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

STATE OF WASHINGTON, Respondent

v.

RODMAN ALFRED WIDING, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.15-1-01156-1

BRIEF OF RESPONDENT

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INTRODUCTION

On or about June 15, 2015 Rodman Widing, who was acting manic and paranoid, attacked his wife, Athena Meisenheimer. During the attack, Mr. Widing twice strangled Ms. Meisenheimer until her face turned purple and on at least one of these occasions she lost consciousness. Responding deputies observed that the victim suffered extensive petechial hemorrhaging throughout her face, many bruises, and that her face remained purple. One deputy noted that he had never seen a victim with these manifestations from strangulation who survived.

When the responding deputies arrived at the scene, Mr. Widing was running around outside wearing only swim shorts. He was yelling that he was God, eating handfuls of dirt and grass, and yelling for officers to kill him. He was arrested and taken to the hospital. Medical personnel medically sedated him and, eventually, he was intubated due to his extreme agitation and psychosis. He would remain in the hospital as a result of his medical condition until June 19, 2015.

During Mr. Widing's stay at the hospital he was examined by numerous doctors. He also received continuing care after his discharge to include psychiatric visits with Paul de Baldo a psychiatric-mental health nurse practitioner. During the following months, Mr. Widing was

examined by defense experts as Mr. Widing intended to rely on the defense of insanity. Mr. Widing was also examined by Dr. Patricia Rice of Western State Hospital. Additional defense experts reviewed Mr. Widing's medical records and provided reports or testimony to the court.

At the hearing on whether Mr. Widing was insane at the time of the crimes the trial court reviewed reports and/or heard testimony from Dr. Rice, Dr. Raymond Singer, Dr. Keith French, Dr. Gary Larsen, and Dave Predmore. Each expert, to the extent that he or she opined, concluded that Mr. Widing was unable to distinguish right from wrong at the time of his crimes. Expert opinion varied, however, as to the cause of Mr. Widing's psychosis and ranged from bipolar disorder to copper toxicity to psychosis secondary to renal failure. The trial court found Mr. Widing not guilty of the charged crimes by reason of insanity.

At the hearing on whether Mr. Widing should be committed to Western State Hospital or released—basically whether Mr. Widing presented as a substantial danger to other persons—the trial court heard testimony from Dr. Rice, Ms. Meisenheimer (the victim), and one of Mr. Widing's ex-wives. The trial court also heard argument from the parties and continued to rely on some of the testimony and reports previously provided by the other experts, most notably Dr. Singer. Ultimately, Dr.

Rice concluded that Mr. Widing presented as a high risk of future dangerousness to other persons while Dr. Singer concluded that Mr. Widing presented as a low risk. The trial court weighed the credibility of the experts, the evidentiary value of the opinions they provided, and Mr. Widing's post-crime behavior, i.e., the manner in which he injected himself into the process by pushing the copper toxicity theory, and concluded that Mr. Widing does present as a substantial danger to other persons and ordered him committed to Western State Hospital.

RESPONSE TO ASSIGNMENTS OF ERROR

- I. The trial court's conclusion that Mr. Widing is a substantial danger to other persons is correct and supported by substantial evidence including the opinion of Dr. Rice.**
- II. The trial court's conclusion that Mr. Widing is a substantial danger to other persons was properly based, in part, on the severity of the offenses and the lack of clarity as to the underlying cause of the psychotic episode.**
- III. Mr. Widing waived this assignment of error, but even if he did not Dr. Rice is qualified to opine as to the cause of Mr. Widing's psychosis or as to the conditions that did not cause the psychosis especially since she researched the relevant issues and consulted with another doctor on the topic.**
- IV. Because the trial court's findings support its conclusion that Mr. Widing presents a substantial danger to other persons it correct ordered him committed to Western State Hospital.**

- V. **Trial counsel was not ineffective as he properly chose not to object to the testimony of Dr. Rice that pertained to the role, or lack thereof, of copper toxicity in causing Mr. Widing's psychosis.**

STATEMENT OF THE CASE

Pursuant to RAP 10.3(b), and for the purposes of this responsive brief only, the State is satisfied with Mr. Widing's statement of the case. Mr. Widing's statement of the case accurately summarizes the facts relating to the underlying offenses for which Mr. Widing was found not guilty by reason of insanity as well as the procedural history of the case. Mr. Widing also accurately summarizes the opinions of some of the testifying or report writing experts, though the State would emphasize different portions of those opinions or make different inferences based on those opinions. The State will discuss those differences below in the argument section.

ARGUMENT

- I. **The trial court's conclusion that Mr. Widing is a substantial danger to other persons and should be committed is correct and supported by substantial evidence including the expert opinion of Dr. Rice.**

Mr. Widing argues that the trial court erred by finding that he presents a substantial danger to other persons and should be committed. Brief of Appellant at 17-19, 23-27. Accordingly, he argues that substantial

evidence does not support the court's findings. *Id.* This argument fails, however, for multiple reasons: 1) as made, it necessarily seeks to have this Court reweigh the persuasiveness of the evidence and resolve the conflicting expert testimony differently than the trial court did;¹ and 2) the testimony presented and medical records in evidence support the trial court's findings.

Notably, the State has "a strong interest in the protection of public safety by detaining mentally unstable individuals who present a threat to society." *State v. Beaver*, 184 Wn.2d 321, 338, 358 P.3d 385 (2015) (citation omitted). Thus, pursuant to RCW 10.77.110(1):

[i]f a defendant is acquitted of a crime by reason of insanity, and . . . it is found that such defendant is a substantial danger to other persons . . . unless kept under further control by the court or other persons or institutions, the court shall order his or her hospitalization, or any appropriate alternative treatment less restrictive than detention in a state mental hospital.

Essentially, in order to commit an insanity acquittee to Western State Hospital the court must find "that the acquittee suffers from a mental illness and second, that the acquittee is a danger to others." *Beaver*, 184 Wn.2d at 332 (quoting *State v. Bao Dinh Dang*, 178 Wn.2d 868, 876, 312

¹ Mr. Widing acknowledges that "[t]his Court's role, of course, is not to reweigh the evidence in the record, . . . but rather to determine whether substantial evidence in the record supports the court's conclusion of dangerousness and resulting order of commitment." Br. of App. at 25.

P.3d 30 (2013)). The determination that a defendant “is a substantial danger to other persons” is a question of fact.² RCW 10.77.010; *State v. Klein*, 156 Wn.2d 102, 121, 124 P.3d 644 (2005). Courts of appeal review disputed findings of fact under a substantial evidence standard. *Klein*, 156 Wn.2d at 115 (citation omitted). “Evidence is substantial if it is sufficient to convince a reasonable person of the truth of the finding.” *Id.* Moreover, where “substantial evidence supports challenged facts, those facts as found by the trial court are binding on appeal.” *Id.* (citation omitted).

Generally, reviewing courts “do not substitute [their own] judgment with that of the trier of fact regarding issues of conflicting expert testimony.” *Id.* at 121 (citing *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997)). Thus, when faced with conflicting expert testimony reviewing courts should “defer to the trial court’s discretion on which expert to believe.” *Id.* at 123. This type of deference makes sense as “the trier of fact is not required to accept an expert’s opinions; rather, it decides an issue based on its own fair judgment, assisted by experts’ testimony.” *Carlton v. Vancouver Care LLC*, 155 Wn.App. 151, 169, 231 P.3d 1241 (2010) (citations omitted). Because, in part, the trier of fact is able to observe the witnesses testify first hand his or her “resolution of conflicting testimony, evaluation of witness credibility, and decisions regarding the

² Here, the trial court mistakenly listed Mr. Widing’s dangerousness as a “conclusion of law” rather than as a “finding of fact.” of CP 78.

persuasiveness and the appropriate weight to be given the evidence” should not be disturbed. *State v. McCreven*, 170 Wn.App. 444, 477, 284 P.3d 793 (2012) (citation omitted).

Following a finding of insanity, the State bears the burden of proving dangerousness by a preponderance of the evidence. *State v. Wilcox*, 92 Wn.2d 610, 614, 600 P.2d 561 (1979). The State, in addition to presenting an expert’s opinion, can freely argue that “[t]he violent nature of the crime itself” is evidence of the defendant’s dangerousness. *State v. Smith*, 88 Wn.2d 639, 647, 564 P.2d 1154 (1997) (overruled on other grounds by *State v. Jones*, 99 Wn.2d 735, 743-44, 664 P.2d 1216 (1983)).

As our Supreme Court opined in interpreting an older commitment statute:

The question is suggested as to what evidence establishes his ‘manifestly dangerous’ condition. The fact of his having killed a human being is conclusive that he was ‘dangerous,’ and the verdict of the jury that he was insane, at the time of the homicide; and, unless there is clear, ample, and conclusive evidence that his mental condition has undergone a radical change toward a normal condition since that time, the trial judge should not hesitate to find him ‘manifestly dangerous,’ within the meaning of the statute. . . .

State v. Snell, 46 Wn. 327, 333, 89 P. 931 (1907).

Dangerousness

Here, there was substantial evidence upon which the trial court based its findings that are challenged by Mr. Widing, including its finding

that Mr. Widing presents a substantial danger to other persons. RP 304. First, the extremely violent nature of Mr. Widing’s “crime itself” is extremely persuasive evidence of future dangerousness. *Smith*, 88 Wn.2d at 647; *Snell*, 46 Wn. at 333; RP 304. Mr. Widing did not just strangle his wife, he strangled her to the point of unconsciousness leaving her face purple and marred by extensive petechial hemorrhaging. CP 24-26, 75. One responding deputy noted that he had never seen someone with these manifestations from strangulation who survived. CP 76.

Second, the trial court properly relied on the expert opinion of Dr. Rice who ultimately concluded that Mr. Widing’s risk of future dangerousness to other persons was high. RP 230-33, 248-254, 305-06, 308; CP 77. Dr. Rice testified that she reached this conclusion based on 1) the severity of the offense; 2) that the offense was against a loved one; 3) Mr. Widing’s long-standing substance use issues; 4) Mr. Widing’s lack of significant substance abuse treatment or insight into how his substance use factors into his mental illness; 5) Mr. Widing’s lack of knowledge and insight³ into the possibility of having bipolar disorder;⁴ and 6) the mental

³ For example, Dr. Rice noted that “both by his self-report and family-report, [the] family was communicating to him their worries early. They were worried about his behaviors. He had a psychiatrist brother-in-law who he called—Mr. Widing recalled mentioned mania to him. None of this feedback was . . . Mr. Widing able to incorporate.” RP 236

⁴ Dr. Rice testified that Mr. Widing “was really wanting to believe in this copper toxicity almost in a magical way.” RP 233.

disorder itself.⁵ RP 230-33, 248-254. For Dr. Rice, the severity of crime was, and should be, given significant weight in determining Mr. Widing's risk of dangerousness. RP 230-32, 246, 305-06.⁶

Third, in resolving the conflicting expert testimony the trial court did not give much weight to Dr. Singer's risk assessment or diagnosis because of Dr. Singer's lack of experience in studying the issue of copper toxicity. RP 307-08; CP 77. In fact, Dr. Singer was provided literature on the topic by Mr. Widing and did not otherwise possess knowledge of some of that information beforehand. RP 40-42,⁷ 308-09; CP 77. The trial court, having reviewed all the relevant evidence and hearing from the experts, was in the best position to make the determination of the appropriate weight to be given to Dr. Singer's testimony. Moreover, the court's decision to accord little weight to Dr. Singer's risk assessment is supported by the record as the court's examination of Dr. Singer resulted in him acknowledging that he had no prior experience "dealing with the

⁵ Dr. Rice's diagnosis that included the possibility of bipolar disorder was supported by Mr. Widing's self-reporting, the family's reporting regarding his behavior leading up to the crimes, which included grandiose thought process and mania, and Mr. Widing's historical reporting to Mr. De Baldo in which he described mood swings as early as when he was a teenager, hypomanic symptoms, and using alcohol to deal with his mood swings. RP 225-27, CP 29-30, 33-34, 37-40. In fact, both Mr. De Baldo and Dr. Chau, his primary care physician, diagnosed Mr. Widing, in part, with bipolar disorder. CP 35-36.

⁶ Dr. Rice also concluded that she initially overvalued Mr. Widing's success while out of custody and his compliance with medications. RP 230

⁷ "[The Court:] But as of copper and specifically what that would mean, that [(the information provided by Mr. Widing)] was new information to you? [Dr. Singer:] It was new to the extent that I hadn't given a lot of thought to copper in that regard."

issue of copper toxicity” and had never rendered an opinion “that relates to copper neurotoxicity and psychosis in any way.” RP 31-32, 51-53, 307-08. Furthermore, additional questioning by the court brought to the surface additional weaknesses in Dr. Singer’s expertise as it related to copper toxicity and its potential role in Mr. Widing’s psychosis to include other testing for copper levels that were normal or barely elevated and Dr. Singer’s inability to explain how Mr. Widing’s decreased exposure to copper materials at his job in the months preceding the incident would result in a sudden onset of psychosis based on copper toxicity. RP 26-38, 51-53.

Finally, the trial court found an elevated risk of dangerousness due to the lack of clarity as to the underlying cause of defendant’s insanity at the time of the offense. RP 307-309, CP 78. That is, because Dr. Rice, Dr. Singer, and Dr. French each came to a different conclusion as to Mr. Widing’s mental disorder—and the trial court was not willing to call any of the diagnoses definitively correct—it was not realistically possible to say with confidence that Mr. Widing presented as a low risk given the severity of his crimes. RP 307-08.⁸

⁸ The trial court stated that despite the lack of clarity regarding the diagnoses that “I believe that Dr. Rice’s opinion, although different than initially identified is—there’s a reasoning and a basis for that.” RP 308.

Just as he did below, Mr. Widing attempts to make much of the fact that (1) Dr. Rice originally opined that he was only a low to medium risk to offend against other persons before amending her opinion and testifying that he was a high risk; and (2) that Dr. Rice used the Historical Clinical Risk Management-20 (“HCR-20”) to assess his risk to offend. Br. of App. at 15-17, 23-27; RP 238-245, 247-49. But these arguments, or analogs, were addressed, considered, and rejected by the trial court. RP 247-48, 253-54, 305-06, 308, CP 76-77 (Findings of Fact #14, #15, #16, #17, #18). Moreover, as discussed, *supra*, Dr. Rice provided significant support for her change of opinion, i.e., that Mr. Widing presented as a high risk to offend against persons. RP 230-33, 246, 248-254, 305-06. This Court should “defer to the trial court’s discretion on which expert to believe” and its “decisions regarding the persuasiveness and the appropriate weight to be given the evidence.” *Klein*, 156 Wn.2d at 123; *McCreven*, 170 Wn.App. at 477. Accordingly, and even assuming deficiencies in Dr. Rice’s use of HCR-20, substantial evidence supported the trial court’s findings and conclusions that are challenged by Mr. Widing.

Commitment

After the finding of dangerousness, and related to the commitment decision, the trial court observed:

it's evident from the file that Mr. Widing from early in this case had been making significant efforts to interject himself into the defense experts' perspective on the reason for the psychotic episode. For instance, it's clear with Dr. Singer that Mr. Widing provided a substantial amount of information himself on copper toxicity.

RP 309. The trial court further commented that Mr. Widing's behavior in inserting himself into the case in the above way gave it concern about placing him in a less restrictive alternative than commitment. RP 309. The court also expressed concern about the lack of "supervision and oversight" in Mr. Widing's proposal that he just continue in his current treatment program.⁹ RP 308. Thus, based on seriousness of the conduct, the finding of dangerousness, and the uncertainty as to the cause or reason for the psychotic episode the court concluded that Mr. Widing should be committed to Western State Hospital. RP 308-310; CP 78. As discussed above, substantial evidence supports these underlying findings.

II. Mr. Widing waived his claim that the trial court erred by admitting Dr. Rice's opinion regarding copper toxicity and renal failure.

The general rule is that an issue, theory, or argument not presented at trial will not be considered on appeal. RAP 2.5(a); *State v. Hayes*, 165 Wn.App. 507, 514, 265 P.3d 982 (2011) (citing *State v. McFarland*, 127 Wn.2d 322, 332–33, 899 P.2d 1251 (1995)). This "rule reflects a policy of

⁹ Mr. Widing has not made that plan part of the appellate record.

encouraging the efficient use of judicial resources. The appellate courts will not sanction a party's failure to point out at trial an error which the trial court, if given the opportunity, might have been able to correct to avoid an appeal and a consequent new trial." *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1998) (citation omitted).

An exception to rule exists, however, for manifest errors affecting a defendant's constitutional rights. RAP 2.5(a)(3); *Hayes*, 165 Wn.App. at 514. To determine whether the exception applies, a reviewing court employs a two-part test. *State v. Kronich*, 160 Wn.2d 893, 899, 161 P.3d 982 (2007) (citing *State v. Lynn*, 67 Wn.App. 339, 345, 835 P.2d 251 (1992) (overruled on other grounds by *State v. Jasper*, 174 Wn.2d 96, 271 P.3d 876 (2012))). "First, the court determines whether the alleged error is truly constitutional. Second, the court determines whether the alleged error is 'manifest.'" *Id.*

To be manifest, the alleged error must have had "practical and identifiable consequences in the trial of the case." *Kronich*, 160 Wn.2d at 899 (citing *State v. Stein*, 144 Wn.2d 236, 240, 27 P.3d 184 (2001)). In other words, the defendant must show, in the context of the trial, actual prejudice as it is this "prejudice that makes the error 'manifest,' allowing appellate review." *McFarland*, 127 Wn.2d at 333 (citing *Scott*, 110 Wn.2d at 688). Consequently, a "purely formalistic error will not be deemed

manifest,” nor will an error that is not “unmistakable, evident, or indisputable.” *Kronich*, 160 Wn.2d at 899; *State v. Burke*, 163 Wn.2d 204, 224, 181 P.3d 1 (2008) (citation omitted). Because “permitting every possible constitutional error to be raised for the first time on appeal undermines the trial process, generates unnecessary appeals, creates undesirable re-trials and is wasteful of the limited resources of prosecutors, public defenders and courts,” courts must not give the term “manifest” an expansive reading. *Lynn*, 67 Wn.App. 343-44; *McFarland*, 127 Wn.2d at 333.

A reviewing court, however, need not even concern itself with a RAP 2.5(a) analysis where a party attempts to raise an issue for the first time on appeal but “fails to argue that any of the exceptions listed in RAP 2.5(a) apply.” *State v. Higgs*, 177 Wn.App. 414, 424, 311 P.3d 1266 (2013). Furthermore, under the invited error doctrine, a “party who sets up an error at trial cannot claim that very action as error on appeal. . . .” *State v. Momah*, 167 Wn.2d 140, 153, 217 P.3d 321 (2009).

Here, Mr. Widing argues that the trial court erred when it admitted portions of Dr. Rice’s testimony in violation of ER 702. Br. of App. at 27-31. Mr. Widing did not object below to Dr. Rice’s testimony about which he now complains. RP 55-82. In fact, at the first hearing Mr. Widing called Dr. Rice as his *own* witness, questioned her about copper toxicity,

and submitted her report as a “Defense evidentiary submission.” RP 8, 15, 55, 58, 61-63. This report included Dr. Rice’s opinion that “copper toxicity appears highly improbable.” CP 39. He now complains that this evidence was admitted.

Plainly the admission of evidence pursuant to, or in violation of, ER 702 is not an issue of constitutional magnitude and Mr. Widing, properly, does argue such. Br. of App. at 27-31. Moreover, Mr. Widing does not argue that he can raise this issue for first time on appeal as he does not address RAP 2.5(a) at all. Br. of App. at 27-31. Plus, even assuming error, the error was not “manifest” and the error was invited since he is now complaining about the admission of evidence that he himself moved to admit with the trial court. Thus, he cannot now raise his claimed error(s) predicated on ER 702 and Dr. Rice’s testimony.

III. Mr. Widing’s counsel was not ineffective.

There is a strong presumption that counsel is effective. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). A defendant is not guaranteed successful assistance of counsel. *State v. Adams*, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978). The court reviews the entire record when considering an allegation of ineffective assistance. *State v. Thomas*, 71 Wn.2d 470, 471, 429 P.2d 231 (1967). Moreover, the burden of showing ineffective assistance of counsel is the defendant’s. *McFarland*, 127

Wn.2d at 334-35. The defendant must make two showings in order to demonstrate ineffective assistance: (1) that counsel provided ineffective representation, and (2) that counsel's ineffective representation resulted in prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052 (1984). In order to satisfy the first requirement (deficiency), the defendant must show his or her counsel's conduct fell below an objective standard of reasonableness. *Id.* at 687-88. In order to satisfy the second requirement (resulting prejudice), the defendant must show by a reasonable probability that, "but for" counsel's errors, the outcome of the case would have been different. *Id.* at 694.

Here, Mr. Widing complains that his trial counsel was "ineffective for failing to challenge Dr. Rice's testimony and report regarding her belief that copper toxicity and resulting renal failure were not the genesis of the psychotic episode." Br. of App. at 32. But as noted above, Mr. Widing actually called Dr. Rice as his own witness, asked her about copper toxicity, and moved to submit her report into evidence. RP 8, 15, 55, 58, 61-63. Furthermore, Mr. Widing provided to Dr. Rice numerous medical records of his relevant to copper, literature on copper toxicity, e.g., "Copper Toxicity: A Comprehensive Study," and information regarding his exposure to copper as an electrician. CP 27-28. Dr. Rice utilized all this information and consulted twice with Dr. Daniel Ruiz

Parades, WSH staff psychiatrist, regarding “copper toxicity or copper metabolism disorder in relation to Mr. Widing’s symptom presentation and available medical records.” RP 61-63; CP 28, 39.

Given her own expertise,¹⁰ when combined with the materials provided and her consultation with Dr. Parades, Dr. Rice’s opinion was, in fact, helpful to the trier of fact and would have been admissible under ER 702 had Mr. Widing sought to object to the opinion. Thus, Mr. Widing’s counsel’s performance was not deficient when he decided not to object to a portion of his own expert’s opinion especially when he was relying on that expert’s opinion to help establish Mr. Widing’s insanity. Moreover, tactically, it makes sense not to object to, and call into question, your own expert’s expertise when you are hoping that the expert can testify that your client was suffering from a mental disorder and was insane at the time that he committed some very serious crimes.

Even if Mr. Widing’s counsel’s performance was deficient, however, he cannot establish prejudice. He cannot establish prejudice because the trial court did not rely on Dr. Rice’s opinion regarding copper toxicity, one way or the other, in making its commitment determination. RP 305-310; CP 77-78. Instead, the trial court’s reluctance to accept Dr.

¹⁰ Dr. Rice is a psychologist who has worked for WSH for 11 years conducting competency and mental state evaluations and also has a designation as a developmental disability professional. RP 56-57, 61-62.

Singer's copper toxicity diagnosis, and determination that commitment was appropriate, was based on Dr. Singer's lack of experience with copper toxicity,¹¹ Mr. Widing's continued efforts to insert himself and push the copper toxicity diagnosis, and the fact that the various and multiple experts who examined Mr. Widing or his records came to different conclusions as to what caused Mr. Widing's psychotic state. RP 305-310; CP 77-78. Accordingly, there is not a reasonable probability that Mr. Widing would not have been committed by the trial court if Dr. Rice's opinions regarding copper toxicity or renal failure were not admitted. Mr. Widing's ineffective assistance claim fails.

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¹¹ "Dr. Singer, for example, identifies copper toxicity; but yet when he testifies, he says that, well, he hasn't been studying the issue of neurotoxicity for very long; he doesn't really have a lot of experience in relation to these types of issues; and, in fact, for him this was a very unusual kind of first-time case of being involved with." RP 307.

CONCLUSION

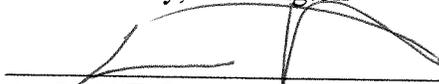
For the reasons argued above, this Court should affirm the trial court's finding of dangerousness and the commitment of Mr. Widing to Western State Hospital.

DATED this 12 day of Feb, 2018.

Respectfully submitted:

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