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

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| UNITED STATES,<br>Appellee<br><br>v.<br><br>**Adam M. PYRON**<br>Master-at-Arms Second Class (E-5)<br>United States Navy,<br>Appellant | **APPELLANT'S REPLY**<br><br>USCA Dkt. No. 22-0277/NA<br><br>Crim. App. Dkt. No. 201900296R |

TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES:

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**UNIFORM CODE OF MILITARY JUSTICE**



**RULE FOR COURTS-MARTIAL**



**CAAF RULES OF PRACTICE AND PROCEDURE**

## Argument

## I.

### THE LOWER COURT EXCEEDED THE SCOPE OF REVIEW UNDER ARTICLE 62, UCMJ, AND DEPARTED FROM THIS COURT'S PRECEDENT SET IN *UNITED STATES V. VANGELISTI* BY ATTACHING MATERIALS TO THE RECORD THAT WERE NOT PROFFERED AT TRIAL AND USING THEM TO APPELLANT'S DETRIMENT.

This Court should grant review to protect future records of trial and the appellate courts' statutorily mandated duties under Article 62, UCMJ.[1]

In *United States v. Jessie*, this Court addressed whether courts of criminal appeals (CCA) may consider materials outside the record on Article 66, UCMJ, review.[2] In his dissent, Chief Judge Ohlson explained the purpose of Article 66(c)'s provision allowing CCAs to make a determination "on the basis of the entire record" exists to ensure decisions are "not based on matters *outside* the record and that the parties are informed ahead of time of evidence the CCA will rely upon in reaching its decision."[3] He explained the parties should be allowed to supplement the record, but only "if that court deems it necessary in order to perform its statutorily mandated duties."[4]

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[1] C.A.A.F. R. 21(b)(5)(B), (F).
[2] 79 M.J. 437, 439-440 (C.A.A.F. 2020).
[3] *Id*. at 446 (Ohlson, CJ. dissenting).
[4] *Id*. (Ohlson, CJ. dissenting).

This speaks precisely to what occurred here. The lower court made a decision based on matters that were not in the record below.[5] The parties—and the military judge—were unaware that the Navy-Marine Corps Court of Criminal Appeals (NMCCA) would rely on this material to make a decision. Although NMCCA granted the government's motion to attach the material on appeal, this material was not necessary for NMCCA to perform its statutory duty under Article 62, UCMJ, where courts "may act only with respect to matters of law."[6]

*Jessie* did not address Article 62, UCMJ, review.[7] Granting review will allow this Court to address the preliminary question of whether CCAs can rely on materials outside the record—including an original record of trial—on Article 62, UCMJ, review.

A. There is no evidence the military judge had access to or reviewed MA2 Pyron's first record of trial. Regardless, the first record was not proffered as evidence.

The government's argument that MA2 Pyron's first record of trial automatically becomes proper evidence for consideration on rehearing is flawed for at least two reasons. First, no rule requires a military judge presiding over a rehearing to have access to the entire first record of trial. Rule for Courts-Martial

[5] *United States v. Pyron*, No. 201900296R, 2022 CCA LEXIS 410, at *14 (N-M. Ct. Crim. App. July 15, 2022).
[6] Art. 62(b), UCMJ.
[7] *Jessie*, 79 M.J. at 438.

1112(f)(1)(C) requires attachment of "any former hearings" for *appellate* review of a rehearing—not for access and consideration by the military judge at trial.

Rule for Courts-Martial 908(b)(5) requires a record for review under Article 62, UCMJ, to be "complete to the extent necessary to resolve the issues appealed." Naturally, a record for review under Article 62, UCMJ, requires less than what is required for a record under Article 66, UCMJ, because an interlocutory appeal occurs before trial is complete.[8] Thus, the President prescribed a rule allowing the government to create a limited version of the record for the purposes of Article 62, UCMJ—R.C.M. 908(b)(5).[9]

Second, even if the military judge had access to and did a cursory review of the first record, the military judge was not required to consider it as *evidence* on rehearing.[10] Evidence in a prior record of trial is not automatically admitted as proper evidence for the military judge to consider in the second trial. It must be offered by the parties. While not directly on point, R.C.M. 810(c) is instructive. It prohibits the new members panel on rehearing from examining the first record

[8] *Compare* R.C.M. 908(b)(5) *and* R.C.M. 1112(b).
[9] *See also United States v. Lincoln*, 42 M.J. 315, 321 (C.A.A.F. 1995) (discussing the "limited record" under Article 62, UCMJ).
[10] *United States v. Staten*, 21 U.S.C.M.A. 493, 496 (C.M.A. 1972) (explaining a rehearing places "the United States and the accused in the same position as they were at the beginning of the original trial").

except "[w]hen permitted to do so by the military judge *after such matters have been received into evidence*."[11]

Just like an improvident plea has "the effect of canceling the pretrial agreement,"[12] a reversal and remand kills the evidence admitted at a contested trial until is it offered at the second trial. Of course, evidence admitted at the previous trial can be re-admitted at the second trial.[13] But that is not what happened here.

The government claims that because the court in *United States v. Murray* cited to the appellant's first trial, it was appropriate for NMCCA to do so in this case.[14] But *Murray* was not appealed under Article 62, UCMJ.[15] The appellant's original and rehearing records were properly before NMCCA for review under Article 66, UCMJ.[16] More importantly, it is clear from the *Murray* opinion that "[f]ollowing vigorous argument from both sides," the military judge detailed to the rehearing "discussed the finding of the original military judge."[17] This suggests

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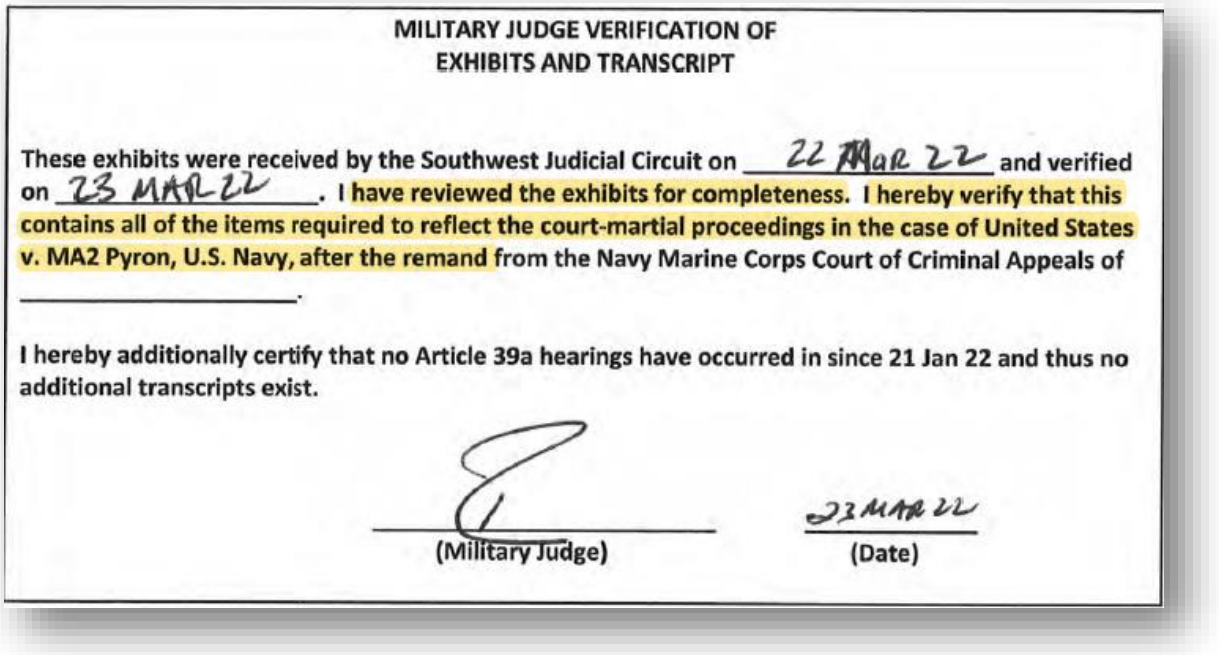
[11] R.C.M. 810(c).
[12] *United States v. VonBergen*, 67 M.J. 290, 293 (C.A.A.F. 2009).
[13] *Harrison v. United States*, 392 U.S. 219, 222 (explaining "a defendant's testimony at a former trial is admissible in evidence against him in later proceedings").
[14] *United States v. Murray*, 52 M.J. 671 (N-M. Ct. Crim. App. 2000); Appellee Ans. at 19-20.
[15] *Murray*, 52 M.J. at 674.
[16] *Id*. (citing Articles 59(a) and 66(c), UCMJ).
[17] *Id*. at 672, 672 n.5.

that material from the appellant's first trial was offered as evidence in the second trial.

This Court can be confident the military judge did not consider MA2 Pyron's first record of trial because it was not included in the record he verified as complete:[18]



MILITARY JUDGE VERIFICATION OF
EXHIBITS AND TRANSCRIPT

These exhibits were received by the Southwest Judicial Circuit on 22 MAR 22 and verified on 23 MAR 22. I have reviewed the exhibits for completeness. I hereby verify that this contains all of the items required to reflect the court-martial proceedings in the case of United States v. MA2 Pyron, U.S. Navy, after the remand from the Navy Marine Corps Court of Criminal Appeals of _____.

I hereby additionally certify that no Article 39a hearings have occurred in since 21 Jan 22 and thus no additional transcripts exist.

(Military Judge) 23 MAR 22 (Date)

Additionally, the military judge specifically asked the trial counsel if they had any evidence to show the Fifth Amendment violation did not cause MA2 Pyron to testify, and the trial counsel said they did not.[19] At the start of the motions hearing, the military judge clarified, "For the record, government, . . . I believe you

[18] Certification pursuant to R.C.M. 1112(c).
[19] R. at 153.

have four enclosures to support this motion? Is that correct?"[20] And the trial counsel responded, "Yes, Your Honor."[21] The military judge pushed the government to respond to the defense's argument that MA2 Pyron may have testified because of the Fifth Amendment violation.[22] But the trial counsel only argued *Harrison* did not apply.[23]

Unlike the "vigorous argument" in *Murray*, the government here said, "it would be difficult to see how the government could ever meet its burden."[24] Thus, the record shows the military judge only considered the evidence proffered to support the admissibility motion.

B. NMCCA did not have sufficient evidence to find the military judge abused his discretion in excluding MA2 Pyron's prior testimony.

The government cites NMCCA's erroneous finding to argue that the trial counsel presented the military judge with sufficient evidence.[25] In its *Pyron II* opinion, NMCCA incorrectly found that the trial counsel included the following evidence in their motion at trial:

> (1) that the named victims made an immediate outcry which their mother reported to the police immediately; (2) testimony from the 8-year-old that Appellee rubbed his penis on her leg and asked her to perform oral sex; (3) testimony from the 6-year-old that Appellee made

[20] R. at 150.
[21] R. at 150.
[22] R. at 153.
[23] R. at 152-53.
[24] R. at 153.
[25] Appellee Ans. at 22-23.

> her perform oral sex; (4) law enforcement testimony establishing chain of custody over DNA evidence; (5) the victims' prior forensic interviews which were entered as prior consistent statements; (6) testimony from a forensic DNA examiner that she found DNA, likely from a body fluid like saliva or vaginal secretions, consistent with the 6-year-old victim on Appellee's penile, pubic mound, and scrotum swabs; (7) and Appellee's trial testimony.[26]

The lower court erroneously found that the alleged victims' testimony, the NCIS agents' testimony, and the forensic DNA examiner's testimony were included in the government's admissibility motion.[27] They were not. An accurate finding supported by the record would look like this:

> (1) that the named victims made an immediate outcry which their mother reported to the police immediately; ~~(2) testimony from the 8-year-old that Appellee rubbed his penis on her leg and asked her to perform oral sex; (3) testimony from the 6-year-old that Appellee made her perform oral sex; (4) law enforcement testimony establishing chain of custody over DNA evidence; (5) the victims' prior forensic interviews which were entered as prior consistent statements; (6) testimony from a forensic DNA examiner that she found DNA, likely from a body fluid like saliva or vaginal secretions, consistent with the 6-year-old victim on Appellee's penile, pubic mound, and scrotum swabs; (7)~~ and Appellee's trial testimony.[28]

The military judge did not have "the trial and appellate exhibits from [MA2 Pyron's] first court-martial," as NMCCA and the government suggest.[29] He had a one-page list of exhibits without explanation.[30] The military judge considered "all

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[26] *Pyron*, No. 201900296R, 2022 CCA LEXIS 410, at *5-6.
[27] *Id*.
[28] App. Ex. XVII.
[29] *Pyron*, No. 201900296R, 2022 CCA LEXIS 410, at *5; Appellee Ans. at 13.
[30] App. Ex. XVII, Encl. 3.

legal and competent evidence presented by the parties," and was not required to consider anything else.[31] While he could have considered evidence from other motions in the record, he is not required to do so, and there is no indication that he did here.[32]

Because the military judge should not be reversed so long as his decision remains within the reasonable "range of choices," he did not abuse his discretion in finding the government's evidence was insufficient.

[31] *See generally United States v. Thompson*, 29 C.M.R. 68, 71 (U.S.C.M.A. 1960) (requiring more than just an offer of proof and finding the "record is devoid of the basic facts upon which [the government's] contention must rest").
[32] App. Ex. LV at 1.

## II.

**THE MILITARY JUDGE CORRECTLY CONCLUDED APPELLANT'S TESTIMONY FROM HIS FIRST COURT-MARTIAL WAS INADMISSIBLE WHERE THE GOVERNMENT FAILED TO PROVE APPELLANT TESTIFIED FOR REASONS UNRELATED TO HIS BIASED MEMBERS PANEL.**

This Court should grant review because this is an issue of first impression.[33]

A. The military judge's reliance on *Harrison* and *Murray* did not "undermine the general rule." He forced the government to carry its burden.

The government claims the military judge's application of *Harrison* to the Fifth Amendment violation in this case creates a "near-impossible burden of disproving the accused's internal motivations."[34] But the government's problem here was not an impossible burden—it was the government's failure to fully litigate the motion at trial.

Rule for Courts-Martial 905(a) requires a party moving the military judge for particular relief to "state the grounds upon which it is made." The government now attempts to circumvent its waived argument by claiming the trial counsel made an "administrative oversight."[35] In reality, the trial counsel *could* have argued that MA2 Pyron testified at this first trial to overcome the evidence against

[33] C.A.A.F. R. 21(b)(A)(5).
[34] Appellee Ans. at 29.
[35] Appellee Ans. at 16.

him, but they did not. The trial counsel could have offered MA2 Pyron's prior record of trial as evidence, but they did not. Now, for the first time on appeal, the government recognized that it may have been able to overcome its burden and asserts an argument that it affirmatively waived at trial.[36]

The government's attempt to assert new arguments in an Article 62 appeal was prohibited by the Army CCA in *United States v. Suarez*.[37] There, the Army CCA declined to address the merits of the government's arguments because the government waived, through concession, underlying issues at trial.[38] The court explained,

> The importance of waiver, the issue here, is all the more important as our jurisdiction to hear the government's appeal is provided by Article 62, UCMJ. While we have the authority to notice waived and forfeited issues when a case is on direct appeal under Article 66, UCMJ, no similar authority exists for interlocutory appeals.[39]

The Army CCA explained the government cannot assert new legal and factual theories for the first time on appeal.[40] Here, the government waived factual assertions and legal arguments, and should be prohibited from raising them now.

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[36] Appellee Ans. at 29.
[37] *United States v. Suarez*, No. 20170366, 2017 CCA LEXIS 631, at *10 (A. Ct. Crim. App. Sept. 27, 2017).
[38] *Id*.
[39] *Id*.
[40] *Id*. at *11.

B. Viewing the evidence in the light most favorable to MA2 Pyron, the military judge relied on the trial counsel's concession.

Contrary to the government's assertion, there is evidence the military judge relied on the trial counsels' concession. During the Article 39(a) hearing, the military judge attempted to get the trial counsel to show him why MA2 Pyron testified by reminding them of the defense's core argument and asking "Is there anything else you can point me to?"[41] But the trial counsel only repeated the general rule in *Harrison*, argued the Fifth Amendment violation had nothing to do with the rest of the trial, and said, "The government has nothing further, Your Honor."[42]

In his ruling, the military judge wrote that he considered "the parties' asserted facts" and found the government had not shown their actions from the first trial did not induce the accused's testimony at his first trial.[43] The government's lack of evidence and argument on the record supports this finding.[44]

It was not the military judge's job to carry the government's burden. "A military judge must be attentive, but not clairvoyant."[45] Thus, viewing the evidence

[41] R. at 153.
[42] R. at 153.
[43] App. Ex. LV at 1, 3.
[44] R. at 153; App. Ex. XVII at 7.
[45] *United States v. Palmer*, No. 98001039, 2000 CCA LEXIS 385, at *15-16 (A. Ct. Crim. App. Sept. 29, 2000) (holding the evidentiary issue was waived because the trial defense counsel did not provide the military judge with adequate information to focus the military judge on the issue).

in the light most favorable to MA2 Pyron, the military judge did not clearly err in finding the government has not shown its action from the first trial did not induce MA2 Pyron's testimony, contrary to the government's assertion.[46]

C. The government's string citations to federal cases demonstrate that the military judge properly applied *Harrison* and show how simple it can be for the government to meet its burden.

The government cites five cases to argue that courts have declined to extend *Harrison* where "the exception becomes progressively unwieldy."[47] But these cases actually show courts applying *Harrison*, and demonstrate that it is not difficult for the government to meet its burden under *Harrison*.

In *Humphreys v. Gibson*, a rehearing was authorized due to an instructional error in the first trial.[48] At the first trial, the accused testified *before* the trial court's refusal to instruct on a lesser offense.[49] Thus, the government showed the accused did not testify as a result of the instructional error.[50]

In *United States v. Pelullo*, the accused testified at his first trial to present an entitlement defense to the jury.[51] The government showed its *Brady* violation from

[46] *United States v. White*, 80 M.J. 322, 327 (C.A.A.F. 2020) (explaining that on Article 62 review, the evidence is viewed in the light most favorable to the party that prevailed on the motion at trial); Appellee Ans. at 25.
[47] Appellee Ans. at 28.
[48] *Humphreys v. Gibson*, 261 F.3d 1016, 1023 (10th Cir. 2001).
[49] *Id*.
[50] *Id.*
[51] *United States v. Pelullo*, 173 F.3d 131, 139 (3d Cir. 1999).

the first trial "cannot establish or even support" the defense the accused sought to establish through testimony.[52] Thus, the government met its burden.[53]

In *United States v. Bohle*, the accused testified at his first trial before the expert took the stand.[54] The court held that even if it found *Harrison* applies to improper expert testimony, the government met its burden.[55]

Finally, neither *Neal v. Booker* nor *United States v. DeWitt* involved a rehearing nor a proven constitutional error.[56] In *Neal*, the court held that any error by the state courts in denying the accused's pretrial motion to suppress "was harmless, at most."[57] The court further found the accused did not testify to rebut the testimony admitted in his statement.[58] Instead it found he testified to gain credibility by testifying consistently with his earlier statement to emphasize to the jury that he was not guilty.[59]

Here, the military judge correctly cited and understood the binding and persuasive cases.[60] The military judge reasonably decided that *Harrison* applies to

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[52] *Pelullo*, 173 F.3d at 139.
[53] *Id*. at 139-40.
[54] *United States v. Bohle*, 475 F.2d 872, 876 (2d Cir. 1973).
[55] *Id*.
[56] *Neal v. Booker*, 497 F. App'x 445, at 449 (6th Cir. 2012); *United States v. DeWitt*, 3 M.J. 455, 455-57 (C.M.A. 1977).
[57] *Neal*, 497 F. App'x at 449.
[58] *Id*. at 450.
[59] *Id*.
[60] App. Ex. LV at 2-3.

the Fifth Amendment violation in MA2 Pyron's first trial and used the only other NMCCA case dealing with the admissibility of prior testimony to guide his analysis.[61] Thus, the military judge's application of *Harrison* to MA2 Pyron's case was not "arbitrary, fanciful, clearly unreasonable or clearly erroneous."[62]

D. The government's comparison to *United States v. Nell* is inapt: the accused in *Nell* was not deprived of a fair and impartial panel.

The government relies on *United States v. Nell* (a Fifth Circuit case) for the proposition that the *Harrison* exception does not extend to errors in the jury selection process.[63] But *Nell* is distinguishable in a significant way: the accused was not deprived of a constitutional right.[64] Rather, the accused in *Nell* was forced to exhaust his peremptory challenges on persons who should have been excused for cause.[65] This is not even a reviewable error in the military justice system since the use of a peremptory challenge precludes further consideration of the issue.[66] It

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[61] App. Ex. LV at 2-3.
[62] *United States v. Taylor*, 53 M.J. 195, 199 (C.A.A.F. 2000) (citation and internal quotations omitted).
[63] *United States v. Nell*, 570 F.2d 1251, 1259 (5th Cir. 1978); Appellee Ans. at 30.
[64] *Nell*, 570 F.2d. at 1259. The government erroneously claims the Fifth Circuit court "found reversible error in his first trial because [the accused's] counsel failed to exercise peremptory challenges during voir." Appellee Ans. at 30. This is incorrect. *See United States v. Nell*, 526 F.2d 1223, 1228-29 (5th Cir. 1976), (explaining the judge erred by forcing the accused to *exhaust* his peremptory challenges on persons who should be excused for cause), *overruled by United States v. Martinez-Salazar*, 528 U.S. 304, 307 (2000).
[65] *Nell*, 526 F.2d at 1228-29.
[66] R.C.M. 912(f)(4) ("When a challenge for cause has been denied the successful use of a peremptory challenge by either party, excusing the challenged member

makes sense, then, that the court in *Nell* found it was "unlikely" that the error compelled the accused to testify since the biased members were excused at the start of trial.[67] While there is no constitutional right to a preemptory challenge, there is, however, a constitutional due process right to a panel that appears unbiased.[68] Furthermore, unlike the lack of evidence in *Nell* that the error tainted the entire trial, the NMCCA in *Pyron I* found that "[n]o accused, regardless of the amount of evidence the government may have to prove his guilt, can receive a fair trial if biased members are permitted to sit in judgment."[69]

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from further participation in the court-martial, shall preclude further consideration of the challenge of that excused member upon later review."); *see also United States v. Nickens*, No. 201500142, 2016 CCA LEXIS 204, at *11-12 (N-M. Ct. Crim. App. Mar. 31, 2016) (holding the challenge for cause issue was waived because the appellant used his peremptory challenge to dismiss the member from the panel).

[67] *Nell*, 570 F.2d. at 1260.

[68] *Ross v. Oklahoma*, 487 U.S. 81, 88 (1988) (explaining the Supreme Court "reject[s] the notion that the loss of a peremptory challenge constitutes a violation of the constitutional right to an impartial jury"); *United States v. Weisen*, 56 M.J. 172, 174 (C.A.A.F. 2001) (citing R.C.M. 912(f)(1)(N)).

[69] *Pyron*, 81 M.J. at 643.

Respectfully submitted,

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**Certificate of Compliance**

1. This Reply complies with the type-volume limitation of Rule 21 because it contains less than 4,000 words.

2. This Reply complies with the type-style requirements of Rule 37 because it has been prepared with monospaced typeface using Microsoft Word 2010 with 14 point, Times New Roman font.

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**CERTIFICATE OF FILING AND SERVICE**

I certify that a copy of the foregoing was electronically mailed to the Court and that a copy was electronically delivered to the Deputy Director, Appellate Government Division, and to the Director, Administrative Support Division, Navy-Marine Corps Appellate Review Activity, on October 20, 2022.

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