

No. 43578-1-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

**Scott Newcomb,**

Appellant.

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Pacific County Superior Court Cause No. 08-1-00161-8

The Honorable Judge Michael J. Sullivan

**Appellant's Opening Brief**

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### **ASSIGNMENTS OF ERROR**

1. The trial court violated Mr. Newcomb's Sixth and Fourteenth Amendment right to confront witnesses.
2. The trial court erred by admitting testimonial evidence, without proof that the person who created the evidence was unavailable.
3. The trial court erred by admitting testimonial evidence, even though Mr. Newcomb had no prior opportunity to cross examine the creator of the evidence.
4. The trial court erred by ordering Mr. Newcomb to pay \$13,000 in restitution.
5. The trial court erred by entering Finding of Fact No 2. CP 3.
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14. The trial court erred by adopting Conclusion of Law No. 8. CP 27.
15. The trial court erred by entering Conclusion of Law No. 8. CP 26.

### **ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. In a criminal case, the Sixth Amendment's confrontation clause prohibits the admission of testimonial evidence unless the declarant is unavailable and the accused person had a prior

opportunity for cross-examination. Here, the trial court admitted testimonial evidence (photographs) even though Mr. Newcomb had no opportunity to cross-examine the photographer. Did the admission of this testimonial evidence violate Mr. Newcomb's Sixth and Fourteenth Amendment right to confront the witnesses against him?

2. Absent good cause, due process protects the right to confront witnesses at post-conviction hearings. Here, the trial court relied upon unsigned and unsworn written estimates to determine the amount of restitution Mr. Newcomb owed. In the absence of good cause, did the trial court's reliance on unsigned and unsworn written estimates violate Mr. Newcomb's right to confrontation under the Fourteenth Amendment's due process clause?
3. By statute, the total amount of restitution in a criminal case must be established by a preponderance of the evidence, and may include payments to third parties for losses related to the crime so long as the total does not exceed twice the victim's loss or the offender's gain. Here, the trial court arbitrarily doubled the amount established at a restitution hearing, even though there was no indication of any loss to a third party. Did the trial court exceed its statutory authority by imposing restitution that exceeded the amount proved by a preponderance of the evidence?

## **STATEMENT OF FACTS AND PRIOR PROCEEDINGS**

Scott Newcomb's mother owned property along South Palix Road outside of South Bend. Next to the property was a piece of land owned by Baynes and Stone, who sold it to Kredlo. RP (5/16/12) 168, 170, 199. Kredlo conditioned his purchase on Baynes clarifying and improving an easement through the Newcomb property. RP (5/16/12) 76, 204; CP 23. The property owners sued the Newcombs, and obtained an order supporting an easement. RP (5/16/12) 175-176; CP 23. Mr. Newcomb did not agree that Baynes and Stone, or Kredlo, had the right to build a road on his land. RP (5/16/12) 200-201, 250, 252; RP (5/17/12) 9-11.

Baynes built a gravel road through the easement in 2006. He removed plants and trees (both living and dead), created a culvert, and flattened the area. RP (5/16/12) 62-64, 77, 79; RP (5/17/12) 36. He charged Kredlo \$12,000 for the work.<sup>1</sup> RP (5/16/12) 64.

When Baynes returned to the property sometime after completing the work, the road was gone. RP (5/16/12) 65. The gravel was in a large pile on Mr. Newcomb's land. RP (5/16/12) 65, 207. Kredlo called the police and made a complaint. RP (5/16/12) 104, 130.

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<sup>1</sup> This amount was apparently factored into the purchase price of the property. RP (5/16/12) 78.

While investigating the case, officers went onto the easement to take photos and make observations. RP (5/16/12) 119-123, 134, 137-139, 149-150. The photographs were taken by a Deputy Souvenier.

The state charged Mr. Newcomb with first-degree malicious mischief. The Information alleged that Mr. Newcomb “did damage a road and/or easement and/or improvement belonging to Tim Kredlo.” CP<sup>2</sup> 1-2.

Mr. Newcomb filed a Motion to Dismiss, arguing that a person cannot maliciously damage their own property. The trial court agreed, and dismissed the case. The government appealed, and the Court of Appeals reinstated the prosecution. Mandate (Opinion attached), Supp. CP.

Mr. Newcomb sought to exclude the photos taken by Deputy Souvenier. There were two bases for his motions: first, that the photos were taken during a warrantless intrusion onto Mr. Newcomb’s property, and second that a proper foundation had not been laid. RP (3/13/12) 29-30; Motion to Suppress, Supp. CP; RP (5/16/12) 103-126. The court denied the motion to suppress based on the warrantless search. Court’s Decision, Supp. CP.

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<sup>2</sup> Two Notices of Appeal were filed in this case: one when the Judgment and Sentence was entered, and another five months later when the restitution order was entered. The matters were consolidated, but the Clerk’s Papers were separately numbered. Citations to Clerk’s Papers from the first appeal will be cited as CP; citations to the restitution appeal will be cited as CP (restitution).

Souvenier did not testify at trial<sup>3</sup>, and the pictures were offered through Officer Pearson. RP (5/16/12) 102, 108, 110-117. Pearson acknowledged that he was not present when the photos were taken, and that when he did go to the property, he did not go to the locations depicted in some of the photos. RP (5/16/12) 119-123, 134, 137-139, 149-150.

Baynes testified that he told Kredlo it would cost \$7263.56 to fix the road. RP (5/16/12) 31-32, 65-69; Ex. 1 (trial), Supp. CP. His estimate did not break out any separate costs. Ex. 1 (trial), Supp. CP. He did not know how long the road was, how much of it was damaged, or how thick it was. RP (5/16/12) 74-75; RP (5/17/12) 37.

Mr. Newcomb moved to dismiss the charge after the state rested, arguing that the amount of damage was unproven, and that an easement cannot be damaged. RP (5/17/12) 42-59. The court denied the motion. RP (5/17/12) 69.

The trial judge found Mr. Newcomb guilty as charged. CP 3-5, 20-28.

The court sentenced Mr. Newcomb, and then held a restitution hearing. CP 9-19. At the restitution hearing, Kredlo presented three unsigned “estimates” he had received. They totaled between \$9000 and

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<sup>3</sup> Mr. Newcomb waived his right to a jury trial. Waiver of Jury Trial (Sub no 25), Supp. CP.

\$9500. RP (10/5/12) 5; Ex. A1 (restitution), Supp. CP. One of them was for over \$21,000. Ex. A1 (restitution), Supp. CP. He also requested that a trailer he purchased and put onto the property be included in the costs, for an additional \$3000 to \$3500. He did not present any estimates or receipts regarding the trailer. RP (10/5/12) 2-10.

The court ordered Mr. Newcomb to pay \$13,000:

Okay, very well. I'm imposing \$13,000.00. I'm approaching it from the, I'm going to say \$7,500.00 figure to repair and then I'm not quite doubling that. I'm going to go up to \$13,000.00 total so either way you cut it, it covers the expenses, but I'm not making a finding on the trailer specifically. There's too much grey area there. But I am imposing a doubling up to \$13,000.00 dollars which in effect awards the same amount of money as if I did consider the trailer. RP (10/5/12) 16.

Mr. Newcomb timely appealed. CP 6; CP (restitution) 3-30.

## **ARGUMENT**

### **I. THE COURT ERRED BY ADMITTING TESTIMONIAL EVIDENCE IN VIOLATION OF MR. NEWCOMB'S RIGHT TO CONFRONT ADVERSE WITNESSES.**

#### **A. Standard of Review.**

Violations of the confrontation clause are reviewed *de novo*. *State v. Jasper*, 174 Wn.2d 96, 108, 271 P.3d 876 (2012).

- B. The confrontation clause prohibits the admission of testimonial evidence unless the accused person had a prior opportunity for cross-examination and the witness is unavailable.

An accused person has the right to confront those who “bear testimony” against him or her. *Crawford v. Washington*, 541 U.S. 36, 51, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004); U.S. Const. Amend VI.<sup>4</sup> The confrontation clause bars the admission of testimonial evidence other than live testimony absent a showing that the witness is unavailable and that the accused had a prior opportunity to cross-examine. *Crawford*, 541 U.S. at 59. The *Crawford* court took confrontation clause analysis outside the realm of the rule against hearsay: “[l]eaving the regulation of out-of-court statements to the law of evidence would render the Confrontation Clause powerless...” 541 U.S. at 51.

Evidence is testimonial if it is “functionally equivalent to live, in-court testimony, doing ‘precisely what a witness does on direct examination.’” *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 310-11, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009). *Melendez-Diaz* involved lab reports introduced at trial in lieu of testimony. The reports were testimonial for two reasons: first, because they were used to establish

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<sup>4</sup> See also Wash. Const. art. I, § 22.

critical facts at trial, and second, because they were created for use in court. *Jasper*, 174 Wn.2d at 115.

- C. Mr. Newcomb's right to confront adverse witnesses was violated by the court's admission of testimonial photographs taken by a non-testifying officer.

At trial, the court admitted seven photographs violation of Mr. Newcomb's confrontation right. RP (5/16/2012) 112, 114, 115-124; *Jasper*, 174 Wn.2d at 115. Mr. Newcomb objected to the admission of the photos, which purported to show damage to the road. RP (5/16/2012) 111, 112 (standing objection to all of the photos), 125.<sup>5</sup>

The photos were admitted through Officer Pearson, who did not take the photos and who was not present when they were taken. RP (5/16/2012) 102, 121. The photographer, Deputy Souvenier, did not testify. No explanation was given for his absence, and Mr. Newcomb had no prior opportunity for cross examination. RP (5/16/2012) 102.

Exhibit 7 depicted a part of the road beyond the area where Officer Pearson walked. RP (5/16/2012) 121. Exhibit 9 was taken from an angle that Officer Pearson did not observe. RP (5/16/2012) 124. Officer

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<sup>5</sup> If Mr. Newcomb's objections at trial (lack of foundation and the absence of a search warrant) did not preserve the confrontation issue, it is still reviewable as a manifest error affecting a constitutional right. RAP 2.5(a)(3).

Pearson did not know if Deputy Souvenier took any other photos of the area. RP (5/16/2012) 145.

The photos admitted through Officer Pearson were testimonial. *Jasper*, 174 Wn.2d at 115. They provided the only direct evidence of the damage to the road and, thus, were used to “establish critical facts at trial.” *Id.* Furthermore, the photos were taken by a police officer as part of an ongoing investigation of alleged criminal activity, and were created for subsequent use at trial. *Id.*

Mr. Newcomb did not have a chance to cross-examine Deputy Souvenier, who took the photos. He never had the opportunity to ask about any additional photos that were taken; nor did he have the chance to ask about Exhibits 7 and 9, which depicted parts of the scene that Officer Pearson did not observe. Instead, the photos were used to establish critical facts at trial, and Mr. Newcomb had no opportunity to test them “in the crucible of cross-examination.” *Crawford*, 541 U.S. at 61.

The admission of the testimonial photos violated Mr. Newcomb’s right to confront adverse witnesses. *Crawford*, 541 U.S. at 59. The court did not find the Deputy Souvenier unavailable, and Mr. Newcomb had no prior opportunity for cross-examination. His conviction must be reversed. *Id.*

D. Mr. Newcomb's confrontation right was violated at the restitution hearing when the court considered unsigned estimates prepared by non-testifying contractors.

Due process guarantees the right to confront adverse witnesses at post-conviction hearings unless the court finds good cause not to permit cross-examination. *See State v. Abd-Rahman*, 154 Wn.2d 280, 289-90, 111 P.3d 1157 (2005) (due process guarantees right to confront adverse witnesses at sentence modification hearing absent a finding of good cause).

At the restitution hearing, the court admitted several unsigned estimates for repair of the damaged road. Mr. Newcomb objected to the court's consideration of the estimates. RP (10/5/12) 12.<sup>6,7</sup> There was no indication that the contractors who made the estimates were unavailable. Nor did Mr. Newcomb have the opportunity to cross-examine the contractors. RP (10/05/12) 4-5; Ex. A1 (restitution), Supp. CP. Evidence The court did not find good cause for denying Mr. Newcomb the chance to confront the contractors. *See generally* RP (10/5/12) 2-16.

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<sup>6</sup> The court did not expressly rule on Mr. Newcomb's objection and did not explicitly state which evidence it relied upon in reaching the restitution award of \$13,000. RP (10/5/12) 16. The court implicitly sought to avoid the issue by ordering an award large enough to cover the damage without actually assessing the dollar amount. RP (10/5/12) 16.

<sup>7</sup> If Mr. Newcomb's objection for lack of foundation did not preserve this due process and confrontation issue, it may still be reviewed as a manifest error affecting a constitutional right. RAP 2.5(a)(3).

The estimates were testimonial because their sole purpose was to establish an essential fact: of the cost of the damage to the road. *Jasper*, 174 Wn.2d at 115. Without the opportunity for cross-examination, it is not clear what the estimates covered, whether the contractors were qualified to give the estimates and make the repairs, or if the proposed repairs would have improved the road beyond its original undamaged condition.

The court denied Mr. Newcomb his right to due process and his right to confront by accepting and considering the unsigned unsworn estimates. In the absence of good cause, Mr. Newcomb should have been allowed to cross-examine the contractors who prepared the estimates. *See Abd-Rahman*, 154 Wn.2d at 289-90. The restitution order must be vacated and the case remanded for a new restitution hearing. *Id.*

**II. THE COURT EXCEEDED ITS STATUTORY AUTHORITY BY ORDERING RESTITUTION THAT WAS ALMOST DOUBLE THE AMOUNT ESTABLISHED AT THE RESTITUTION HEARING.**

A. Standard of Review.

Statutory construction is a question of law reviewed *de novo*. *Sound Infiniti, Inc. v. Snyder*, 169 Wn.2d 199, 206, 237 P.3d 241 (2010).<sup>8</sup>

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<sup>8</sup> Ordinarily, the amount of a restitution award is reviewed for abuse of discretion. *State v. Griffith*, 164 Wn.2d 960, 965, 195 P.3d 506 (2008). However, in this case, Mr.

B. A restitution award must be based on substantial credible evidence sufficient to afford a reasonable basis for estimating loss without speculation or conjecture.

A statute must be construed according to its plain language.

*Seashore Villa Ass'n v. Hugglund Family Ltd. P'ship*, 163 Wn. App. 531, 538-39, 260 P.3d 906 (2011) *review denied*, 173 Wn.2d 1036, 277 P.3d 669 (2012). If the statute's language is unambiguous, the analysis ends.

*Id.* An interpretation that leads to absurd results must be rejected, as it "would belie legislative intent." *Troxell v. Rainier Public School Dist. No. 307*, 154 Wn.2d 345, 350, 111 P.3d 1173 (2005). A statute shall be construed so as to give meaning to each provision. *Berrocal v. Fernandez*, 155 Wn.2d 585, 599-600, 121 P.3d 82 (2005).

A court's authority to impose restitution is derived wholly from statute. *Griffith*, 164 Wn.2d at 965. A court may order restitution as part of a criminal sentence. The restitution order

Shall be based on easily ascertainable damages for injury to or loss of property, actual expenses incurred for treatment or injury to persons, and lost wages resulting from injury.  
RCW 9.94A.753(3).

A restitution award must be based on "substantial credible evidence," which is "sufficient if it affords a reasonable basis for

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Newcomb's argument rests on the interpretation of RCW 9.94A.753; accordingly, review is *de novo*.

estimating loss and does not subject the trier of fact to mere speculation or conjecture.” *Griffith*, 164 Wn.2d at 965. If the accused disputes the amount of restitution, the state must prove the amount of loss or expense by a preponderance of the evidence. *Id.*

The court can order restitution for loss or expense that was incurred by a party other than the victim, so long as the loss is causally connected to the offense. *State v. Tobin*, 161 Wn.2d 517, 524, 166 P.3d 1167 (2007); *see e.g. State v. Davison*, 116 Wn.2d 917, 809 P.2d 1374 (1991) (upholding a restitution award compensating a city for wages paid to an assault victim during his recovery).<sup>9</sup> The total amount of restitution, however, “shall not exceed double the amount of the offender’s gain or the victim’s loss from the commission of the crime.” RCW 9.94A.753(3).

Under the plain language of the statute, the doubling provision imposes a limit on what the sentencing court can order. It does not authorize the court to arbitrarily double the restitution amount and thereby grant the alleged victim a windfall. Interpreting the doubling provision as creating authority to double an award (rather than imposing an upper limit on the aggregate of all restitution) would lead to absurd results and render

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<sup>9</sup> When the court orders restitution for expenses beyond the victim’s actual loss, it should enter findings as to the amount of loss to the victim. *State v. Slemmer*, 48 Wn. App. 48, 60, 738 P.2d 281 (1987) *overruled on other grounds by State v. Frohs*, 83 Wn. App. 803, 924 P.2d 384 (1996).

other portions of the statute superfluous. Such an interpretation would contravene the plain language of the statute and violate basic precepts of statutory interpretation. *Seashore*, 163 Wn. App. at 538-39; *Troxell* 154 Wn.2d at 350; *Berrocal*, 155 Wn.2d at 599-600.

For example, permitting a court to double a restitution award without providing any reason for doing so would vitiate the requirement that restitution be based on “easily ascertainable damages,” in violation of the rule of statutory interpretation that each provision be given meaning. *Berrocal*, 155 Wn.2d at 599-600; RCW 9.94A.753(3). Such an interpretation also contradicts the requirement that the state prove the amount of restitution by a preponderance of the evidence based on substantial, credible evidence. *Griffith*, 164 Wn.2d at 965.

Instead, the doubling provision must be read to allow the court to compensate parties other than the victim, so long as the total award does not exceed double the victim’s loss (or the offender’s gain).<sup>10</sup> See *Tobin*, 161 Wn.2d at 524; *Davison*, 116 Wn.2d 917.

The trial court in Mr. Newcomb’s case erroneously interpreted the doubling provision as granting the court the authority to arbitrarily double

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<sup>10</sup> Remedial statutes are to be construed liberally. *Bostain v. Food Exp., Inc.*, 159 Wn.2d 700, 712, 153 P.3d 846 (2007). However, this rule only applies where the plain language of a statute is ambiguous. Because the plain language of RCW 9.94A.753(3) is unambiguous, the court must give effect to that plain language and need not engage in additional interpretive analysis. *Seashore*, 163 Wn. App. at 538-39.

the amount of loss or expense established at the restitution hearing: “I’m imposing \$13,000. I’m approaching it from the, I’m going to say \$7,500 figure to repair and then I’m not quite doubling that.” RP (10/05/12) 16. Thus, the court ordered \$5,500 of additional restitution, which was not based on “easily ascertainable damages” of a loss or gain to any party. RCW 9.94A.753(3).<sup>11</sup>

The plain language of the restitution statute sets a maximum amount beyond which restitution cannot be ordered. RCW 9.94A.753(3). The trial court’s interpretation of this provision as a grant of authority to arbitrarily “double” the amount of restitution is contrary to that plain language. *Seashore*, 163 Wn. App. at 538-39. No statute endows the court with authority to impose additional restitution beyond what has been proven based on easily ascertainable damages. RCW 9.94A.753(3).

The trial court’s interpretation of the restitution statute was erroneous. Mr. Newcomb’s case must be remanded for a new restitution hearing. *Griffith*, 164 Wn.2d at 968.

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<sup>11</sup> It does not appear that any published case has addressed the trial court’s interpretation of the doubling provision. At least one Supreme Court case has interpreted the plain language as a limitation on the maximum amount above which restitution cannot be ordered. *See e.g. Matter of Gardner*, 94 Wn.2d 504, 617 P.2d 1001 (1980) (overturning a restitution award because it totaled more than double the victim’s loss for the offense of conviction).

C. The trial court misinterpreted the law and abused its discretion by ordering \$13,000 in restitution after finding Kredlo suffered only \$7,500 in damages.

A court necessarily abuses its discretion when it applies an erroneous interpretation of the law. *Dix v. ICT Group, Inc.*, 160 Wn.2d 826, 833, 161 P.3d 1016 (2007).

In Mr. Newcomb's case, the court arbitrarily increased its restitution award \$5,500 beyond the amount of loss to the victim in order to avoid assessing the amount of any additional expense:

I'm going to go up to \$13,000 total so either way you cut it, it covers the expenses, but I'm not making a finding on the trailer specifically. There's too much grey area there. But I am imposing 13,000 dollars which in effect awards the same amount of money as if I did consider the trailer.  
RP (10/05/12) 16.

By relying on an erroneous interpretation of the restitution statute and arrogating the right to arbitrarily double a restitution award, the court explicitly relieved the state of its burden to prove the amount of restitution by a preponderance of credible evidence. *Griffith*, 164 Wn.2d at 965; RCW 9.94A.753(3).

The court misinterpreted the law and abused its discretion when it ordered Mr. Newcomb to pay \$5,500 in restitution beyond the "easily ascertainable damages" that had been established by a preponderance of the evidence. RCW 9.94A.753(3). Mr. Newcomb's restitution order must

be vacated and his case remanded for a new restitution hearing. *Griffith*,  
164 Wn.2d at 968.

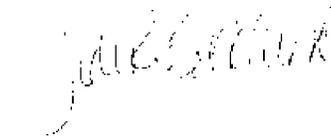
### **CONCLUSION**

The trial court erred when it admitted evidence in violation of Mr. Newcomb's right to confront adverse witnesses at trial and at the restitution hearing. The court's factual findings do not support the legal conclusion that Mr. Newcomb is guilty of each element of malicious mischief. The court misinterpreted the restitution statute and arrogated to itself the authority to arbitrarily increase a restitution award without a showing of an actual loss or expense.

Mr. Newcomb's conviction must be vacated. In the alternative, his case must be remanded for a new restitution hearing.

Respectfully submitted on June 19, 2013,

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CERTIFICATE OF SERVICE

I certify that on today's date:

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

Scott Newcomb  
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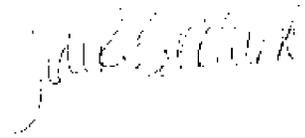
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Pacific County Prosecuting Attorney  
dburke@co.pacific.wa.us

I filed the Appellant's Opening 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 June 19, 2013.



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Jodi R. Backlund, WSBA No. 22917  
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# BACKLUND & MISTRY

**June 19, 2013 - 8:10 AM**

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