NO. 98308-9

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CHARLES GIBSON,
Petitioner.

PETITION FOR REVIEW OF THE COURT OF APPEALS FEBRUARY 20, 2020 DECISION IN STATE V. GIBSON COA#36377-5-III

LISE ELLNER, WSBA No. 20955
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RULES, STATUTES, AND OTHERS

A. IDENTITY OF MOVING PARTY

Petitioner Charles Gibson through his attorney, Lise Ellner, asks this court to accept review of the Court of Appeals decision designated in Part B of this petition.

B. COURT OF APPEALS DECISION

Charles Gibson requests review of the Court of Appeals February 20, 2020 ruling. A copy of the decision is attached (Appendix A).

C. ISSUE PRESENTED FOR REVIEW

1. Did the Court of Appeals incorrectly affirm the trial court's finding that Deputy Russell's warrantless search was justified as a protective frisk merely because (a) Deputy Russell observed that Gibson was lawfully carrying two knives that Gibson did not use or indicate in a threatening manner and (b) Deputy Russell was the only officer present at the scene?

D. STATEMENT OF THE CASE

The facts relevant to this petition are set forth in Petitioner's opening brief. In addition, the following facts are relevant:

The trial court found that Deputy Randall Russell was justified

in relying on an informant's tip that Gibson committed a trespass to conduct a *Terry* stop of Gibson. RP 42. The informant reported that the defendant, named "Charlie," parked his vehicle by a barn on the informant's property and refused to leave stating his car would not start. RP 8, 18, 40. When the informant went out to ask the defendant to leave, he observed the defendant cutting a white powdery substance on a phone. RP 8, 40.

After Deputy Russell confirmed Gibson's vehicle would not start, he confronted Gibson about being seen with possible drugs. RP 18, 20. When Gibson denied having drugs Deputy Russell requested identification and when Gibson went to retrieve his wallet, when Deputy Russell observed two knives attached to Gibson's belt. RP 9-10.

The trial court further found that Deputy Russell did not exceed the scope of the *Terry* stop when he conducted a warrantless search of Gibson's pockets after observing the two lawful knives attached to Gibson's belt because those knives posed a "possible danger". RP 40-41. The trial court found Deputy Russell was justified in searching for additional knives even though Deputy Russell testified that it was his routine practice to remove citizens' weapons

any time he is alone at a scene and could not articulate a specific threat or danger. In fact, Deputy Russell testified Gibson was cooperative, not aggressive. RP 9-11, 22, 41.

While searching for additional knives, Deputy Russell observed a baggie containing a white powdery substance. RP 11. The trial court found that seeing the baggie during the search for weapons, authorized Deputy Russell to search for drugs, which resulted in finding two additional containers containing drugs. RP 12-13, 41-42.

On appeal, the Court of Appeals (COA) affirmed. *State v. Gibson*, No. 36377-5-III, slip opinion at 10 (Feb. 20, 2020) (Herein after "Opinion"). The COA ruled that Deputy Russell was justified in relying on the informant's information to conduct a *Terry* stop because citizen informants are inherently reliable. *Gibson*, No. 36377-5-III, slip opinion at 7 (Herein after "Opinion").

> Mr. Reinhart is presumed reliable and Deputy Russell's contact with Mr. Gibson corroborated much of the information Mr. Reinhart had provided. The deputy found Mr. Gibson and his SUV near a barn, which is where Mr. Reinhart said he would be. Mr. Gibson answered to "Charlie." Asked by Deputy Russell what was going on, Charlie told the deputy his car would not start. When asked to produce identification, his driver's license revealed his first

> name to be Charles. These are sufficient indicia of reliability to justify Deputy Russell's reliance on Mr. Reinhart's report that Mr. Gibson was trespassing and had been seen in possession of a white powdery substance, some of which he had been cutting on his phone.

Id.

The Court of Appeals also held that the officer was justified in conducting the warrantless search based on the mere possibility, of danger, without specific facts. Id.

The Court of Appeals stated that "[a]n additional articulable fact, although not mentioned by the deputy, was his reason to believe, based on information provided by [the informant], that Mr. Gibson had recently used methamphetamine." (Opinion at 10).

However, the informant did not report he had seen Gibson possess or use methamphetamine, and Deputy Russell did not know Gibson possessed methamphetamine until he conducted the warrantless search. RP 11. Furthermore, Deputy Russell did not testify that he observed any signs Gibson was under the influence of any drugs. RP 8-9, 11-12, 17-19.

This timely petition for review follows.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

THE COURT OF APPEALS' DECISION AFFIRMING THE TRIAL COURT'S DENIAL OF GIBSON'S MOTION TO SUPPRESS THE METHAMPHATAMINE FOUND DURING A WARRANTLESS SEARCH RAISES A SIGNIFICANT QUESTION OF LAW UNDER THE STATE AND FEDERAL CONSTITUTIONS, AND INVOLVES AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST

The Court of Appeals incorrectly affirmed the trial court's denial of Gibson's motion to suppress the methamphetamine found during a warrantless search. (Opinion at 6).

RAP 13.4(b) provides in relevant part:

> A petition for review will be accepted by the Supreme Court only:
>
> (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)(3), (4).

This issue meets the criteria set forth in RAP 13.4(b)(3) and (4).

A warrantless search is per se unreasonable under Wash.

Const. art. I, § 7 unless the search falls under one of the carefully drawn and jealously guarded exceptions to the warrant requirement. *State v. Patton*, 167 Wn.2d 379, 386, 219 P.3d 651 (2009). When the state seeks to introduce evidence obtained through a warrantless search or seizure, the State bears the burden to prove one of those exceptions applies. *State v. Williams*, 102 Wn.2d 733, 736, 689 P.2d 1065 (1984).

A brief investigative *Terry* stop is an exception to the warrant requirement. *State v. Gatewood,* 163 Wn.2d 534, 539, 182 P.3d 426 (2008).

A *Terry* stop is lawful when a law enforcement officer has a reasonable suspicion based on specific and articulable facts known to him at the inception of the stop that the detained person was involved in a crime. *State v. Fuentes*, 183 Wn.2d 149, 158, 352 P.3d 152 (2015); *State v. Z.U.E.*, 183 Wn.2d 610, 617, 352 P.3d 796 (2015). Specific and articulable facts must demonstrate more than a generalized suspicion or hunch that the person detained has committed a crime. *Z.U.E*., 183 Wn.2d at 618. In evaluating reasonable suspicion, the reviewing court examines the totality of the circumstances known to the officer. *State v. Glover*, 116 Wn.2d 509,

514, 806 P.2d 760 (1991).

The totality of the circumstances include the officer's training and experience, the location of the stop, the conduct of the person detained, the purpose of the stop, and the amount of physical intrusion on the suspect's liberty. *State v. Acrey*, 148 Wn.2d 738, 747, 64 P.3d 594 (2003).

When an officer bases his or her suspicion on an informant's tip, the state must show that the tip bears some "indicia of reliability" under the totality of the circumstances. *Z.U.E.*, 183 Wn.2d at 618. This requires either (1) circumstances establishing the informant's reliability or (2) some corroborative observation, usually by the officers, that shows either (a) the presence of criminal activity or (b) that the informer's information was obtained in a reliable fashion. *Z.U.E.*, 183 Wn. 2d at 618 (citing *State v. Sieler*, 95 Wn.2d 43, 47, 621 P.2d 1272 (1980)). The officer's observation must corroborate more than just innocuous facts. *Z.U.E.*, 183 Wn. 2d at 618.

When an officer makes a lawful investigatory stop of a person he has no general authorization to search that person. *State v. Russell*, 180 Wn.2d 860, 867, 330 P.3d 151 (2014); *See also State v. Crettol*, No. 52504-6-II, 2019 WL 2442340, at *1 (Ct. App. June

11, 2019), unpublished.[1]

Instead, to conduct a protective frisk the officer must point to "'specific and articulable facts' which create an objectively reasonable belief that a suspect is 'armed and presently dangerous.'" *Russell*, 180 Wn.2d at 867-68 (quoting *State v. Collins,* 121 Wn.2d 168, 173, 847 P.2d 919 (1993) (quoting *Terry,* 392 U.S. at 21–24)). The state must meet both prongs. Further, "*Terry* does not authorize a search for evidence of a crime..." *State v. Day*, 161 Wn.2d 889, 895, 168 P.3d 1265 (2007).

The COA misunderstood *Collins, citing Terry* which requires both "specific and articulable facts" which create an objectively reasonable belief that a suspect is "armed and presently dangerous." *Colllins*, 121 Wn.2d at 173 (quoting *Terry,* 392 U.S. at 21–24). In Gibson's s case, the officer was concerned that Gibson was armed, but Gibson did not present as dangerous or aggressive. RP 10, 22. This lack of present danger defeats the COA ruling that the search was lawful.

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1 Unpublished opinions of the Court of Appeals have no precedential value and are not binding on any court. However, unpublished opinions of the Court of Appeals filed on or after March 1, 2013, may be cited as nonbinding authorities, identified as such by the citing party, and may be accorded such persuasive value as the court deems appropriate. See GR 14.1.

This Court should also accept review because the police searched Gibson without reasonable articulable suspicion that he was presently armed and **dangerous**.

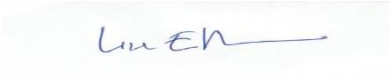
F. CONCLUSION

For the reasons stated herein and in the opening brief, this Court should accept review.

DATED THIS 23rd day of March 2020.

Respectfully submitted,

LAW OFFICES OF LISE ELLNER



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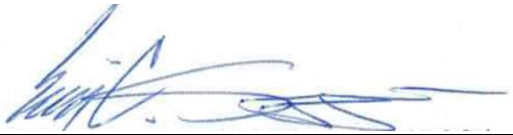

ERIN C. SPERGER, WSBA No. 45931
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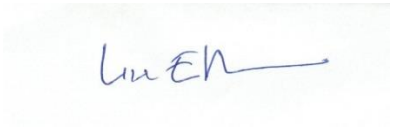
I, Lise Ellner, a person over the age of 18 years of age, served the Stevens County Prosecutor's Office trasmussen@stevenscountywa.gov and Charles Gibson, PO Box 267, Springdale, WA 99173 on March 23, 2020. Service was made electronically to the prosecutor and to Charles Gibson by depositing in the mails of the United States of America, properly stamped and addressed.



_____Signature

APPENDIX A

Renee S. Townsley
Clerk/Administrator

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February 20, 2020

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CASE # 363775
State of Washington v. Charles A. Gibson
STEVENS COUNTY SUPERIOR COURT No. 181001921

Counsel:

Enclosed please find a copy of the opinion filed by the Court today.

A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. Please file the motion electronically through the court's e-filing portal or if in paper format, only the original motion need be filed. If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of this opinion (may be filed by electronic facsimile transmission). The motion for reconsideration and petition for review must be <u>received</u> (not mailed) on or before the dates they are due. RAP 18.5(c).

Sincerely,

Renee S. Townsley
Clerk/Administrator

RST:jab
Attachment

c: **E-mail**—Hon. Jessica T. Reeves

c: Charles A Gibson, PO Box 267, Springdale, WA 99173

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

STATE OF WASHINGTON, Respondent, v. CHARLES ALLEN GIBSON, Appellant.	)))))))))	No. 36377-5-III UNPUBLISHED OPINION

SIDDOWAY, J. — Charles Gibson appeals his conviction for possession of a controlled substance (methamphetamine) following a stipulated facts trial. He challenges the trial court's denial of his motion to suppress evidence of methamphetamine found in his pocket when he was frisked during a *Terry*[1] stop. He contends that no reasonable

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

suspicion of criminal activity supported the stop, and the frisk for weapons that turned up the methamphetamine was not supported by an objectively reasonable concern for officer safety. We reject his arguments and affirm.

FACTS AND PROCEDURAL BACKGROUND

On a spring day in 2018, Brian Reinhart called Stevens County dispatch to report that he had a trespasser on his property who had been asked but failed to leave. He reported that when he last approached the trespasser's SUV[2] to renew the demand that he leave, the trespasser was sitting inside cutting up a white powdery substance on his cell phone. Deputy Randall Russell responded to the report, and after speaking with Mr. Reinhart, approached the defendant, Charles Gibson, who was by then standing outside his SUV.

The deputy asked Mr. Gibson about being seen with a baggie of a white powdery substance, and Mr. Gibson denied having anything like that. Asked for identification, Mr. Gibson reached for a wallet in his back pocket and produced his driver's license; as he reached for his wallet, the deputy noticed he had two knife sheaths on his belt. Asked if he had weapons, Mr. Gibson said he did. In addition to the knives in sheaths on his belt, Mr. Gibson turned out to have multiple pocket knives in his front pants pockets. The deputy removed the knives, shining a flashlight into the pockets, which he explained

[2] Sports-utility vehicle.

he does because in reaching into a pocket blindly, he was once almost pricked by an uncapped needle. In the course of looking into and removing knives from Mr. Gibson's right front pocket, the deputy saw and removed a baggie of a white substance that proved to be methamphetamine. Mr. Gibson was charged with one count of possession of methamphetamine.

Mr. Gibson moved to suppress the methamphetamine, supporting his motion with a copy of an incident report Deputy Russell had completed the day after Mr. Gibson's arrest. At a hearing on the motion, the deputy was the only witness who testified.

At the conclusion of the hearing, the trial court made oral findings. They included the following findings about the pat down and removal of weapons that took place after Deputy Russell saw the sheaths on Mr. Gibson's belt:

> When [the deputy] asks for ID he sees the sheaths on the belt. That's when he has the defendant place his hands on the vehicle and he pats him down for weapons, patted his front pockets, could feel what appeared to be more knives.
>
> And then he asks the defendant if he has more knives in his pockets, and he says yes.
>
> So then—Dep. Russell removes five pocket knives from the left front pocket of his pants, asked, "How many knives do you have on your person," defendant says, "I'm not sure." Dep. Russell says "I asked if he had any in his right front pocket." He states, "Yes." And so he pulls the pocket open, shines the flashlight in there, sees the baggie, and what he retrieves from the pocket are—two more knives in the right front pants pocket.
>
> So this is a—a pat-down for weapons. He knew there was a possible danger. Dep. Russell knew this because he saw the knives in—the sheaths on the belt.

> And I think that this—what triggered the investigation into the drugs you see transpires later, he sees the plastic baggie, he asks about the baggie and then he puts the defendant into custody, and that's when the pockets get searched for small containers containing drugs.
>
> He was searching for knives quite clearly. And he was searching—patting down, he felt the knives in the pockets, asked the defendant, defendant said yes, he has more knives in his right pocket. And how does law enforcement remove those knives when the defendant's hands are on the vehicle? It would be unreasonable to expect law enforcement to stick their hands blindly into pockets, knowing what we know about—needles and other hazardous—contaminated items that could be in pockets. We don't—that would be an unreasonable expectation. I don't think you could say that this was—shining a light in a pocket was done to search for drugs. It was clearly weapons, even though he had information about the observation of the property owner, would certainly have had some suspicion that drugs could be at play.
>
> So, it was—It did not—exceed the pat-down—of a Terry stop.

Report of Proceedings (RP) at 40-42.

Following denial of the motion to suppress, Mr. Gibson agreed to proceed to a stipulated facts trial, at which he was found guilty as charged. The trial court sentenced Mr. Gibson to 90 days of incarceration and 12 months of community custody. He appeals.

ANALYSIS

Mr. Gibson assigns error to the trial court's denial of his suppression motion and to its written findings, entered following the hearing, that "the court finds the *Terry* pat-down search of the defendant was justified" and "[T]he subsequent discovery of the suspected narcotics was proper." Br. of Appellant at 1 (quoting Clerk's Papers (CP) at 28). He contends that the deputy's actions were based on an informant's uncorroborated

statement that Mr. Gibson was observed cutting a white powdery substance and, even if the initial stop was justified, Deputy Russell's search of Mr. Gibson's front pants pockets exceeded the permissible scope of a *Terry* stop because he had no objectively reasonable belief that Mr. Gibson was armed and dangerous.

Standard of review

When reviewing the denial of a CrR 3.6 motion to suppress, this court "determines whether substantial evidence supports the challenged findings of fact and whether the findings support the conclusions of law." *State v. Garvin*, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). "Evidence is substantial when it is enough 'to persuade a fair-minded person of the truth of the stated premise.'" *Id.* (quoting *State v. Reid*, 98 Wn. App. 152, 156, 988 P.2d 1038 (1999)). Conclusions of law are reviewed de novo. *State v. Duncan*, 146 Wn.2d 166, 171, 43 P.3d 513 (2002).

Validity of *Terry* stop

"Warrantless searches and seizures are per se unreasonable unless one of the few jealously and carefully drawn exceptions to the warrant requirement apply." *State v. Tarango*, 7 Wn. App. 2d 425, 432, 434 P.3d 77 (2019). "A *Terry* investigative stop is a well-established exception." *Id.* A police officer who suspects that a particular person has committed a crime can conduct a *Terry* stop and detain that person briefly to investigate the circumstances provoking suspicion. *Berkemer v. McCarty*, 468 U.S. 420, 439, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984). A *Terry* stop allows "'police to make an

intermediate response to a situation for which there is no probable cause to arrest but which calls for further investigation.'" *State v. Armenta*, 134 Wn.2d 1, 16, 948 P.2d 1280 (1997) (quoting *State v. Kennedy*, 107 Wn.2d 1, 17, 726 P.2d 445 (1986) (Dolliver, C.J., dissenting)).

"To conduct a valid *Terry* stop, an officer must have 'reasonable suspicion of criminal activity based on specific and articulable facts known to the officer at the inception of the stop.'" *State v. Weyand*, 188 Wn.2d 804, 811, 399 P.3d 530 (2017) (quoting *State v. Fuentes*, 183 Wn.2d 149, 158, 352 P.3d 152 (2015)). The standard for articulable suspicion is a "substantial possibility that criminal conduct has occurred or is about to occur." *Kennedy*, 107 Wn.2d at 6. "The reasonableness of an officer's suspicion is evaluated based on the totality of the circumstances known to the officer." *Tarango*, 7 Wn. App. 2d at 432.

When it comes to relying on information provided by a citizen informant, "[u]nder the totality of the circumstances test, an informant's tip provides reasonable suspicion sufficient to justify an investigatory stop if 'it possesses sufficient indicia of reliability.'" *State v. Marcum*, 149 Wn. App. 894, 903-04, 205 P.3d 969 (2009) (internal quotation marks omitted) (quoting *State v. Sieler*, 95 Wn.2d. 43, 47, 621 P.2d 1272 (1980)). "When deciding whether this indicia of reliability exists, the courts will generally consider several factors, primarily '(1) whether the informant is reliable, (2) whether the information was obtained in a reliable fashion, and (3) whether the officers can

corroborate any details of the informant's tip.'" *State v. Howerton*, 187 Wn. App. 357, 365, 348 P.3d 781 (2015) (quoting *State v. Lee*, 147 Wn. App. 912, 918, 199 P.3d 445 (2008)). "Citizen informants are deemed presumptively reliable." *State v. Gaddy*, 152 Wn.2d 64, 73, 93 P.3d 872 (2004).

Here, the citizen informant called to report a trespass on his property, providing an address and meeting Deputy Russell on his arrival. He identified himself to the deputy as Brian Reinhart and told the deputy that he knew the trespasser as "Charlie." He repeated his earlier report that when he approached Charlie's SUV to ask him to leave a second time, he observed Charlie with a plastic bag of a white powdery substance that he was cutting on his phone. He also told the deputy that Charlie claimed his SUV would not start.

Mr. Reinhart is presumed reliable and Deputy Russell's contact with Mr. Gibson corroborated much of the information Mr. Reinhart had provided. The deputy found Mr. Gibson and his SUV near a barn, which is where Mr. Reinhart said he would be. Mr. Gibson answered to "Charlie." Asked by Deputy Russell what was going on, Charlie told the deputy his car would not start. When asked to produce identification, his driver's license revealed his first name to be Charles. These are sufficient indicia of reliability to justify Deputy Russell's reliance on Mr. Reinhart's report that Mr. Gibson was trespassing and had been seen in possession of a white powdery substance, some of which he had been cutting on his phone.

Mr. Gibson also challenges the scope of the search. "A reasonable safety concern exists, and a protective frisk for weapons is justified, when an officer can point to 'specific and articulable facts' which create an objectively reasonable belief that a suspect is 'armed and presently dangerous.'" *State v. Collins*, 121 Wn.2d 168, 173, 847 P.2d 919 (1993) (quoting *Terry*, 392 U.S. at 21-24). Mr. Gibson argues that the evidence did not support an objectively reasonable belief that Mr. Gibson was dangerous, making much of the fact that when Deputy Russell was asked at the suppression hearing whether Mr. Gibson "pose[d] any type of threat," the deputy responded, "You never know." RP at 10. The deputy immediately added, however, "[I]f I talk to someone out on the—situation that I'm in like that where I'm by myself, and I see that they have weapons I'm going to remove those weapons." RP at 11.

Neither federal nor state cases require that a law enforcement officer wait until a knife is wielded or actual danger otherwise materializes before taking protective action. Our Supreme Court reframed the concern that will support a protective frisk in the following terms:

> "[C]ourts are reluctant to substitute their judgment for that of police officers in the field. 'A founded suspicion is all that is necessary, some basis from which the court can determine that the [frisk] was not arbitrary or harassing.'"

State v. Collins, 121 Wn.2d at 173, (emphasis omitted) (alteration in original) (quoting *State v. Belieu*, 112 Wn.2d 587, 601-02, 773 P.2d 46 (1989). In *State v. Olsson*, 78 Wn.

App. 202, 205, 208, 895 P.2d 867 (1995), this court held that having taken one knife from a suspect, it was reasonable for the law enforcement officer in that case to pat down the suspect and retrieve another knife, in the course of which he found a substance later identified as cocaine.

At the suppression hearing, Deputy Russell identified the following facts that supported his reasonable concern: Mr. Gibson was carrying two sheathed knives, admitted having others, and the deputy was the only law enforcement officer present. As he explained, under such circumstances, he "[is] going to remove those weapons." RP at 11. This is a sufficient basis for determining that the frisk was not arbitrary or harassing. An additional articulable fact, although not mentioned by the deputy, was his reason to believe, based on the information provided by Mr. Reinhart, that Mr. Gibson had recently used methamphetamine.

The trial court's oral findings were supported by the evidence and supported its conclusions that the *Terry* pat-down search of the defendant was constitutional. The trial court properly denied the suppression motion.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Siddoway, J.

WE CONCUR:

Lawrence-Berrey, C.J.

Fearing, J.

LAW OFFICES OF LISE ELLNER

March 21, 2020 - 2:29 PM

Transmittal Information

Filed with Court:	Court of Appeals Division III
Appellate Court Case Number:	36377-5
Appellate Court Case Title:	State of Washington v. Charles A. Gibson
Superior Court Case Number:	18-1-00192-1

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