

No. 43693-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Sergey Fedoruk,

Appellant.

Cowlitz County Superior Court Cause No. 11-1-00827-1

The Honorable Judge Marilyn K. Haan

Appellant's Reply Brief

Jodi R. Backlund
Manek R. Mistry
Attorneys for Appellant

BACKLUND & MISTRY
P.O. Box 6490
Olympia, WA 98507
(360) 339-4870
backlundmistry@gmail.com

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ARGUMENT

I. DEFENSE COUNSEL’S DEFICIENT PERFORMANCE PREJUDICED MR. FEDORUK.

To provide effective assistance, defense counsel must undertake a reasonable investigation. *Duncan v. Ornoski*, 528 F.3d 1222, 1234 (9th Cir. 2008). Counsel must also confer with the accused to evaluate potential defenses. *United States v. DeCoster*, 487 F.2d 1197, 1203 (D.C. Cir. 1973); *see also* RPC 1.4. In addition, counsel must help an accused decide what plea to enter. *See State v. A.N.J.*, 168 Wn.2d 91, 111-112, 225 P.3d 956 (2010). Although *A.N.J.* involved choosing between a guilty plea and trial, the same level of competence is required of attorneys counseling clients who have the option of raising a mental health defense or entering a plea of Not Guilty by Reason of Insanity (NGRI).

Here, counsel failed to investigate a mental health defense, despite a prior NGRI finding, prior psychiatric hospitalizations, past diagnoses of schizophrenia, ongoing mental problems, and the fact that Mr. Fedoruk had not been taking his medication at the time of the incident. Inexplicably, counsel believed he had “no basis” for an NGRI plea, even after 10 months of representing Mr. Fedoruk. CP 29-47, 158-160; RP 1-25, 397.

Ultimately, the decision to plead not guilty by reason of insanity rests with the accused person. *State v. Jones*, 99 Wn.2d 735, 402-404, 664

P.2d 1216 (1983); RPC 1.2(a).¹ However, the decision to investigate does not. *A.N.J.*, 168 Wn.2d at 111-112. Similarly, matters of trial strategy are the attorney's responsibility. Thus counsel has the obligation— independent of the client's wishes—to investigate and (in some cases) to properly raise a mental health defense such as diminished capacity. *See, e.g., Pirtle v. Morgan*, 313 F.3d 1160, 1169 (9th Cir. 2002).

Absent reasonable investigation, counsel cannot properly advise a defendant on how to proceed. *See A.N.J.*, 168 Wn.2d at 111-112.

Respondent's suggestion—that counsel could not even investigate an insanity defense without permission—lacks merit, because it conflicts with counsel's duty to conduct a reasonable investigation, and to provide advice regarding the client's options. Brief of Respondent, p. 36.

Respondent cites no authority for this argument, and thus can be presumed to have found none after diligent search. *Coluccio Constr. v. King County*, 136 Wn. App. 751, 779, 150 P.3d 1147 (2007).

Here, counsel admitted that he had not investigated an insanity plea. RP 1-25, 397. Respondent acknowledges that counsel was dilatory

¹ The rule provides as follows: "In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify."

in seeking an evaluation: “There was absolutely no indication... [that] counsel [was] unaware of these issues.” Brief of Respondent, p. 50.²

This undermines Respondent’s contention regarding the sufficiency of the record on appeal. Brief of Respondent, p. 41. Counsel did not consult with experts because he believed he had “no basis” to investigate insanity. CP 29-47, 158-160; RP 1-25, 397. Under the circumstances, a reasonable attorney would have undertaken a reasonable investigation. Given Mr. Fedoruk’s history—including a prior NGRI finding—counsel’s investigation should have included consultation with an expert. Without making such an investigation, counsel could not provide Mr. Fedoruk advice. *A.N.J.*, 168 Wn.2d at 111-112.

Respondent erroneously describes as “undisputed” the conclusion that “counsel did not have a basis to pursue the NGRI defense...” Brief of Respondent, p. 41. This is incorrect. Counsel had a substantial basis to pursue the defense: as outlined above, a great deal of information in the record suggests that Mr. Fedoruk lacked a solid connection to reality. CP 29-47, 158-160; RP 1-25, 397. Even if Mr. Fedoruk did not agree to assert the defense until after hearing testimony at the CrR 3.5 hearing, this did not excuse defense counsel from his responsibility to investigate the

² This admission comes in the context of Respondent’s arguments regarding Mr. Fedoruk’s requested continuance.

defense. *Cf. A.N.J.*, 168 Wn.2d at 110-112 (defendant's admissions of guilt did not excuse counsel from investigating).

Likewise misplaced is Respondent's reliance on *State v. Turner*, 143 Wn.2d 715, 23 P.3d 499 (2001). Brief of Respondent, p. 44. The issue in *Turner* was defense counsel's failure to present expert testimony; the issue here is counsel's failure to even investigate. *Turner*, 143 Wn.2d at 730. The defendant in *Turner* was violently disruptive; he did not exhibit behavior that called his sanity into question. *Turner*, 143 Wn.2d at 727. Here, by contrast, Mr. Fedoruk exhibited bizarre behavior that suggested he had a mental disease or defect that impaired his ability to perceive the nature, quality, and wrongfulness of the act with which he was charged. *See* RCW 9A.12.010.³ Furthermore, an evaluation of *Turner* showed that he did not qualify for a mental health defense. *Turner*, 143 Wn.2d at 721. No evaluator ruled out an insanity defense for Mr. Fedoruk. CP 35-47.

An appellant claiming ineffective assistance need not show a likelihood of acquittal. *Strickland* requires only a reasonable probability that the outcome would have differed. *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). This amounts to "a probability

³ Respondent's implied argument that sanity consists of the ability to "formulate actions and understand the consequences" lacks merit. *See* RCW 9A.12.010.

sufficient to undermine confidence in the outcome.” *Id.* Respondent seeks to burden Mr. Fedoruk with the obligation to prove he would have prevailed at trial. Brief of Respondent, pp. 43-45. *Strickland* does not impose such a requirement.

This unreasonable failure to investigate deprived Mr. Fedoruk of the effective assistance of counsel. *A.N.J.*, 168 Wn.2d at 111-112. His convictions must be reversed and the case remanded for a new trial. *Id.*

II. THE TRIAL COURT’S REFUSAL TO GRANT A CONTINUANCE DEPRIVED MR. FEDORUK OF DUE PROCESS.

Respondent agrees that denial of a constitutional right requires *de novo* review, but suggests that Mr. Fedoruk must show prejudice. Brief of Respondent, p. 46. This is incorrect: “if trial error is of constitutional magnitude, prejudice is presumed and the State bears the burden of proving it was harmless beyond a reasonable doubt.” *State v. Coristine*, 177 Wn.2d 370, 380, 300 P.3d 400 (2013).⁴ Neither the U.S. Supreme Court nor the Washington Supreme Court has carved out an exception for a violation of constitutional rights stemming from denial of a

⁴ The prosecution must show any error was “trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the outcome of the case.” *City of Bellevue v. Lorang*, 140 Wn.2d 19, 32, 992 P.2d 496 (2000).

continuance.⁵ Respondent's error regarding the standard of review infects the remainder of the state's argument.

An accused person has a due process right to present a defense. *State v. Maupin*, 128 Wn.2d 918, 924, 913 P.2d 808 (1996). Failure to grant a continuance may deprive a defendant of a fair trial. *State v. Purdom*, 106 Wn.2d 745, 725 P.2d 622 (1986); *see also United States v. Flynt*, 756 F.2d 1352 (9th Cir. 1985). The court's refusal to continue Mr. Fedoruk's case infringed his due process right to present a defense. Mr. Fedoruk's argument on appeal thus raises a constitutional error. Respondent's failure to dispute this may be treated as a concession. *In re Pullman*, 167 Wn.2d 205, 212 n.4, 218 P.3d 913 (2009).

Despite this, Respondent erroneously applies an abuse of discretion standard, instead of the required *de novo* standard. *State v. Iniguez*, 167 Wn.2d 273, 280-81, 217 P.3d 768 (2009); *see* Brief of Respondent, p. 48. In addition, Respondent erroneously implies that the lower court might not have allowed Mr. Fedoruk to present his mental

⁵ By contrast, the Court of Appeals has held that the defendant bears the burden of proving prejudice upon denial of a continuance request. *See, e.g., City of Tacoma v. Bishop*, 82 Wn. App. 850, 861, 920 P.2d 214 (1996). Where constitutional error is concerned, this standard conflicts with the presumption of prejudice, described as "a constitutional minimum protection for the rights of accused persons..." *Coristine*, 177 Wn.2d at 380.

health defense.⁶ Brief of Respondent, pp. 47-48. Given the presumption of prejudice attaching to violation of a constitutional right, such speculation is not warranted. *Coristine*, 177 Wn.2d at 380.

Likewise improper is Respondent's unsupported argument that Mr. Fedoruk sought to delay his trial by raising NGRI after the CrR 3.5 testimony. Brief of Respondent, p. 50. Nothing in the record supports this assertion. If, as Respondent contends, defense counsel really had no basis to pursue the defense until after the CrR 3.5 hearing, the delay in raising the defense could not have been avoided. *See* Brief of Respondent, p. 41.

Although a continuance may have posed some inconvenience to the prosecution, the record does not establish any insurmountable problems. Respondent raises three concerns: a witness scheduled to travel from Portland, the availability of two expert witnesses, and the possibility that family members would become less cooperative as time went on. Brief of Respondent, p. 53-54. The first two concerns are trivial when compared to Mr. Fedoruk's constitutional right to present a defense. Portland is not far from Cowlitz County, and even the busiest experts find time to testify in homicide cases. The third concern—possible changes in the family's attitude toward the prosecution—is entirely speculative. Furthermore, such concerns

⁶ This suggestion—that counsel waited too long to raise a defense of NGRI—supports Mr. Fedoruk's ineffective assistance claim.

could be addressed through a motion under CrR 4.6(a), which permits a trial court to order a deposition.

In this case, the court's denial of Mr. Fedoruk's continuance motion deprived him of the opportunity to present his only realistic defense.⁷ His conviction must be reversed and his case remanded for a new trial. *Flynt*, 756 F.2d at 1358.

III. MR. FEDORUK'S CUSTODIAL STATEMENTS SHOULD HAVE BEEN EXCLUDED.

A. Police failed to scrupulously honor Mr. Fedoruk's assertion of his privilege against self-incrimination.

If an accused person invokes his right to remain silent, the police must "scrupulously honor[]" the request to cut off questioning. *Michigan v. Mosley*, 423 U.S. 96, 104-106, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975). Officers may only seek a subsequent *Miranda* waiver if (1) all questioning ceases, (2) a significant period elapses, (3) *Miranda* warnings are readministered, and (4) the subject of the second interrogation is unrelated to the first. *United States v. Rambo*, 365 F.3d 906, 910-11 (10th Cir. 2004). The sole exception is where the accused initiated further discussion and knowingly and intelligently

⁷ Respondent's suggestion that identity was at issue ignores the trove of evidence pointing to Mr. Fedoruk as the perpetrator. Brief of Respondent, p. 53. The facts in the state's possession allowed for only one real trial issue: Mr. Fedoruk's mental state at the time of the killing.

waives her or his rights. *Smith v. Illinois*, 469 U.S. 91, 95, 105 S.Ct. 490, 83 L.Ed.2d 488 (1984). The state is obligated to show both initiation and waiver. *Oregon v. Bradshaw*, 462 U.S. 1039, 1045, 103 S.Ct. 2830, 77 L.Ed.2d 405 (1983).

Here, Mr. Fedoruk unequivocally invoked his right to remain silent. RP 193. He did not initiate conversation, and did not waive his rights. *See* RP 907-909; *see also* Appellant's Opening Brief, pp. 11-12, 35-39. Respondent suggests that Mr. Fedoruk's rambling rant qualified as initiation. Brief of Respondent, p. 59. Given the rambling, disjointed nature of Mr. Fedoruk's statement, the state's argument requires more than the usual level of speculation about Mr. Fedoruk's mental state and the meaning of his words. Brief of Respondent, p. 59. Furthermore, even if the rant counts as "initiation," Respondent fails to show a separate waiver, as required under *Bradshaw*, 462 U.S. at 1045. In addition, Mr. Fedourk was not provided additional warnings before he was interrogated. RP 194-196, 242.

Because police failed to scrupulously honor Mr. Fedoruk's invocation of his right to remain silent, his statements to Gilchrist must be suppressed. *Bradshaw*, 462 U.S. at 1045..

B. Mr. Fedoruk's statements were involuntary.

Due process requires exclusion of involuntary statements. *Reck v. Pate*, 367 U.S. 433, 440, 81 S.Ct. 1541, 6 L.Ed.2d 948 (1961). State action is

a necessary prerequisite for a due process violation; however, a person's mental condition is relevant to the analysis. *Colorado v. Connelly*, 479 U.S. 157, 165, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986).

Here, the state failed to sustain its burden of proving voluntariness. Police action, combined with Mr. Fedoruk's mental health issues, produced involuntary statements. *See* Appellant's Opening Brief, pp. 37-41. Respondent's observation that the police didn't use force does not end the analysis. Brief of Respondent, p. 60. As the U.S. Supreme Court has noted, "coercion can be mental as well as physical... the blood of the accused is not the only hallmark of an unconstitutional inquisition." *Blackburn v. State of Ala.*, 361 U.S. 199, 206, 80 S.Ct. 274, 4 L.Ed.2d 242 (1960). Respondent also claims that Mr. Fedoruk likely understood what the officers said and managed to control himself. Brief of Respondent, p. 61. This is not the same as saying Mr. Fedoruk actually exercised free will in deciding to speak. *See United States v. Gamez*, 301 F.3d 1138, 1144 (9th Cir. 2002).

Mr. Fedoruk's statements were involuntary. His conviction must be reversed, the statements suppressed, and the case remanded for a new trial. *Mincey v. Arizona*, 437 U.S. 385, 401-402, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978).

C. Police subjected Mr. Fedoruk to custodial interrogation without benefit of *Miranda*.

A person is “in custody” for *Miranda* purposes if a reasonable person would have felt unable to terminate the interrogation and leave. *J.D.B. v. N. Carolina*, --- U.S. ---, 131 S.Ct. 2394, 180 L.Ed.2d 310 (2011). Although brief *Terry* stops⁸ do not involve *Miranda* custody,⁹ Mr. Fedoruk was subjected to detention more intense than that permitted under *Terry*: five armed and uniformed officers confronted him, ordered him to keep his hands from his pockets, told him to remain on his porch, and handcuffed him. He was kept there for more than just a few seconds, though the state did not establish exactly how long he was detained. RP 110, 113-116, 141-144, 151, 168, 170, 186. A reasonable person would not have felt free to disregard the officers and leave; accordingly, he was in custody for *Miranda* purposes. *J.D.B.*, --- U.S. ---, 131 S.Ct. 2394. Respondent’s contrary argument does not take into account all of the circumstances. *See* Brief of Respondent, pp. 62-63.

⁸ *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

⁹ *Howes v. Fields*, --- U.S. ---, 132 S.Ct. 1181, 182 L.Ed.2d 17 (2012).

Nor was the error harmless. Respondent claims the evidence was overwhelming, but cites nothing in the record that established Mr. Fedoruk's mental state at the time of the incident. Brief of Respondent, pp. 63-64.

Police placed Mr. Fedoruk in custody for *Miranda* purposes. RP 110, 113-116, 141-144, 151, 168, 170, 186. Because they failed to administer *Miranda* warnings, his statements should have been suppressed. *J.D.B.*, --- U.S. ---, 131 S.Ct. 2394; *see also* Appellant's Opening Brief, pp. 39-40. His conviction must be vacated, the statements suppressed, and the case remanded for a new trial. *Id.*

IV. THE PROSECUTOR'S EGREGIOUS MISCONDUCT REQUIRES REVERSAL.

A. The prosecutor improperly misstated the burden of proof.

A prosecuting attorney commits misconduct by misstating the burden of proof. *State v. Dixon*, 150 Wn. App. 46, 55, 207 P.3d 459 (2009); *United States v. Perlaza*, 439 F.3d 1149, 1171 (9th Cir. 2006). Even where evidence is uncontradicted, the prosecution cannot suggest that jurors should convict based on a failure to present evidence. *State v. Sells*, 166 Wn. App. 918, 930, 271 P.3d 952 (2012) *review denied*, 176 Wn.2d 1001 (2013).

Here, the prosecutor made improper arguments that misstated the burden of proof. RP 1776, 1778, 1779. The state presented some of its arguments visually through a power-point presentation. Ex 237. Contrary to

Respondent’s suggestion, the prosecutor did more than simply “narrow[] the case.” Brief of Respondent, pp. 65-66. Although Mr. Fedoruk’s defense may have focused on the issue of identity, he did not stipulate, concede, or agree to any of the elements or to any of the evidence introduced by the prosecution.

The misconduct was flagrant and ill-intentioned, and violated Mr. Fedoruk’s Fourteenth Amendment right to due process. *In re Glasmann*, 175 Wn.2d 696, 714, 286 P.3d 673 (2012). His conviction must be reversed and the case remanded for a new trial. *Glasmann*, 175 Wn.2d at 714.

B. The prosecutor improperly argued that intuition could provide the basis for conviction.

A conviction must rest on probative evidence and sound reason. *Glasmann*, 174 Wn.2d at 704. A prosecutor commits misconduct by undermining this principle. *Glasmann*, at 706. Here, the prosecutor improperly argued that conviction could be based on intuition. RP 1784-1801, 1805; *see* Ex 287, slide 22. Contrary to Respondent’s assertion, the prosecutor’s repeated use of the phrase “intuition is a powerful thing” had nothing to do with “explain[ing] the evidence and why the family reacted the way they did.” Brief of Respondent, pp. 67-68.

The prosecutor also crossed the line by asking for a verdict based on the juror’s feelings—that is, what was in each juror’s heart or gut. RP 1805. The prosecutor didn’t merely urge jurors to deliver a just verdict; instead, she

told jurors that a gut feeling could provide a rational basis for convicting, and linked this argument to the intuition of various witnesses. RP 1805. This misconduct differs from the prosecutor's vague admonitions in *State v. Curtiss*, 161 Wn. App. 673, 701, 250 P.3d 496 (2011) *review denied*, 172 Wn.2d 1012, 259 P.3d 1109 (2011).

The prosecutor's improper arguments deprived Mr. Fedoruk of a fair trial. *Glasmann*, 174 Wn.2d at 704, 709. His convictions must be reversed and the case remanded for a new trial. *Id.* at 714.

C. Defense counsel deprived Mr. Fedoruk of his Sixth Amendment right to the effective assistance of counsel by failing to object to misconduct.

Mr. Fedoruk rests on the argument set forth in the Opening Brief.

V. THE TRIAL JUDGE SHOULD HAVE INSTRUCTED ON FIRST-DEGREE MANSLAUGHTER

A court's refusal to instruct on a lesser included offense is ordinarily reviewed for an abuse of discretion; however, a court necessarily abuses its discretion by infringing constitutional rights. *Iniguez*, 167 Wn.2d at 280-81. Where the appellant raises a constitutional issue, review is *de novo*. *Id.*

An accused person has both a statutory and a constitutional right to have the jury instructed on applicable included offenses. U.S. Const. Amend. XIV; *Vujosevic v. Rafferty*, 844 F.2d 1023, 1027 (1988); *State v. Parker*, 102 Wn.2d 161, 163-164, 683 P.2d 189 (1984); RCW 10.61.003; RCW 10.61.010.

Because Mr. Fedoruk raises a constitutional claim, review is *de novo*. *Iniguez*, 167 Wn.2d at 280-81.

When the prosecution files alternative charges, the court must instruct on any included offense of either charge. *State v. Schaffer*, 135 Wn.2d 355, 359, 957 P.2d 214 (1998); *see also State v. Berlin*, 133 Wn.2d 541, 552-553, 947 P.2d 700 (1997) (manslaughter instructions appropriate in prosecution for alternative charges of intentional and felony murder); *State v. Warden*, 133 Wn.2d 559, 562-565, 947 P.2d 708 (1997) (manslaughter instructions appropriate in prosecution for alternative charges of premeditated and felony murder).

Intentional murder includes the lesser offense of first-degree manslaughter. *Berlin*, 133 Wn.2d at 550-51. Mr. Fedoruk was entitled to instructions on first-degree manslaughter: he was charged with first-degree intentional murder and the record includes at least slight evidence that he was guilty of only the lesser offense. *See Appellant's Opening Brief*, pp. 49-50.

As charged in this case, conviction of murder required proof that he intended to kill Ishchenko. CP 4-5; RCW 9A.32.030. If he intended to beat Ishchenko to within an inch of his life, but did not intend to kill him, he would

have been guilty of manslaughter but not intentional murder.¹⁰ RCW 9A.32.060.

It is true that the record does not conclusively establish Mr. Fedoruk's lack of intent to kill. *See* Brief of Respondent, p. 83. But this is not the correct standard for evaluating evidence under *State v. Workman*, 90 Wn.2d 443, 584 P.2d 382 (1978). Instead, the evidence is viewed in a light most favorable to the instruction's proponent. *State v. Fernandez-Medina*, 141 Wn.2d 448, 456, 6 P.3d 1150 (2000). The instruction must be given even if there is only slight evidence in support of it. *Parker*, 102 Wn.2d at 163-164. Here, the number and variety of blows, Mr. Fedoruk's irrational and distorted thinking, and his belief that Ischenko was still alive provide slight evidence that he intentionally assaulted the other man and recklessly caused his death. *See* Appellant's Opening Brief, pp. 46-50.

Because of this the court should have instructed the jury on manslaughter. Mr. Fedoruk's conviction must be reversed and the case remanded for a new trial. RCW 10.61; *Fernandez-Medina*, 141 Wn.2d at 456.

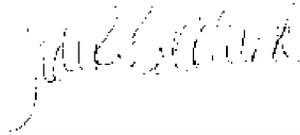
¹⁰ Respondent misstates the applicable *mens rea* by suggesting that any intentional act establishes murder. Brief of Respondent, p. 83. This is incorrect. Murder requires proof of the intent to kill. An intentional act – including an assault—that recklessly causes death qualifies as manslaughter. RCW 9A.32.060; *see e.g., In re Burchfield*, 111 Wn. App. 892, 899, 46 P.3d 840 (2002) (intentional shooting that recklessly causes death constitutes manslaughter.)

CONCLUSION

Mr. Fedoruk's conviction must be reversed and the case remanded for a new trial.

Respectfully submitted on August 6, 2013,

BACKLUND AND MISTRY



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant



Manek R. Mistry, WSBA No. 22922
Attorney for the Appellant

CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Reply Brief, postage prepaid, to:

Sergey Fedoruk, DOC #317936
Washington State Penitentiary
1313 N 13th Ave
Walla Walla, WA 99362

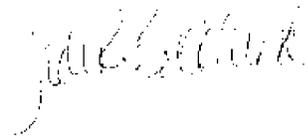
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Cowlitz County Prosecuting Attorney
baurs@co.cowlitz.wa.us

I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on August 6, 2013.



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

BACKLUND & MISTRY

August 06, 2013 - 7:01 AM

Transmittal Letter

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Case Name: State v. Sergey Fedoruk

Court of Appeals Case Number: 43693-1

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