

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Appeal from Pickens County
Court of General Sessions

S.C. SUPREME COURT

Brian M. Gibbons, Circuit Court Judge

Appellate Case No.: 2019-000500

The State, Respondent,

v.

Suzanna Brown Simpson, Petitioner.

BRIEF OF PETITIONER

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Issues on Appeal

1. Did the trial court err in excluding testimony by defense expert that during a personal interview the treating physician (State Expert) had concurred that the Petitioner lacked sanity at the time of the offenses?
2. Did the trial court's ruling constitute reversible error as it excluded all testimony by the defense expert arising solely from the interview of the treating physician?
3. Did the trial court's ruling improperly exclude admissible evidence necessary to explain the reasons and underlying facts supporting the opinion of the defense expert?
4. Did the trial court's ruling result in prejudice to the petitioner?

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Statement of the Case

The petitioner, Suzanna Brown Simpson, was indicted for the murder of her two children, and the attempted murder of her husband, along with being in possession of a weapon during a violent crime. Simpson proceeded to a jury trial in Pickens County on June 20, 2016. At trial Simpson was represented by John Mauldin, Public Defender, Teal Johnson, and Jacob Goldstein of the Public Defender's Office. The State was represented by Walter Wilkins, Solicitor and Betty C. Strom, Deputy Solicitor, for the 13th Judicial Circuit. The case was tried before a jury, the Honorable Brian M. Gibbons, presiding. The jury returned a verdict of guilty on all charges and Simpson was sentenced to two life sentences, a thirty year sentence, and a five year sentence, all consecutive. Simpson timely appealed and J. Falkner Wilkes substituted as counsel for Simpson. The court of appeals heard the case and issued an opinion affirming Simpson's conviction. The court of appeals denied rehearing. This Court granted the petition for certiorari and this Brief follows:

Statement of Facts

The petitioner, Suzanna Brown Simpson, was charged with attempted murder of her husband and the murder of her two children, ages five and seven. Simpson did not contest that she shot her husband and children. A. 254. Simpson defended on the basis of her inability to tell right from wrong at the time of the incident. A. 255. The incident occurred at approximately 4:00 a.m. on May 14, 2013. A. 465.

On the day before the incident Nathan Stegall, a friend of Simpson's husband, came over to borrow a car while Simpson's husband was at work. He had a short conversation with Simpson. Stegall said that he "could tell she was highly agitated." A. 411, l. 25. Stegall borrowed a truck and left. At 9:11 p.m. that night Stegall received a text message from Simpson that said "Hell on Earth?" A. 415. Stegall testified that out of all the time that he had known Simpson this was the only text he had ever received from her and thought it very odd. A. 418.

Kevin Sanders' son and Simpson's daughter attended the same school. The day before the incident Mr. Sanders was in the school office and recalled overhearing Simpson telling her son that she was signing out his sister because he was sick, to which the boy responded "I'm not sick, Mom." A. 422, l. 20. Sanders characterized her behavior that day as odd. While waiting for her daughter to come to the office Simpson was walking back and forth, real impatient. A. 423. Then when leaving, Simpson heard Sanders say something to his child and mistakenly believed that he had been speaking to her. Simpson spun around angrily and said, "What did you say to me?" A. 424, l. 8. Sanders said that "something just didn't feel right" about Simpson's actions. A. 425, l. 11-14. Sanders said that Simpson was acting very strangely. A. 426-427.

Simpson's mother-in-law, Alison Simpson, testified to Simpson's commitment to an

in-patient mental health facility about a year before the incident, and that after the commitment she had openly questioned Simpson's ability to care for the children and whether she would ever hurt them. A. 433. Alison Simpson said that on the day before the incident Simpson had called and asked her about why she didn't come to the house as much. A. 435. The end of the call was bizarre with Simpson saying, "I just wanted to say hello." A. 297, l. 6-7. Alison Simpson testified to another bizarre conversation with Simpson just after she was released from inpatient psychiatric care. A. 439.

Simpson's mother, Susan Brown, testified about Simpson's history of mental health problems and her behavior leading up to her hospitalization at St. Francis Hospital and the Carolina Center about ten months prior to the incident. She said that during a drive to Asheville Simpson was not making sense, nothing connected, talking about friends that she had talked to that had somebody else's voices coming out of their mouth. A. 450-451. Brown testified that Simpson later called her around midnight saying to turn the lights on because her house wasn't safe. R. 314. Brown said that Simpson did not even sound like herself in the phone call. A. 452. They took her to the emergency room and she was committed based on the psychotic episode. A. 453-454. Brown said that Simpson thought she was being followed, her phones bugged, and that she was being watched through her ceiling fan. A. 455.

On the day before the incident, Brown indicated that Simpson wasn't quite herself when they went out to dinner for Mother's Day. A. 457; 887-889. Brown said that Simpson was just sitting and staring and wouldn't eat dinner. A. 459.

On the day of the incident Brown had several conversations with Simpson. A. 445. Simpson called her around 10:30 in the morning and asked one "very bizarre" question: "Did you

and dad really want me?" A. 445, l. 10-12. About noon Simpson called a second time and asked another "very bizarre" question about deceased family members being better off in heaven. A. 445. Brown testified that Simpson's tone was so strange that it almost didn't sound like herself. A. 445. Brown responded to Simpson's question about family members better off in heaven that they were because they had suffered so much. A. 445. Then around 1:30 in the afternoon Simpson called back and "was talking very fast, nonstop about the evils of the world and how you couldn't protect yourself, you couldn't protect your children from the evils of this world." A. 446, l. 14-18. At 5:45 that evening Simpson called Brown again and said that Simpson sounded so happy. A. 446-447. Then at 8:45 p.m., just hours before the incident, Simpson called back and sounded as sad and low as she had been happy hours earlier. A. 447. In that last conversation Simpson told her mother that she couldn't take care of the kids anymore. A. 448. In addition to the very bizarre nature of the calls Brown testified that it was very unusual for her to get so many calls from Simpson in one day. A. 448.

Dr. Leonard Mulbry, Jr., M.D., was qualified as an expert in forensic psychiatry. A. 518. Mulbry reviewed Simpson's extensive medical, psychiatric and associated records. A. 520. He met with Simpson on three different occasions as part of his forensic evaluation. A. 520. Dr. Mulbry diagnosed Simpson with schizo-affective disorder bipolar type, the typical symptoms for which can include long periods of very severe depression and high rates of suicide. A. 522-523. Mulbry testified that this also includes mania where the mind races, irritability, and the inability to think clearly because thoughts don't link very well, which can result in a person not sleeping for a week or more at a time. A. 524. Mulbry testified that his review of records showed that Simpson had been treated for bipolar disorder for a long time. A. 524. Mulbry explained

schizophrenia which involves the marked loss of reality. A. 524. Symptoms include hearing things that aren't there. A. 524. Symptoms also include paranoia, inability to link thoughts, and the inability to complete a sentence or thought. A. 524. Dr. Mulbry testified that Simpson suffered a major decline in mental health beginning in 2010. A. 529. In 2012 Simpson was committed to in-patient psychiatric treatment by St. Francis Hospital emergency room staff. At that time Simpson was found to be psychotically paranoid. A. 530. Dr. Mulbry testified that there is no cure for Simpson's condition. A. 532. Dr. Mulbry indicated that the photo taken of Simpson the day before the incident at the Mother's Day dinner showed a typical appearance for someone distracted and fearful from paranoia. A. 887-889. Based on an extensive forensic review of Simpson's records, Dr. Mulbry opined that at the time of the incident Simpson was unable to tell moral and legal right from wrong. A. 533.

Dr. David Price, PhD., was qualified as an expert in forensic psychology, clinical psychology, and neuropsychology. A. 577. Dr. Price reviewed thousands of pages of medical history for Simpson and met with her on nine different occasions. A. 581. Dr. Price also interviewed Simpson's parents, and her treatment providers, including Dr. Jeffrey Smith. A. 582. Dr. Price diagnosed Simpson with schizo-affective disorder bipolar type. A. 591. After an exhaustive forensic review, Dr. Price opined that at the time of the incident Simpson did not know legal and moral right from wrong. A. 582. Dr. Price testified that he had no question about her psychosis, delusions, or paranoia, and that she was acting under the presence of a significant delusion at the time of the incident. A. 583.

Dr. Richard Lesense Frierson, M.D., was qualified as an expert in the field of forensic psychiatry. A. 605. On the motion of the State Dr. Frierson was appointed by the court to perform

an evaluation of Simpson. Dr. Frierson did an extensive evaluation, reviewed records, interviewed family member, interviewed the ER physician that treated Simpson after the incident, and met with Simpson three times. He also diagnosed Simpson with schizo-affective disorder bipolar type. A. 611. His diagnosis was wholly independent of the diagnosis of the other two defense experts. A. 612. Frierson explained that Simpson suffered from delusions which he defined as fixed false beliefs and psychosis which he defined as "out of touch with reality". A. 613-614. Dr. Frierson opined that Simpson was, due to mental illness, unable to distinguish legal or moral right from legal or moral wrong at the time of the incident. A. 617. Dr. Frierson related Simpson's paranoid delusional thought that hell had come to earth to the text message Simpson sent to Nate Stegall the day before the incident. A. 617; 887-889. Dr. Frierson has conducted over a thousand evaluations for criminal responsibility. A. 634. Dr. Frierson testified that Simpson was not criminally responsible for her actions when she shot her family. A. 635.

In reply, and over the discovery violation objection by the defense, the State offered surprise forensic testimony by Dr. Jeffrey K. Smith, M.D. Dr. Smith was Simpson's treating physician leading up to the date of the incident. Dr. Smith last saw Simpson clinically three months prior to the incident, and then for only 8 minutes. A. R. 610-611; 626. Dr. Smith's average appointment with Simpson lasted 7.4 minutes. A. 769-770. Dr. Smith was qualified as an expert in psychiatry. A. 725. The state chose not to offer Smith as an expert in forensic psychiatry, stating that it would not be able to have him qualified in forensic psychiatry. A. 681, 1. 1-2. Dr. Smith believed that Simpson had stabilized around that time but admitted in his testimony that he was obviously wrong. A. 752. Smith admitted that his own records indicated that Simpson suffered from psychosis on at least three occasions. A. 755. Throughout his

treatment Smith had Simpson on various anti-psychotic drugs. A. 757. Smith admitted that during her treatment Simpson's condition would destabilize when she would stop taking medications which resulted in mood swings and recurrence of paranoia. A. 759. During Smith's treatment Simpson had the psychotic episode that caused her to be committed for psychiatric by the emergency room at St. Francis Hospital. A. 759. Smith's records indicate that on the appointment immediately following Simpson's release from her commitment in Carolina Behavioral Center he saw Simpson for eight minutes for her August 16, 2012. A. 762-763. Over the course of his treatment of Simpson the average time spent with Simpson was 7.4 minutes. A. 768.

In preparing to testify for the State Dr. Smith never reviewed witness statements, police reports, supplemental reports, EMS reports, 911 phone calls. A. 749. Dr. Smith never met with any of the family members, Michael Simpson, Simpson's parents, or Simpson's in-laws. A. 750-752. Over the objection of the defense Smith gave a forensic opinion that Simpson knew right from wrong but was unable to conform her conduct to the behavior of the law. A. 741.

The defense objected to the testimony of Dr. Smith based on a lack of prior notice to the defense required by Rule 5, Brady and due process. A. 163-166; 174; 478-479; 568-665. Based on Fourth Amendment grounds, HIPAA, and state privacy laws pertaining to mental health records the defense further objected to any forensic testimony by Dr. Smith. A. 659-660; 944. The defense also sought to suppress any forensic testimony that was based on his review of Simpson's mental health records illegally seized by SLED. A. 659-667; 944. Those records, which Dr. Smith admitted that he had never seen before, were provided to him by the solicitor just prior to trial to allow Dr. Smith to give forensic testimony. A. 709. The court expressly

refused to make any findings as to the SLED's seizure of Simpson's records or make a clear ruling on the issue. A. 683. (Additional facts in argument section).

[Argument begins on next page]

ARGUMENT

I. THE TRIAL COURT ERRED IN EXCLUDING TESTIMONY OF THE DEFENSE EXPERT AS TO STATEMENTS MADE BY THE PETITIONER'S TREATING PHYSICIAN (STATE EXPERT) DURING A PERSONAL INTERVIEW.

A. *The Testimony at Issue Does Not Constitute Hearsay*

Defense expert Dr. David Price testified that during a personal interview, Simpson's treating physician and state expert (Dr. Jeffrey Smith) had concurred in Price's finding that Simpson lacked the ability to distinguish right from wrong at the time of the offenses. On the state's objection the court excluded any testimony about information not contained in Dr. Smith's medical records that Dr. Price had learned solely from his discussions with Dr. Smith. As a result, Dr. Price was prevented from relating all of the information that would explain the reasons for his opinion as well as its underlying factual basis. The exclusion of the information gained solely through Dr. Price's discussions with Dr. Smith on the grounds of hearsay was clearly error.

As an initial matter, characterizing Dr. Smith's prior concurrence on Simpson's lack of sanity as hearsay presents an interesting and potentially novel issue under Rule 801. Rule 801(c) defines hearsay generally as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." *Rule 801(c), SCRE*. While Dr. Price's testimony as to what Dr. Smith had told him during the interview may constitute hearsay under Rule 801(c), Rule 801(d)(1) provides that out of court statements by a witness are not hearsay where "[t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the

declarant's testimony." *Rule 801(d)(1), SCRE*. Dr. Smith testified at trial, was subject to cross-examination, and the statement was inconsistent with his opinion testimony at trial.

What appears to be a novel twist to the application of Rule 801(d)(1) in the present case is that Dr. Price testified prior to Dr. Smith, something that was outside the control of the defense. The state chose not to present Dr. Smith in its case-in-chief. If it had, then Dr. Smith's statement would have been clearly within the confines of Rule 801(d)(1). But instead, the state presented Dr. Smith as a rebuttal witness. While there was nothing to prevent the state from presenting Dr. Smith as a rebuttal witness, its doing so should not have diminished Simpson's ability to otherwise present a complete defense. In light of Dr. Smith being a rebuttal witness, the defense had no other procedure by which it could expect to introduce Dr. Price's testimony that Dr. Smith had previously concurred with Dr. Price in concluding that Simpson lacked sanity at the time of the offenses. The defense therefore presumably offered Dr. Price's testimony in anticipation of Dr. Smith changing his opinion when called as a rebuttal witness. In light of Dr. Smith's being held by the state until rebuttal, Dr. Price's testimony should not have been excluded as hearsay. Especially where the issue would not have existed but for the state's election to call Dr. Smith in rebuttal rather than in its case-in-chief. The court therefore erred in excluding Dr. Price's testimony on the basis of hearsay.

B. Even If Considered Hearsay, the Testimony at Issue Was Admissible to Explain the Reason for the Defense Expert's Opinion as Well as its Underlying Factual Basis.

The defense offered the testimony of three experts on the issue of sanity. Dr. Price, the first to testify, opined that Simpson could not distinguish between moral or legal right and wrong

at the time of the incident. A. 582. On direct examination Dr. Price was asked to explain the basis of his opinion. A. 582. In response Dr. Price testified that he reviewed “hundreds if not thousands of pages” of Simpson’s records, met with Simpson on nine different occasions, and interviewed Simpson’s prior treatment providers. This included Simpson’s last treating psychiatrist Dr. Jeffrey Smith. A. 579-582. While beginning to explain the information gained from his discussions with Dr. Smith, Dr. Price stated that Dr. Smith had agreed with his opinion on Simpson’s lack of sanity. A. 585. The state objected. A. 585. The basis for the objection was not entirely clear: “Objection, Your Honor. He’s about to opine as to what another doctor has – diagnosis or –.” The court then interjected: “Objection as to hearsay.” A. 585, l. 13-16. There was a brief discussion that resulted in the court excluding testimony relating the discussions between Dr. Price and Dr. Smith, Simpson’s treating psychiatrist.

Defense Counsel: Well, the evaluator obviously talked to tens of people, that he is relating what they told him about the person being evaluated. I don’t know how --

The Court: Is this something that was contained in the records?

Dr. Price: It’s what he told me directly, Your Honor.

Solicitor: It’s not in the medical records. It’s what he told him.

The Court: All right, Objection sustained.

Defense: Don’t say what Dr. Smith told you unless it actually is contained in Dr. Smith’s records. Okay?

A. 585, l. 17-586, l. 5.

The court’s ruling that the treating physician’s statements to the defense expert

constituted *impermissible* hearsay was clearly in error. As an expert witness, Dr. Price is permitted to testify to hearsay: “The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.”

Rule 703, SCRE. An expert may testify as to matters of hearsay for the purpose of showing what information he or she relied on in giving an opinion. *In re Manigo* (S.C.App. 2010) 389 S.C. 96, 697 S.E.2d 629, *rehearing denied, certiorari granted, affirmed* 398 S.C. 149, 728 S.E.2d 32.

Prior to trial Dr. Smith, as the treating physician, had discussed not only his treatment of Simpson, but his belief (at that time) that Simpson could not tell the difference from right and wrong at the time of the offenses. Dr. Price’s opinion was informed in part by these discussions.

Dr. Price’s testimony as to the information he learned from his interview of Dr. Smith, as the treating physician, was admissible to explain the reasons for his opinion. “The expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.” *Rule 705, SCRE*. Here, Dr. Price was simply attempting to explain all of the underlying facts and reasons for his opinion when the court ruled to exclude any information provided directly by Dr. Smith that was not contained in his medical records.

An expert is entitled to state a basis for his or her opinion. At common-law an expert had to state the basis for the opinion prior to giving the opinion. Although Rule 705 did away with the common-law practice of requiring that the underlying facts be disclosed prior to the expert

giving an opinion, its adoption did not forbid it, and in practice it is difficult to imagine how an opinion could be deemed reliable without the underlying reasons being sufficiently explained.

Preventing Dr. Price to testify to the any of the discussions and information he learned from his interview with Dr. Smith therefore diminished the value of Dr. Price's testimony.

The pre-Rule position has some merit. It is both sensible and logical to require the expert witness to disclose the facts that underlie his or her position. If these facts are not disclosed to the jury, the expert's opinion might be irrelevant and misleading if grounded on facts ultimately discounted by the trier of fact. The trier of fact could not adequately assess the validity of the expert testimony without knowing the particular facts that support the expert opinion. The pre-Rule position was designed to aid the trier of fact in its assessment of the validity of the expert's opinion.

Weissenberger's Federal Evidence § 705.3.

Here Dr. Price's ability to explain all of the reasons underlying his opinion was essential to the jury's ability to fully assess his testimony. This is especially true since Dr. Smith was Simpson's treating physician. It was therefore necessary to show the jury that Dr. Price was working off of the same information as Dr. Smith. This could only be done though Dr. Price informing the jury of any additional information that he learned from Dr. Smith directly, especially information not contained in the medical records. That not being the case it is likely that the jury assumed that Dr. Smith, being the treating physician, knew more about Simpson's condition than Dr. Price. The court's hearsay ruling therefore diminished the testimony of Dr. Price and prevented Simpson from fully presenting her defense.

C. The Petitioner's Constitutional Right to Present the Evidence in Question and the Prejudice Resulting From its Exclusion

The exclusion of the discussions between Dr. Price and Dr. Smith severely impacted

Simpson's ability to present a complete and meaningful defense. Thus the exclusion of the evidence at issue impinged upon Simpson's rights as protected under the state and federal constitutions.

“The Constitution of the United States guarantees a criminal defendant certain fundamental rights. *See U.S. Const. amend. VI.* ‘The Sixth Amendment rights to notice, confrontation, and compulsory process guarantee that a criminal charge may be answered through the calling and interrogation of favorable witnesses, the cross-examination of adverse witnesses, and the orderly introduction of evidence.’ State v. Lyles, 379 S.C. 328, 341, 665 S.E.2d 201, 208 (Ct. App. 2008). ‘These basic rights are applicable to the states through the due process clause of the Fourteenth Amendment. The Amendment essentially “constitutionalizes” the right to present a defense in an adversary criminal trial. Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. (2d) 562 (1975).’ State v. Schmidt, 288 S.C. 301, 342 S.E.2d 401 (1986). Our State's Constitution and legislature have further ensured individuals accused of a crime will enjoy these rights. ‘The right of trial by jury shall be preserved inviolate. Any person charged with an offense shall enjoy the right to a speedy and public trial by an impartial jury; to be fully informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to be fully heard in his defense by himself or by his counsel or by both. *S.C. Const. art. 1, § 14; see also S.C. Const. art. 1, § 3.*’ State v. Lyles, 379 S.C. 328, 341, 665 S.E.2d 201, 208 (Ct. App. 2008). ‘Additionally, the South Carolina Code confirms these guarantees by allowing criminal defendants to compel witnesses to appear in their favor and to produce witnesses and evidence at trial. *See S.C. Code Ann. § 17-23-60 (1976); S.C. Code Ann. § 19-7-60 (1976).* These safeguards

ensure the accused will benefit from a fair and impartial trial.” State v. Lyles, 379 S.C. 328, 341, 665 S.E.2d 201, 208 (Ct. App. 2008).

As further stated in Lyles, “Few rights are more fundamental than that of an accused to present witnesses in his own defense. Chambers v. Mississippi, 410 U.S. 284, 302, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); *see also* California v. Trombetta, 467 U.S. 479, 485, 104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984) (finding the Due Process Clause of the Fourteenth Amendment affords criminal defendants a meaningful opportunity to present a complete defense); State v. Hutton, 358 S.C. 622, 631, 595 S.E.2d 876, 881 (Ct. App. 2004) (recognizing fundamental fairness requires criminal defendants be granted a meaningful opportunity to present a complete defense); State v. Harris, 311 S.C. 162, 167, 427 S.E.2d 909, 912 (Ct. App. 1993) (Due process requires that a criminal defendant be given a reasonable opportunity to present a complete defense.). “The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations.” Chambers, 410 U.S. at 294.” State v. Lyles, 379 S.C. 328, 341-42, 665 S.E.2d 201, 208 (Ct. App. 2008). Here Simpson was entitled to present the evidence at issue as an essential part of her defense of insanity.

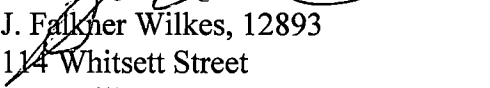
The exclusion of the defense expert’s reasons and underlying factual basis for his opinion can not be considered harmless. “Harmless beyond a reasonable doubt means the reviewing court can conclude the error did not contribute to the verdict beyond a reasonable doubt.” State v. Mizzell, 349 S.C. 326, 334, 563 S.E.2d 315, 319 (2002). “[I]n order to conclude that the error did not contribute to the verdict, the Court must ‘find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record.’” Lowry v. State, 376 S.C. 499, 508, 657 S.E.2d 760, 765 (2008) (*quoting* Yates v. Evatt, 500 U.S. 391, 403, 111 S. Ct.

1884, 114 L. Ed. 2d 432 (1991)). Here, the entire defense at trial was that Simpson was unable to distinguish between right and wrong at the time of the offenses. As in Schmidt the excluded evidence was an essential part of Simpson's defense. Its exclusion therefore prevented Simpson from effectively presenting her only defense, and as a result denied Simpson a fair and impartial trial.

CONCLUSION


Based on the foregoing the petitioner moves this Court to grant the petition, reverse the decision of the lower courts, and grant the petitioner a new trial.

Respectfully submitted,



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