

42058-9-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

State of Washington

v.

DANIEL E. M. KLEIN

42058-9

On Appeal from the Superior Court of Clallam County

Cause No. 09-1-00458-6

The Honorable George Wood

REPLY BRIEF

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I. **ARGUMENTS IN REPLY**

1. This Court may take judicial notice of the names of the judges presiding at the relevant trial court proceedings.
2. Contrary to this Court's order on remand, Appellant did not receive the benefit of a different judge on remand, because the second judge was inextricably involved in the first proceeding and had previously determined the sentence vacated by the remand order.
3. Klein was not fully informed of the consequences of his plea because the trial court failed to inform him that, notwithstanding the order of this Court granting him specific performance of the plea agreement, the judge would not follow the negotiated sentencing recommendation.
4. The State concedes that the community custody condition regarding pornography is unconstitutionally vague because it is subject to the subjective opinion of a therapist or Community Corrections Officer.

II. **SUMMARY OF THE CASE**

This is Daniel E.M. Klein's second appeal challenging his sentence upon a plea of guilty to two counts of communicating with a minor for immoral purposes in violation of RCW 9.68A.090(2). Following the first appeal, this Court remanded to the Clallam County Superior Court for resentencing after the State conceded that the prosecutor had violated the plea agreement. *State v. Klein*, Unpublished Opinion filed January 6, 2011, Slip Op. 40683-7 at 1 (*Klein I*).

The primary judge presiding over Klein's case in *Klein I* was the Honorable George Wood. Judge Wood presided over most of the pretrial hearings, with Judge Kenneth Williams occasionally filling in as a substitute. Judge Wood accepted Mr. Klein's guilty plea. CP 57. Judge Wood ordered a Pre-Sentence Investigation (PSI). State's Supp. CP 68. The Department of Corrections directed the PSI report to the attention of Judge Wood. PSI filed April 23, 2010, Appellant's Supp. CP ____ (Sub. 73). Appendix F to the Judgment and Sentence bears Judge Wood's name printed under the signature line. CP 46-47. The State addressed a motion to continue the sentencing to Judge Wood. Sub. 70, filed March 26, 2010, Appellant's Supp CP ____.

This was Judge Wood's case.

As it happened, Judge Williams presided over the actual sentencing on April 29, 2010, and signed the Judgment and Sentence. CP 32, 44. Judge Williams lined out Judge Wood's name on the Appendix F and wrote in a couple of modifications to the conditions. CP 46-47.

Based on Klein's criminal history, the standard range sentence was 51-60 months. After intensive negotiations, the parties agreed that the State would recommend 51 months, the low end of the range. *Klein I*, Slip Op. at 1; RP 11.¹ At sentencing, however, the prosecutor departed from the agreement and recommended a sentence between 51 and 60 months. Judge Williams imposed 60 months, the top of the standard range. *Klein I* Slip Op. at 1; Report of Proceedings (April 29, 2010) at 3-4.²

This Court remanded, giving Mr. Klein the option to withdraw the plea or to elect specific performance. If Klein elected specific performance, the Court ordered that "he should be resentenced "by a different judge" and "consistent with this opinion." *Klein I*, Slip Op. at 1.

Klein decided to maintain his guilty plea and opted for specific performance pursuant to this Court's order. RP 6. Contrary to the order for a different judge, however, Judge Wood presided over the proceedings on remand. RP 1. Judge Wood further circumvented this Court's order

¹ RP refers to the April 26, 2011 proceedings on remand.

² This Court has temporarily imported this transcript from the record of 40683-7. Order filed October 4, 2011.

for a different judge, moreover, by consulting the minutes of the first sentencing proceeding. RP 3.

On remand, the State duly asked Judge Wood to follow the recommendation in the plea agreement. RP 8. The defense likewise asked the court to follow the State's recommendation for 51 months. RP 11. Counsel advised Judge Wood that plea agreement represented a joint recommendation and that the agreed sentence had been arrived at by way of an intensive process of negotiations. "[W]e worked very long to reach an agreement." RP 11.

Judge Wood duly recited the boilerplate advisement that a sentencing court was not bound by the State's recommendation but could impose any sentence within the five-year statutory maximum. Klein acknowledged this. Judge Wood did not mention this Court's remand order. Specifically, the court not alert Klein that the Court of Appeals order that he receive "specific performance" of the agreement did not mean he would receive the agreed sentence. RP 7.

Klein elected to proceed to sentencing. The judge explained that, having read the PSI and Mr. Klein's history, the court perceived Klein as a danger to society and that he deserved the maximum sentence. Accordingly, Judge Wood rejected the plea agreement and reimposed the vacated sentence of 60 months. RP 12.

Defense counsel objected that “pornography” condition in Appendix F to the Judgment and Sentence was impermissibly vague because it left the definition of pornography to the subjective opinion of Klein’s therapist and Community Corrections, Judge Wood left it the way it was. RP 8-10. This appeal followed. CP 34.

III. **ARGUMENT**

1. THIS COURT MAY TAKE JUDICIAL NOTICE OF THE IDENTITY OF THE PRESIDING JUDGES.

As a preliminary matter, the State takes issue with Klein’s efforts to establish Judge Wood’s continuing involvement in the prosecution of *Klein I*. Brief of Respondent (BR) 7.

The Court appointed different appellate counsel to represent Mr. Klein in his second appeal. Accordingly, unlike the State, Mr. Klein’s counsel did not have the benefit of the transcripts from *Klein I* while preparing the Opening Brief in this appeal. But one of Mr. Klein’s issues here is whether the Clallam County Superior Court abided by the spirit as well as the letter of this Court’s remand order that a different judge should conduct Klein’s new plea proceeding.

For this reason, Klein asks the Court to take judicial notice of the identity of the presiding judges at the proceedings that culminated in the

denial of due process in *Klein I*. Klein has filed certified copies of the Superior Court Clerk's Minutes, solely to show the name of the presiding judges and for no other purpose.

A reviewing court may take judicial notice of procedural facts not in the trial record. *State v. Cyr*, 40 Wn.2d 840, 844, 246 P.2d 480 (1952). And the Court will take judicial notice of facts conceded by the State on appeal. *See, e.g., State v. Bashaw*, 169 Wn.2d 133, 138, note 1, 234 P.3d 195 (2010).

The State does not dispute that Judge Wood has been the primary presiding judge throughout the prosecution of Mr. Klein.

2. JUDGE WOOD WAS NOT A "DIFFERENT JUDGE" AS CONTEMPLATED BY THIS COURT'S REMAND ORDER.

The State claims Judge Wood was a "different" judge as contemplated by the remand order. BR 10. But, in addition to the minutes, the transcripts imported into this record from Appeal No. 40683-7 independently establish that *State v. Klein* was Judge Wood's case from start to finish. The cover page for the transcripts reads:

January 7, 2010	Wood
January 14, 2010	Wood
January 15, 2010	Williams
March 18, 2010	Wood
March 22, 2010	Wood
April 29, 2010 (Sentencing)	Williams

The *Klein I* transcripts show that the two dates presided over by Judge Williams were set-overs from a date originally fixed by Judge Wood. See, January 14, 2010 RP at 15. In particular, Judge Wood had set the April 29, 2010 sentencing for April 15, 2010, presumably a date when he expected to preside. March 22, 2010 RP at 10. In other words, Judge Williams was merely filling in.

Thus, the record strongly suggests that, although the Judgment and sentence was signed by Judge Williams in *Klein I* and by Judge Wood on remand, the “difference” between these judges is illusory. This was Judge Wood’s case, and Judge Wood cannot be characterized as a neutral, independent voice on remand.

It was Judge Wood who reviewed and accepted Klein’s Statement on Plea of Guilty. Judge Wood accepted the plea. Judge Wood ordered and reviewed the Pre-Sentence Investigation report. RP And Judge Wood clearly intended to do the sentencing. Judge Williams substituted because the State changed the sentencing date from April 15 to April 29, 2010, but not before Judge Wood determined the sentence and prepared his proposed Appendix F to the Judgment and Sentence.

Accordingly, to observe both the letter and the spirit of this Court’s remand order, a judge other than Wood should have conducted the

proceedings on remand. Mr. Klein was constructively denied the benefit of a different judge.

As discussed in the opening brief, the most effective remedy is for this Court to vacate the sentence again and remand for resentencing with instructions to assign the matter without comment to a visiting judge.

3. **KLEIN'S GUILTY PLEA ON REMAND
WAS NOT KNOWING, INTELLIGENT
AND VOLUNTARY.**

The State claims that allowing a defendant to plead guilty without informing him that the judge has secretly decided not to honor the negotiated sentencing provisions of the plea agreement is compatible with constitutional due process, consistent with Washington law and condoned by public policy. This is wrong.

A. **The Plea Proceeding Was Contrary to
Washington's Sentencing Reform Act.**

The State argues that the SRA does not prohibit a superior court judge from accepting a guilty plea without advising the defendant that the court intends to reject a key provision of the plea agreement as inconsistent with the interests of justice. BR 14. This is wrong.

This Court reviews questions of statutory interpretation de novo. *State v. Alvarado*, 164 Wn.2d 556, 561, 192 P.3d 345 (2008). If the statute's meaning is plain, that meaning must be given effect as an

expression of legislative intent. *State v. Jacobs*, 154 Wn.2d 596, 600, 115 P.3d 281 (2005). The Court must read compound statutes in harmony and give effect to each element. *See, State v. Bays*, 90 Wn. App. 731, 735, 954 P.2d 301 (1998). The Court interpret statutes so as not to render any portion meaningless or superfluous. *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003). Finally, if a provision is subject to more than one reasonable interpretation, it is ambiguous. *Jacobs*, 154 Wn.2d at 600-01. In that case, the Rule of Lenity imposes an interpretation that favors defendants, absent legislative intent to the contrary. *Id.* at 601.

A plea agreement is a contract between the defendant and the State to which the sentencing court is not bound. *State v. Sledge*, 133 Wn.2d 828, 839 n.6, 947 P.2d 1199 (1997). Before conviction, however, the court is constrained by the Sentencing Reform Act.

Plea proceedings are governed by RCW 9.94A.431. This statute contains two sections. By their plain language, section (1) applies pre-conviction, and section (2) applies post-conviction. RCW 9.94A.431(2) requires the sentencing court to notify the defendant that it is not bound by the prosecutor's sentencing recommendation. RCW9.94A.431(1), by contrast, applies at the time the court is asked to accept a guilty plea.

By the plain language of the statute, "if a plea agreement has been reached by the prosecutor and the defendant ... , they shall at the time of

the defendant's plea state to the court, on the record, the nature of the agreement and the reasons for the agreement. ... The court, at the time of the plea, shall determine if the agreement is consistent with the interests of justice and with the prosecuting standards. If the court determines it is not consistent with the interests of justice and with the prosecuting standards, the court shall, on the record, inform the defendant and the prosecutor that they are not bound by the agreement and that the defendant may withdraw the defendant's plea of guilty, if one has been made, and enter a plea of not guilty. RCW 9.94A.431(1).

Following the usual practice, the *Klein* court conflated the two sections of 94A.431. But it is not sufficient to inform an already-convicted defendant at the time of sentencing that the court is not bound by the plea agreement. The defendant must be informed "at the time of the plea" that the court is not inclined to honor the agreement. This comports with the constitutional mandate to fully inform the defendant of the consequences of his plea. The fact that the judge has no intention of going along with the recommended sentence is vital information without which the defendant cannot make an intelligent decision whether or not to plead guilty or go to trial. The time to give him this information is before he irrevocably commits to a guilty plea. Which is why RCW 9.94A.431(1) comes before (2).

Here, at the time of entering the plea the court rejected the agreement, having secretly concluded that the recommended sentence was inconsistent with the interests of justice. Note that this was not the sentencing court referred to in RCW 9.94A.431(2). A sentencing court does not come into existence until after a conviction. The governing provision was RCW 9.94A.431(1), which compelled the court to inform the defendant that it viewed the agreement as inconsistent with the interests of justice and that the defendant had the right to reconsider the proposed plea. This ensures that the defendant can make an informed and intelligent choice whether to go ahead and plead guilty notwithstanding the failure of the sentencing agreement, or to change his plea to not guilty.

B. The State's Proposed Interpretation of RCW 9.94A.431(1) is Unconstitutional.

The interpretation of RCW 9.94A.431(1) urged by the State renders the statute unconstitutional. Where possible, this Court must interpret a statute in a manner that upholds its constitutionality. *City of Seattle v. Webster*, 115 Wn.2d 635, 641, 802 P.2d 1333 (1990).

It violates due process for a court to accept a guilty plea without an affirmative showing that the plea was made intelligently and voluntarily. *State v. Barton*, 93 Wn.2d 301, 305, 609 P.2d 1353 (1980); *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969). A plea

is not intelligent and voluntary unless the defendant is fully informed of the consequences of his plea before the plea is entered. *Id.* This fundamental constitutional principle is reflected in Washington's rules of criminal procedure, which establish requirements even beyond the constitutional minimum. *Wood v. Morris*, 87 Wn.2d 501, 508, 554 P.2d 1032 (1976). The court is charged with ensuring that a guilty plea is made "with an understanding of the nature of the charge and the consequences of the plea." CrR 4.2(d); *Wood*, 87 Wn.2d at 508. In the absence of clear and convincing extrinsic evidence, the record of the plea hearing must affirmatively disclose that a guilty plea was made with an understanding of the full consequences of the plea. *Barton*, 93 Wn.2d at 304; *Wood*, 87 Wn.2d at 506. This requires the trial judge's "active participation" in 'canvassing the matter with the accused.' *Id.*

These fundamental due process principles simply cannot be reconciled with the practice of a court withholding from the defendant at the time of entering a guilty plea, the critical information that the judge subjectively decided not to follow the agreed sentencing recommendation.

C. The Plea Proceeding Contravened Washington Case Law.

The case law is consistent with this interpretation of RCW 9.94A.431 and CrR 4.2(f). The trial court has the discretion to reject a plea agreement the terms of which it deems terms inconsistent with the

interests of justice, but the court must disclose its rejection of the agreement at the time of the plea and inform the defendant of his options. *State v. Conwell*, 141 Wn.2d 901, 909, 10 P.3d 1056 (2000), citing *State v. Rhode*, 56 Wn. App. 69, 73, 782 P.2d 567 (1989).

In *Conwell*, the superior court deemed the plea agreement inconsistent with the interests of justice and rejected it. The court then entered a plea of not guilty on its own motion without consulting the defendant. *Conwell*, 141 Wn.2d at 909. The reviewing court reversed on the ground that the defendant may have preferred to plead guilty anyway and had the right to consider that option.

Here, as in *Conwell*, the court rejected the proposed plea agreement as inconsistent with the interests of justice. But, rather than pleading Klein not guilty, the judge went ahead and allowed Klein to plead guilty without alerting him he was about to step on a land mine.

This contravened the constitutional mandate to fully inform the defendant of the consequences of his plea. It violated RCW 9.94A.431(1) and CrR 4.2(f). Having decided to reject the plea agreement, the court was compelled by CrR 4.2(f) to so inform the defendant so as “give him a voice.” *Conwell*, 141 Wn.2d at 910. Klein had the absolute right to make a fully informed choice whether to go ahead and plead guilty without benefit of an agreement, or to enter a plea of not guilty. *Id.*

**D. The Plea Proceedings Violated
Basic Contract Principles.**

In *Klein I*, this Court explained that a plea agreement is to be enforced because it is “analogous to a contract.” *Id.*, citing *State v. Harrison*, 148 Wn .2d 550, 556, 61 P.3d 1104 (2003). Moreover, a “defendant’s underlying contract right is constitutionally based and therefore reflects concerns that differ fundamentally from and run wider than those of commercial contract law.” *Harrison*, 148 Wn.2d at 556-57, citing *Santobello v. New York*, 404 U.S. 257, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971); *United States v. Harvey*, 791 F.2d 294, 300 (4th Cir.1986).

A contract exists and will be judicially enforced when the parties mutually assent to its essential terms. *Weiss v. Lonquist*, 153 Wn. App 502, 511, 224 P.3d 787 (2009). The essential elements of a valid executory contract ordinarily include “competent parties, a legal subject matter, and a valuable consideration[.]” *Lager v. Berggren*, 187 Wash. 462, 467, 60 P.2d 99 (1936). There must be mutuality of obligation, and all the material terms of the contract must be complete and reasonably certain. *Berggren*, 187 Wash. at 467. And interpretation of a contract is a matter of law so long as the analysis does not depend on extrinsic evidence or if only one reasonable inference can be drawn from the

extrinsic evidence. *Tanner Elec. Coop. v. Puget Sound Power & Light*, 128 Wn.2d 656, 674, 911 P.2d 1301 (1996).

The *Klein* plea agreement contained all the essential elements of an enforceable contract.

The Court applies basic principles of contract to plea agreements. “Plea agreements are contracts.” *Sledge*, 133 Wn.2d at 838-839. There is an implied duty of good faith and fair dealing in every contract, and the law specifically imposes an implied promise by the State to act in good faith in plea agreements. *Sledge*, 133 Wn.2d at 839.

Sledge goes on to hold that the court is not bound by the plea agreement, citing former RCW 9.94A.090(2) (recodified in 2000 as RCW 9.94A.431(2)). But, as discussed above, it is section .431(1), not .431(2) that governs entry of the plea.

If, after having exercised its discretion to strike a bargain with a defendant, “the Government seeks to avoid those arrangements by using the courts, its decision so to do will come under scrutiny. If it further appears that the defendant, to his prejudice, performed his part of the agreement while the Government did not, the indictment may be dismissed.” *United States v. Carter*, 454 F.2d 426, 428 (4th Cir.1972).

It is unthinkable that a civil court would, on its own motion, rescind a key contract term that indisputably reflected the intent of the

parties and was mutually agreed upon after specific negotiations in which the parties “worked very long to reach an agreement.” RP 11. Yet plea agreements in criminal prosecutions are more than simple common law contracts. They concern fundamental rights of the accused, and constitutional due process considerations come into play. *Sledge* 133 Wn.2d at 839.

The courts disapprove of civil practitioners who lie in the weeds to catch their opponents unawares. The practice is even less defensible when judges do it to criminal defendants.

E. The Plea Proceeding Was Not Consistent With This Court’s Remand Order.

In order to ensure that Mr. Klein was fully informed about the consequences of his plea, the court, at minimum, should have discussed this Court’s remand order in its colloquy and ascertained on the record that Klein understood, not only that the judge was inclined to ignore the State’s sentencing recommendation, but also that this Court’s remand order granting specific performance of the plea agreement did not bind the court to impose 51 months instead of 60 months.

The terms of a plea agreement are defined by what the defendant reasonably understood them to be when she entered her plea. *State v. Cosner*, 85 Wn.2d 45, 51-52, 530 P.2d 317 (1975). *See also United States*

v. *Quan*, 789 F.2d 711, 713 (9th Cir.) (reviewing court looks to what the defendant reasonably understood when he entered the plea), *cert. dismissed*, 478 U.S. 1033, 107 S. Ct. 16, 92 L. Ed. 2d 770 (1986). Washington courts have recognized that a trial judge’s promise of a standard range sentence “could easily sway a defendant to plead guilty.” *State v. Wakefield*, 130 Wn.2d 464, 475, 925 P.2d 183 (1996). The same applies to an order by this Court granting specific performance. A lawyer arguably would recognize that the remand order was not technically a promise, but it was “manifestly reasonable” that an unschooled defendant would understand the order as requiring the court to sentence him to 51 months. *See Wakefield*, 130 Wn.2d at 481, Sanders, J., dissenting.

Although the court at sentencing duly reminded Mr. Klein that it was not obliged to follow the State’s sentencing recommendation, it is clear from the record that Klein did not understand this at the time he entered his plea. He was stunned and distraught when Judge Wood imposed the same sentence on remand. “This is not fair, man. It is not fair. The deal was 51 months. The deal was 51 months.” RP 7, 15-16.

F. The Plea Proceeding Contravened Public Policy.

Finally, the State contends that accepting Mr. Klein’s decision to maintain his plea of guilty while keeping him ignorant of the court’s

intention to reject the negotiated sentencing recommendation furthers public policy. This argument fails.

It is well-settled that strong public policy encourages guilty pleas pursuant to voluntary and intelligent plea agreements. *Klein I*, Slip Op. at 1, citing *In re Pers. Restraint of Breedlove*, 138 Wn.2d 298, 309, 979 P.2d 417 (1999). Accordingly, where, as here, the government and the defendant have negotiated a plea agreement, public policy requires that the sentencing court honor not only the defendant's promises in the agreement but also those of the prosecutor.

The State characterizes Mr. Klein's expressions of shock and outrage as "buyer's remorse." BR 5. The analogy is spot on. Mr. Klein reacted exactly like the buyer of a used car who has been subjected to a "bait-and-switch" transaction.³ Just as consumers prefer to deal with honest brokers, criminal defendants are more likely to entertain plea offers if they can be confident that their understanding of the consequences of the plea reflects reality. Requiring a defendant to gamble with his freedom by concealing the true consequences of the plea until after he is to irrevocably committed is a tactic better suited to a television game show

³ Bait and switch describes the deceptive (and unlawful) practice of advertising an item at an attractive price in order to draw a customer to the store to sell him another similar product that is more profitable to the advertiser. *Walker v. Wenatchee Valley Truck & Auto Outlet, Inc.*, 155 Wn. App. 199, 215, 229 P.3d 871 (2010), citing *Tashof v. F.T.C.*, 437 F.2d 707, 709 n. 3 (D.C.Cir.1970).

than a courtroom. The practice demeans the judicial process. To suppose it encourages defendants to plead is simply deluded.

Contrary to the State's concerns, a fully informed defendant may very well decide to go ahead and plead guilty to the reduced charges resulting from the plea bargain notwithstanding full disclosure by the judge, with the hope his counsel can get a break on the sentence even without the prosecutor's recommendation.

Public policy does demand that the ultimate power to fix sentences be wielded by judges, not prosecutors. But the reason for this is to interpose the protection of the courts between hapless defendants and over-zealous prosecutors. No public benefit is achieved, by contrast, by permitting an over-zealous judge to override an agreed sentence for the purpose of exacting a more severe penalty than the people, in the person of the prosecutor, have deemed appropriate in a particular case.

Ultimately, the purpose of plea agreements is to meet public's interest in guaranteeing that defendants are fully informed of the consequences before they enter a guilty plea. Eliminating the bait and switch element can only ennoble our courts and improve the plea bargaining process.

As a final policy consideration, it was not in the public interest for Mr. Klein's sentencing courts to ignore defense counsel's argument that

imposing the statutory maximum of 60 months would preclude any post-release supervision to ensure that Mr. Klein was staying out of trouble. 4/29/2010 RP 15. The community would benefit more from a sentence of a shorter period of incarceration followed by post-release supervision.

The Court should reverse and remand yet again and remand with instructions to enter a sentence of 51 months with 9 months community supervision. Failing that, the Court should remand for a new sentencing hearing at which Klein is fully informed of the court's view of the justiciability of the plea agreement and has the opportunity to make an fully informed decision whether or not to maintain his plea.

4. THE PORNOGRAPHY RESTRICTION
IS UNCONSTITUTIONALLY VAGUE.

The State concedes that Appendix F to the Judgment and Sentence is unconstitutionally vague to the extent that it leaves the determination of what constitutes pornography to the subjective predilections of corrections officers. CP 23.

Such conditions are unconstitutionally vague under First Amendment principles that are well established in Washington. *State v. Bahl*, 164 Wn.2d 739, 757, 193 P.3d 678 (2008). Specifically, the sentencing court may not impose a pornography condition whereby a

community corrections officer will decide arbitrarily what falls within the condition. *Bahl*, 164 Wn.2d at 755-56.

The remedy is to vacate the Judgment and Sentence and remand for resentencing. *State v. Valencia*, 169 Wn.2d 782, 795, 239 P.3d 1059 (2010).

IV. **CONCLUSION**

For the foregoing reasons, the Court should vacate the Judgment and Sentence and remand for a new hearing before a truly independent judge at which Mr. Klein is to be fully advised of the consequences of pleading guilty at the time entering his plea.

Respectfully submitted this 11th October, 2011.

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CERTIFICATE OF SERVICE

Jordan McCabe certifies that opposing counsel was served electronically via the Division II portal: Brian Wendt, Clallam County Prosecutors Office: bwendt@co.clallam.wa.us

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