DOCKET NUMBER 18-5562

UNITED STATES SUPREME COURT

ALBERT NORMAN PIERRE- Petitioner

V.

DARREL VANNOY, WARDEN, LOUISIANA STATE PENITENTIARY – Respondent

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WRIT OF CERTIORIO

FROM THE FIFTH CIRCUIT COURT OF APPEAL, Docket # 17-30458 and

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA, Docket # 16-1336

RESPONDENT'S, THE STATE OF LOUISIANA,

OPPOSITION TO PETITIONER'S WRIT OF CERTIOARI

Submitted by: **/s/ Ellen Daigle Doskey**
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QUESTION PRESENTED FOR REVIEW

The issue presented by this writ of certiorari is whether a criminal defendant can obtain collateral review under the Antiterrorism and Death Penalty Act of 1996 (28 U.S.C.A. 2254) based on a claim of Due Process violation, i.e. the use of false testimony at trial, when the state had no knowledge of the allegedly false testimony and when there is no clearly established federal law which recognizes unknowing use of false testimony by the state as a constitutional violation.

List of Interested Parties

I certify that the following individuals may have an interest in the outcome of this case. I make these representations in order that the members of this Court may evaluate possible disqualifications or recusal.

State District Judge:	Honorable Judge Randy Bethancourt
Federal District Judge:	Honorable Jay Zainey
Federal Appellate Court Judges:	Honorable Judge Jacques L. Weiner, Jr
	Honorable Judge James F. Graves, Jr.
	Honorable Judge James Ho
Terrebonne Parish District Attorney:	Joseph L. Waitz, Jr.
Assistant District Attorney for Terrebonne Parish:	Mark Rhodes (trial attorney) Ellen Daigle Doskey (appellate attorney)
Trial Counsel:	Craig Stewart and Damon Brown
Appellate Counsel:	Bertha Hillman
PCR Counsel:	Summer McKeiver
PCR Appellate Counsel:	Kerry Bryne
Federal Appellate Counsel:	KajaStamnes Elmer
Petitioner:	Albert Norman Pierre, Sr.

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History of the Case (Citations)

State v. Pierre, 2009-0454 (La. App. 1st Cir. 9/11/09), 17 So.3d 519 – direct appeal

State v. Pierre, 2009-2267 (La. 4/16/2010), 31 So.3d 1054 – writ denied on direct appeal

State v. Pierre, 2013WL12124006 (La. App. 1st Cir. 4/15/13) – denied state's request for post-conviction writ of review

State v. Pierre, 2013-0873, (La. 10/15/13), 125 So.3d 403) – granted state's requested for post-conviction writ of review; reversed state district court.

State v. Pierre, 2015-0841 (La. 2/5/16), 183 So.3d 509 – denied petitioner's request for post-conviction writ of review.

Pierre v. Vannoy, 2016 WL9024952 (E.D. La. 10/31/16) – magistrate's Report and Recommendation.

Pierre v. Vannoy, 2017 WL 2267195 (E.D. La. 5/23/17) – district court's decision on habeas corpus review

Pierre v. Vannoy, 17-30458 (5th Cir. 5/23/18), 891 F.3d 224 – Fifth Circuit's decision reversing the District Court.

STATEMENT OF JURISDICTION

1. **Subject Matter Jurisdiction**: This case arose from a writ of habeas corpus filed by petitioner, Pierre. The district court had jurisdiction of this case under 28 U.S.C. 2254.
2. **Jurisdiction in the Supreme Court.** This petition for writ of certiorari is from the United States Fifth Circuit Court of Appeal decision which reversed the district court and reinstated the state court conviction and life sentence for aggravated rape of a minor. This Court has jurisdiction under 28 U.S.C. 2254.

Constitutional Provisions and Statutes

1. United States Constitution- Amendment V:

   No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. Antiterrorism and Effective Death Penalty Act of 1996:

   28 U.S.C. 2254

   (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

   (b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that--

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that--

(A) the claim relies on--

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated

by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

STATEMENT OF THE CASE

I. Facts of the Underlying Offense and Events Occurring Post Trial

The Louisiana Supreme Court, in its opinion which reversed the district court's decision to grant Pierre's application for post-conviction relief, stated the facts as follows:

> The state charged respondent with aggravated rape on the basis of allegations made by C.C., the granddaughter of Gayle Ardoin, respondent's live-in partner, that respondent had repeatedly abused her sexually over the course of the several years she lived in the home with the permission of her legal guardian, Paula Martinez, Gayle Ardoin's sister. C.C.'s fortuitous revelations of respondent's conduct during a visit to her father in 2006 led to her removal from the Ardoin household when she was 12 years old. After living with her father and his wife, C.C.'s stepmother, for approximately two months, and then moving back in with Martinez for a month, C.C. moved next door to the residence occupied by Martinez's daughter and Ardoin's niece, ChantellPercle, whom C.C. referred to as her "nanny," and her husband, Michael Percle. C.C. was still living with the Percles at the time of respondent's trial in June 2008.
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> To bolster C.C.'s testimony at trial detailing the respondent's intense sexual abuse of her over the years, the state called three other witnesses to underscore for jurors respondent's lustful disposition toward, and highly inappropriate behavior with, young females, although nothing he did with them approached his conduct with C.C. The state also elicited testimony from Detective Cher Pitre, lead investigator in the case, that C.C.'s revelations described a classic "grooming" scenario in which child sex abusers ingratiate themselves with their victims by giving them gifts, becoming their friends, and soothing them when another adult disciplines them as a gateway to escalating their sexual advances from mere touching to sexual intercourse. Pitre had known C.C. since the age of three, when the detective interviewed her in the course of investigating allegations that C.C.'s father had been sexually abusing young girls. Pitre acknowledged that C.C. gave a statement to the effect that her father had put his penis in

her “coonie.” The detective discounted the statement as obviously coached and the subsequent conviction of C.C.'s father and his registration as a sex offender did not involve any conduct with his daughter.

In his own testimony, respondent flatly denied sexually abusing C.C. and attributed her allegations of abuse to resentment over the fact that as she grew older and became increasingly ungovernable, beyond the capacity of Ardoin to manage, as evidenced by C.C.'s chronic truancy from school, he stepped in and became the disciplinarian in the Ardoin household. Respondent testified that on the day C.C. went to the police with her allegations against him, he had consulted an assistant district attorney in the Office of Youth Development about her behavior and what steps were available to him to bring her under control. Ardoin also attested to C.C.'s increasingly volatile behavior and suggested that something else altogether may have been going on with her granddaughter. Ardoin recalled that on one occasion when she visited the Percle residence and called out for her granddaughter, C.C. and Michael Percle stumbled out of a bedroom. C.C. was adjusting her underwear and skirt and Percle was looking nervous. When Ardoin asked what was going on, they replied, “We was playing.” As the prosecutor, assistant district attorney Mark Rhodes, acknowledged, by way of making the point on cross-examination that Ardoin did nothing about the incident and did not report it because she was a less than attentive guardian of C.C., “What you saw by any reasonable standard sounds like a young girl who's being sexually involved with an adult man....”

In her own testimony, however, C.C. recalled for jurors that when she was 12 years old, respondent had sent her for a medical examination to determine whether she had become sexually active. The nurse practitioner who conducted a general medical examination took C.C. at her word that she was not sexually active and did not attempt more detailed physical findings. C.C.'s testimony prompted the prosecutor to ask whether she had in fact been “sexually active other than the things that Norman had done to you,” to which C.C. replied, “No.”

The jury trial conducted in June 2008 ended in a verdict of guilty as charged. Jurors thereby rejected defense counsel's argument that

respondent had, in effect, become an unwitting pawn in an intra-family custody dispute in which C.C. used allegations of sexual abuse to facilitate her perceived interests in where and how she wanted to live, making use of her skills at dissembling and manipulating she first displayed at the age of three when she falsely accused her own father of rape. The court sentenced respondent on July 18, 2008 to the mandatory term of life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence. The court of appeal affirmed respondent's conviction and sentence, *State v. Pierre,* 09–0454 (La.App. 1 Cir. 9/11/09), 17 So.3d 519 (unpub'd), and this Court denied review. *State v. Pierre, 09–2267 (La.4/16/10), 31 So.3d 1054*.

During pendency of respondent's appeal, two events occurred that shaped the post-conviction proceedings initiated after this Court denied writs on direct review. In February 2009, C.C. reported to the police that she and a girlfriend had been riding around with a teenage boy, B.B., they had just met and that he had forced both of them to perform sexual acts. An arrest warrant issued for B.B., but only days after she made the complaint, C.C. met with prosecutor Rhodes, who had developed a relationship with her over the course of preparing her testimony for respondent's trial, and admitted the report was false and that the sex with B.B. was consensual. The warrant for B.B. was never executed. At the end of October 2009, C.C. then revealed, as Gayle Ardoin's testimony had suggested, that, in fact, Michael Percle had also been sexually abusing her during the same period of time respondent was molesting her. Detective James Daigle investigated the complaint and on November 5, 2009, C.C. was interviewed at the Terrebonne Parish Children's Advocacy Center, where she had also been interviewed after revealing respondent's abuse of her. The investigation did not result in the arrest or prosecution of Michael Percle and Detective Daigle closed his file at the end of the year.

C.C.'s allegations against Michael Percle resurfaced, however, in Claim Three of an application for post-conviction relief filed by respondent in 2011. The application quoted directly from a letter prosecutor Rhodes had written to respondent's appellate counsel on March 23, 2011. The letter advised counsel that while C.C. had denied at trial sexual activity with anyone other than respondent, she had subsequently made allegations

against a third party (Percle), "stating that the two molestations ... overlapped." The letter further advised counsel that he had agreed with the detective handling the case they did not have "near enough to make an arrest" because the victim "is a very troubled young girl and comes from a dysfunctional family," who had been placed in therapy "to determine whether she would recant the story about the third party molestation." Rhodes also acknowledged, however, that to date, "she had continued to state that she was molested by this third party." The upshot of these revelations in the March 2011 letter, post-conviction counsel asserted in his Claim Three, was that "[t]his fact, which could not have been introduced at trial, coupled with the fact that C.C.'s father is a convicted child molester and that C.C. contends that two men very close to her, both of whom have served as father figures in her life, both molested her during the same time period, is highly probative and damaging to C.C.'s credibility and would have very likely caused the jury to render a different verdict."

At the post-conviction hearings conducted on August 8 and August 9, 2012, various witnesses testified, including C.C., Rhodes, and Detective Daigle. Rhodes and Daigle recalled putting their heads together and deciding that the detective needed something more before pursuing C.C.'s claims against Percle. Daigle testified that at the time, he "was not familiar at all with Mr. Pierre's case" because he had not been involved in respondent's prosecution. The detective thus did not appreciate the implications of C.C.'s claims against Percle for respondent's own case, and other than the investigation he conducted through November and December 2009, he did nothing further in the case. "Quite frankly," Daigle testified, "I perceived some credibility issues." Rhodes, on the other hand, had prepared C.C.'s testimony for trial and he testified that at the time, she "was always pretty clear that it was a one-perpetrator situation." Although he deemed the B.B. incident "fairly insignificant," Rhodes fully understood the implications of C.C.'s allegations against Michael Percle for respondent's case and thus felt duty bound to reveal them to appellate counsel "as soon as I could." C.C. testified that she did not reveal the abuse at the hands of Percle either before or during respondent's trial, because she was afraid that if she did so, she would be removed from the home and deprived of her "nanny," as in fact happened after her interview at the Children's Advocacy Center. C.C. testified that she decided to come

forward when her nieces, ages three and six, began visiting the Percle home and she became afraid that what had happened to her would happen to them. As for the incident involving B.B., C.C.'s girlfriend had made the first complaint and C.C. testified she lied to cover her friend and initially to protect herself.[1]

II. Proceedings in State Court

The State of Louisiana charged the petitioner, Albert Norman Pierre, with aggravated rape of the victim, C.C. A jury found Pierre guilty as charged and the trial court sentenced him to serve life imprisonment. Pierre appealed and the first circuit court affirmed the conviction and sentence.[2] The Louisiana Supreme Court denied Pierre's application for writ of review on October 14, 2009.[3]

Pierre filed an application for post-conviction relief on June 28, 2011. Evidentiary hearings were held in the state trial court on August 8 and 9, 2012, and on September 6, 2012, after which the trial court took the matter under advisement.

On December 5, 2012, the trial court issued an order which granted Pierre's post-conviction relief application, vacated the conviction and

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[1] *State v. Pierre,* 2013-0873 (LA. 10/15/13), 125 S.Ct. 403.

[2] *State v. Pierre*, 2009-0454 (La. App. 1st Cir. 9/11/09), Unreported, 2009 WL 3162246.

[3] *State v. Pierre*, 2009-KO-2267 (La. 4/16/10), 31 So.3d 1054.

sentence for aggravated rape, and ordered a new trial. The state sought review of this ruling to the first circuit and the first circuit denied the state's application for writ of review on April 5, 2016.

The state applied to the Louisiana Supreme Court for review and the review was granted. The Louisiana Supreme Court reversed the trial court and reinstated petitioner's conviction and sentence on October 15, 2013.[4]The court remanded the matter for ruling on the remaining issues raised in the application for post-conviction relief.

On remand, the trial court denied petitioner's remaining claims with written reasons on June 30, 2014. Petitioner filed for a writ of review of this decision, which was denied by the court of appeals. Petitioner also sought review from the Louisiana Supreme Court, which was also denied.

III. Proceedings in Federal District Court

Pierre filed a Petition for Habeas Corpus review on February 17, 2016. The magistrate judge issued a Report and Recommendation on October 31, 2016, in which he recommended that Pierre's petition for writ

[4]*State v. Pierre,* 2013-0873 (LA. 10/15/13), 125 S.Ct. 403.

of habeas corpus be denied and dismissed with prejudice. On May 22, 2017, the district judge granted Pierre's writ, vacated and set aside the conviction for aggravated rape, and ordered the State of Louisiana to release Pierre or to retry him within 120 days of the ruling. The state appeals from this ruling.

On May 23, 2018, the Fifth Circuit reversed the District Court and reinstated Pierre's conviction for aggravated rape and sentence of life imprisonment.[8]Pierre is now seeking review of this ruling.

SUMMARY OF THE ARGUMENT

The State of Louisiana submits that this application for writ of certiorari should be denied because the petitioner has not meet his burden of showing that the Fifth Circuit Court of Appeals erred in applying the standards of the AEDPA. Under the AEDPA, a state court's decision should not be reversed unless it is contrary to, or is an unreasonable application of,clearly established federal law, as determined by this Court.[9] In *Kinsel v. Cain*, the Fifth Circuit stated that "clearly established Supreme Court precedent demands proof that the prosecution made *knowing* use of

[8]*Pierre v. Vannoy*, 891 F.3d 224, (5th Cir. 5/23/2018), 2018 WL 2338813.
[9] 28 U.S.C. 2254(d)(1).

perjured testimony" in order to establish a constitutional violation. This Court has never held that the State's unknowing use of false testimony violates the Due Process Clause. It is undisputed that the State of Louisiana was unaware that the victim's testimony was false at the time of the trial and thus, there was no constitutional violation which would warrant habeas relief.

ARGUMENT

The victim, a minor child, made a disclosure after trial that she had been sexually abused by someone other than the defendant, Pierre, during the same time period as the sexual abuse at the hands of Pierre. However, at trial, she answered "no" when the prosecutor asked her if she was sexual active with anyone other than Pierre. Prior to trial, and up until the victim made this disclosure to her counselor, the state had no knowledge that this third party was also sexually abusing the victim.

Pierre now alleges that he received a "fundamentally unfair trial" due to the victim's delayed disclosure of the sexual abuse by a third party. He alleges that this information could have been used at his trial to attack the victim's credibility, her identification of himself as the perpetrator, and to show her propensity to lie about sexual abuse.

The Louisiana Supreme Court, when faced with reviewing Pierre's state PCR claims, the court applied its own precedent from *State v. Conway*[10], which holds that, although the court has not conclusively held that free-standing post-conviction claims of actual innocence are cognizable in collateral attacks on final convictions, such claims must necessarily invoke "new, material, noncumulative and conclusive evidence which meets an extraordinarily high standard, and which undermines the state's entire case." The court found that Pierre's free-standing claim of actual innocence did not meet the extraordinarily high standard of actual innocence, rather, the alleged false testimony of the victim could only be used to attach her credibility.[11]

Furthermore, the Louisiana Supreme Court also found that there was no constitutional violation of the Confrontation Clause which would support a granting of a new trial. The court stated: "The Confrontation Clause of the Sixth Amendment guarantees only 'an opportunity for

[10] 01-2808 (La. 4/12/02), 816 So.2d 290, citing *Herrera v. Collins*, 506 U.S. 390, 417, 113 S.Ct. 853,869, 122 L.Ed.2d 203 (1993).
[11] *State v. Pierre,* 2013 (La. 10/15/13), 125 So.3d 403.

effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense may wish."[12]

In his writ of habeas corpus, Pierre argued that his right to a fair trial was violated by the victim's false testimony, even if the State was not aware of the false testimony. This argument presents to the Court the issue of whether the state's presentation of false testimony is a Due Process violation when the state had no knowledge, or reason to believe, that the testimony was false.

First, this Court has consistently held that claims of "actual innocence" are not cognizable on federal habeas corpus relief. In 1923, this Court noted that what a federal habeas corpus court has "to deal with is not the petitioner's innocence or guilt but solely the question of whether his constitutional rights have been preserved."[13] Seventy years later the Court reiterated that view noting:

> Claims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation in the underlying state criminal proceedings . . . This rule is grounded in the principal that federal habeas

[12]*Pierre*, supra at 411, citing *United States v. Owens*, 484 U.S. 554. 559. 108 S.Ct. 838. 842, 98 L.Ed.2d 951 (1988).

[13]*Moore v. Dempsey*, 261 U.S. 886 (1923).

courts sit to ensure that individuals are not imprisoned in violation of the Constitution – not to correct errors of fact.[14]

Second, the Fifth Circuit, as well as a majority of the U.S. Appellate Courts, have held that "due process is not implicated by the prosecution's introduction or allowance of false or perjured testimony unless the prosecution actually knows or believes the testimony to be false or perjured."[15] In fact, in a case which the Fifth Circuit described as "practically indistinguishable" from this case[16], the Fifth Circuit found that a minor child's recantation of her testimony accusing her father of rape was not grounds for habeas relief because there was no constitutional error given that the prosecutors did not knowingly present false testimony at trial.[17]

Furthermore, as noted by the Fifth Circuit in this case at footnote 4, the victim in this case never recanted her testimony accusing Pierre of rape and molestation, unlike the victim in the *Kinsel* case. The Fifth Circuit also noted, in Footnote 5, that there was still a question of whether the

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[14]*Herrera v. Collins*, 506 U.S. 390, 400, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993).
[15] See *Kutzner v. Cockrell*, 303 F.3d 333, 337 (5th Cir. 2002) and *Kinsel v. Cain*, 647 F.3d 265 (5th Cir July 11, 2011);
[16]*Pierre v. Vannoy,* supra at pg. 7, 229.
[17]*Kinsel v. Cain*, 647 F.3d 265, 272 (5th Cir. 2011).

testimony alleged by Pierre was actually false. The court stated: "Because it is undisputed that the State did not knowingly present perjured testimony, we need not address whether the underlying testimony was in fact false. It should go without saying, however, that no victim would consider rape the equivalent of being 'sexually active' in any ordinary sense of that phrase. Nothing in our opinion today should be construed to hold otherwise."

Considering these two factors, as well as the precedent from this Court and the Fifth Circuit, the state submits that Pierre has failed to prove a constitutional violation which would justify reversing the Louisiana Supreme Court's decision to reinstate his conviction for aggravated rape.

CONCLUSION

Since there is no Supreme Court case which directly holds that a prosecutor's unknowing use of false testimony violates the Due Process Clause, under existing law and precedent, Pierre cannot show that the Louisiana Supreme Court unreasonably applied clearly established federal law and thus, he is not entitled to any relief under the AEDPA.

Submitted by: **/s/ Ellen Daigle Doskey**

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