

(i) A spreadsheet cross-referencing disclosed items with the item numbers from the Rule 102(3) list and containing disclosure history of the item in relation to each completed disclosure batch be provided to the Defence concurrent with the disclosure of the last document on it, and with the filing of a request for protective measures of challenge to materiality of the document sought;

(ii) The SPO to prioritize requests for protective measures of challenges to materiality for documents requested by more than one team to allow each Defence team to make submissions;

(iii) All SPO requests for protective measures or challenges to materiality be submitted by 26 August 2022 at the latest; Consolidated Defence Responses to all such requests to be filed by 16 September 2022; and Decisions on requests to be issued by 30 September 2022; and,

(iv) The provision of a supplementary Rule 102(3) list by 31 August 2022 to include any additional documents falling under Rule 107 which were not previously included in the original Rule 102(3) list as well as any other documents that should have been included in the original list or which have been acquired by the SPO since that list was produced, as well as an update on the status of documents falling under Rule 107 which were included in the original Rule 102(3) list.

b. Defence investigations and next steps

17. Defence investigations are continuing and will increase up to the filing of the Defence pre-trial brief and then on to trial. However, two factors limit the Defence's ability to move their investigations forward.

18. First, the Decision on contact with witnesses ("Contact Decision"),[12] significantly reduces the capacity of the Defence to meet with SPO witnesses who are willing to meet with the Defence as was possible before the Decision entered into force. As a consequence of the Decision, and without entering into its merits, if the Defence wishes to speak to any of the 326 witnesses on the SPO witness list, the Defence has to:

(i) notify the SPO, the Court Management Unit ("CMU") and, in relation to dual status witnesses, Victims' Counsel at least ten days prior to the intended interview and wait for them to both ascertain in good faith if the witness consents to being interviewed by the opposing Party and inform the witness of the possibility of having a representative of the calling Party, a legal representative of the witness, Victims' Counsel in relation to dual status witnesses and/or a WPSO representative present during the interview and wait for the SPO to inform the Defence whether the witness consents; and,

(ii) respond to any request by the SPO to the Panel to permit it to attend any meeting between the opposing Party and the witness even where the witness does not request the SPO's presence on the basis of "any legitimate reason" and refrain from interviewing the witness until the Panel has issued its decision.

[12] F00854, Decision on Framework for the Handling of Confidential Information during Investigations and Contact between a Party or Participant and Witnesses of the Opposing Party or of a Participant, 24 June 2022.

19. As a result of the Contact Decision, the Defence no longer benefits from the same flexibility in conducting its investigations which it had previously enjoyed and which reflected how Defence investigations were conducted before the ICTY or those domestic adversarial systems upon which the KSC trial procedure is based. It must follow a bureaucratic and convoluted process which inevitably results in delay in Defence investigations, even before the question of whether such interviews can actually be conducted given the further requirement that a videotape of any interview must be produced, disclosed and potentially entered into evidence by the SPO.
20. In this regard, it also appears that many of the individuals who are SPO witnesses, are completely unaware of this fact as the SPO has not previously notified them. As a consequence, when the Defence requests to meet with witnesses, and the SPO informs them of such requests and by definition informs them of their status as an SPO witness this will be the first time that this information will be conveyed to them. This will likely result in a certain amount of confusion and delay which would be best mitigated by the SPO being required to inform each of these 326 witnesses now that they are prosecution witnesses. The Pre-Trial Judge should order the SPO to make this notification at the earliest opportunity, and within a set deadline.
21. To be clear, the Defence is not challenging the Contact Decision through these submissions, for this will be done through the proper procedural avenue of a request for certification to appeal. However, the impact of the Contact Decision on the strategy and timing of Defence investigations cannot simply be ignored.
22. Second, Defence investigations continue to be severely hampered by the extensive redactions to the Indictment, the SPO Pre-Trial Brief and the witness statements that purport to support both.
23. At the outset, the Defence notes and recognizes that each of these redactions have been authorized by the Pre-Trial Judge. The Defence is not seeking

reconsideration of those decisions. Instead, the Defence highlights the effect of these redactions on the ability of the Defence to prepare.

24. By way of example, the following allegation appears in the SPO Pre-Trial Brief at paragraph 145:

> "[REDACTED]"

25. The footnote underlying this allegation is entirely redacted. The allegation itself does not appear in the Indictment and nor does any further information appear in the Outline. The Defence has no idea when, where or how this alleged interference occurred, let alone what evidence the SPO relies upon to support it. It is therefore effectively impossible to investigate this at the present time.

26. The same applies still to paragraph 41 and 42 of the Indictment which are entirely redacted as well as a myriad of other redactions applied by the SPO.

27. Again, the Defence does not suggest that the redactions are inconsistent with the decisions on protective measures nor that the decisions themselves are not based upon sufficient justification. No reconsideration is sought at this stage of these decisions. However, as previously set out by the Defence in response to the SPO's first Request for Protective Measures:

> "Finally, when assessing a request for protective measures, the Pre-Trial Judge must respectfully always keep at the forefront of his mind, the impact of the proposed measures on the ability of the Defence to investigate and effectively and efficiently confront the evidence at trial."[13]

28. This is as true now as it was when submitted by the Defence over eighteen months ago.

29. To seek to mitigate the impact on Defence investigations of both the protective measures which have been granted to witness statements and the resulting redactions to the Indictment and SPO Pre-Trial Brief, the Defence needs clarity

[13] F00127, Selimi Defence Response to Confidential Redacted Version of Specialist Prosecutor's 'Request for Protective Measures' and Supplement to Request for Protective Measures', 8 December 2020, para. 15.

on which statements relate to which redactions in the Indictment and SPO Pre-Trial Brief and when these redactions to statements or documents will be lifted. This is vital in order to allow the Defence to plan ahead and focus its investigations, and allocate resources accordingly.

30. By way of example, in relation to the allegation in paragraph 145 of the SPO Pre-Trial Brief, the SPO should be ordered to:

(i) Identify which statements or other evidence relate to this allegation;

(ii) Confirm when the redactions to these statements will be lifted, or when disclosure will be effected if it has not yet occurred.

31. The same should apply to each and every redaction in the Indictment and Pre-Trial Brief.

32. In relation to the other specific issues raised in the Order:

(i) No unique investigative opportunities are envisaged.[14]

(ii) The Defence currently envisage potentially needing to give notice of an alibi or grounds for excluding responsibility, pursuant to Rule 95(5) of the Rules, subject to the redacted allegations in the Indictment being unredacted;[15]

(iii) The Defence is still actively reviewing facts to determine whether or not it can agree to them and notes the exchange of correspondence on certain facts between other teams which may facilitate agreement on some issues;[16]

(iv) The Defence does not foresee creating a list of issues subject to dispute and those not subject to dispute beyond the agreed facts. The burden rests on the SPO to prove its case to the appropriate standard and is required to

[14] Order, Section 2(b).
[15] Order, Section 2(c).
[16] Order, Section 2(d).

do so for every relevant underlying fact unless explicitly agreed to by all four Accused.[17]

33. Objections to the admissibility of evidentiary material disclosed pursuant to Rule 95(2)(e) of the Rules remain premature.[18] Only the Trial Chamber assigned to hear the case may make decisions on admissibility in accordance with Rule 138 and not the Pre-Trial Judge. The SPO is obliged to justify the admissibility of any evidence that it seeks to rely upon in trial proceedings and the Defence will respond to such applications in good time before the Trial Chamber in accordance with the relevant criteria for admission of such evidence under the Rules, either orally or in writing at the appropriate time. Therefore, not only the deadline of 8 September 2022 as suggested by the Pre-Trial Judge, but indeed any deadline in this regard, is wholly unjustified. Until the SPO seeks to admit evidence before the Trial Chamber, the Defence is presumed to oppose admission of all evidence disclosed under Rule 102. Nothing further need be submitted at this stage.
34. However, to constructively assist the Pre-Trial Judge to fulfil his statutory duty to prepare the case for trial, the Defence is willing to enter into preliminary discussions with the SPO on which documents the Defence may not oppose being admitted during trial proceedings if the SPO can provide relevant information on which documents it will seek to rely upon and why.
35. At present, the SPO's exhibit list contains 16,298 documents. While this number is in part due to the curious and unhelpful practice of dividing each interview into each separate parts, even if that part of the interview lasted no longer than a few minutes, this is not a focused list of documents or witness statements which it actually intends to rely upon at trial. Instead it is a strategic decision by the SPO to cast the net as wide as possible to include all possible documents it may

[17] Order Section 2(f).
[18] Order Section 2(e).

use in trial to avoid having to seek judicial authorisation to add exhibits to this list in the future and explain why these were not on the initial list and why it would be in the interests of justice to add them now.

36. By contrast, the documents which the SPO does actually consider relevant appear to be those which it relies upon specifically in its Pre-Trial Brief. Rather than expending focus and attention on the many thousands of documents which are simply prosecutorial padding, if any progress is to be made in this area, the SPO should extract these documents into a list and explain why it is relying on each document. This will allow the Defence to meaningfully assess and communicate which documents it does not oppose. The same would also assist the Pre-Trial Judge in determining which SPO witnesses it genuinely intends to rely upon rather than simply include in its list to be able to apply the Contact Protocol to as many individuals as possible.

37. Finally, while the Defence has not ultimately decided whether it will file a pre-trial brief, if one is filed, the Defence envisages that it will be able to file one by 21 October 2022. However, this is subject to the following caveats, namely that any Defence Pre-Trial Brief cannot meaningfully:

    (i) respond to allegations based on redacted portions of the Indictment or SPO Pre-Trial Brief; or

    (ii) respond to allegations based on redacted evidence which had not been disclosed to the Defence at the time of filing; or

    (iii) rely on evidence disclosed by the SPO since 1 September 2022 or, self-evidently was not disclosed by the deadline of 30 September 2022 due to challenges to materiality or requests for protective measures.

c. Proposals for streamlining the case

38. The Defence is willing to constructively engage with the SPO in how the case may be streamlined from the current amount and duration of witnesses, exhibits

and crime sites. However, as yet, no clear indication has been provided by the SPO that they would be willing to do so, except for a reduction in the time scheduled for each witness. While the Defence recognises the discretion accorded to the SPO in how it presents its case, it is simply noted that the later any decision is taken on any of these reductions, the more time will be wasted by the Defence reviewing exhibits for documents that will never be tendered, preparing to cross-examine witnesses who will never testify and investigating crime sites for which no evidence will be called by the SPO. The earlier any decisions are taken by the SPO in this regard the better.

39. As for the specific issue of whether "time limits can be set for all Parties to question each witness and whether the Defence can designate one representative for cross-examining certain witnesses"[19] the Defence does not object, in principle to reasonable time limits being placed on the cross-examination of each witness, subject to the following factors.

40. First, there are four accused with separate interests and strategies. Any limit must reflect this, rather than applying the same time as would be available for a single accused.

41. Second, artificial time limits, with the Registry forced to act as an arbiter with a stopwatch monitoring time used by each party and the resulting disputes as to how objections from the opposing party should be counted, rarely contributes to efficient proceedings.

42. Third, pursuant to Rule 143(3), cross-examination is not only limited to the subject-matter of the direct examination but also matters affecting the credibility of the witness as well as "evidence relevant to the case of the cross-examining party." A relatively short examination-in-chief, shall not automatically therefore result in a comparable level of cross-examination.

[19] Order, Section 3(d).

43. Fourth, the amount of necessary cross-examination may vary dramatically between witnesses. Any times savings for cross-examination by the Defence should therefore be considered for future witnesses.

44. In light of these same factors, appointing a single representative of the Defence teams to cross-examine certain witnesses is inherently problematic, and is objected to. As a matter of principle, it risks undermining the central principle that each accused must be treated as an individual and that Defence Counsel representing that accused has a duty solely to their client.

45. Further, in practice, it is likely that the first team to cross-examine a witness will ask the majority of the necessary questions and the following teams will have less questions and may indeed have none to ask depending on the evidence of that witness. The first team to cross-examine may alternate, based on discussions between the teams, but that is wholly different from requiring one specific Defence team to ask questions on behalf of the others.

46. In terms of the sitting schedule,[20] while noting this will be a decision for the Trial Panel assigned to the case, the Defence puts forward certain principles that should be followed:

    (i) The schedule should allow for the most effective and efficient presentation of evidence and for a fair opportunity for the opposing party to challenge this evidence;

    (ii) Any schedule must fully respect the right of an accused, especially a detained one, to an expeditious trial while simultaneously recognising the rights to adequate time and facilities to prepare and present his case;

    (iii) Non-sitting days are not "days off" but are necessary to be able to effectively carry out the panoply of non-court work but that advance notice

[20] Order, Section 2(e).

of the trial schedule is crucial to allowing the parties to properly make use of periods when the court is not sitting;

(iv) Flexibility through occasional extended sitting sessions or additional sitting days to finish the testimony of a witness in exceptional circumstances may assist in moving proceedings forward;

(v) Court should be used solely for court activities. Reading summaries of admitted written evidence or documents, as occurred at other courts, is not an effective use of court time.

d. Impact of inadvertent disclosures

47. The Defence recognises the significant amount of evidence that is relevant to this case and the work that the SPO conducts in organising such evidence to be reviewed and disclosed in accordance with its disclosure obligations under Rules 102 and 103. Further, in cases of this magnitude, self-evidently mistakes occur and the parties must do their best to mitigate their consequences.

48. However, the regularity of inadvertent disclosures by the SPO, and the impact that such disclosures have on the Defence demonstrates that whatever system the SPO is using for ensuring that it is diligently conducting its work is not functioning properly.

49. Since the beginning of this case, the SPO has requested the Defence to destroy evidence or filings that purportedly contain confidential information on the following occasions:

(i) On 25 February 2022, the SPO requested the Defence to delete and destroy [REDACTED].

(ii) On 28 March 2022, the SPO, in its cover email for Batch 204, requested the Defence to delete and destroy three documents that had been erroneously disclosed in Batch 18 on 11 March 2022.

(iii) On 23 May 2022, the SPO requested the Defence to delete and destroy the [REDACTED].[21]

(iv) On 22 June 2022, the SPO, in its cover email for Batch 304, requested the Defence to delete and destroy a document erroneously redacted and disclosed in Batch 159 on 1 February 2022.[22]

(v) On 23 June 2022, the SPO, in its cover email for Batch 307, requested the Defence to delete and destroy a document erroneously redacted and disclosed in Batch 31 disclosed on 28 April 2021.[23]

(vi) On 28 June 2022, the SPO, in its cover email for Batch 308, requested the Selimi Defence to delete and destroy a document that had been inadvertently disclosed under Rule 102(3) in Batch 303 on 21 June 2022.[24]

50. Each time this occurs, the Defence has diligently searched its records and carried out the necessary destruction and removal despite this requiring multiple efforts to ensure that the SPO's mistakes are sufficiently mitigated. However, often, this is not simply a question of deleting the specific document that has been disclosed but requires the Defence to ensure that the information which has been extracted from these underlying documents had also been destroyed, a complicated and time-consuming task.

51. The Defence has in various manners sought to expedite and/or improve the process for identifying and resolving these inadvertent disclosures. For example, on 12 May 2022, the issue of inadvertent disclosure was raised by the Defence at the Legal Workflow Forum with the Defence Teams requesting a list of all inadvertent disclosures by the SPO. On 2 June 2022, the Krasniqi Defence on behalf of all Defence Teams reminded the SPO of this issue. On 3 June 2022, the

[21] [REDACTED].
[22] Email from the SPO to Defence Teams on Disclosure Package 304, dated 22 June 2022.
[23] Email from the SPO to Defence Teams on Disclosure Package 307, dated 23 June 2022.
[24] Email from the SPO to Selimi Defence on Disclosure Package 308, dated 28 June 2022.

SPO confirmed the receipt of this request and stated it would revert to the Defence once it had looked into the issue.[25] No further response has been provided.

52. Similarly, on 26 May 2022, Counsel for Mr. Selimi wrote to the SPO in relation to the request to delete and destroy [REDACTED], suggesting ways in which the process of deleting all of the erroneously disclosed information (including from internal work products) can be made more efficient in the following terms:

> "Therefore, instead of simply destroying the filings as you have requested, we respectfully suggest that it would be far more sensible for you to identify the specific information contained in these [REDACTED] that should remain redacted and we can ensure that information is properly and promptly removed both from our systems and from those of our client. While we note that this approach will specifically reveal to us the confidential information you seek to redact, we are still bound by our obligations under the code of conduct and would at least be aware of that information and ensure that it is not disseminated any further."[26]

53. The SPO was unable to accede to the request.

54. [REDACTED],[27] [REDACTED] :

> "[REDACTED]"[28]

55. [REDACTED].

56. [REDACTED].

57. [REDACTED].

[25] Email from Krasniqi Defence to the SPO on Fourth Forum Meeting Follow-up: Inadvertent Disclosure, 2 June 2022; Reply from the SPO to Krasniqi Defence on Fourth Forum Meeting Follow-up: Inadvertent Disclosure, 3 June 2022.
[26] Email from the Selimi Defence, Geoffrey Roberts, to the SPO [REDACTED], 26 May 2022.
[27] [REDACTED].
[28] [REDACTED].

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III. RELIEF REQUESTED

58. The Defence hereby respectfully requests the Pre-Trial Judge to order the necessary practical steps set out in paragraphs 16, 20, 30, 31 and 36 above.

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Respectfully submitted on 8 July 2022,

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