NO. 95639-1

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JAMES LARRY JOHNSON III,

Petitioner.

ANSWER TO PETITION FOR REVIEW AND CROSS-PETITION

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A. IDENTITY OF RESPONDENT

Respondent, the State of Washington, asks this Court to deny review of the Court of Appeals' decision in this case. If this Court grants review of this case, the State asks this Court to also grant review of the additional issues raised in this Answer.

B. COURT OF APPEALS DECISION

The Court of Appeals decision at issue is the unpublished opinion terminating review in State v. James Larry Johnson III, No. 75429-7-I, entered on December 26, 2017 (attached to Petition for Review).

C. NEW ISSUE PRESENTED FOR REVIEW

If this Court accepts review in this case, the State seeks cross-review of the following issue:

Whether the Court of Appeals applied an improperly heightened standard for crime-relatedness when it invalidated community custody conditions prohibiting access to sexually explicit materials and sex-related businesses as not crime-related purely because the known facts of the offenses did not involve sexually explicit materials or sex-related businesses.[1]

[1] This issue is currently pending before this Court in State v. Norris, No. 95274-4, consolidated under State v. Nguyen, No. 94883-6. Oral argument is set for May 10, 2018.

D. STANDARD FOR ACCEPTANCE OF REVIEW

"A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court." RAP 13.4(b).

E. STATEMENT OF THE CASE

The evidence in this case is too voluminous to be fully set out in this Answer. In short, eight-year-old M.D. reported in 2015 that his mother's live-in boyfriend, petitioner James Larry Johnson III, had raped him on numerous occasions over the previous five months. 1RP 417-21.

M.D. provided consistent accounts of the abuse to his mother, a forensic child interview specialist, and the jury at trial, despite his acknowledged and visible embarrassment. 1RP 346, 419-24, 435, 476-80; Ex. 2. He indicated that each rape followed the same pattern, wherein Johnson would initiate play wrestling while babysitting M.D., and then would maneuver them so that M.D. was on his stomach and Johnson was lying on M.D.'s back with M.D.'s pants and underwear pulled down. Ex.

2 at 12; 1RP 422-24, 477, 483. Johnson would then insert his penis into M.D.'s anus, which was very painful for M.D.[2] Ex. 2 at 15; 1RP 477-79.

M.D. would cry and beg Johnson to stop, but Johnson would merely tell M.D. to calm down, and if M.D. tried to get up Johnson would pull him back to the ground. Ex. 2 at 14; 1RP 477-78. Afterward, Johnson would throw a blanket over M.D.'s head and rearrange his own clothing while M.D. couldn't see him. Ex. 2 at 15-16; 1RP 483. Johnson would pretend to be surprised that M.D.'s pants and underwear were down, saying things like, "Ew, your pants and underwear are down. How'd that happen?" Ex. 2 at 15.

A description of other testimony by M.D. and corroborating evidence from other witnesses can be found in the Brief of Respondent filed in the Court of Appeals. Br. of Respondent at 2-15.

Johnson testified in his own defense. 1RP 620. He admitted to often wrestling with M.D. while babysitting him, but denied any sexual contact. 1RP 652, 656, 661. The jury deliberated for less than an hour and 45 minutes before finding him guilty as charged. CP 141-42.

Johnson appealed, challenging the admission of two prior sexual assaults and the imposition of several community custody conditions. Br. of Appellant. The Court of Appeals affirmed Johnson's convictions and

[2] M.D., who was 10 years old at the time of trial, used less precise terminology in his account, but his meaning was clear. 1RP 478-79; Ex. 2 at 15.

some of the challenged community custody conditions, but remanded the case to the trial court for some of the challenged conditions to be modified or stricken. Johnson, No. 75429-7-I.

F. ARGUMENT

1. THIS COURT SHOULD DENY REVIEW OF JOHNSON'S CLAIM THAT THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING LIMITED EVIDENCE OF PRIOR SEXUAL ASSAULTS.

a. Relevant Facts.

During motions in limine, the parties litigated the admissibility of Johnson's prior acts of sexual misconduct against children. 1RP 164-76. The State proffered information from defense interviews in the current case and police reports in a Pierce County criminal case, which detailed the numerous prior sexual assaults by Johnson that had been reported by three of his younger cousins. Ex. 2; Ex. 9; Pretrial Ex. 3; Pretrial Ex. 5. The State acknowledged that most of the prior misconduct was insufficiently similar to the rapes of M.D. to be admissible as evidence of a common scheme or plan, and sought to admit only two prior incidents: an incident in which he grabbed his young cousin P.P.J.'s penis from behind while they wrestled alone in Johnson's bedroom, and an incident in which he put his penis in the anus of his young cousin M.G., who lived in Johnson's home under the care of Johnson's mother, while babysitting her. 1RP 166-67; CP 115.

After reviewing the State's proffer, the trial court analyzed the admissibility of those two prior incidents under ER 404(b) and found them admissible for the purpose of showing a common scheme or plan. CP 52-61. The trial court noted that prior acts are admissible to prove a common scheme or plan if they contain "common features and a substantial degree of similarity such that the acts can be explained as caused by a general plan of which the charged crime and the prior misconduct are the individual manifestations." CP 58. The court entered detailed findings regarding the similarities between the prior and current incidents:

> 5. The children were all a similar age when the defendant allegedly victimized them[,] between the ages of 6 and 12. M.D., the charged victim, was between the ages of 8 and 9. M.G. was between the ages of 9 and 12.[3] P.P.J. was around the age of 6. The defendant allegedly molested and raped these children during a roughly 10-year window of time between his teenage years and 24th birthday.
>
> 6. The defendant was a caretaker to both M.G. and M.D. Both [Johnson's mother[4]] and [M.D.'s mother] trusted the defendant to watch over the children. The defendant spent significant periods of time alone with M.G., P.P.J. and M.D. The defendant was a trusted individual in M.G., P.P.J. and M.D.'s life. M.G. and M.D. were vulnerable when they were isolated with the defendant, and P.P.J. was vulnerable when he was alone with the defendant.

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[3] M.G.'s subsequent trial testimony established that she was actually between six and nine years old when Johnson anally raped her. 1RP 575, 578, 586.

[4] Johnson's mother was M.G.'s and P.P.J.'s maternal aunt, and M.G.'s de facto guardian. 1RP 547-48, 576-77.

7. The defendant held positions of power over M.D., M.G., and P.P.J. He had the authority to discipline M.D. and M.G. and did indeed discipline both children. [M.D.'s mother] expected M.D. to listen to and respect the defendant. Likewise, [Johnson's mother] expected M.G. to listen to and respect the defendant.

8. The defendant used play wrestling with both P.P.J. and M.D. to initiate the sexual assaults. The wrestling would start as playful, and then proceed to touching, and in the case of M.D., rape. The defendant attempted to deflect his behavior with both M.D. and P.P.J. as a psychological tactic, telling P.P.J. his fondling of his genitals was an accident, and shaming and mocking M.D. by saying things such as, "Ew, why are your pants down? How'd that happen?"

9. The defendant allegedly assaulted M.G. and M.D. when no other adults were in the home. Both children were left alone with the defendant so that he could babysit them. In P.P.J.'s situation, it is unclear whether other adults were in the same house when the touching occurred, but the evidence does show that P.P.J. was alone with the defendant in his room outside the immediate view of adults. All three children were accessible and vulnerable when the incidents occurred because adults were not in the immediate vicinity.

10. The defendant used physical violence to frighten both M.D. and M.G. This fear was a primary reason both children were reticent to disclose the abuse. The defendant hit M.D. in the throat when he was having difficulty studying. The defendant regularly hit M.G. when he was her babysitter.

11. The defendant sexually assaulted the children in his own home. He selected locations that were comfortable and familiar to him, specifically where he resided, to exert physical control over the children and assault them.

12. The defendant attempted to placate M.G. and M.D. when he was assaulting them by saying to M.D. "calm down" when he protested, and providing M.G. a pepperoni stick when she started crying.

13. The defendant positioned his body and sexually assaulted both M.D. and M.G. in a similar manner.[5] He pulled down their pants and underwear without their permission by positioning his body in back of their bodies. He then forcefully raped both children anally from behind despite their crying and protests.

14. The defendant took specific steps to keep his victims from seeing his exposed penis. Neither M.D. nor M.G. saw the defendant's exposed penis. With M.D., he threw a blanket over the child's head when he was finished. With M.G., he had her positioned facing forward on the couch and had his pants pulled up before she could turn around.

CP 59-60. Johnson does not challenge these findings on appeal. Br. of Appellant at 1.

The trial court applied the ER 404(b) analysis, noting that it was very mindful of the prohibition on "propensity evidence." CP 61; 1RP 174-76. The court found that the State had proven by a preponderance of the evidence that the two prior incidents occurred, and that they were substantially similar to the charged incidents and relevant to establish a common scheme or plan. 1RP 174-75; CP 58-61. Noting that the defense was general denial and the State's case rested on the testimony of a single

[5] Although the trial court's findings did not address the physical positioning of P.P.J. and Johnson when Johnson grabbed P.P.J.'s penis while wrestling, the State's proffer indicated that, like with M.D. and M.G., Johnson maneuvered himself so that P.P.J.'s back was to Johnson's chest before sexually assaulting him. Ex. 9 at 33.

child witness, the court also found that the probative value of the prior incidents was not outweighed by the danger of unfair prejudice. 1RP 174-76; CP 58-61. The trial court instructed the jury that "the allegations of sexual misconduct made by [M.G.] and [P.P.J.]" could be considered "only for the purpose of determining whether there was a common scheme or plan" by Johnson, and not "as showing James Johnson has a propensity for sexual misconduct" or for any other purpose. CP 33.

The Court of Appeals examined the unchallenged findings of fact and affirmed the trial court's ER 404(b) ruling as a proper exercise of discretion. Johnson, No. 75429-7-I, slip op. at 7-10. The Court of Appeals did not address the State's alternative argument regarding harmless error.

b. This Issue Does Not Meet The Criteria For Review, And Any Review Granted Should Address Harmless Error.

Johnson contends that the facts in this case show only "opportunistic behavior" rather than a common scheme or plan, and asserts that this Court should grant review because preventing such purported misapplication of ER 404(b) is "an issue of substantial public interest that should be determined by the Supreme Court." Pet. for Review at 7. However, the caselaw on the common scheme or plan doctrine is well developed, and it is clear that circumstances showing only

opportunistic behavior are not sufficient for admission under ER 404(b). E.g., State v. Slocum, 183 Wn. App. 438, 456, 333 P.3d 541 (2014). The trial court and the Court of Appeals properly applied that caselaw to the facts of this case and rejected Johnson's arguments. Confirming that the trial court properly applied that caselaw to the facts of this particular case is not an issue of substantial public interest. However, if this Court does grant review on this issue, it should also review whether any error was harmless, an issue briefed by the parties but not reached by the Court of Appeals.

c. The Trial Court's Unchallenged Findings Of Fact Establish That The Court Properly Exercised Its Discretion In Admitting The Challenged Evidence.

When a defendant disputes that a charged incident of child sexual abuse occurred, "the existence of a design to fulfill sexual compulsions evidenced by a pattern of past behavior is probative." State v. DeVincentis, 150 Wn.2d 11, 17-18, 74 P.3d 119 (2003). Prior bad acts are admissible under ER 404(b) to show a common scheme or plan if there is "substantial similarity" between the prior and charged acts, meaning they share sufficient common features that they can be naturally explained as individual manifestations of a general plan. Id. at 18-19, 21. While similarity in results alone is insufficient, uniqueness is not required. State v. Gresham, 173 Wn.2d 405, 422, 269 P.3d 207 (2012).

An appellate court reviews a trial court's interpretation of ER 404(b) de novo. DeVincentis, 150 Wn.2d at 17. However, once the rule is correctly interpreted, a trial court's decision to admit or exclude evidence is reviewed for abuse of discretion. Id. A trial court abuses its discretion only when no reasonable judge would have reached the same conclusion. State v. Emery, 174 Wn.2d 741, 765, 278 P.3d 653 (2012).

Here, the trial court correctly interpreted ER 404(b) to require that the prior acts be proved by a preponderance of the evidence, that there be substantial similarity between the prior and charged acts, and that the probative value of the prior acts not be outweighed by the danger of unfair prejudice. 1RP 174-76; CP 58-61. The court's decision to admit the evidence is therefore reviewed only for abuse of discretion. See Gresham, 173 Wn.2d at 422.

Unchallenged findings of fact are verities on appeal. State v. Harris, 106 Wn.2d 784, 790, 725 P.2d 975 (1986). The trial court's unchallenged findings of fact establish a multitude of similarities between the charged sexual abuse of M.D. and the prior incidents involving P.P.J. and M.G. Some similarities, like the use of play wrestling as an excuse to initiate physical contact and get behind both M.D. and P.P.J. in order to sexually assault them from the rear, and then pretending that the assault or the removal of the child's pants and underwear occurred by accident, are

particularly striking. Given the unchallenged findings, it was a proper exercise of the trial court's discretion to determine that the rapes of M.D. shared substantial similarity with the prior incidents involving P.P.J. and M.G. CP 58. See, e.g., Gresham, 173 Wn.2d at 422-23, 269 P.3d 207 (sufficient similarity found where defendant fondled young girls' genitals on trips while other adults were asleep, notwithstanding differences between sex acts performed); State v. Slocum, 183 Wn. App. 438, 448-57, 333 P.3d 541 (2014) (sufficient similarity found where victims were both molested after defendant asked them to sit in his recliner with him); State v. Baker, 89 Wn. App. 726, 729, 950 P.2d 486 (1997) (sufficient similarity found where defendant more seriously abused prior victim under similar circumstances 11-15 years earlier).

Johnson argues that because he did not engineer his position of trust and authority and did not take affirmative steps to isolate his victims, the facts that he held a position of trust and authority over each victim and sexually abused them only when they were isolated from other people are not relevant to the common scheme or plan analysis. Br. of Appellant at 18-20. In so doing, he appears to misunderstand the core principle underlying the doctrine. Similarities are not relevant to prove a common scheme or plan only if there is affirmative evidence that the defendant caused the similar condition to occur each time as part of a plan to commit

the crimes. Instead, the mere existence of a sufficient number of similarities is relevant to prove a common scheme or plan because of the unlikelihood that similar crimes would occur under such similar circumstances in the absence of a common scheme or plan. State v. Burkins, 94 Wn. App. 677, 689, 973 P.2d 15 (1999).

Accordingly, our caselaw does not require evidence that the defendant affirmatively took steps to create each condition that is similar across the multiple incidents. E.g., Gresham, 173 Wn.2d at 422-23 (fact that victims were abused while on trips with defendant cited as supporting common scheme or plan ruling; no indication that defendant proposed or orchestrated the trips); Baker, 89 Wn. App. at 733-34 (fact that victims were abused while sleeping in bed with defendant; no indication defendant orchestrated sleeping arrangement that was cited as supporting common scheme or plan ruling).

Thus, the lack of evidence regarding whether Johnson volunteered to look after his victims or was appointed to that position without his input is immaterial. The fact remains that each incident of abuse took place while the victim was in Johnson's home and alone under his supervision—

one of many similarities that, taken together, support the natural inference of a common scheme or plan.[6]

The Court of Appeals thus properly affirmed the trial court's ruling as a proper exercise of discretion, and review is not warranted. Moreover, even if the trial court had erred in admitting one or both of the prior incidents, it would have been harmless. As explained in the Brief of Respondent below, although it was reasonable to believe prior to trial that the corroboration provided by P.P.J. and M.G.'s accounts would be necessary given that M.D. was the sole witness to his abuse, because of the way the testimony came out at trial there is not a reasonable probability that the verdict would have been different had the prior incidents been excluded. Br. of Respondent at 36-39. While the Court of Appeals did not reach this argument, any review by this Court should address it.

2. THIS COURT SHOULD DENY REVIEW OF JOHNSON'S CLAIM THAT THE TRIAL COURT VIOLATED HIS RIGHT TO PRESENT A DEFENSE.

a. Relevant Facts.

In his Statement of Additional Grounds to the Court of Appeals, Johnson made a brief complaint alluding to his "[r]ight to present a

[6] Moreover, the Court of Appeals noted that "a rational trier of fact could easily conclude that development of the trust relationships with M.D.'s, M.G.'s, and P.P.J.'s mothers were each intended to create the opportunity to sexually assault the children." Johnson, No. 75429-7-I, slip op. at 9.

complete defense" and the exclusion as hearsay of "M.D.'s prior statement telling biological father that I abused him, and later admitting to his mom and I that he does not know why he said those things." Statement of Additional Grounds at 1. Johnson provided no further information or argument. The Court of Appeals declined to address the claim, explaining that Johnson had not presented sufficient facts. Johnson, No. 75429-7-I, slip op. at 12.

b. The Court Of Appeals Properly Declined To Address This Claim.

RAP 10.10 states that, except in cases where defense counsel moves to withdraw because any appeal would be meritless, an appellate court "is not obligated to search the record in support of claims made in a defendant's statement of additional grounds for review." RAP 10.10(c).

Johnson's statement of additional grounds regarding the alleged violation of his right to present a defense did not identify when or in what context the exclusion of M.D.'s alleged prior statement occurred. The Court of Appeals properly determined that it was not obligated to search the record to determine what happened and whether the exclusion was proper. The Court of Appeals' decision not to search the record to evaluate the merits of Johnson's claim does not conflict with other cases of this Court or the Court of Appeals, does not present a significant

question of constitutional law, and is not an issue of substantial public interest. Review is therefore not warranted. RAP 13.4(b).

Moreover, if the Court of Appeals had searched the record to evaluate the merits of Johnson's claim, it would have discovered that no violation of the right to present a defense occurred. During Johnson's direct examination, defense counsel attempted to elicit testimony from him about out-of-court statements by M.D. 1RP 635. Defense counsel's proffer to the court was that M.D. had at some point complained to his biological father about physical abuse by Johnson, which M.D.'s father had relayed to M.D.'s mother, and then Johnson and M.D.'s mother had a conversation about it with M.D. in which M.D. "agreed . . . that that hadn't happened."[7] 1RP 636. Defense counsel asserted that this testimony would be elicited, not for the truth of the matter asserted, but because "it goes to the relationship . . . between Mr. Johnson and [M.D.]." 1RP 635. The trial court excluded the testimony because both prior statements by M.D.—the allegation to his father and the alleged recantation to Johnson and M.D.'s mother—were hearsay. 1RP 636-37.

Johnson argues in his Petition for Review that "Johnson's testimony about what M.D. said would not have been hearsay because it was not being offered for the truth of the matter asserted, but rather to

[7] The record does not indicate whether M.D. or his mother would have disagreed with this account if asked about it.

show M.D.'s willingness to lie." Pet. for Review at 14-15. However, this ignores the levels of hearsay inherent in any testimony by Johnson that M.D. told his father that Johnson physically abused him. Johnson didn't hear M.D. make such an accusation—he only heard from M.D.'s mother that M.D.'s father told her M.D. made such an accusation. 1RP 636. M.D.'s mother's statement to Johnson, and within it the father's statement to the mother, were being offered to prove the truth of the matter asserted—that M.D. had in fact made such an allegation to his father. Furthermore, without admissible evidence of the original allegation, any testimony about M.D.'s purported recantation was no longer relevant for anything other than the truth of the matter asserted. As such, the trial court properly excluded the testimony.

3. THIS COURT SHOULD DENY REVIEW OF JOHNSON'S CLAIM THAT HIS TRIAL COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE FOR NOT PROPERLY IMPEACHING THE VICTIM.

Another issue raised in Johnson's Statement of Additional Grounds for Review was an assertion that Johnson's trial counsel was ineffective for failing to follow the proper impeachment procedures while questioning M.D. Statement of Additional Grounds at 1. This appears to be a reference to the fact that, in excluding the testimony discussed above about M.D.'s purported allegation and recantation of physical abuse, the

trial court explained that, as to M.D.'s purported recantation in Johnson's presence, it was both hearsay and "[t]here was no questioning of [M.D.] about that, so you're not doing this for impeachment." 1RP 637.

The Court of Appeals held that Johnson's argument that trial counsel should have used a different impeachment strategy failed to overcome the strong presumption of effective representation in light of trial counsel's lengthy cross-examination of M.D. Johnson, No. 75429-7-I, slip op. at 14-15. This decision does not meet the criteria for review set out in RAP 13.4(b). Moreover, Johnson's claim fails on the merits.

In order to prevail on a claim of ineffective assistance of counsel, a defendant must show that (1) defense counsel's performance was deficient and (2) the deficient performance prejudiced the defendant. State v. Cienfuegos, 144 Wn.2d 222, 226-27, 25 P.3d 1011 (2001); Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Contrary to Johnson's arguments in his Petition, the record shows that the recantation by M.D. that defense counsel wanted to elicit from Johnson was not a recantation of M.D.'s allegations of sexual abuse. Instead, the most generous reading of the record is that it was a recantation of the allegation of physical abuse that M.D. purportedly made to his father. 1RP 636. Moreover, it's not clear from the record that M.D.'s statement to Johnson and his mother was actually a recantation of what he had told

his father. Defense counsel's proffer was that M.D. had "said to his father that he was being physically abused by Mr. Johnson" and that when questioned by his mother and Johnson, M.D. "agreed that he -- that that hadn't happened." 1RP 636. However, it is not clear whether M.D. had actually claimed "physical abuse" in speaking to his father and later recanted the allegation, or whether the characterization of "physical abuse" was provided by an adult and M.D. simply agreed that what he reported to his father did not constitute "physical abuse."

Thus, if defense counsel had questioned M.D. about the statements, the result may not have helped Johnson's case. Defense counsel may have known from his own investigation that M.D.'s answers would be unhelpful and may have made a tactical choice not to ask M.D. about the out-of-court statements. It's also possible that defense counsel chose not to ask M.D. about them because defense counsel knew that, even if M.D. denied making the purported allegation of physical abuse, counsel would be unable to impeach M.D. by calling his father, either because M.D.'s father was not available to testify or because his testimony would corroborate M.D.'s denial.

On this record, it cannot reasonably be said that Johnson's trial counsel was constitutionally deficient in choosing not to question M.D. about the alleged prior allegation of physical abuse and his subsequent

agreement in Johnson's presence that Johnson had not physically abused him. Johnson also failed to establish that the outcome of the trial would have been different had defense counsel attempted to question M.D. about the statements. Review is not warranted.

4. IF THIS COURT GRANTS REVIEW, IT SHOULD ALSO REVIEW THE COURT OF APPEALS' HOLDING THAT THE PROHIBITIONS ON SEXUALLY EXPLICIT MATERIALS AND SEX-RELATED BUSINESSES ARE NOT CRIME-RELATED.

Review, if granted, is also warranted as to the Court of Appeals' determination that community custody conditions restricting Johnson's access to sexually explicit materials and sex-related businesses are not reasonably related to Johnson's crime because the known facts of Johnson's offenses do not directly involve sexually explicit materials or sex-related businesses. The lower court's decision followed State v. Norris, 1 Wn. App. 2d 87, 404 P.3d 83 (2017), review granted, 413 P.3d 12 (2018), in applying an untenably restrictive interpretation of what constitutes a "reasonably related" prohibition for the purposes of community custody. This is an issue of substantial public interest that should be determined by the Supreme Court because it involves community-custody conditions in countless sex-offense sentencings. Also, Division One's continued adherence to the approach set out in Norris is in conflict with decisions of Division Three of the Court of

Appeals, such as State v. Alcocer, __ Wn. App. 2d __, __ P.3d __, 2018 WL 1415657 (2018).

This Court has accepted review in Norris on this exact issue, and oral argument is set for May 10, 2018. If this Court grants Johnson's petition for review, it should also grant review on this issue so that this Court's eventual decision in Norris can be applied to this case.

G. CONCLUSION

For the foregoing reasons, the State respectfully asks that the petition for review be denied. If it is granted, the State asks this Court to also grant review of the additional issues identified in this Answer.

DATED this 3rd day of April, 2018.

Respectfully submitted,

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