

No. _____

IN THE
Supreme Court of the United States

JANICE SHUFFORD,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent.

**On Petition for Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

This case presents two issues. First, did the court of appeals properly affirm the trial court and hold that it did not err in prohibiting the defense from adducing evidence that two prosecution witnesses were criminals, with extensive past and current misbehavior, when Ms. Shufford had no criminal history of any kind? Second, were Counts 2 & 13 in the indictment fatally defective by alleging dates of the supposed conspiracy which were not times that any criminal behavior occurred?

This Court's resolution of these issues would provide much-needed guidance on how to determine these issues.

LIST OF PARTIES

Petitioner, Janice Shufford, was the defendant in the district court and the appellant in the court of appeals. Respondent, the United States of America, was the plaintiff in the district court and the appellee in the court of appeals.

CORPORATE DISCLOSURE

Not applicable.

RELATED CASES

None.

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PETITION FOR A WRIT OF CERTIORARI

Janice Shufford respectfully petitions this Court for a writ of certiorari to review the Sixth Circuit Court of Appeals' denial on February 27, 2020, of her appeal on the issue of whether the trial court erred in prohibiting the defense from adducing evidence that two prosecution witnesses were criminals, with extensive past and current misbehavior; when Ms. Shufford had no criminal history of any kind, and whether two counts in the indictment were fatally defective by alleging dates of the supposed conspiracy which were not times that any criminal behavior occurred. No rehearing was sought.

OPINION AND ORDER BELOW

The Sixth Circuit's affirmation of the trial court's judgment is included in the Appendix at A.

STATEMENT OF JURISDICTION

The United States District Court for the Northern District of Ohio, Eastern Division, had original jurisdiction over Ms. Shufford's criminal case pursuant to 18 U.S.C. § 3231 as the offenses charged against her were offenses against the laws of the United States. She

was charged with Conspiracy to Commit Wire Fraud in violation of 18 U.S.C. §§ 1343 and 1349 (count 1), Wire Fraud in violation of 18 U.S.C. § 1343 (counts 2-6), and Aggravated Identity Theft in violation of 18 U.S.C. § 1028A (counts 13-17). The court of appeals had jurisdiction over Ms. Shufford's direct appeal pursuant to 28 U.S.C. § 1291 for the appeal of the final order of the district court. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) and Part III of the Rules of the Supreme Court of the United States. This petition is timely pursuant to Supreme Court Rule 13.1.

RELEVANT STATUTORY PROVISIONS

This case involves the application of Evidence Rule 609:

Rule 609. Impeachment by Evidence of a Criminal Conviction

(a) In General. The following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction:

(1) for a crime that, in the convicting jurisdiction, was punishable by death or by imprisonment for more than one year, the evidence:

(A) must be admitted, subject to Rule 403, in a civil case or in a criminal case in which the witness is not a defendant; and

(B) must be admitted in a criminal case in which the witness is a defendant, if the probative value of the evidence outweighs its prejudicial effect to that defendant; and

(2) for any crime regardless of the punishment, the evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving—or the witness's admitting—a dishonest act or false statement.

(b) Limit on Using the Evidence After 10 Years. This subdivision

(b) applies if more than 10 years have passed since the witness's conviction or release from confinement for it, whichever is later. Evidence of the conviction is admissible only if:

- (1) its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect; and
- (2) the proponent gives an adverse party reasonable written notice of the intent to use it so that the party has a fair opportunity to contest its use.

STATEMENT OF THE CASE

Janice Shufford was charged along with two co-defendants who ultimately testified at trial against her. Ms. Shufford was charged with Conspiracy to Commit Wire Fraud in violation of 18 U.S.C. §§ 1343 and 1349 (count 1), Wire Fraud in violation of 18 U.S.C. § 1343 (counts 2-6), and Aggravated Identity Theft in violation of 18 U.S.C. § 1028A (counts 13-17). She was arraigned November 30, 2017 and pleaded not guilty to all of the charges.

On July 16, 2018, trial began against Ms. Shufford; after *voir dire* the court ruled on the evidentiary issues related to the defense cross-examination of the cooperating witnesses, discussed *infra*. On July 17, 2018, testimony began in the afternoon session, and jury instructions were given on July 20, 2018. The jury was excused at 11:40 a.m. on July 20, and at 2:38 p.m. the court addressed juror questions with counsel. At 3:01 p.m. the court answered the jury questions without objection, and at 3:40 p.m. the jury returned its verdict of guilty to all charges of conspiracy and aiding and abetting wire fraud.

A Presentence Report was prepared and a final report was filed October 16, 2019. The pretrial services officer recommended a total offense level for Ms. Shufford of 25, criminal history category I. He

recommended incarceration for 57 months (33 months as to counts 1-6 and concurrent 24 months on counts 13-17), three years supervised release, no fine, special assessment of \$1,100 and restitution of \$1,826,064. Shufford was sentenced on November 6, 2018 as recommended. Final judgment was entered December 3, 2018 (Appendix B). Ms. Shufford timely appealed. The Court of Appeals for the Sixth Circuit affirmed her conviction (Appendix A).

REASONS FOR GRANTING THE WRIT

The defendants allegedly conspired together to defraud the Department of Education by obtaining financial aid for students who were either ineligible to attend college or who simply did not attend college; many allegedly did not know that Ms. Shufford or her co-defendants had enrolled them or taken out student loans in their names.

Ms. Shufford's co-defendants both pleaded guilty. Brigid Sommerville was charged in the indictment with Conspiracy to Commit Wire Fraud in violation of 18 U.S.C. §§ 1343 and 1349 (count 1), Wire Fraud in violation of 18 U.S.C. § 1343 (counts 7-10), and Aggravated Identity Theft in violation of 18 U.S.C. § 1028A (counts 18-21). She entered into a plea agreement with the prosecution. Christine Robinson was charged similarly with Conspiracy to Commit Wire Fraud in

violation of 18 U.S.C. §§ 1343 and 1349 (count 1), Wire Fraud in violation of 18 U.S.C. § 1343 (counts 11-12), and Aggravated Identity Theft in violation of 18 U.S.C. § 1028A (counts 22-23); she also agreed to plead guilty to one charge in each category. Both ultimately testified against Shufford.

The government moved *in limine* to prohibit Ms. Shufford's counsel from cross-examining as to heroin found in the home of Ms. Sommerville at the time of her arrest. It argued that heroin possessed by Sommerville is irrelevant to Shufford's guilt, and that any probative value was outweighed by prejudice.

The government also argued that the eight prior criminal convictions of Ms. Sommerville should not be the subject of cross-examination. Some were more than 10 years old, and the more recent conviction for possessing criminal tools (a felony of the fifth degree) did not include a dishonest act or false statement. It left open the question of Sommerville's 2011 convictions for theft and receiving stolen property, both misdemeanors of the first degree within ten years.

As to Christine Robinson, the U.S. argued similarly that her eight prior criminal convictions should be excluded. Most were over 10 years old, or did not include an element of a dishonest act or false statement.

Similarly to Ms. Sommerville's convictions, the trial court reserved as to two: Robinson's 1991 felony convictions for theft and receiving stolen property and 2008 misrepresenting identity.

In response, defense counsel argued that Bridgid Sommerville received a substantial benefit by not being prosecuted despite the large quantity (80 grams) of heroin found in her possession at the time of her arrest, her admitted knowledge of its presence in her home, and her admission that she intended to transfer the heroin to another person at the instruction of an alleged unindicted co-conspirator. Shufford's counsel further argued that the benefit Sommerville would receive by not being charged with drug trafficking was so large as to create a substantial preferential bias in favor of the government, that the introduction into evidence of those facts meets the criteria for admissibility of Evid.R. 609(a), and that the offenses demonstrate dishonesty or false statements. Finally, the defense argued that Ms. Sommerville's six prior theft convictions demonstrate her dishonest character, that one of those convictions was within the ten year period, and that the three felony theft convictions despite their age should be admissible as their probative value outweighed their prejudicial effect.

As to Christine Robinson, the defense pointed out that the most

relevant of her three felony and five misdemeanor convictions, that of misrepresenting her identity, was only slightly more than ten years old, and that the probative value outweighed the prejudicial effect where Robinson's convictions were similar to the offenses charged to the defendant. The defense argument at trial would be that Robinson and Sommerville were the ringleaders and stealers of identities.

The trial court issued a written decision on the subject of the witnesses' prior convictions. It held that the prior criminal offenses were not admissible to impeach the testifying co-defendants pursuant to the interpretation of Evid.R. 609 set out in *United States v. Washington*, 702 F.3d 886, 893-894 (6th Cir. 2012). In that case, a shooting victim's prior conviction for theft of services and resultant fifty-dollar fine was held inadmissible for impeachment purposes. This Court in that case had held that, "Theft of services is not automatically admissible as a crime of dishonesty or false statement, and the court did not err in excluding evidence of Lipford's prior conviction for impeachment purposes." 702 F.3d at 892. It noted that theft of services under Tennessee law does not require proof of a dishonest act or false statement.

On the first day of trial, the court asked the government's additional position on these issues. Ms. Elzein for the prosecution

repeated the argument that the discovery of heroin in a Ms. Sommerville's home is not properly subject to cross-examination based on the plea agreement addendum in that witness's portion of the case. The government asserted that there was no evidence that the witness was lying, and that letters not in the record demonstrate that the inmate who caused her to be in possession of the heroin also told her what to do with marijuana, and that this in some way supported the conclusion that the inmate was the person responsible for Sommerville possessing heroin. The argument appears to be that the cooperating witness lacked free will and that this is not properly subject to examination by the defense. Finally, the government's position was that Ms. Sommerville not having been charged with the crime of possession of the heroin at issue causes her Fifth Amendment right against self-incrimination to protect her from cross-examination.

The defense argument was that the evidence demonstrated a conspiracy between Ms. Sommerville and the inmate, and that the inmate was the source of at least some of the personal identifying information allegedly used to enroll students falsely for school, possibly directly to Ms. Sommerville rather than directly to the defendant here, Ms. Shufford. Defense counsel asserted that he had asked the government for any

evidence of an understanding, even if not reduced to a written agreement, as to Ms. Sommerville not being charged for the heroin, and seeking to explore whether such a tacit understanding had been reached. The trial court granted the motion *in limine*, holding that it would prohibit such inquiry in the presence of the jury, that it would not be relevant, and even if it were relevant the prejudice would outweigh the probative value.

As to the admissibility of old convictions implicating issues of honesty, the government's argument was that all convictions older than 10 years are inadmissible. The defense argued that theft convictions relate to honesty, and that a "pattern and practice across her life of stealing things" is appropriate for cross-examination not for propensity but for the jury's consideration of truthfulness. The trial court concluded that propensity was exactly the point, and took the matter under advisement as to whether those felony and misdemeanor convictions were proper for cross-examination.

The defense asserted that the exception to the 10-year rule limiting cross-examination is implicated as to Ms. Sommerville where the probative value outweighs its prejudicial effect, as where a "person's lifelong pattern and practice of committing crimes of dishonesty" should be considered. The government contested the claim that Ms.

Sommerville demonstrated such a pattern; the trial court again took the matter under advisement.

Finally at the pretrial the government raised the issue of retaliation by these two witnesses against Shufford for what they perceived to be Shufford's thefts from them. They or someone working with them firebombed Shufford's home twice, shot up her car, texted her, and posted signs around the neighborhood. The defense asserted that this should be explored for bias at least as to Ms. Robinson, who had counsel present. The government did not object to cross-examination of Ms. Robinson as to the fliers posted in the neighborhood, but asserted that the other issues were not proper for cross-examination as there was no proof that the witnesses were responsible for those acts, which would "mislead the jury and waste time." As Shufford apparently told investigators that she did not believe Sommerville had anything to do with those actions, the defense would lack a good faith basis to inquire. The trial court held those issues inadmissible.

Testimony began the afternoon session of July 17, 2018. After the government investigators testified, Ms. Shufford's alleged co-conspirators testified. Ms. Sommerville identified an unindicted co-conspirator, Thomas Lollis, an ex-boyfriend of hers who was in prison

for murder. Sommerville testified that on behalf of Lollis she paid Ms. Shufford \$400 for enrolling him at the University of Maricopa. Sommerville further testified that Shufford said she would do Lollis' homework in order for him to receive \$3,000 - \$3,500 in financial aid which Sommerville spent at Lollis' direction. Sommerville admitted to keeping \$700 of that sum for herself.

According to her testimony, Ms. Sommerville later found other prisoners who sought financial aid by enrolling in Maricopa Community College. Mr. Lollis provided names, social security numbers, and birth dates of other prisoners, and Ms. Sommerville provided that information to Ms. Shufford who enrolled them in classes and secured financial aid. Lollis supposedly told Ms. Sommerville that he had provided additional names directly to Ms. Shufford, but did not trust her and wanted Sommerville to supervise.

Ms. Sommerville testified that Mr. Lollis secured prisoners' names, social security numbers, and birth dates from a third party and Sommerville would take that information to Ms. Shufford, who would enroll those inmates in college. Several days later Ms. Shufford would enroll the students and give Ms. Sommerville the log-in and password information. After enrollment, Mr. Lollis and some of the students would

receive student loans for books and living expenses. To receive the financial aid, someone had to do the students' homework; Ms. Sommerville testified that she and Ms. Shufford would do the work.

When the subject turned to what Ms. Sommerville spent her share of the proceeds on, the prosecutor asked her, "What did you use the money that you obtained for?" Sommerville testified, "Just living. I wasn't working at the time, so paying my bills." In response to the following question, "And can you please explain to the jurors why you did this?" the defense objected and at sidebar argued that the prosecution had opened the door to the cross-examination which the court had previously prohibited. The prosecutor responded that her answer did not implicate her purchase of drugs. Judge Adams held that his pretrial *in limine* order controlled, and that he would not revisit the order based on Sommerville's testimony that she used the money for support.

Following up, the prosecution secured Ms. Sommerville's testimony that she engaged in the scheme with Mr. Lollis and Ms. Shufford because, "I needed money, and when he approached me, I thought I was helping out a friend, and I also needed money, so that's why I did it." Ms. Sommerville admittedly did not pay Ms. Shufford for enrolling some students, though Sommerville blamed the students, so

they stopped working together. After that, the prosecutor adduced Ms. Sommerville's testimony that Shufford told her that Christina Robinson was putting posters up accusing Shufford of stealing money from students.

On cross-examination the following day, Ms. Sommerville admitted that she had told investigating officers that at least some of the people signing up for class intended to attend. She was unsure of whether Ms. Shufford logged on for students. In addition, Ms. Shufford gave students their logon information. However, Shufford allegedly told Sommerville that she logged in to make students appear to be active and participating in the classes.

Ms. Sommerville also testified that besides herself and Ms. Shufford, Ms. Robinson had lists of student identifiers and log-in information, and that both she and Robinson used Shufford's computer. Sommerville admitted to having pleaded guilty to conspiracy to commit wire fraud, wire fraud, and aggravated identity theft.

Christine Robinson was called and testified that she had previously admitted her guilt in this matter, and had previously been convicted of misrepresenting her identity in 2008 and of trafficking cocaine in 2017.

Robinson testified that she helped Ms. Shufford sign some people up for school who were unable to benefit from it, either due to being in prison, homeless, or illiterate. She also testified that Ms. Sommerville had concluded that Shufford was stealing money from the people she signed up for school, and that Robinson texted Shufford accusing her of stealing the money. Robinson made about 100 fliers and posted them in the neighborhood accusing Shufford of theft, and called the community college which Shufford was allegedly defrauding to warn it of the scheme, resulting in her own conviction. Finally, she testified on direct examination that she had referred five people to Shufford in addition to herself and had profited in the amount of \$6,000 - \$7,500.

On cross-examination, Ms. Robinson admitted that she and some of the people she had signed up for school with Ms. Shufford actually intended to attend or to repay the student loans. She was asked whether based on her testimony under cross-examination she did not fully understand the facts of her guilty plea, and that she did not realize that she pleaded guilty to defrauding her aunt; the court sustained the prosecution's objection and advised defense counsel that it would stop the hearing for Ms. Robinson to consult with her own defense counsel; Ms. Shufford's counsel moved on. An unrecorded recess with a

discussion in the conference room followed, following which defense counsel cross-examined Ms. Robinson as to the terms of her plea agreement and its cooperation requirement.

At the conclusion of the prosecution case, after the jury was excused, defense counsel notified the court that no witnesses would be called for the defense. The trial court examined Ms. Shufford on her understanding of her right to testify, which she elected not to do. The prosecution rested, as did the defense.

Outside of the presence of the jury, exhibits were admitted without objection on either side. Defense counsel moved pursuant to Crim.R. 29 to acquit on Counts 2 & 13 where no reasonable juror could find beyond a reasonable doubt that Ms. Shufford logged in to Maricopa Community College on or reasonably close to December 19, 2013. The prosecution position was that Counts 2 and 13 should be amended to reflect the correct date of February 27, 2014, which would not cause prejudice to Ms. Shufford.

The trial court held that as the alleged date was not an essential element of the charges, the caselaw supported the amendment, citing *United States v. Bowman*, 783 F.2d 1192 (5th Cir. 1986), *United States v.*

Reed, 887 F.2d 1398, 1403 (11th Cir. 1989), and *Charlot v. United States*, 2008 U.S. Dist. LEXIS 44206, 2008 WL 2312924 (M.D. Fla Jun. 3, 2008). The trial court noted that there was no risk of double jeopardy from a clerical error such as this. It held that the jury heard the proper dates in testimony, and was advised to disregard the incorrect date, and so overruled the defense motion. The jury was instructed, and returned its verdict of guilty to all charges.

On appeal, the United States Court of Appeals for the Sixth Circuit held that the district court did not abuse its discretion in limiting the cross-examination of the co-defendant, and that it did not err in denying the motion for judgment of acquittal where the variance in the dates of the conduct compared to the charge was “reasonably near the date named in the indictment.”

A. It was unfair for the trial court to protect the prosecution witnesses from cross-examination by the defense as to their prior convictions and offenses.

The trial court’s decision protecting Ms. Sommerville from cross-examination as to her possession of drugs at the time of her arrest with intent to distribute them was unfair and the law should be changed.

Its written and oral *in limine* decisions that the prior criminal

offenses were not admissible to impeach the testifying co-defendants was based on the interpretation of Evid.R. 609 set out in *United States v. Washington*, 702 F.3d 886, 893-894 (6th Cir. 2012), which was simply inapplicable to the present case. In *Washington*, a shooting victim's prior conviction for theft of services and resultant fifty-dollar fine was held inadmissible for impeachment purposes. This Court in *Washington* held that, "Theft of services is not automatically admissible as a crime of dishonesty or false statement, and the court did not err in excluding evidence of Lipford's prior conviction for impeachment purposes." 702 F.3d at 89.

Here the witness, Ms. Sommerville, had not been indicted nor convicted of a drug possession at the time of the trial of Ms. Shufford, and thus was not admissible pursuant to Evid.R. 609, Impeachment by Evidence of a Criminal Conviction. The failure to bring an indictment by the United States gave Ms. Sommerville the incentive to ensure that she cooperated in securing the conviction of Ms. Shufford. The district court thus erred in denying its admissibility and the court of appeals by affirming the conviction. The trial court here also orally granted the motion *in limine*, holding that it would prohibit such inquiry in the presence of the jury, that it would not be relevant, and even if it were

relevant the prejudice would outweigh the probative value.

Defense counsel sought to convince the trial court otherwise at the time of the testimony by each witness. Ms. Sommerville testified on direct examination by the prosecution, where the prosecutor asked her, “What did you tained for?” Sommerville testified, “Just living. I wasn’t working at the time, so paying my bills.” In response to the following question, “And can you please explain to the jurors why you did this?” the defense objected and at sidebar argued that the prosecution had opened the door to the cross-examination as to purchase of heroin which the court had previously prohibited. The prosecutor responded that her answer did not implicate her purchase of drugs. Judge Adams held that his pretrial *in limine* order controlled, and that he would not revisit the order based on Sommerville’s false testimony that she used the money for support.

Evid.R. 609 as discussed in *United States v. Washington*, 702 F.3d 886, 893-894 (6th Cir. 2012), cited by the trial court here, was wrongly applied here. In *Washington*, a shooting victim’s prior conviction for theft of services and resultant fifty-dollar fine was held inadmissible for impeachment purposes. The Sixth Circuit Court of Appeals in *Washington* held that, “Theft of services is not automatically admissible

as a crime of dishonesty or false statement, and the court did not err in excluding evidence of Lipford's prior conviction for impeachment purposes." 702 F.3d at 89. But the facts here are so different as to mandate a different outcome.

Here the witness, Ms. Sommerville, had not been indicted nor convicted of a drug possession at the time of the trial of Ms. Shufford, and thus her crime was not admissible pursuant to Evid.R. 609, Impeachment by Evidence of a Criminal Conviction. However, Evid.R. 608 should be held to have permitted cross-examination on this subject. The failure to bring an indictment by the United States gave Ms. Sommerville the incentive to ensure that she cooperated in securing the conviction of Ms. Shufford. The district court thus erred in denying the defense any ability to test the truthfulness of the witness in this matter.

B. An indictment is unfair when alleged dates of commission of the offenses can be changed at any point.

During trial, the defense noticed that what they had been told was a clerical error was in fact substantive, and moved to dismiss Counts 2 and 13. Count 2 alleged that Ms. Shufford on December 19, 2013, transmitted wire communications to Maricopa Community College in Arizona. Count 13 alleged that on that date she committed aggravated identity theft by transferring, possessing, and using the identification of

another person.

When defense counsel received the Jencks material during the trial, the attorneys discovered that December 19, 2013, did not relate to a computer log-in, but that Agent Burt had testified to that date erroneously before the grand jury. The defense argued that the grand jury thus lacked probable cause to indict Ms. Shufford of offenses on that date.

The prosecution opposed the motion, arguing that the proper date was February 27, 2014, which it argued was sufficiently close to December 13, 2013 for the “on or about” language of the indictment to apply and that there was no double jeopardy issue.

The trial court took the matter under advisement at that point. The trial court ultimately granted the prosecution’s motion to amend Counts 2 & 13, based on its interpretation of the cases of *United States v. Bowman*, 783 F.2d 1192 (5th Cir. 1986), *United States v. Reed*, 887 F.2d 1398, 1403 (11th Cir. 1989), and *Charlot v. United States*, 2008 U.S. Dist. LEXIS 44206, 2008 WL 2312924 (M.D. Fla Jun. 3, 2008).

In *United States v. Bowman*, 783 F.2d 1192, 1197 (5th Cir. 1986), the Fifth Circuit held that the prosecution need not prove an exact date, but that a date “reasonably near” to that alleged in the indictment was sufficient. The court in *United States v. Reed*, 887 F.2d 1398, 1403 (11th

Cir. 1989), held that:

When the government charges that an offense occurred "on or about" a certain date, the defendant is on notice that the charge is not limited to the specific date or dates set out in the indictment. * * * United States v. Creamer, 721 F.2d 342 (11th Cir. 1983). Proof of a date reasonably near the specified date is sufficient.

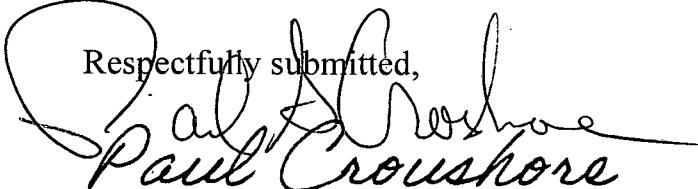
But Count 2 in the instant case charges a date which is neither reasonably near nor does it use the "on or about" language – it alleges a specific date of conduct which was not proven. The same is true of Count 13.

This Court should hold that more than a 60-day variance in a specific charged date is not permissible, and Ms. Shufford asks that this Court vacate her conviction on Counts 2 and 13 and remand the matter for further proceedings.

CONCLUSION

Counsel respectfully submits that this Honorable Court should accept jurisdiction and hold that Ms. Shufford was denied an opportunity to fully cross-examine the witnesses in this matter, and that she was denied due process by the variance between the dates charged in her indictment and the dates proven at trial, and prays that it reverse her conviction and remand the matter to the district court.

Respectfully submitted,



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