Supreme Court No. 100593-8
COA No. 81677-2-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JUAN MACIAS,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT
OF KING COUNTY

PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

A. IDENTITY OF PETITIONER

Juan Macias, born April 8, 1991, was the defendant in King County No. 18-1-04406-1-SEA, and the appellant in COA No. 78760-8-I.

B. COURT OF APPEALS DECISION

Mr. Macias seeks review of the Court of Appeals decision issued December 27, 2021, affirming the trial court's sentence imposed on his conviction for second degree murder. Appx. 1.

C. ISSUES PRESENTED ON REVIEW

Did the Court of Appeals err when remanding Mr. Macias's case for resentencing on a corrected offender score, while allowing that his mental deficits and other related mitigating factors could be again proffered for purposes of seeking an exceptional downward, but ruled that the fact that his prior offenses were committed when he was 17 years old is not a valid mitigating factor?

D. STATEMENT OF THE CASE

1. Charging and trial. Juan Macias, d.o.b. 4/8/91, who was age 26 years and 9 months at the time of the offense, was charged with first degree murder of Dallas Esparza, pursuant to RCW 9A.32.030(a). CP 157. On February 7, 2018, surveillance video showed a man and several other individuals approach Mr. Esparza at a taco truck in the South Park neighborhood and begin chasing him. The man shot Mr. Esparza, resulting in injuries that led to his death at Harborview Hospital a week later. CP 3, 5; 1/22/20RP at 863-65, 879. Mr. Macias was arrested on July 7, 2018. CP 7. He told police following Miranda warnings that he saw Mr. Esparza on February 7, and recognized him as the person who came up to him and robbed him at gunpoint on New Year's Eve. Mr. Macias explained that he shot Mr. Esparza near the taco truck when Esparza once again began running at him; he feared for his life and accordingly acted in self-defense. 1/27/20RP at 115,

1132, 1136-40. The jury found Mr. Macias guilty of second degree murder. 1/28/20RP at 1256-58; CP 256-57.

2. Sentencing. The State filed a sentencing memorandum contending that Mr. Macias's offender score was 4, based on the other current offense of VUFA secured by bench trial, and his two prior convictions in adult court while a juvenile: for third degree assault and second degree robbery committed on August 9, 2008, in King County cause 08-C-09518-1 SEA. CP 262-70.

The court rejected the defense exceptional sentence request, which was based on the fact that Mr. Macias had significant mental deficits, and on the fact that he was 17 years old when he committed the 2008 cause; the court sentenced Mr. Macias to 300 months based on offender score of 4 on the second degree murder. 6/26/20RP at 45-46; CP 407-14; see Supp. CP 453-577, Sub # 151 (Defense Sentencing Memo); Supp. CP 578-582, Sub # 153 (Supplemental Defense Memo).

On appeal, the State conceded that Mr. Macias's offender score was incorrectly calculated, and the Court of Appeals ordered remand for resentencing at which, it held, the court could consider Mr. Macias's arguments for an exceptional sentence downward based on the asserted mitigating factors of mental health issues, his IQ of 79, and violence against him in the past leading to Post-Traumatic Stress Disorder, and other psychological deficits. However, the Court of Appeals chose to reject the argument that Mr. Macias's age in 2008 could ever be a mitigating factor, relying on State v. Moretti, 193 Wn.2d 809, 446 P.3d 609 (2019). (Appx. A, at pp. 5-7 and n. 6, n. 7). The Court of Appeals reasoned:

> Citing [State v. Houston-Sconiers, 188 Wn.2d 1, 9, 391 P.3d 409 (2017); State v. O'Dell, 183 Wn.2d 680, 695-96, 358 P.3d 359 (2015)], Macias argues that he was "entitled to consideration of his age as a juvenile" when he committed his 2008 offenses as a mitigating factor warranting an exceptional downward sentence for his 2018 offense. But those cases involve defendants who were juveniles when they committed the crimes for which the courts were sentencing them. Houston-Sconiers, 188 Wn.2d at 413; O'Dell, 183 Wn.2d at 683. Macias fails to

explain how his youth when he committed crimes in 2008 relates to the commission of the current crime. Our Supreme Court addressed a similar argument in State v. Moretti, 193 Wn.2d 809, 446 P.3d 609 (2019). That case involved three consolidated appeals where the defendants committed at least one "most serious offense" as young men and then committed a third "strike" offense as older adults. Moretti, 193 Wn.2d at 813-14. The courts sentenced each defendant to life in prison without the possibility of parole under the Persistent Offender Accountability Act, RCW 9.94A.030(37), .570. Moretti, 193 Wn.2d at 815, 816, 817. The defendants argued that it was unconstitutional to punish them with life in prison without parole because their youth at the time of the predicate offenses reduced their culpability. Moretti, 193 Wn.2d at 820. The Supreme Court rejected this argument because youth as a mitigating factor presumes that "most juveniles are capable of change and will not continue to recidivate into adulthood," and "the concerns applicable to sentencing juveniles do not apply to adults who continue to reoffend after their brains have fully developed." Moretti, 193 Wn.2d at 829, 818.

Like the defendants in Moretti, Macias committed his prior offenses as a young man, but he was an adult with a fully developed brain 10 years later when he committed the current offense. The trial court did not err in refusing to impose an exceptional sentence below the standard range based on Macias' youth at the time of his 2008 offenses.

Appx. A, at pp. 6-7 and n. 6, n. 7. Mr. Macias seeks review by this Supreme Court.

E. ARGUMENT

THE TRIAL COURT HAD AUTHORITY TO IMPOSE AN EXCEPTIONAL SENTENCE BELOW THE STANDARD RANGE.

(1). Review is warranted under RAP 13.4(b)(1), (3).

Punishment should be proportional to the crime committed. Weems v. United States, 217 U.S. 349, 367, 30 S. Ct. 544, 54 L. Ed. 793 (1910); State v. Bassett, 192 Wn.2d 67, 91, P.3d 343 (2018); U.S. Const. amend. XIV; Const. art. I, § 14. In light of this principle, the U.S. Supreme Court has held that individuals with "lessened culpability are less deserving of the most severe punishments." Graham v. Florida, 560 U.S. 48, 68, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010). The question of lessened culpability related to offenses committed by persons within the age range of juvenile to youthful adults is a rapidly developing area of case law in Washington, and this Supreme Court has held that trial courts have always possessed the

authority - and indeed are required to consider age at the time of the offense - when issuing sentence, even as the scope of that existing authority has been set forth in very recent decisions. See State v. Houston-Sconiers, 188 Wn.2d at 9; State v. O'Dell, 183 Wn.2d at 695-96; In re Monschke, 197 Wn.2d 305, 306, 482 P.3d 276 (2021). The notion that these principles regarding age, culpability and sentencing cannot include consideration of age at the time of prior offenses as a mitigating factor permissible for a trial court to consider for an exceptional sentence downward implicates constitutional protections and conflicts with decisions of this Court. Review is warranted in the present case under RAP 13.4(b)(1) and (3).

(2). The trial court had authority to impose an exceptional sentence.

To comply with the Eighth Amendment to the United States Constitution, courts must consider mitigating qualities of juvenile youth at sentencing and must have discretion to impose any sentence below the otherwise applicable standard range.

State v. Houston-Sconiers, 188 Wn.2d at 20-21. And young age in general mitigates the offender if a defendant shows it "relates to the commission of the [current] crime." In re Pers. Restraint of Light-Roth, 191 Wn.2d 328, 336, 422 P.3d 444 (2018) (citing O'Dell, 183 Wn.2d at 689)).

The case of State v. Moretti, 193 Wn.2d at 813-18, involved offenders who sought to invoke the categorical bar of the constitutional prohibition against excessive punishment, and to do so in which the defendants in the strikes cases were 32, 39, and 41 years old, and had committed their prior strike offenses at age 19 and 20, and it does not control the outcome of this case.

Mr. Macias seeks no such dramatic pronouncement as sought in Moretti, categorical or otherwise. He merely contends that our State's understanding of the age of offenders and the development of the adult brain that may take an individual until their 20's to become a person who has the maturity to abide by the law present a consideration that the

trial court can consider when being asked to impose a sentence below the standard range. Whether looking at prior offenses committed at age 17, or later at age 26, young people are less culpable for their actions than fully mature adults. Roper v. Simmons, 543 U.S. 551, 574, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005). "The qualities that distinguish juveniles from adults do not disappear when an individual turns 18." Id.; see also Miller v. Alabama, 567 U.S. at 476 (recognizing that "youth is more than a chronological fact.").

The science on how young adults mature and lack the culpability of older persons has led to a series of opinions from this Court examining the constitutionality and fairness of standard range sentencing for youthful offenders. These opinions grew out of the United States Supreme Court analysis of youthful sentencing. See Graham v. Florida, 560 U.S. 48, 68, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010); Roper, 543 U.S. at 574; Miller, 567 U.S. at 476.

In State v. Houston-Sconiers, this Court held that sentencing courts *must* consider the mitigating qualities of youth at sentencing, even in adult court. State v. Houston-Sconiers, 188 Wn.2d at 18. State v. O'Dell holds that trial courts *must* meaningfully consider youth as a possible mitigating circumstance even when sentencing an adult. O'Dell, 183 Wn.2d at 696. And in In re Monschke, 197 Wn.2d at 306, this Court held that courts *must* exercise the same discretion when considering the mitigating qualities of youth for these persons as they do with 17-year-olds. Id. at 329.

Here, the SRA provides courts with authority to depart from sentencing guidelines where it finds "substantial and compelling reasons" to justify an exceptional sentence. RCW 9.94A.535(1). Per RCW 9.94A.535(1), the statute's listed mitigating grounds are "illustrative only" and not the "exclusive reasons for exceptional sentences" downward.

It must be noted that the Court of Appeals' statement that Mr. Macias was "an adult with a fully developed brain" at the time of the current offenses was the subject of extensive pre-sentencing briefing and debate in the trial court, and one which the Court of Appeals made clear can be considered on remand for resentencing. See Appx. A, at p. 7 and n. 7; see Psychological Evaluation - John Fabian, PSY.D, J.D. (Exhibit B to Defense 2020 Sentencing Memo, at p. 7 of 44); Exhibit A to Macias Defense Sentencing Memorandum (2008 Psychological Report of Kimberly Barrett, Ed.D, MFCC).

Crucially, the SRA's list of enumerated mitigating circumstances that a court may consider includes the fact that the defendant's "capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law, was significantly impaired." RCW 9.94A.535(1)(e).

Here, Mr. Macias asks for nothing more than that these same considerations of age and capacity be deemed proper for a

trial court to consider in whatever manner young age is pertinent to culpability in fashioning a sentence. Punishment - the sanction appropriate to the culpability of the defendant - is what has been at issue in these groundbreaking cases of Graham, Roper, Miller, Houston-Sconiers, O'Dell, and In re Monschke. This Court has necessarily held that the trial court, at a minimum given the directive that it must do so, certainly does possess the lesser authority to merely consider an exceptional sentence below the standard range based on specific personal characteristics including a defendant's youthfulness and background. O'Dell, 183 Wn.2d at 695-96; see also Houston-Sconiers, 188 Wn.2d at 23.

The fact that Juan Macias was a juvenile when he committed his 2008 offenses can be a mitigating factor for an exceptional sentence below the standard range. In 2008 - at the request of his same defense counsel representing Mr. Macias at trial in this case - therapist Kimberly Barrett assessed Juan and

diagnosed him with learning disorders. She stated that Juan was

> immature, and does not have adult role models or supervision. This has led to poor choices and difficulties with judgment about peers and behavior. Because he worries about others, he may find himself in risky situations with the thought that he might prevent trouble.

Defense Memo, at p. 21 (attachment A - evaluation by Kimberly Barrett, Ed.D. MFCC). This is consistent with the reasoning of Houston-Sconiers as it indicates that Mr. Macias, who committed the earlier offenses as a 17 year old, is entitled to consideration of his age as a juvenile at that time when assessing his sentence for the present offense. Juveniles are not absolved of responsibility for their actions, but offenses committed at that age are certainly not "as morally reprehensible as that of an adult." Graham, 560 U.S. at 68. The reasoning that a person under the age of majority at the time of their prior offenses but is now before the sentencing court having committed a new offense in their 20's, somehow

shows that the person was not among those who would reform as he became a more mature person, turns our courts' assessment of youth, culpability, and punishment on its head. See Moretti, 180 Wn.2d at 829 (reasoning that courts "do not have to guess whether [the offender] will continue committing crimes into adulthood" because he already has). As the defense argued, Mr. Macias' lack of capacity was a product of mental health issues that traced their origin to even before his 2008 juvenile crimes, for which he was charged and sentenced as an adult, and after which he spent his confinement time partly in county jail and was never rehabilitated in terms of his perceptive abilities and his judgment. Defense Memo, at pp. 2-7, 11-14; 6/26/20RP at 49, 168-72, 177-78.

The court below wrongly refused to exercise discretion by declining to consider a proper, proffered legal basis for an exceptional sentence which provides authority for a departure, is an abuse of discretion. A "failure to exercise discretion is itself an abuse of discretion subject to reversal." State v.

O'Dell, 183 Wn.2d at 697; State v. Bunker, 144 Wn. App. 407, 421, 183 P.3d 1086 (2008), aff'd, 169 Wn.2d 571, 283 P.3d 487 (2010). Reversal is required.

F. CONCLUSION

Based on the foregoing, Mr. Macias ask that this Court accept review, reverse his sentence and remand the case to the Superior Court.

This Brief contains 2,513 words, formatted in font Times New Roman 14.

Respectfully submitted this 21st day of January, 2022.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

THE STATE OF WASHINGTON, Respondent, v. JUAN JOSE MACIAS, Appellant.	)	No. 81677-2-I UNPUBLISHED OPINION

BOWMAN, J. — Juan Jose Macias appeals his sentence following a jury conviction for second degree murder. He argues the trial court should not have counted one of his prior felony convictions in his offender score because it "washed out." The State concedes that error. We accept the State's concession and remand to the trial court to resentence Macias using the correct offender score. Macias also claims the trial court erred by refusing to consider his youth at the time he committed prior offenses as a mitigating factor warranting an exceptional sentence downward for his current offense. Because youth is a mitigating factor only as it relates to the current crime, we affirm.

FACTS

On February 7, 2018, Macias gunned down D.E. as D.E. fled from a confrontation with Macias' friends. Macias fired four shots at D.E., killing the 16-

year-old. The State charged Macias with first degree murder and first degree unlawful possession of a firearm. The court bifurcated the two counts for trial.[1]

Macias claimed self-defense. He argued he acted out of fear because D.E. was part of a group of men that robbed Macias at gunpoint five weeks earlier on New Year's Eve. According to Macias, on February 7, D.E. appeared to be holding a gun and made a threatening gesture as he ran away from Macias' friends. Macias said he "panicked," "thinking that [D.E.]'s gonna end up shooting me, too, again."

The trial court instructed the jury on self-defense and several lesser included offenses of first degree murder. The jury rejected Macias' self-defense claim and convicted him of the lesser included offense of second degree murder while armed with a firearm.[2]

At sentencing, the court considered two prior felony convictions from an incident in 2008—third degree assault and second degree robbery—when calculating Macias' offender score for second degree murder. Macias did not object to including the prior offenses in his offender score but asked the court to treat them as the same criminal conduct and score them as only 1 point. The court denied Macias' request and calculated his offender score as 4. An offender score of 4 made his standard-range sentence 225 to 325 months, which also included a mandatory consecutive 60-month firearm enhancement.

[1] Macias waived his right to a jury trial as to count 2, unlawful possession of a firearm. Count 1, first degree murder, proceeded to a jury trial.

[2] The court also convicted Macias of unlawful possession of a firearm after the bench trial.

Macias also urged the court to impose an exceptional sentence downward of 101 months' total confinement. Macias offered expert testimony that he suffered from several "neurodevelopmental disorders," impacting his capacity to conform his behavior to lawful standards. He also argued D.E. was the primary aggressor to a significant degree. Macias maintained that those reasons, along with his failed self-defense claim, warranted a downward departure from the standard range. Finally, Macias asked the court to consider that he was only 17 years old when he committed his 2008 felonies. He argued his youth in 2008 was another mitigating factor supporting an exceptional sentence downward.

The State objected to an exceptional sentence and asked the court to impose a high-end standard-range sentence of 325 months. The court sentenced Macias to 300 months' total confinement, which included the 60-month firearm enhancement.[3]

Macias appeals.

ANALYSIS

Offender Score

Macias argues and the State concedes that his 2008 third degree assault conviction "washed out" and the court should not have used it to calculate his offender score. We accept the State's concession.

We review a sentencing court's calculation of an offender score de novo. State v. Tili, 148 Wn.2d 350, 358, 60 P.3d 1192 (2003). In calculating an offender score, the sentencing court must (1) identify all prior convictions, (2)

[3] The court imposed a concurrent 41-month sentence for the unlawful possession of a firearm conviction.

eliminate those that wash out, and (3) count the prior convictions that remain. State v. Moeurn, 170 Wn.2d 169, 175, 240 P.3d 1158 (2010). The State has the burden of proving a defendant's criminal history by a preponderance of the evidence. State v. Mendoza, 165 Wn.2d 913, 920, 205 P.3d 113 (2009).

" '[A] sentence that is based upon an incorrect offender score is a fundamental defect that inherently results in a miscarriage of justice.' " State v. Wilson, 170 Wn.2d 682, 688-89, 244 P.3d 950 (2010)[4] (quoting In re Pers. Restraint Petition of Goodwin, 146 Wn.2d 861, 868, 50 P.3d 618 (2002)). The proper remedy in such cases is reversal and remand for resentencing. State v. Ramirez, 190 Wn. App. 731, 734-35, 359 P.3d 929 (2015).

Third degree assault is a class C felony. RCW 9A.36.031(2). Prior class C felony convictions other than sex offenses are not included in the offender score—or in other words, "wash out"—if following release from confinement or entry of a judgment and sentence, the offender spends five consecutive years in the community without committing any crime resulting in a conviction. RCW 9.94A.525(1)(c). Here, until the current offense, Macias incurred no criminal convictions after he was released from custody in late 2009. As a result, the court should not have included the 2008 third degree assault conviction in calculating Macias' offender score. We reverse Macias' sentence and remand to the trial court for resentencing.[5]

[4] Alteration in original.

[5] Because we reverse and remand for resentencing based on the improper calculation of Macias' offender score, we do not reach his allegation that the trial court erred in refusing to treat his prior convictions as the same criminal conduct.

Exceptional Sentence

Macias argues the fact that he "was a juvenile when he committed his 2008 offenses is a proper mitigating factor for an exceptional sentence below the standard range" for his current offense.

Generally, a trial court must impose a sentence within the standard sentence range. RCW 9.94A.505(2)(a)(i). But it can impose a sentence above or below the standard range for reasons that are "substantial and compelling." RCW 9.94A.535. The Sentencing Reform Act of 1981, chapter 9.94A RCW, contains a list of aggravating and mitigating factors, which the court may consider in the exercise of its discretion to impose an exceptional sentence. State v. Fowler, 145 Wn.2d 400, 404, 38 P.3d 335 (2002); see RCW 9.94A.535. The list is not exclusive, but any reasons considered by the court must relate to the crime and make it more, or less, egregious. Fowler, 145 Wn.2d at 404, 38 P.3d 335 (2002).

"[A]n exceptional sentence is appropriate only when the circumstances of the crime distinguish it from other crimes of the same statutory category." State v. Estrella, 115 Wn.2d 350, 359, 798 P.2d 289 (1990) (citing State v. Pennington, 112 Wn.2d 606, 610, 772 P.2d 1009 (1989)). Whether a particular factor can justify an exceptional sentence is a question of law we review de novo. State v. O'Dell, 183 Wn.2d 680, 688, 358 P.3d 359 (2015).

Youth is not a statutory mitigating factor. See RCW 9.94A.535. Still, a defendant's youth may support an exceptional sentence below the standard range. O'Dell, 183 Wn.2d at 698-99, abrogating State v. Ha'mim, 132 Wn.2d

834, 940 P.2d 633 (1997). To comply with the Eighth Amendment to the United States Constitution, courts must consider mitigating qualities of youth at sentencing and must have discretion to impose any sentence below the otherwise applicable standard range. State v. Houston-Sconiers, 188 Wn.2d 1, 20-21, 391 P.3d 409 (2017). But youth mitigates only if a defendant shows it "relates to the commission of the [current] crime." In re Pers. Restraint of Light-Roth, 191 Wn.2d 328, 336, 422 P.3d 444 (2018) (citing O'Dell, 183 Wn.2d at 689)).

Citing Houston-Sconiers and O'Dell, Macias argues that he was "entitled to consideration of his age as a juvenile" when he committed his 2008 offenses as a mitigating factor warranting an exceptional downward sentence for his 2018 offense. But those cases involve defendants who were juveniles when they committed the crimes for which the courts were sentencing them. Houston-Sconiers, 188 Wn.2d at 413; O'Dell, 183 Wn.2d at 683. Macias fails to explain how his youth when he committed crimes in 2008 relates to the commission of the current crime.[6]

Our Supreme Court addressed a similar argument in State v. Moretti, 193 Wn.2d 809, 446 P.3d 609 (2019). That case involved three consolidated appeals

[6] Macias argued for the first time at oral argument that his age when he committed the 2008 offenses relates to his current crime because the State charged and the court sentenced him as an adult for those prior offenses. According to Macias, had the court sentenced him as a juvenile, he could have received rehabilitation services that may have prevented the commission of his current offense. Because Macias did not argue this theory below or in his brief on appeal, we do not address it. See Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (we will not consider an argument not raised below or unsupported by citation to the record or authority); Smith v. King, 106 Wn.2d 443, 451-52, 722 P.2d 796 (1986) (a party waives assignment of error where they presented no evidence below to support the issue or they do not argue the issue in their brief).

where the defendants committed at least one "most serious offense" as young men and then committed a third "strike" offense as older adults. Moretti, 193 Wn.2d at 813-14. The courts sentenced each defendant to life in prison without the possibility of parole under the Persistent Offender Accountability Act, RCW 9.94A.030(37), .570. Moretti, 193 Wn.2d at 815, 816, 817. The defendants argued that it was unconstitutional to punish them with life in prison without parole because their youth at the time of the predicate offenses reduced their culpability. Moretti, 193 Wn.2d at 820. The Supreme Court rejected this argument because youth as a mitigating factor presumes that "most juveniles are capable of change and will not continue to recidivate into adulthood," and "the concerns applicable to sentencing juveniles do not apply to adults who continue to reoffend after their brains have fully developed." Moretti, 193 Wn.2d at 829, 818.

Like the defendants in Moretti, Macias committed his prior offenses as a young man, but he was an adult with a fully developed brain 10 years later when he committed the current offense. The trial court did not err in refusing to impose an exceptional sentence below the standard range based on Macias' youth at the time of his 2008 offenses.[7]

[7] Macias also argues that the trial court erroneously rejected evidence supporting a downward departure based on three statutory mitigating factors. Because we remand for resentencing, we do not reach this claim. But we note that when a trial court has considered the facts and concluded that there is no basis for an exceptional sentence, it has exercised its discretion, and the defendant may not appeal that ruling. State v. Garcia-Martinez, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997).

We reverse Macias' sentence and remand to the trial court to resentence him using the proper offender score. We otherwise affirm.

Brunner, J.

WE CONCUR:

Smith, J.

Andrus, A.C.J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 81677-2-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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