Supreme Court No. ____
(COA No. 49561-9-II)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

State of Washington,

Respondent,

v.

Edwin Tom Santos,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KITSAP COUNTY

PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

A. IDENTITY OF PETITIONER AND COURT OF APPEALS DECISION

Pursuant to RAP 13.4(b)(1) and RAP 13.4(b)(3), Edwin Tom Santos, petitioner here and appellant below, asks this Court to accept review of a Court of Appeals decision affirming his conviction for possession of methamphetamine. A copy of the Court of Appeals' opinion is attached to this petition.

B. ISSUES PRESENTED FOR REVIEW

1. The defense of unwitting possession is an affirmative defense.[1] In *State v. Fisher*, 185 Wn.2d 836, 374 P.3d 1185 (2016), this Court reasserted several rules that govern a court's decision to issue an affirmative defense jury instruction. A court may only deny a request for such a jury instruction if *no* credible evidence supports the instruction. Therefore, a court must provide the jury with a defendant's affirmative defense instruction if the defendant points to *some* evidence that supports his theory.

Here, the State charged Mr. Santos with possession of methamphetamine after a police officer discovered a pipe with an unknown residue on Mr. Santos. At trial, the State presented evidence from a forensic scientist that demonstrated she could not identify the

[1] *State v. Deer*, 175 Wn.2d 725, 735, 287 P.3d 539 (2012).

contents of the residue in Mr. Santos' pipe through eyesight alone. The expert could only identify the contents of the residue after subjecting the residue to scientific testing. Because this evidence illustrated Mr. Santos' theory that, like the State's expert, Mr. Santos possessed the inability to identify the contents of the residue by eyesight alone, this testimony demonstrated he may have possessed the methamphetamine unwittingly. However, when Mr. Santos asked the trial court to issue an instruction consistent with his theory, the trial court denied his request. The Court of Appeals affirmed Mr. Santos' conviction, claiming this evidence was insufficient to warrant his proposed instruction.

In light of Mr. Santos' constitutional right to present a defense[2] and the fact that Mr. Santos clearly pointed to *some* evidence that his possession of the methamphetamine may have been unwitting, does the Court of Appeals' opinion conflict with *Fisher*? RAP 13.4(b)(1); RAP 13.4(b)(3).

2. In *State v. Gunderson*, 181 Wn.2d 916, 337 P.3d 1090 (2014), this Court determined that evidence improperly admitted under ER 404(b) prejudiced the defendant *even though* the other evidence produced at trial may have been sufficient to the find defendant guilty. Here, "to complete

[2] U.S. Const. amend. XI; Const. art. I, § 21 and 22.

the story" of the circumstances that led to Mr. Santos' arrest, the trial court admitted evidence that Mr. Santos was the passenger in a stolen car before his arrest under the res gestae exception.[3] The State made an unflattering comment about Mr. Santos' association with the stolen car during opening argument.

While the Court of Appeals clearly questioned the relevance of this evidence, the court opined that this evidence did not materially impact the trial's outcome because "uncontroverted" evidence supported Mr. Santos' conviction. But *Gunderson* requires courts to focus on the potential prejudicial effect of the improperly admitted evidence rather than assess the other evidence to determine if it supports the defendant's conviction. Does the Court of Appeals' opinion conflict with *Gunderson*? RAP 13.4(b)(1).

C. STATEMENT OF THE CASE

The police seized Edwin Tom Santos pursuant to a Terry stop. RPI1 19, 43, RPII 183, 187;[4] CP 97-99. During the stop, Mr. Santos

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[3] Under ER 404(b), crimes or bad acts other than the acts for which the defendant is charged are admissible to establish the immediate time and place of the charged act's occurrence and therefore complete the story of a crime. *State v. Brown,* 132 Wn.2d 529, 570-71, 940 P.2d 546 (1997). "If another offense or bad act constitutes a 'link in the chain' of an unbroken sequence of events surrounding the charged offense, evidence of that offense or misconduct is admissible to complete the picture for the jury." *Id.* at 571.

[4] RPI refers to the proceedings that occurred on June 17, 2016, and RPII refers to the proceedings that occurred between July 25, 2016 and July 27, 2016.

revealed his name, and the police discovered Mr. Santos had a warrant out for his arrest. RPII 11. The police searched Mr. Santos incident to arrest and discovered a pipe in his pocket. RPI 25, RPII 11,187. The police sent the pipe to Donna Wilson, a forensic scientist, for analysis. RPII 169, 172.

Ms. Wilson could not determine the substance inside the pipe merely by observation and could only tell that the pipe was a "smoking devise with residue adhering to its inner surface." RPII 177. To determine what was inside the pipe, Ms. Wilson scraped the residue of the pipe with a scalpel to produce a powder and submitted the powder to a chromatography-mass spectrometry and infrared spectroscropy machine. RPII 177, 179. Both machines are highly sensitive and are therefore capable of detecting trace amounts of substances. RPII 178. The machines revealed that the residue inside the pipe contained methamphetamine. RPII 182. The State charged Mr. Santos with one count of possession of a controlled substance (methamphetamine). CP 1-3.

Over Mr. Santos' objections, the court permitted the State to admit evidence of acts that occurred before the police stopped Mr. Santos. RPII 10-13, 15.2

At trial, Mr. Santos attempted to advance several theories in his defense. Primarily, he attempted to argue that his possession of methamphetamine was unwitting; however, his attempts to present this

theory were rebuffed several times. RPII 167-168, 198-201. The jury found Mr. Santos guilty of the crime of possession of a controlled substance. CP 62.

The Court of Appeals affirmed Mr. Santos' conviction on December 12, 2017. Opinion at 1.

D. ARGUMENT

1. This Court should accept review because the Court of Appeals' opinion conflicts with this Court's ruling in *Fisher*.

This Court should accept review because the Court of Appeals' opinion conflicts with this Court's ruling in *Fisher* and implicates a defendant's right to present a defense. U.S. Const. amend. XI; Const. art. I, § 21 and 22; 185 Wn.2d at 849-52; RAP 13.4(b)(1); RAP 13.4(b)(3).

In *Fisher*, the State charged the defendant with felony murder due to her participation in a robbery/drug deal that resulted in a murder. 185 Wn.2d at 839. At trial, the defendant asked for a jury instruction based on RCW 9A.32.030(1)(c), which provides an affirmative defense to felony murder if the defendant satisfies four elements. *Id.* at 848. The State objected to the defendant's proposed instruction, arguing that while the defendant produced evidence that she met two of the elements required in RCW 9A.32.030(1)(c), no evidence existed that she met the third and fourth elements. *Id.* The trial court refused to grant the defendant the

instruction, and the Court of Appeals affirmed the trial court's ruling. *Id.* at 841, 848.

To assess whether the defendant was entitled to the instruction, this Court reasserted several rules that govern a court's decision to issue an affirmative defense jury instruction. A defendant is entitled to a jury instruction representing his theory of the case if evidence exists that supports her theory, regardless of the source of the evidence. *Id.* at 849. This means that the defendant may also point to the State's evidence to demonstrate that he merits the instruction. *Id.* In evaluating the evidence, the trial court must view the evidence in the light most favorable to the defendant. *Id.* (referencing *State v. Fernandez-Medina*, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000)). While the defendant may not point to the State's *absence* of evidence to demonstrate that she warrants an affirmative defense jury instruction, "the trial court is justified in denying a request for an affirmative defense jury instruction only where *no credible evidence* appears in the record to support it." *Id.* at 849-51 (quoting *State v. McCullum*, 98 Wn.2d 484, 488, 656 P.2d 1064).

In sum, the defendant must produce *only some* evidence (from either the defendant himself or the State), and once the defendant produces this evidence, the defendant bears the burden of persuading the jury by a

preponderance of the evidence that the affirmative defense requires his acquittal. *Id.* at 849, 852.

Here, the Court of Appeals' opinion conflicts with *Fisher* because the opinion plainly fails to view the evidence in the light most favorable to Mr. Santos and dismisses the evidence that supported the instruction. Viewed in the light most favorable to Mr. Santos, the testimony of one of the State's witnesses, Ms. Wilson, provided a wealth of evidence justifying a jury instruction of unwitting possession. Ms. Wilson is a forensic scientist professionally trained to analyze and identify controlled substances. RPII 169-71. However, she did not know what was in the pipe until she subjected the contents of the pipe to both an infrared spectroscopy and gas chromatography-mass spectometry test. RPII 172, 177. This is because the pipe merely contained residue, and there was nothing loose inside the pipe. RPII 177. Ms. Wilson also agreed the tests she subjected the residue powder to are extremely sensitive, and conceded it does not take a lot of a substance for the machines to identity its contents. RPII 177. All of these circumstances indicate that while Mr. Santos certainly possessed the pipe, he may have nevertheless possessed no knowledge of its contents.

Instead, the Court of Appeals' opinion erroneously concludes *more* evidence needed to be produced before the court could grant the

instruction; however, because Mr. Santos produced *some* evidence, the court was required to grant the instruction. Opinion at 7-8; *see also Fisher*, 185 Wn.2d at 852 ("while not overwhelming, a defendant is required to produce *only* some evidence to satisfy the burden of production) (emphasis added).

Under this Court's opinion in *Fisher*, the Court of Appeals applied the wrong legal standard. This Court should accept review. RAP 13.4(b)(1).

2. This Court should accept review because the Court of Appeals' opinion conflicts with this Court's opinion in *Gunderson*.

This Court should accept review because the Court of Appeals' opinion conflicts with this Court's ruling in *Gunderson*. 181 Wn.2d at 926; RAP 13.4(b)(1).

In *Gunderson*, the State charged the defendant with domestic violence based on a third-party's claim that the defendant hit the mother of his child. 181 Wn.2d at 918. The alleged victim told the police that no assault occurred, and her testimony at trial was consistent with her version of the events on the day of the alleged incident. *Id.* at 920. The trial court admitted evidence of prior domestic violence incidents between the defendant and the alleged victim to impeach her credibility pursuant to ER 404(b). *Id.* at 921.

After concluding that this evidence was improperly admitted under ER 404(b), the court next determined whether the introduction of this evidence was harmless error. *Id.* at 926. If the error was harmless, reversal is not required; however, if the error was harmful, reversal is required. To determine whether the erroneous introduction of evidence was harmless error, courts assess whether "within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected." *Id.* (quoting *State v. Smith*, 106 Wn.2d 772, 780, 725 P.2d 951 (1986)).

This Court held that while the evidence may have been sufficient to find the defendant guilty, it was still not harmless error for the trial court to have admitted these prior instances due to the highly prejudicial evidence of the defendant's past history. *Id.* at 926. In other words, because the prejudice of these prior instances undoubtedly *influenced* the jury's decision to render a guilty verdict, it *materially affected* the outcome of the trial; therefore, the error was not harmless.

Here, the Court of Appeals' opinion conflicts with *Gunderson* because instead of assessing the prejudicial effect of the erroneous evidence admitted under ER 404(b), the court assessed whether other evidence supported Mr. Santos' guilt. To "complete the story" of the circumstances that led to Mr. Santos' arrest, the trial court admitted

evidence that Mr. Santos was the passenger in a stolen car before his arrest under the res gestae exception. RPII 13-16.

From the outset, the State seized upon its ability to mention the circumstances of Mr. Santos' arrest, stating in opening argument,

> the defendant really should have left his meth at home if he was going to be driving around in a stolen vehicle with an active warrant out for his arrest.

RPII 164.

"Counsel may not use the opening statement to get before the jury prejudicial matters or to discuss issues not relevant to the guilt or innocence of the accused." Royce Ferguson, Jr., Washington Practice Series: Criminal Practice & Procedures § 4202. Here, the State's presentation of both prejudicial and immaterial information within just a minute of Mr. Santos' trial undoubtedly influenced the jury. This evidence painted Mr. Santos in a criminal light and made him seem like the kind of person who would certainly possess methamphetamine.

While the Court of Appeals correctly questioned the relevance of this evidence, it failed to assess how the jury interpreted this prejudicial evidence and how it may have impacted their decision to find Mr. Santos guilty. Opinion at 4. Instead, the Court concluded "uncontroverted" evidence supported Mr. Santos' conviction. *Id.* But a court's harmless error analysis under *Gunderson* is not contingent on the *sufficiency* of the

evidence.181 Wn.2d at 926. Instead, it is contingent on the *value* the jury may have placed on the erroneous evidence. *Id.*

Because the Court's opinion conflicts with *Gunderson*, this Court should accept review. RAP 13.4(b)(1).

E. CONCLUSION

The Court of Appeals used the wrong legal standard to assess whether Mr. Santos was entitled to a jury instruction of unwitting possession. The Court of Appeals also used the wrong legal standard to assess whether the erroneous admission of prejudicial evidence was harmless error. For these reasons, Mr. Santos asks this Court to accept review.

DATED this 11th day of January, 2018.

Respectfully submitted,

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Filed
Washington State
Court of Appeals
Division Two

December 12, 2017

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. EDWIN TOM SANTOS, Appellant.	No. 49561-9-II UNPUBLISHED OPINION

MAXA, A.C.J. – Edwin Santos appeals his conviction for possession of a controlled substance (methamphetamine). We hold that (1) even if the trial court erred in allowing the State to introduce evidence that Santos was standing next to a stolen vehicle when the arresting officer first encountered him, any error was harmless; and (2) the trial court did not err by declining to give Santos's proposed jury instruction on unwitting possession. Accordingly, we affirm Santos's conviction.

FACTS

Officer Michael Mezen was patrolling near Poulsbo on April 14, 2016 when he encountered three men standing on the road's shoulder, near a parked vehicle. Mezen asked if the men needed help. One responded that they were having car trouble and they had a ride coming. As Mezen continued driving, he checked the status of the vehicle's license plate and determined that the vehicle was stolen.

Mezen returned to the vehicle, but the men were gone. Mezen searched for the men and eventually located them in a nearby store. One of them, Santos, had an outstanding arrest warrant. Mezen placed Santos under arrest and conducted a search incident to that arrest. Mezen found a pipe in Santos's pants pocket, which Mezen recognized as a pipe used to smoke methamphetamine.

The State charged Santos with possession of a controlled substance (methamphetamine). The State did not charge Santos with any offenses relating to the stolen vehicle.

In a pre-trial motion, Santos sought to prevent the State from eliciting testimony from Mezen that Santos was associated with a stolen vehicle. Santos argued that the vehicle's status was not relevant to his charge and that it was unfairly prejudicial. The trial court ruled that testimony concerning the vehicle completed the chain of events and therefore would be admissible as res gestae.

At trial, Mezen testified about his encounter with and arrest of Santos, as described above. He specifically testified that when he first encountered the three men, they were standing next to a stolen vehicle. However, Mezen confirmed on cross-examination that Santos had not been charged with possession of a stolen vehicle.

The State also elicited testimony regarding Santos's pipe from Donna Wilson, an employee at the Washington State Patrol Crime Lab who tested the pipe. She testified that she used a scalpel to scrape residue from inside the pipe for testing. She stated that she would not have known what the substance was prior to testing. But based on her testing, Wilson concluded that the residue contained methamphetamine.

Santos proposed a jury instruction on unwitting possession. The trial court declined to give the instruction.

The jury found Santos guilty of possession of a controlled substance (methamphetamine). Santos appeals his conviction.

ANALYSIS

A. TESTIMONY ON STOLEN VEHICLE

Santos argues that the trial court erred in allowing the State, under a res gestae theory, to elicit testimony from Mezen that Santos was standing next to a stolen vehicle when Mezen first encountered him. We hold that even if the trial court erred in allowing the State to introduce this evidence, any error was harmless.

Under ER 402, evidence is admissible only if it is relevant. Evidence is relevant under ER 401 if it (1) tends to prove or disprove the existence of a fact and (2) the fact is of consequence to the case's outcome. *State v. Weaville*, 162 Wn. App. 801, 818, 256 P.3d 426 (2011).

One type of potentially relevant evidence is res gestae evidence. *See State v. Grier*, 168 Wn. App. 635, 645-47, 278 P.3d 225 (2012). Res gestae evidence "complete[s] the story of the crime by establishing the immediate time and place of its occurrence." *State v. Brown*, 132 Wn.2d 529, 571, 940 P.2d 546 (1997). When evidence "constitutes a 'link in the chain' of an unbroken sequence of events surrounding the charged offense," that evidence is admissible to provide a " 'complete picture' " for the jury. *Id.* (quoting *State v. Tharp*, 96 Wn.2d 591, 594, 637 P.2d 961 (1981)).

We question the relevance of the evidence that Santos was associated with a stolen vehicle. The fact that the vehicle was stolen had nothing to do with the only material issue in the case – whether Santos possessed methamphetamine. And the stolen vehicle evidence was not necessary to complete the story of the crime. Officer Mezen easily could have explained his interaction with Santos without stating that the vehicle was stolen.

However, a trial court's improper admission of evidence generally is nonconstitutional error that requires reversal only if the evidence materially impacted the trial's outcome. *State v. Beadle*, 173 Wn.2d 97, 120-21, 265 P.3d 863 (2011). Erroneous admission of evidence is harmless unless there is a reasonable probability that, but for the error, the verdict would have been materially different. *State v. Ashley*, 186 Wn.2d 32, 47, 375 P.3d 673 (2016). In addition, improper admission of evidence constitutes harmless error if the evidence is of only minor significance in reference to the evidence as a whole. *State v. Rodriguez*, 163 Wn. App. 215, 233, 259 P.3d 1145 (2011).

Here, even without testimony concerning the vehicle's status, there was uncontroverted evidence that supported Santos's conviction. To convict Santos, the jury had to find that he had possession of a controlled substance. Evidence at trial showed that Santos had in his pocket a pipe that contained methamphetamine residue. Santos did not testify or present any defense. Regardless of whether Mezen testified that the vehicle was stolen, the evidence was overwhelming that Santos possessed a controlled substance.

Further, the admitted evidence was less likely to affect the verdict because the evidence did not establish a strong connection between Santos and the stolen vehicle. Mezen did not state

that Santos had been in possession of the vehicle. And Santos was able to clarify that he was never charged with any crime related to the stolen vehicle.

Any testimony about the stolen vehicle likely had little impact on the jury's finding of guilt. Accordingly, we hold that even if the trial court erred in admitting Mezen's testimony, any error was harmless.

B. UNWITTING POSSESSION INSTRUCTION

Santos argues that the trial court erred in rejecting his jury instruction on unwitting possession. We disagree.

1. Legal Principles

Unlawful possession of a controlled substance is a strict liability crime that requires the State to prove the nature of the substance and the fact of possession. *State v. Bradshaw*, 152 Wn.2d 528, 538, 98 P.3d 1190 (2004). As an affirmative defense, a defendant may allege that possession was unwitting. *Id.* To raise a successful unwitting possession defense, the defendant must prove by a preponderance of the evidence that he or she did not know that the substance was in her or his possession or did not know the nature of the substance. *State v. George*, 146 Wn. App. 906, 914-15, 193 P.3d 693 (2008); *see* 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 52.01, at 1196 (4th ed. 2016) (listing elements).

The defendant is entitled to have the trial court instruct the jury on his or her theory of the case when there is evidence to support the theory. *George*, 146 Wn. App. at 915. The trial court's failure to do so is reversible error. *State v. Otis*, 151 Wn. App. 572, 578, 213 P.3d 613 (2009). When the trial court evaluates whether the evidence is sufficient to support an unwitting possession instruction, it must interpret the evidence in favor of the defendant without weighing

the proof or judging witness credibility. *George*, 146 Wn. App. at 915. Whether proof is sufficient must be considered in light of all the evidence presented at trial, irrespective of which party presented it. *Id.*

The defendant is entitled to a jury instruction on unwitting possession only if the evidence presented at trial is sufficient to permit a reasonable juror to find by a preponderance of the evidence that the defendant unwittingly possessed the controlled substance. *State v. Buford*, 93 Wn. App. 149, 153, 967 P.2d 548 (1998).

2. Analysis

Here, Mezen testified that he found a pipe in Santos's pants pocket and recognized it as one used commonly to smoke methamphetamine. Wilson testified that she scraped off residue from the inside of the pipe, which she tested for methamphetamine. She also stated that she had been unable to tell what the substance was when she first looked at it.

In a similar case, *Buford*, police seized a crack pipe from the defendant that contained a small amount of cocaine residue. 93 Wn. App. at 150. The court held that the defendant had not raised evidence sufficient to give an unwitting possession instruction. It explained:

> [T]he only evidence that could arguably support Buford's claim that he unwittingly possessed the cocaine is that the amount of cocaine seized was small and had to be scraped out of the crack pipe with a scalpel. But this evidence, without more, does not support an inference that Buford unwittingly possessed the cocaine.

Id. at 153. The court noted that the defendant had failed to provide basic facts – where the pipe came from, how long the defendant had it, if the defendant expressed dismay at finding it, whether the defendant knew what it was for, or whether the defendant knew what cocaine looked like – without which the jury would be forced to speculate to apply the defense. *Id.*

Santos's argument on appeal is different. He does mention that he only possessed a small amount of methamphetamine residue, but on appeal he disclaims any argument based on the amount possessed. Instead, his primary argument is that the State's expert could not tell by sight the nature of the residue – that the substance was methamphetamine. Santos apparently argues that this evidence supports an inference that he did not know that the substance was methamphetamine.

However, some of the same facts missing in *Buford* also are missing here – where the pipe came from, whether Santos knew that it was used for smoking methamphetamine, and whether Santos knew what methamphetamine residue looked like. Without knowing this information, it would not be reasonable to infer that Santos did not know that the pipe contained methamphetamine simply because a person with no connection with the pipe could not tell the nature of the substance by sight.

Santos relies on *George*, where the court held that an unwitting possession instruction was proper. 146 Wn. App. at 915-16. In that case, a police officer pulled over a car with three occupants, including the defendant who was sitting in the back seat. *Id.* at 912. The officer smelled marijuana, and after searching the vehicle found a large water pipe containing burnt marijuana behind the driver's seat. *Id.* at 912-13. Throughout the encounter, all three occupants denied that marijuana was present and the defendant denied owning the pipe. *Id.*

The court held that this evidence justified giving an unwitting possession instruction. *Id.* at 916. The court highlighted the relevant facts: all three parties denied any knowledge that marijuana was present or ownership of the pipe, the defendant was not driving, the defendant did not own the vehicle and the owner was present, and no fingerprint evidence linked the defendant

to the pipe. *Id.* at 915. Therefore, it was possible that someone in the front seat placed the pipe in the back or that the pipe had been placed there previously. *Id.* at 915-16.

Similar evidence is missing in this case. Unlike in *George*, neither party presented evidence that could have allowed the jury to conclude that Santos did not know the pipe was in his pocket or did not know its purpose. While the evidence in *George* could have allowed the jury to conclude that the defendant was unaware that the pipe or marijuana was present, the evidence in this case would have required the jury to speculate as to Santos's knowledge.

There was insufficient evidence to support a jury instruction on unwitting possession. Accordingly, we hold that the trial court did not err in declining to give that instruction.

CONCLUSION

We affirm Santos's conviction.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Maxa, A.C.J.
MAXA, A.C.J.

We concur:

Johanson, J.
JOHANSON, J.

Melnick, J.
MELNICK, 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. 49561-9-II**, 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 / residence / e-mail address as listed on ACORDS / WSBA website:

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Date: January 11, 2018

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