

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE ARMED FORCES**

UNITED STATES,  
Appellee

v.

Specialist (E-4)  
Austin L. Hendrix  
United States Army,  
Appellant

) BRIEF ON BEHALF OF APPELLEE

)

)

) Crim. App. Dkt. No. 20140476

)

) USCA Dkt. No. 16-0731/AR

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V. WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION IN DENYING APPELLANT’S MOTION TO COMPEL AN EXPERT CONSULTANT, EP, IN THE FIELD OF AUDIO FORENSIC SCIENCE AND VOICE IDENTIFICATION.

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**Statement of Statutory Jurisdiction**

The United States Army Court of Criminal Appeals (Army Court) reviewed this case pursuant to Article 66, Uniform Code of Military Justice [hereinafter UCMJ], 10 U.S.C. § 866 (2012). The statutory basis for this Honorable Court's jurisdiction is Article 67(a)(3), UCMJ, 10 U.S.C. § 867 (2012).

## **Statement of the Case**

An enlisted panel sitting as a general court-martial convicted appellant, contrary to his plea, of one specification of sexual abuse of a child, in violation of Article 120b, UCMJ, 10 U.S.C. § 920b (2012). (JA 1). The panel sentenced appellant to forfeiture of all pay and allowances, confinement for thirty months, reduction to the grade of E-1, and to be discharged from the service with a dishonorable discharge. (JA 1). The convening authority approved the adjudged sentence. (JA 1).

On 18 July 2016, the Army Court affirmed the findings and adjudged sentence. (JA 6). This Court granted appellant's petition for grant of review of the Army Court's decision on 12 December 2016.

## **Statement of Facts**

Appellant and Specialist (SPC) PK were friends while they were both stationed in Germany. (JA 152-53). Specialist PK lived with his wife, Mrs. SK, and three daughters, the eldest being Miss JK, who was 10 years old at the time. (JA 167). Miss JK was the step-daughter of Mrs. SK. (JA 166). Miss JK testified that she considered her father's friend, SPC Brian Wiegand, her "friend" and that he previously visited the house on several occasions prior to 10 June 2013. (JA 104). According to SPC PK, SPC Wiegand visited the house "about a dozen times or so, maybe a little less." (JA 153). During some of the visits, SPC Wiegand

would have dinner with SPC PK and his family and would occasionally spend the night at SPC PK's house. (JA 105, 153, 168). Appellant visited SPC PK's house on two prior occasions before 10 June 2013. (JA 153).

On 10 June 2013, appellant visited SPC PK's house in Ramstein, Germany. (JA 154). Miss JK arrived home from school and saw appellant and SPC PK playing beer pong. (JA 104, 169). Specialist Wiegand also visited the house, and all three males drank beer and liquor while they played video games throughout the evening. (JA 104, 154, 169). Miss JK and her sister, Miss SK, went to bed around 2100 hours. (JA 155, 170). Prior to SPC PK going to bed, he noticed that SPC Wiegand had gone to bed on the couch in the back room of the house and that the appellant was in the living room. (JA 155). Miss JK and Miss SK shared a bedroom and slept on opposite sides of the room. (JA 106). When Miss JK was in her room, she heard her parents go to their bedroom and SPC Wiegand go to bed as well. (JA 107).

Shortly after, Miss JK saw appellant come into her room. (JA 107). She stated the kitchen light was on and the window blinds in her bedroom were open so that she could go to the bathroom without having to turn on a light and wake up her sister. (JA 107). Appellant did not turn on the light in the room, but Miss JK stated she saw him "a little" and provided a physical description of appellant. (JA 107). Miss JK noticed that he was about the same height as her father, who was at



least 6 feet tall, and that he had short, blond hair. (JA 108). When asked about SPC Wiegand's physical characteristics, she stated SPC Wiegand was as tall as her mother and was bald at the time. (JA 108). As appellant entered her room, he asked Miss JK if her sister was asleep and she told him that she was, but he tapped Miss SK on the shoulder to make sure. (JA 108).

Miss JK recognized appellant's voice because his voice sounded "girlish." (JA 109). In contrast, she described SPC Wiegand's voice as "a scratchy type voice." (JA 109). Appellant sat down on Miss JK's bed and told her that she could trust him. (JA 109). Appellant then pulled down her pants and underwear and moved his hand up and down her vaginal area for approximately five to ten minutes. (JA 109-11). Miss JK was scared and embarrassed about what was going on. (JA 111). Appellant removed his hand from her vaginal area and told her not to tell anyone before he pulled her pants back up. (JA 112). As he told her that, she thought to herself that she needed to tell someone because what he did "was a bad thing." (JA 112).

The next day, Miss JK asked her step-mother if she was ever sexually assaulted. (JA 113). Miss JK knew what "sexual assault" meant because she had watched a commercial about the subject. (JA 112). Her mother spoke to her about the importance of reporting sexual assault, and Miss JK told her that a friend's mother had been assaulted by a stranger the night before. (JA 171). Hours later,

after SPC PK got home, Miss JK lit a cigar and was confronted by her parents about it. (JA 171-72). Miss JK and her sister blamed each other, which resulted in a series of spankings from SPC PK.<sup>1</sup> (JA 114, 171-72). While Miss JK and Miss SK were in their room arguing about who should take the blame, Mrs. SK overheard Miss JK tell her sister that she should take the blame because “[I] was sexually assaulted [last night].” (JA 172).

Mrs. SK entered the room to get clarification on what Miss JK had said. (JA 172). Mrs. SK described Miss JK as being very shy about describing what happened and that Miss JK first said she didn’t know who it was, but stated she knew it was not SPC Wiegand because she knew his voice. (JA 172, 176). Mrs. SK had sent Miss JK to their neighbor’s house, Mrs. TB, who then called the police. (JA 177). Miss JK was taken to the hospital and underwent a physical exam. (JA 172).

Special Agent (SA) RW from the Army Criminal Investigation Command (CID) interviewed Miss JK and collected her underwear and pajama shorts that she wore the prior night. (JA 178). Miss JK’s clothing was sent to the Army Criminal Investigation Laboratory for testing. (JA 186). Ms. Melissa Chila was the forensic

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<sup>1</sup> The expert testimony from both sides demonstrated that Miss JK had suffered physical abuse from her father but understood the difference between being punished for doing something wrong and being assaulted. (JA 225-26, 240).

biologist who tested Ms. JK's clothing for DNA. (JA 190-93). Ms. Chila tested the swabs from the underwear and shorts and found male DNA, but she could not generate a DNA profile identifying the individual. (JA 194-93). The swabs came from the inner front panel of the shorts and from inside the waistband of the shorts. (JA 197). Ms. Chila was able to determine that it was "touch DNA." (JA 194).

During the interview with SA RW, Miss JK told him that appellant did not pull any of her clothes down. (JA 188). When asked how she knew it was appellant that touched her, she said, "Brian [SPC Wiegand] didn't do it and I know my dad wouldn't do it. My sister and mom wouldn't do it. He was the only other one." (JA 188). She told SA RW that she didn't see his face because it was really dark, but she heard his voice. (JA 188).

### **Voice Identification**

Prior to trial, agents from CID conducted a voice identification procedure to determine whether Miss JK could recognize her assailant's voice. (JA 19-21). Special Agent JS recorded the voices for the lineup, but was not present for the presentation of the lineup to Miss JK. (JA 14, 21). There were six different males whose voices he recorded, including appellant. (JA 14). Special Agent JS did not screen the individuals beforehand to see if their voices sounded similar to appellant's. (JA 14-15). One of the individuals had a noticeable speech

impediment and another had a Jamaican accent. (JA 15). Specialist Wiegand was also included in the voice lineup. (JA 14).

Special Agent JS instructed them to repeat two sentences at three volume levels: (1) at a whisper, (2) above a whisper, and (3) at a normal voice. (JA 15). Special Agent AH conducted the voice identification procedure for Miss JK. (JA 19). He stated voice identification procedures are conducted in the same manner as a photographic lineup. (JA 26). He did not have any prior experience with voice identification procedures, but he had conducted photographic lineups in the past. (JA 26).

On 7 March 2014, Special Agent AH instructed Miss JK to listen to the voices and to let him know if she recognized any of the voices as the alleged offender. (JA 21, 119-21). He played three segments of the voice recordings that consisted of the six different males. (JA 21). Each series of recordings had the same six individuals, but the voice exemplars were presented to Miss JK in a different order for each series. (JA 21). After the first series of recordings were played for her, she stated that two of the voices sounded familiar to her. (JA 22). In both the second and third series of recordings, she identified appellant's voice as the man who "touched her wrong." (JA 23, 137-38). Special Agent AH stated Miss JK was very confident in her choices. (JA 24).

The defense filed a motion to suppress the voice lineup because it was unnecessarily suggestive. (JA 287). The military judge denied the motion and reserved the right to supplement his rulings at a later time. (JA 339). After trial, the military judge did not believe he needed to provide findings of fact and conclusions of law because the government was unable to introduce the actual recordings of the lineup. (JA 340). However, the government elicited testimony from Miss JK and SPC PK that a lineup occurred and that she was able to distinguish SPC Wiegand's and appellant's voices on the recordings. (JA 119,158-59). On direct examination, Miss JK was asked whether she knew the voices on the audio recordings and she stated that she recognized two individuals—appellant and SPC Wiegand. (JA 119). During Miss JK's direct examination, the following exchange took place:

TC: Had anyone told you that you were supposed to identify [appellant]?

Miss JK: Yes.

TC: What did they say to you?

Miss JK: To write down the number that you think is [appellant]. And then the next time he played the audio recording he had switched the numbers up.

TC: When they asked you to identify the voices did they actually say you should identify [appellant] or did they ask you to identify the person who had come into your room?

DC: Objection, Your Honor.

MJ: Basis?

DC: Asked and answered.

MJ: Overruled.

Miss JK: The second one.

TC: So, they asked you to identify the person who had come in your room?

DC: Objection.

MJ: Basis?

DC: Leading.

MJ: Are you asking for greater latitude with a child witness?

TC: Yes, sir, please.

MJ: Granted. Objection overruled.

TC: They asked you to identify the person who had come into your room?

Miss JK: Yes, which I knew was [appellant] cause [sic] he was the only person in my house who had a girlish voice.

(JA 119-21).

On cross-examination, Miss JK admitted that one of the voices was “Australian sounding” and others were “really deep voices.” (JA 137). Miss JK

also admitted that in the first series of the audio recordings, two of the voices sounded similar to appellant's. (JA 138). She was further asked:

DC: And you said the agent told you to pick out [appellant's] voice, right?

Miss JK: Yes.

DC: And so you heard his voice before, so you were able to pick it?

Miss JK: Not that well.

(JA 138).

Finally, during closing arguments, both parties argued about the reliability of the lineup. (JA 251, 260-61).

### **Request for Expert Consultant**

Prior to trial, the defense submitted a motion to compel an expert consultant, Dr. EP, in the field of audio forensics and voice identification. (JA 315). In its request to justify what the expert assistance would accomplish for the accused, the defense stated Dr. EP, "will discuss whether it is likely that a child would be able to identify a whisper 8 months from the date that she thought she might have heard it." (JA 329). In addition, the defense stated, "His expert testimony will help the trier of fact understand how a case with so little physical evidence made it to a General Court-Martial." (JA 329).

At the motions hearing, Dr. EP testified that he believed the lineup was unreliable and that physical and background characteristics affect a person's voice. (JA 53-57). He also testified that the proper method for conducting voice identifications is to record a sample of a person's voice so that they are made into a comparison file and compared to an original recording. (JA 52, 54). In this case, Dr. EP was aware that there was no original recording of the appellant's voice. (JA 54). He further stated, "[T]his particular case involves memory. There is no original recording. And it's my opinion that that is a very unreliable method for conducting voice identification." (JA 52). When asked about the reliability of a voice identification procedure similar to the one conducted in appellant's case, Dr. EP stated, "It's not reliable at all in my opinion. Memory is not something that serves us well with understanding and being able to identify somebody through their voice." (JA 56).

During argument for the appointment of the expert consultant, the defense counsel argued that Dr. EP was needed to address the "red herring" that the government created with the lineup and that the lineup was unreliable because the voices were so different. (JA 76). The military judge denied the motion and reserved the right to supplement his ruling at a later time. (JA 339). After trial, the military judge provided limited findings of fact and conclusions of law with regard to denying the defense's expert consultant request for Dr. EP. (JA 342). The



military judge found that the purpose of the expert's assistance would be to assist the defense in their preparation of attacking the reliability of the voice lineup. (JA 342).

### **Summary of Argument**

This court should affirm the decision of the Army Court and grant appellant no relief because the military judge did not abuse his discretion when he denied the defense's motion to suppress the identification of appellant through a voice lineup. The identification of appellant was not unnecessarily suggestive, and even if it was, the pretrial identification was not conducive to a substantial likelihood of misidentification because Miss JK previously identified appellant as her assailant the day after the incident. In addition, the military judge did not abuse his discretion when he denied the defense's request for an expert consultant in the field of audio forensic science and voice identification because the defense failed to meet its burden of establishing that the expert assistance was necessary.

### **ISSUE I**

**WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE DENIED A DEFENSE MOTION TO SUPPRESS RELATED TO THE IDENTIFICATION OF THE APPELLANT DURING A VOICE LINEUP.**

## Standard of Review

A military judge's ruling on the admissibility of evidence is reviewed for an abuse of discretion. *United States v. Rhodes*, 42 M.J. 287, 290 (C.A.A.F. 1995).

When a military judge does not make findings of fact or explicit conclusions of law, the military judge's application of the law is reviewed de novo. *United States v. Alameda*, 57 M.J. 190, 198 (C.A.A.F. 2002).

## Law and Analysis

This court adopted a two-prong test for determining the admissibility of eyewitness identifications: (1) whether the pretrial identification was unnecessarily suggestive, and (2) if the pretrial identification was unnecessarily suggestive, whether it was conducive to a substantial likelihood of misidentification. *Rhodes*, 42 M.J. at 290 (citing *Manson v. Brathwaite*, 432 U.S. 98 (1977)). The analysis for the proper admission of eyewitness lineups has been applied in cases involving voice identification. *Cooper v. Bergeron*, 778 F.3d 294, 300 (1st Cir. 2015). "An 'unnecessarily suggestive' pretrial identification does not preclude a reliable in-court identification." *Rhodes*, 42 M.J. at 290. The reliability of an in-court identification following supposed suggestive identification procedures is evaluated under a totality of the circumstances. *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972). The factors to be considered are: (1) the opportunity of the witness to view the criminal at the time of the crime, (2) the witness' degree of

attention, (3) the accuracy of his prior description of the criminal, (4) the witness' demonstrated level of certainty during the confrontation, and (5) the elapsed time between the criminal act and the confrontation. *Id.*

**A. The pretrial lineup was not unnecessarily suggestive.**

While some evidence suggests the government could have taken further measures to find individuals with a voice similar in tonal quality to appellant's, the lineup was not unnecessarily suggestive. In this case, the defense counsel admitted that one of the voices used in the lineup could be considered similar to appellant's. (JA 71). Furthermore, each male voice was distinctly different, and the inclusion of SPC Wiegand could reasonably have been viewed as a measure to properly exclude him as the assailant since he was the other male who stayed at the house on the night of the incident. Finally, Miss JK was instructed to identify the "alleged offender" and the person who "touched her wrong," thereby eliminating any indication that she was specifically told to identify appellant. (JA 21-23, 48, 119-21).

**B. Assuming *arguendo* that the voice lineup was unnecessarily suggestive, the in-court identification was reliable.**

The totality of the circumstances demonstrates there was no substantial likelihood of misidentification by Miss JK. Regarding the first factor under *Biggers*, Miss JK had an ample amount of time to observe appellant in a room that was not pitch black. Miss JK stated she was able to see appellant's height and hair

because of the light coming in from the kitchen and the light coming in from the open blinds of her bedroom window. (JA 107). Miss JK described the incident as lasting from five to ten minutes. (JA 109-11).

Miss JK's degree of attention, the second factor, also weighs in favor of her reliable identification, because she observed appellant's movements throughout the entire time he was in her room. Miss JK watched appellant reach over to her sister to see if she was awake and was scared when he sat on her bed and touched her vaginal area. (JA 108-11). She was alert enough to have an internal dialogue after his request that she not tell anyone what he did. (JA 112). In regard to the third factor, there was no discrepancy between the descriptions because Miss JK had always identified appellant as her assailant. She was old enough to understand that her assailant was one of three men in the house: her father, SPC Wiegand, or appellant. Regarding the fourth factor, SA AH stated that Miss JK did not hesitate in identifying appellant's voice during the lineup. (JA 24).

In *Biggers*, the court analyzed the fifth factor and found that seven months between the incident and the lineup "would be a seriously negative factor in most cases." *Biggers*, 409 U.S. at 201. Here, although the eight month length of time between the incident and the voice lineup weighs against the reliability of the later identification, Miss JK's initial identification of appellant to CID and to her mother tips the balance back in favor of a reliable identification. For the foregoing

reasons, the military judge properly denied the defense motion to suppress the voice identification.

**C. Even if the identification was unnecessarily suggestive, it was not prejudicial.**

Even if this court finds the lineup was inadmissible, the error is harmless. Appellant is only entitled to relief if the “error materially prejudices the substantial rights of the accused.” Article 59(a), UCMJ. Prejudice from an erroneous evidentiary ruling is evaluated “by weighing: 1) the strength of the Government’s case, 2) the strength of the defense case, 3) the materiality of the evidence in question, and 4) the quality of the evidence in question.” *United States v. Kerr*, 51 M.J. 401, 405 (C.A.A.F. 1999).

Here, the government’s case was strong because multiple witnesses testified that the only three males in the house on the night of the incident were SPC PK, SPC Wiegand, and appellant. Miss JK provided sufficient detail to demonstrate that she knew it was appellant who assaulted her. (JA 107-12). The defense’s theory was that Miss JK made up the story to stop the spankings from her father, and alternatively, that it was all just a dream. (JA 263-64). The defense also argued that the government had not excluded SPC Wiegand as the assailant beyond a reasonable doubt. (JA 138). The expert testimony from both sides demonstrated that Miss JK had suffered physical abuse from her father, but she understood the

difference between being punished for doing something wrong and being assaulted. (JA 225-26, 240).

As to the materiality and quality of the voice identification evidence, Miss JK identified appellant as her assailant months before she listened to the recordings with CID, making the quality of the evidence at issue low. She also identified appellant to her step-mother and SA RW the day after the incident, thereby making the subsequent voice identification immaterial. (JA 176, 188). In addition, the defense's focus was on Miss JK's motive to fabricate and her reaction to her father's repeated discipline, further confirming that the voice identification was immaterial. Finally, the recordings from the lineup were never presented to the panel. Through cross-examination, the defense counsel was able to elicit that one individual in the lineup had an accent and another had a speech impediment, making the overall quality of the voice lineup evidence weak. The consideration of all the *Kerr* factors weighs in the government's favor. In conclusion, the error did not result in prejudice to appellant.

## **ISSUE V**

**WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION IN DENYING APPELLANT'S MOTION TO COMPEL AN EXPERT CONSULTANT, EP, IN THE FIELD OF AUDIO FORENSIC SCIENCE AND VOICE IDENTIFICATION.**

## Standard of Review

A military judge's decision to deny a request for expert assistance is reviewed for an abuse of discretion. *United States v. Bresnahan*, 62 M.J. 137, 143 (C.A.A.F. 2005). “A military judge abuses his discretion when: (1) the findings of fact upon which he predicates his ruling are not supported by the evidence of record; (2) if incorrect legal principles were used; or (3) if his application of the correct legal principles to the facts are clearly unreasonable.” *United States v. Ellis*, 68 M.J. 341, 344 (C.A.A.F. 2010) (citing *United States v. Mackie*, 66 M.J. 198, 199 (C.A.A.F. 2008)).

## Law and Analysis

“An accused is entitled to expert assistance before trial to aid in the preparation of his defense upon a demonstration of necessity.” *Bresnahan*, 62 M.J. at 143 (citing *United States v. Gunkle*, 55 M.J. 26, 31 (C.A.A.F. 2001)). “The accused must show that a reasonable probability exists ‘both that an expert would be of assistance to the defense and that denial of expert assistance would result in a fundamentally unfair trial.’” *Id.* (quoting *United States v. Robinson*, 39 M.J. 88, 89 (C.M.A. 1994)).

Military courts apply a three-part test to determine whether expert assistance is necessary. *United States v. Gonzalez*, 39 M.J. 459, 461 (C.M.A. 1994), *cert. denied*, 513 U.S. 965 (1994). The appellant must show: (1) why the expert

assistance is needed, (2) what the expert assistance would accomplish for the accused, and (3) why the defense counsel was unable to gather and present the evidence that the expert assistance would be able to develop. *Id.* (citing *United States v. Allen*, 31 M.J. 572, 623 (N.M.C.M.R. 1990)). Appellant bears the burden of meeting all three prongs of the test. *See Bresnahan*, 62 M.J. at 143.

When a military judge's denial of expert assistance denies an appellant the right to present a defense, the reviewing court may conclude that the accused was "deprived of his constitutional right to a fair hearing as required by the Due Process Clause." *United States v. McAllister*, 64 M.J. 248, 252 (C.A.A.F. 2007). If a constitutional due process violation is established, then the burden shifts to the government to prove that the error was harmless beyond a reasonable doubt. *Id.*

In this case, the military judge did not abuse his discretion because the defense did not adequately show that Dr. EP was necessary or how the denial of his assistance would result in a fundamentally unfair trial. Furthermore, appellant received a fair trial and cannot establish prejudice. The proffered testimony from Dr. EP did not provide any explanations or information that was relevant to the case at issue. The proffered testimony demonstrated Dr. EP's expertise involved comparing voice exemplars to an original voice recording. (JA 52, 54). Dr. EP testified that the identification in this case came down to an issue of memory, and there is no indication in the record that Dr. EP was qualified in this area of



expertise. Furthermore, evaluating and arguing the strength or reliability of the lineup was not tied to any scientific or forensic principles, but rather, the reliability of Miss JK's memory after an extended period of time, which came down to common sense. There is no indication that the requested expert would add anything that could not be expected of an experienced defense counsel. *United States v. Freeman*, 65 M.J. 451, 459 (C.A.A.F. 2008) (finding that the military judge did not abuse his discretion in denying defense's expert assistance which, even if helpful to defense, seemed to add only what an experienced defense counsel could provide). For example, Dr. EP testified that physical and background characteristics affect a person's voice. (JA 53-57). One does not need an expert consultant to identify that an individual has a noticeable speech impediment and another individual has a Jamaican accent. (JA 15). In addition, one does not need an expert consultant for the basic principle that memories fade over time. Finally, the defense had failed to establish their inability to gather or present evidence that only their requested expert would have been able to develop. The defense's request focused only on audiology, and there was no evidence that the defense was unable to educate themselves on the principles behind reliable identifications. (JA 315-25).

Assuming *arguendo* that the military judge abused his discretion, appellant cannot establish prejudice. The defense adequately attacked the reliability of the


voice identification through cross-examination. The voice lineup was not central to the government's case and did not contribute to the conviction because Miss JK identified appellant as her assailant the day after the incident. In addition, the defense theory was that Miss JK made it all up to prevent further abuse from her father. Therefore, because appellant has failed to establish prejudice, his requested relief should be denied.

## Conclusion

Wherefore, the Government respectfully requests that this honorable court affirm the decision of the Army Court and grant appellant no relief.



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**CERTIFICATE OF COMPLIANCE WITH RULE 24(d)**

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Linda Chavez  
Captain, Judge Advocate  
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February 16, 2017

## CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was transmitted by electronic means to the court ([efiling@armfor.uscourts.gov](mailto:efiling@armfor.uscourts.gov)) and contemporaneously served electronically on appellate defense counsel, on February 16, 2017.

A handwritten signature in black ink, appearing to read 'D. Mann', with a long horizontal flourish extending to the right.

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