Case No. 71372

IN THE SUPREME COURT OF THE STATE OF NEVADA

THOMAS KNICKMEYER

Appellant,

v.

STATE OF NEVADA, *ex rel.*
EIGHTH JUDICIAL DISTRICT COURT

Respondent.

ON APPEAL FROM THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK
DISTRICT COURT CASE NO. A–14–711200–P

RESPONDENT'S ANSWER TO PETITION FOR REVIEW

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Respondent, State of Nevada, *ex rel*. Eighth Judicial District Court (EJDC), by and through counsel, and pursuant to this Court's *Order Directing Answer to Petition for Review*,[1] hereby provide the following Answer to Appellant, Thomas Knickmeyer's (Knickmeyer), Petition for Review by the Supreme Court, filed on January 5, 2018.[2]

INTRODUCTION

In seeking appeal of the District Court's affirmance of the arbitrator's decision to terminate him, Knickmeyer informed this Court that this case could and should be considered by the Court of Appeals (COA).[3] Now that the COA has, like the District Court, the arbitrator, the hearing officer, and the hearing referee, concluded that his termination was appropriate and that he was provided with all required procedural and substantive due process, he has sought this Court's

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[1] Docket 71372, Document 18-07109. All document numbers contained herein refer to documents filed in this case, Docket 71372.

[2] Document 2018-00683.

[3] Opening Brief at 1 (Document 2017–05191) ("This case should be assigned to the Court of Appeals under NRAP 17(b) as it does not fit the criteria set forth in NRAP 17(a)").

intervention in a last ditch attempt to save his lawsuit.[4] Knickmeyer should not be afforded this opportunity.

This is especially true given that the COA's decision is wholly consistent with statutory construction and interpretation, the doctrine of separation of powers, and consistent with 28 other jurisdictions' unanimous conclusions that courts and law enforcement agencies are mutually exclusive entities.

In short, Knickmeyer seeks this Court's review of the Court of Appeals (COA) well–reasoned, thorough, decision, by claiming that the COA erred when it held that while Knickmeyer is a peace officer as contemplated in the Peace Officer Bill of Rights, NRS 289 *et seq*., the EJDC is not a law enforcement agency. Despite this bold assertion by Knickmeyer, the record and legal principles establish that the COA correctly concluded the plain language of NRS 289 *et seq*. mandated the finding that the EJDC—like all courts—is not a law enforcement agency. This holding is not only consistent with the plain language of

[4] Knickmeyer's federal claims have also been dismissed by the United States District Court of Nevada, *see Knickmeyer v. Nevada ex rel. Eighth Jud. Ct.*, 2017 WL 936624 (D. Nev. March 9, 2017) and the Ninth Circuit Court of Appeals. *Knickmeyer Nevada ex. re. Eighth Jud. Dist. Ct.*, ___ Fed. Appx. ___, 2017 WL 5494029 (9th Cir. Nov. 16, 2017).

NRS 289, but also with the constitutional mandate of separation of powers.

Finally, notwithstanding the COA's correct and clear ruling with regard to the EJDC not being a law enforcement agency, this Court's review is wholly unnecessary given that the arbitrator's decision to terminate Knickmeyer was not contingent on the issue of whether the EJDC was or was not a law enforcement agency. Thus, this Court's review will not result in Knickmeyer's reinstatement, as the termination was justified on various, alternative bases wholly unrelated to the Peace Officer Bill of Rights concerns raised in the Petition.

Accordingly, the Petition should be denied.

THIS COURT'S REVIEW IS UNWARRANTED

A. The COA Did Not Overlook or Misapply Existing Law

Knickmeyer asserts the COA "overlooked and misapplied existing law when it found that 'the plain text of the relevant statute makes clear that the term "law enforcement agency" does not encompass a judicial court such as the EJDC.'"[5] Notwithstanding this assertion, Knickmeyer has failed to provide this Court with any law that the COA either overlooked or misapplied.

[5] Document 2018–00683 (Petition) at 2.

In this regard, Knickmeyer first addresses aspects of NRS 289 the COA either explicitly or implicitly agreed with, as he noted that under NRS 289.150(4), a "peace officer" includes "bailiffs and deputy marshals of the district courts."[6] The COA explicitly acknowledged this definition and therefore held that Knickmeyer, as a judicial marshal, was a peace officer under NRS Chapter 289.[7]

The COA then correctly relied on definitions of "local law enforcement agency" included in NRS 179D.050 and NRS 62A.200, which define "law enforcement agency" as a "sheriff's office," "a metropolitan police department," or a "police department of an incorporated city,"[8] as evidence of the legislature's knowledge of what the term "law enforcement agency" is under Nevada law.

In addition to these uniform definitions, the Miscellaneous Provisions portion of Chapter 289 specifically defines "law enforcement agency" as meaning "a sheriff's office," "a metropolitan police department," "a police department of an incorporated city" and the

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[6] Petition at 2.

[7] *Knickmeyer v. State of Nevada ex. re. Eighth Judicial District Court*, 133 Nev. Adv. Op. 84, 408 P.3d 161, 165 (Nev. App., Nov. 16, 2017).

[8] *See* NRS 62A.200; NRS 179D.050; *Knickmeyer*, 408 P.3d at 166.

"Nevada Highway Patrol."[9] Thus, while the COA failed to note the definition of "law enforcement agency"[10] contained in a different portion of Chapter 289, the presence of the definition within Chapter 289 only provides additional evidence of the soundness of the COA's opinion.

Knickmeyer then attempts to cast doubt on the COA's plain meaning determination of the term "law enforcement agency" by addressing the general "agency" definition contained in § 289.015 of the Nevada Administrative Code (NAC). However, this definition is of no assistance to Knickmeyer as it is contained within a portion of the NAC that addresses the standards and training of peace officers, as opposed to the peace officer's employer.

Contrary to the general definition of "agency" contained in the NAC, the Legislature has defined the term "law enforcement agency" at NRS 289.830, and as part of the definition of "local law enforcement" in

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[9] NRS 289.830(3)(a)(1)–(4).

[10] This failure was most likely due to the EJDC's incorrect assertion that the term "law enforcement agency" was not defined in Chapter 289. *See* Answering Brief at 42 (Document No. 2017–08932). The EJDC apologizes for this error. However, as NRS 289 supports and reinforces the COA, this Court's review is unnecessary to address the omission.

at least two other statutes.[11] Thus, Knickmeyer's reliance on the NAC's definition of "agency" does not call into question the COA's determination. This is especially true given this Court's precedent indicating that the "agency" typically "refer[s] to subdivisions of the executive branch, not divisions of the judiciary."[12]

Knickmeyer next relies on NRS 3.310(10).[13] Knickmeyer's reliance on NRS 3.310(10) is wrong for at least two separate and distinct reasons.

First, NRS 3.310 does not require the court to employ a bailiff or deputy marshal, but rather states that it "may" do so. This permissive language as opposed to mandatory language is required given that this Court made clear that "Nevada's Constitution . . . contains an express provision prohibiting any one branch of government from impinging on the Junctions of another."[14] It is only if the court decides to employ a

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[11] *See* NRS 179D.050 and NRS 62A.200.

[12] *Knickmeyer*, 408 P.3d at 166 (citing *Las Vegas Metro. Police Dep't v. Blackjack Bonding, Inc.*, 131 Nev. ____, _____ n. 4, 343 P.3d 608, 613 n. 4 (2015) and NAC 239.690).

[13] Petition at 4.

[14] *Commission on Ethics v. Hardy*, 125 Nev. 285, 291, 212 P.3d 1098, 1103 (2009) (quoting Const., Article 3, § 1(1)).

bailiff or deputy marshal that they be category I certified.[15] And despite the requirement that they be category I certified under NRS 3.310(10), NRS 289.470(1) makes clear that they, like legislative police officers and other non–traditional peace officers, are employed as category II peace officers, not category I peace officers.[16]

This category II recognition tracks the language of NRS 3.310. Specifically, subjections (3) and (7) of NRS 3.310 provide specific and explicit limitations on the duties of bailiffs and deputy marshals working for a court. Namely, their duties are limited to ensuring that court operations run smoothly. In addition, any duties they may possess as a category I peace officer are limited by specific prohibitions preventing them from "serv[ing] any civil or criminal process" except orders of the court.

Accordingly, NRS 3.310 undermines Knickmeyer's statement that he was "unrestricted in [his] law enforcement capabilities."[17]

Second, NRS 3.310(1) undermines Knickmeyer's argument as the Legislature made clear that any court appointed bailiff or deputy

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[15] *See* NRS 3.310(1),(2) and (8) (using the terms "may" and "if" which denotes permissive as opposed to mandatory action).

[16] *See generally* NRS 289.470(1)–(20).

[17] *See* Petition at 4.

marshal "serves *at the pleasure of the judge* he or she serves."[18] Thus, NRS 3.310's at will employment provision directly contradicts the statutory framework that a law enforcement agency must comply with prior to terminating a peace officer under its employ.[19]

B. It is Clear Courts are Not Law Enforcement Agencies

The COA decision is also consistent with separation of powers jurisprudence throughout the United States. To this end, albeit in different contexts, at least twenty–eight (28) jurisdictions[20] have

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[18] NRS 3.310(1) (emphasis added).

[19] *Compare* NRS 3.310(1)'s at will employment language with requirements for a law enforcement agency to conduct an interview before investigated a peace officer, NRS 289.060, and the requirement that peace officers employed with a law enforcement agency cannot be suspended without pay or have punitive employment action taken against them without an investigation. NRS 289.057.

[20] These jurisdictions include the states of Arizona (*State v. Sutton*, 21 Ariz. App. 550, 551, 521 P.2d 1008, 1009 (1974)), Alabama (Ala. Code § 36–21–40(3), 36–26A–2(1)), California (*Moore v. Fox*, No. B233657, 2013 WL 953995 (March 13, 2013)), Connecticut (*Edwards v. Awd*, No. NNHCV136043343S, 2014 WL 7739171, * 2 (Dec. 31, 2014) (citing Gen. Stats., § 46b–124(a)), *State v. Avery*, CR 16285945, 2017 WL 6273543 (Aug. 16, 2017) (citing Gen. Stats. § 46b–38c(c)(A)–(I)), Delaware (*Tomei v. Sharp*, 902 A.2d 757, 762 (Del. 2006) (citing 19 Del. C. § 1702(4)a–e)), Louisiana (*State v. Lanclos*, 980 So.2d 643, 653 (2008), Maine (*Connolly v. Goodall Hosp.*, No. Civ. A. CV–4–328, 2006 WL 270222, * 2 (Jan. 6, 2006) (citing 26 M.R.S.A. § 833(4)), Michigan (*People v. Smith*, 437 Mich. 293, 303 n. 22, 470 N.W.2d 70, 75 n. 22 (1991) (citing M.C.L. § 712A.18e(13)), Minnesota (*State v. J.R.A.*, 714 N.W. 722, 725 (Minn. App. 2006) (Minn. Stats. §§ 13.82; 609A.01;

concluded that courts and law enforcement agencies are wholly and distinct entities, with law enforcement agencies generally considered

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609A.02(3)), New Jersey (*State v. Brady*, 452 N.J. Super. 143, 167 n. 5, 172 A.3d 550, 564 n. 4 (2017)), Ohio (*State v. Dingus*, 81 N.E.3d 513, 516 (2017) (citing R.C. 2909.15(D)(2)(b)), Utah (*State v. Green*, 108 P.3d 710, 721–22 (2005) (citing Utah Code §§ 76–1–303(c), 53–1–102(1)(c), 53–13–103, 76–8–101(3)), Washington (*Tabor v. Moore*, 6 Wash. App. 759, 763, 496 P.2d 361, 363-64 (1972)), and West Virginia (*Anstey v. Ballard*, 237 W.Va. 411, 434 n. 8, 787 S.E.2d 864, 887 n. 8 (2016)).

In addition to the above states, the following federal court jurisdictions have held or suggested that law enforcement agencies and courts are wholly distinct entities: The Ninth Circuit Court of Appeals (*United States v. Chanen*, 549 F.2d 1306, 1312 (9th Cir. 1977) (citing *In re Grand Jury Proceedings*, 486 F.2d 85, 89-90 (3d Cir. 1973)), the Eighth Circuit Court of Appeals (*United States v. Lucas*, 499 F.3d 769, 776 (2007) (citing *United States v. Parker*, 373 F.3d 770 (6th Cir. 2004), the Northern District of Alabama (*Lane v. Central Ala. Comm. College*, 2012 WL 5873351, * 2 (N.D. Ala. Nov. 20, 2012), the Middle District of Alabama (*Flood v. Dep't. of Indus. Relations*, 948 F. Supp. 1535, 1549–50 n. 54 (M.D. Ala. 1996), the District Court for the District of Columbia (*United States v. Safavian*, 233 F.R.D. 12, 14–15 (D.D.C. 2005)), the Central District of California (*Orantes–Hernandez v. Gonzales*, 504 F.Supp.2d 825, 876 (C.D. Cal. 2007), the Middle District of Florida (*United States v. Aldissi*, 2014 WL 5426630, * 3 (M.D. Fl., Oct. 22, 2014) (citing *Chanen*, *supra*)), the Southern District of Ohio (*Westfall v. Plummer*, 2010 WL 4318586, * 2–3 (S.D. Ohio, Oct. 25, 2010)), the District of New Jersey (*Carlino v. Gloucester City High Sch.*, 57 F. Supp. 2d 1, 35 (D.N.J. 1999) (citing N.J. Stat. Ann. § 34:19–2.c), the Southern District of New York (*ACLU v. Dept. of Justice*, 2016 WL 8259331, * 18 (S.D.N.Y. Aug. 8, 2016), the Eastern District of New York (*Vasile v. Dean Witter Reynolds, Inc.*, 20 F. Supp.2d 465, 477 (E.D.N.Y. Sept. 14, 1998), the Northern District of Texas (*Alford v. Hunt Co.*, 2011 WL 5104504, * 11 (N.D. Texas Oct. 21, 2011), the District of West Virginia (*United States v. Westmoreland*, 982 F. Supp. 376, 378 (D.W.V. Oct. 9, 1997), and the Eastern District of Wisconsin (*United States v. Whiting Paper Co.*, 2009 WL 10677392, * 3 (E.D. Wisc. Dec. 16, 2009)).

part of the executive branch, whereas courts are always considered part of the judicial branch.

All three of Nevada's border states—Arizona, California, and Utah—are part of these twenty-eight jurisdictions.

The Supreme Court of Utah has provided very clear language regarding the constitutional duties of law enforcement agencies stating:

> In its broadest sense, a law enforcement agency may well bring to mind the *whole of the executive branch of government*, the branch charged under our constitution with the duty to "see that the laws are faithfully executed."
>
> * * *
>
> This definition of law enforcement claims substantial statutory support [as law enforcement agency is defined] as "an entity of the federal government, a state or political subdivision of a state . . . that exists *primarily* to prevent and detect crime and enforce criminal laws, statutes, and ordinances."[21]

Here, regardless of what powers deputy marshals may have generally, it cannot be said that the EJDC is *primarily* involved in the enforcement, prevention or detection of crime. Rather, the EJDC's primary duty is to hear and decide legal disputes. Thus, while bailiffs and deputy marshals may have certain duties as part of their employment with the EJDC and other courts that are ancillary to the

[21] *Green*, 108 P.3d at 721–22 (emphasis added).

primary duty of deciding cases (such as providing safety and security), those duties are necessary and appropriate under the courts' inherent powers which provides them with all necessary power to ensure that their primary duty, e.g. to decide legal cases, is fully carried out.[22] The fact that the EJDC, and by extension its employees, have ancillary powers that, at first blush, seem akin to law enforcement functions, does not in any way change the primary function of the court to one of law enforcement. This conclusion was simply and aptly stated by our neighboring state of California when its Court of Appeal made clear that a "court *is not a law enforcement agency*."[23]

Similarly, our third border state, Arizona, has made clear that the executive branch enforces laws "through its law enforcement agencies" whereas the judicial branch is comprised of courts.[24]

The common sense and long–standing conclusion that law enforcement agencies are part of the executive branch, and that

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[22] *See generally City of Sparks v. Sparks Mun. Court*, 129 Nev. 358, 363–65, 302 P.3d 1118, 1128–29 (2013) (citing *Halverson v. Hardcastle*, 123 Nev. 245, 261, 163 P.3d 428, 439–40 (2007), *Galloway v. Truesdell*, 83 Nev. 13, 21, 422 P.2d 237, 243 (1967), and *Blackjack Bonding v. City of Las Vegas*, 116 Nev. 1213, 1218, 14 P.3d 1275, 1279 (2000)).

[23] *Moore*, 2013 WL 953995 at * 15 (emphasis added).

[24] *Sutton*, 21 Ariz. App. at 551, 521 P.2d at 1009.

therefore it is impossible for a court to be a law enforcement agency, was perhaps best stated over fifty years ago by the United States District Court for the District of Columbia where the court stated in *United States v. Mihalopoulos*[25] that "[l]aw enforcement agencies are attached to the executive branch of the Government. Consequently under our basis and fundamental tripartite division of the departments of the Government, *the judiciary has no power of supervision or control over them*."[26] At least one state, Washington, has relied on this precise language to make the same conclusion based on state constitutional separation of power principles.[27]

As such, the COA's determination that the EJDC is not a law enforcement agency followed straightforward statutory interpretation, is consistent with the definitions of "law enforcement agency" used by the Legislature in at least three statutes (including in a different section of Chapter 289), and tracked decades of state and federal constitutional separation of power principles.

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[25] 228 F. Supp. 994 (D.D.C. 1964).

[26] *Id*. at 1010 (emphasis added).

[27] *See Tabor v. Moore*, 6 Wash. App. 759, 763, 496 P.2d 361, 363 (1972).

Thus, this Court's review of this straight forward, consistent, and noncontroversial position is not warranted.

C. Review Will Not Result in Knickmeyer's Reinstatement

Finally, notwithstanding the correct legal conclusion of the COA with regard to its common sense and uniformly consistent holding that courts are not law enforcement agencies as a matter of both statutory interpretation and constitutional necessity, this Court's review is unwarranted because even if this Court were to address the law enforcement agency aspect of the COA opinion, the result would be the same: Knickmeyer was appropriately terminated.

To this end, the COA opinion noted Knickmeyer's failure to "request any [] discovery below or object to any failure" of not receiving the information he claims he is entitled to under Chapter 289.[28] In addition, even assuming the argument had not been waived, the arbitrator made clear in his ruling that, despite the available progressive discipline options, "Knickmeyer's conduct was 'sufficiently egregious' to justify termination without first imposing less severe

[28] *Knickmeyer*, 408 P.3d at 164–65 (citing *Carrigan v. Comm'n on Ethics*, 129 Nev. 894, 905 n. 6, 313 P.3d 880, 887 n. 6 (2013)).

forms of discipline" and that he did not rely on "the prior incidents [of misconduct] in reaching his decision."[29]

Thus, even assuming this Court wished to provide additional insight and instruction to the District Courts, practicing members of the bar, and the employers, employees, and residents of this great state with regard to the issue of why a court is not a law enforcement agency, this case is not the proper vehicle to provide that guidance. This is because, regardless of any further instruction this Court may provide (including any decision to go against the holdings of 28 other jurisdictions), Knickmeyer's circumstances would not be changed.

This is because nothing about this Court's review of the COA's decision regarding whether the EJDC is a "law enforcement agency" would call into question the arbitrator's decision that termination was warranted without progressive discipline and without taking into account Knickmeyer's previous disciplinary issues and concerns. In this regard, the arbitrator concluded that at least one, and most likely two of Knickmeyer's inappropriate actions warranted immediate termination. Specifically, the arbitrator concluded that Knickmeyer's "willingness to misuse his position as a peace officer to get even with or retaliate

[29] *Knickmeyer*, 408 P.3d at 164–65, 168.

against [an attorney] for filing a complaint against him distracted him from his duties and could easily have jeopardized the safety and security of the building and people in it," and that therefore that "misconduct [was] sufficiently egregious . . . to warrant termination in and of itself."[30]

The arbitrator also implicitly held that Knickmeyer's actions of accusing his supervisor of falsifying an application "clearly crosses the line"[31] that would be a serious offense in any work place setting, but that it was "totally unacceptable when done by peace officers charged with the safety and security of a government building."[32]

Given the record reviewed by the arbitrator, which included an eleven (11) page hearing master decision following the Step I hearing[33] and an eight (8) page hearing officer decision following the Step II hearing,[34] the District Court and the COA both properly concluded that Knickmeyer failed to establish by clear and convincing evidence any

[30] Answering Brief at 25 (citing 1 AA 57).
[31] *Id*. at 24 (citing 1 AA 56–57).
[32] *Id*. (citing 1 AA 57).
[33] 1 AA 24–34.
[34] 1 AA 36–43.

statutory or common law reasons to reverse the arbitrator's fourteen (14) page decision[35] upholding his termination.

CONCLUSION

The COA's conclusion that the EJDC is not a law enforcement agency is consistent with the statutory scheme set forth in NRS 289 *et seq*., court decisions and statutory schemes throughout the nation, and the doctrine of separation of powers. Indeed, there are no cases from any jurisdiction that calls into question this penultimate holding of the COA. Thus, this Court's review is not warranted.

The Petition should also be denied because, notwithstanding the COA's conclusions regarding the applicability of NRS 289, nothing about that conclusion has any bearing on the ultimate findings and conclusion of the arbitrator or the two different administrative officers, all of whom concluded that Knickmeyer's actions warranted termination as opposed to progressive discipline.

The record clearly establishes the arbitrator did not exceed his authority. The record also confirms that the arbitrator did not reach his findings and conclusions in manifest disregard to the law. Finally, the

[35] 1 AA 45–58.

arbitrator's decision was based on substantial evidence and therefore was neither arbitrary nor capricious.

Consequently, Knickmeyer has no statutory or common law grounds to have the Arbitration Decision set aside. The District Court was correct in denying the Amended Petition. The COA was correct when it affirmed that decision. As such, this Court's intervention in this case is neither necessary nor warranted.

Accordingly, the EJDC respectfully requests that this Court deny the Petition, and permit the COA opinion to stand.

Respectfully submitted this 12th day of March, 2018.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Office Word 2013 in size 14 font in double spaced Century Schoolbook.

I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 3,580 words; or

Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to

sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 12th day of March, 2018.

ADAM PAUL LAXALT
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CERTIFICATE OF SERVICE

Pursuant to NEV. R. APP. P. 25(5)(c), I hereby certify that, on the 12th day of March, 2018, I electronically served the foregoing **RESPONDENT'S ANSWERING BRIEF** by electronic means to all parties who are registered users of the court's electronic filing system as follows:

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