

No. 45533-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

JOSHUA PETTIS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR JEFFERSON COUNTY

BRIEF OF APPELLANT

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A. SUMMARY OF ARGUMENT

Joshua Pettis was initially charged with first degree theft for removing portions of a steel bridge from United States Forest Service land. Because both parties agreed the primary concern at sentencing was substance abuse treatment, the State permitted Mr. Pettis to plead guilty to possession of methamphetamine instead.

In the plea statement, the State indicated it would recommend 12 months community custody with substance abuse treatment and \$188,000 in restitution for the bridge. Mr. Pettis did not agree to the State's recommendation or agree to pay restitution in the plea statement or during the subsequent hearing on the change of plea. Because there was no causal connection between the losses incurred and the charged crime, and Mr. Pettis did not agree to pay restitution, the trial court lacked statutory authority to order restitution and the order is void. In addition, Mr. Pettis's attorney did not challenge the court's authority to impose this order, denying Mr. Pettis the effective assistance of counsel.

Alternatively, the restitution order should be dismissed and remanded for a new hearing because the State presented insufficient evidence of the amount of loss attributable to Mr. Pettis, requiring the

trial court to rely on speculation and conjecture to determine the award in violation of Mr. Pettis's due process rights.

B. ASSIGNMENTS OF ERROR

1. The trial court lacked statutory authority to enter the restitution order.

2. Mr. Pettis's right to effective assistance of counsel was violated when his attorney failed to challenge the court's authority to enter the restitution order.

3. There was insufficient evidence for the amount of the restitution award.

4. The trial court erred when it entered the restitution order of \$62,666 against Mr. Pettis.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A court's authority to impose restitution is derived entirely from statute, which requires a causal connection between the loss and the crime charged or the defendant's express agreement to pay restitution for an uncharged crime. Where the charged crime had no causal connection to the losses incurred by the United States Forest Service and Mr. Pettis did not agree to pay restitution, must the Court reverse and dismiss the order of restitution?

2. A defendant has a Sixth Amendment and Article I, section 22 right to counsel and to the effective representation of counsel. A defendant is entitled to effective assistance of counsel at a restitution hearing. Where trial counsel unreasonably failed to challenge the court's authority to impose restitution, and there is a reasonable probability that, but for this failure, the result would have been different, is Mr. Pettis entitled to a reversal of the order and a new hearing?

3. The Due Process Clause of the Fourteenth Amendment and Article I, section 3 require that an award of restitution be supported by substantial credible evidence, which requires that the court not rely on speculation or conjecture. The State presented evidence of a total amount of loss, but no evidence regarding the amount of loss attributed to Mr. Pettis. Where the trial court was forced to formulate its own speculative equation to determine the amount of the loss incurred as a result of Mr. Pettis's actions, was there insufficient evidence to support the restitution award?

D. STATEMENT OF THE CASE

Joshua Pettis was charged with first degree theft after the State alleged he stole parts of a steel bridge that was stored in a large pit on

United States Forest Service (“Forest Service”) land. CP 1-4; RP 71.

Witnesses observed Mr. Pettis and another man cutting the bridge apart with an acetylene blowtorch and loading it on to a flatbed trailer. RP 70. Officers stopped Mr. Pettis on the highway based on the information provided by the witnesses. RP 87.

Deputy Derek Allen estimated Mr. Pettis had approximately two tons of steel in the back of his pick-up truck at the time of the stop. RP 89. He testified Mr. Pettis admitted to taking steel on two separate occasions and that he took approximately five tons total. RP 88. Mr. Pettis later testified that when he removed the steel he believed he was performing legitimate work for a friend, who had directed him to take it in exchange for pay. RP 156.

Mr. Pettis attempted to plead guilty to a reduced charge of theft in the second degree, seeking a residential drug offender sentencing alternative (DOSA). RP 4. However, this was withdrawn after the trial court noted that a DOSA was not available given the low standard range. RP 6. The parties returned a week later, having negotiated a dismissal of the theft charge and a plea to possession of methamphetamine instead. RP 8. The State did not have probable cause to charge Mr. Pettis with possession of methamphetamine, but

some mention of methamphetamine was “embedded in the police reports,” and the parties agreed that the primary concern was getting Mr. Pettis into substance abuse treatment. RP 10-11. Because Mr. Pettis was ineligible for a DOSA, the State recommended a sentence of 12 months community custody with treatment. RP 9-10, CP 10.

As part of its recommendation, the State requested \$188,000 in restitution for the portions of the bridge discovered missing by the Forest Service. CP 10. At the restitution hearing, the State did not present an itemized cost bill, so the trial court used its own “algebraic equation” and imposed restitution in the amount of \$62,666. CP 27-28; RP 189. It then lowered this amount to \$24,000 after taking Mr. Pettis’s financial circumstances into account. RP 192. However, upon the State’s motion for reconsideration, the trial court reinstated the full \$62,666. CP 72. Mr. Pettis appeals the restitution order.

E. ARGUMENT

1. The trial court acted without authority when it imposed restitution for an uncharged crime.

“A court’s authority to impose restitution is statutory.” State v. Griffith, 164 Wn.2d 960, 965, 195 P.3d 506 (2008); State v. Davison, 116 Wn.2d 917, 919, 809 P.2d 1374 (1995). Pursuant to RCW 9.94A.753(5), restitution is permitted only for losses that are “causally

connected to the crime charged.” Griffith, 164 Wn.2d at 965; see also State v. Enstone, 17 Wn.2d 675, 680, 974 P.2d 828 (1999). Restitution may not be imposed based on a general scheme or acts connected with the charged crime, if the acts are not a part of the charge. State v. Dauenhauer, 103 Wn. App. 373, 378, 12 P.3d 661 (2000). “The losses must be the result of the ‘precise offense charged.’” State v. McCarthy, 178 Wn. App. 290, 297, 313 P.3d 1247 (2013). When the costs imposed on the defendant were not directly related to the crime of conviction, the appellate courts have repeatedly reversed. Id. at 297.

The only exception to this rule is when the defendant “expressly agrees to pay restitution for crimes for which [he] was not convicted.” Griffith, 164 Wn.2d at 966. Pursuant to RCW 9.94A.753(5):

restitution shall be ordered to pay for an injury, loss, or damage if the offender pleads guilty to a lesser offense or fewer offenses and agrees with the prosecutor’s recommendation that the offender be required to pay restitution to a victim of an offense or offenses which are not prosecuted pursuant to a plea agreement.

As part of any guilty plea, there must be an express agreement to pay restitution for crimes for which the defendant was not convicted.

Dauenhauer, 103 Wn. App. at 378.

When the defendant challenges the legal basis for an award of restitution, this Court does not defer to the trial court. McCarthy, 178 Wn. App. at 296. A trial court’s authority to order restitution under the statute is reviewed de novo. State v. Oakley, 158 Wn. App. 544, 552, 242 P.3d 886 (2010).

- a. There was no causal connection between the charged offense and the restitution imposed.

Mr. Pettis was initially charged with first degree theft. CP 1-2. However, because both parties agreed Mr. Pettis needed treatment for substance abuse, the State allowed Mr. Pettis to plead guilty to possession of methamphetamine instead. RP 10-11. This permitted the trial court to sentence Mr. Pettis to 12 months community custody with substance abuse treatment, as the State recommended. RP 9-10, CP 20.

When a charge is amended, any restitution must be causally connected to the charge of which the defendant is actually convicted. McCarthy, 178 Wn. App. at 297, n.3. “The initial charges are immaterial.” Id. To determine whether a charge is causally connected to the loss, this Court has applied a “but for” analysis. Oakley, 158 Wn. App. at 552; see also Griffith, 164 Wn.2d at 966; State v. Tobin, 161 Wn.2d 517, 524, 166 P.3d 1167 (2007). The losses are causally

connected if “but for” the charged crime, the victim would not have incurred the loss. Id.

In this case, the State conceded it did not have probable cause to charge Mr. Pettis with possession of methamphetamine. RP 10-11. The charge was proposed only because “embedded in the police reports” was “something about methamphetamine and the possession of it.” RP 11. Mr. Pettis’s possession of methamphetamine was not causally connected to the Forest Service’s loss. It does not meet the “but for” test, as Mr. Pettis’s possession of methamphetamine did not cause the Forest Service to lose portions of its bridge. Thus, the trial court’s order of restitution is not permitted under RCW 9.94A.753(5) unless Mr. Pettis expressly agreed to pay restitution for the crime of theft. Griffith, 164 Wn.2d at 966.

- b. Mr. Pettis did not expressly agree to pay restitution for the uncharged crime.

When a defendant enters into a guilty plea, his agreement that he will pay restitution for an uncharged crime must be express. Id.; Dauenhauer, 103 Wn. App. at 378. Here, the defendant’s plea statement contains no such express agreement.

In the plea statement, the only mention of restitution is in reference to the State's recommendation. Section 7(g) of the Statement of Defendant on Plea of Guilty to Non-Sex Offense (Felony) states:

In Considering the Consequences of My Guilty Plea, I Understand That: The prosecuting attorney will make the following recommendation to the judge:

- Credit for time served
- 12 months of community custody with treatment ordered
- \$1,450 legal financial obligations
- \$188,000 restitution to U.S. Forest Service, Pacific Northwest Region Forest Service, 333 SW First Avenue, Portland, OR 97204-3440

CP 10. Nothing in the statement indicates Mr. Pettis agreed with the State's recommendation, and section 7(h) follows with the warning that "[t]he judge does not have to follow anyone's recommendation as to sentence." Id.

After the trial court accepted Mr. Pettis's guilty plea, finding that the plea was made knowingly, intelligently, and voluntarily, and that Mr. Pettis understood the consequences of the plea, the court moved to the sentencing phase. RP 17. Only at that point, after the State orally presented its sentencing recommendation, including its request for \$188,000 in restitution, did the court say to Mr. Pettis:

So, Mr. Pettis, you understand that as a part of this guilty plea you apparently agreed and the State is going to be asking for restitution for the theft and so forth that you were originally charged with apparently. You understand that?

RP 19 (emphasis added). When Mr. Pettis responded affirmatively, the court continued:

And I understand there may be a disagreement about the amount, but that they're going to be asking for that and the Court will be authorized to order restitution, you understand that?

RP 19. Mr. Pettis again responded affirmatively, and the court confirmed this with defense counsel, who agreed that was his understanding as well. RP 20.

Despite Mr. Pettis's agreement at sentencing that he understood, the plea statement did not contain Mr. Pettis's express agreement to pay restitution for the theft charge or his agreement with the State's recommendation. CP 7-16. Similarly, during the plea, neither party informed the court Mr. Pettis agreed to pay restitution for an uncharged crime. RP 9-17. The trial court seemed to recognize this when it informed Mr. Pettis at sentencing that he "apparently" agreed to restitution. RP 19.

There was nothing before the trial court indicating Mr. Pettis had, in fact, agreed to restitution for the theft charge except for an

unspoken assumption by the trial court that Mr. Pettis had agreed to restitution during negotiations. Defense counsel's agreement with the trial court's subsequent inquiry at sentencing is not sufficient to find statutory authorization for the imposition of restitution. Dauenhauer, 103 Wn. App. at 379-80 (finding "defense counsel's incorrect concession to liability for those damages 'under the facts of this case as presented' is not akin to a guilty plea and agreement to pay for uncharged acts" and did not alter the fact there was no statutory authority for the ordered restitution). The trial court's assumption did not satisfy the requirement that Mr. Pettis "expressly" agreed to pay restitution for an uncharged crime. Griffith, 164 Wn.2d at 966; State v. Woods, 90 Wn. App. 904, 908, 953 P.2d 834 (1998).

c. The restitution order must be reversed and dismissed.

Because the authority of the trial court to impose restitution is derived entirely from statute, an order imposing restitution is void if the statutory provisions are not followed. State v. Duback, 77 Wn. App. 330, 332, 891 P.2d 40 (1995); Dauenhauer, 103 Wn. App. at 378. The statute allows for the imposition of restitution for the loss resulting from an uncharged crime only when the defendant agrees with the State's recommendation. RCW 9.94A.753(5). Mr. Pettis did not

expressly agree to pay restitution as part of his guilty plea. CP 7-16; RP 9-17. The restitution is therefore void and the order must be reversed and dismissed. Duback, 77 Wn. App. at 332-33.

2. Defense counsel rendered ineffective assistance of counsel when he failed to challenge the trial court's authority to impose restitution.

- a. Mr. Pettis had the constitutionally protected right to effective assistance of counsel.

A person accused of a crime has a constitutional right to effective assistance of counsel. U.S. Const. amend. VI;¹ Wash. Const. art. I, § 22;² United States v. Cronin, 466 U.S. 648, 654, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984); State v. Hendrickson, 129 Wn.2d 61, 77, 917 P.2d 563 (1996). “The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel’s skill and knowledge is necessary to accord defendants the ‘ample opportunity to meet the case of the prosecution’ to which they are entitled.” Strickland v. Washington, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), quoting Adams v. United States ex rel. McCann, 317 U.S. 269, 276, 63 S.Ct. 236, 87 L.Ed.2d 268 (1942).

¹ The Sixth Amendment provides, in relevant part, “In all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defense.”

² Article I, § 22 of the Washington Constitution provides, in relevant part, “In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel.”

An attorney renders constitutionally inadequate representation when he or she engages in conduct for which there is no legitimate strategic or tactical basis. State v. McFarland, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1998). A decision is not permissibly tactical or strategic if it is not reasonable. Roe v. Flores-Ortega, 528 U.S. 470, 481, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000); see also Wiggins v. Smith, 539 U.S. 510, 521, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) (“[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms”), quoting Strickland, 466 U.S. at 688. While an attorney’s decisions are treated with deference, his actions must be reasonable under all the circumstances. Wiggins, 539 U.S. at 533-34.

If there is a reasonable probability that but for counsel’s inadequate performance, the result would have been different, prejudice is established and reversal is required. Strickland, 466 U.S. at 694; Hendrickson, 129 Wn.2d at 78. A reasonable probability “is a probability sufficient to undermine confidence in the outcome.” Strickland, 466 U.S. at 694; State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). It is a lower standard than the “more likely than not” standard. Thomas, 109 Wn.2d at 226.

“A claim of ineffective assistance of counsel presents a mixed question of fact and law [and is] reviewed *de novo*.” State v. Sutherby, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

- b. Mr. Pettis is entitled to a new restitution hearing because trial counsel rendered ineffective assistance of counsel by conceding the court’s authority to impose restitution.

Mr. Pettis was entitled to effective assistance of counsel at his restitution hearing, as “the setting of restitution is an integral part of sentencing.” State v. Milton, 160 Wn. App. 656, 659, 252 P.3d 380 (2011); State v. Kisor, 68 Wn. App. 610, 620, 844 P.2d 1038 (1993). Should this Court refuse to review Mr. Pettis’s claim that the trial court lacked statutory authority to impose restitution because Mr. Pettis’s counsel failed to raise this issue below, it should vacate the restitution order and remand for a new hearing because Mr. Pettis was denied effective assistance of counsel.

There was no legitimate strategic or tactical basis for trial counsel’s failure to object to the court’s imposition of restitution. See McFarland, 127 Wn.2d at 335-36. The court accepted Mr. Pettis’s plea of guilty without any written or oral statement indicating Mr. Pettis agreed with the State’s recommendation or otherwise agreed to pay restitution for an uncharged crime. CP 7-16; RP 9-17. The statute

plainly requires the defendant agree with the prosecutor's recommendation that the offender be required to pay restitution for an uncharged crime, and this Court has held such agreement must be express. RCW 9.94A.753(5); Griffith, 164 Wn.2d at 966; Woods, 90 Wn. App. at 908. Trial counsel should have objected and challenged the court's authority to impose restitution. Instead, he conceded the court's authority at sentencing, despite making no mention of restitution in the plea statement or during Mr. Pettis's hearing to enter the change in plea. RP 20. His acquiescence to the court's presumption of statutory authority was not reasonable. See Flores-Ortega, 528 U.S. at 481; Wiggins, 539 U.S. 533-34.

The prejudice from counsel's failure is clear. Under RCW 9.94A.753(5), the trial court did not have authority to enter the restitution order. Thus, there is a reasonable probability that but for trial counsel's performance, the result would have been different. See Strickland, 466 U.S. at 694; Hendrickson, 129 Wn.2d at 78. Reversal is required to give Mr. Pettis the opportunity to contest the imposition of restitution at a new hearing. See Strickland, 466 U.S. at 694.

3. The restitution award was based on insufficient evidence and required the court to rely on speculation and conjecture.

- a. Evidence supporting a restitution order is insufficient if it requires the trier of fact to rely on speculation or conjecture.

Evidence presented at restitution hearings must meet due process requirements. Kisor, 68 Wn. App. at 620; U.S. Const. amend. XIV; Wash. Const. art. I, § 3. The amount of restitution imposed must be based on “easily ascertainable damages.” RCW 9.94A.753(3); State v. Hughes, 154 Wn.2d 118, 154, 110 P.3d 192 (2005), overruled on other grounds by Washington v. Recuenco, 548 U.S. 212, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006). “While the claimed loss ‘need not be established with specific accuracy,’ it must be supported by ‘substantial credible evidence.’” State v. Deskins, 180 Wn.2d 68, 82, 322 P.3d 780 (2014). Evidence is only sufficient if it provides the trier of fact with a reasonable basis for estimating the loss and requires no speculation or conjecture. Id. at 82-83.

When the amount of restitution is in dispute, the State has the burden of proving the award by a preponderance of the evidence. State v. Kinneman, 155 Wn.2d 272, 285, 119 P.3d 350 (2005).

If the restitution order is authorized by statute, this Court reviews the order for an abuse of discretion. Deskins, 180 Wn.2d at 77.

The trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds or untenable reasons. Id.

- b. Because the restitution order was based on speculation and conjecture, the trial court abused its discretion and the restitution order must be vacated.

Shannon Henriquez, a licensed civil engineer employed with the Forest Service, testified at the restitution hearing that he performed an inventory of the missing portions of the bridge. RP 122, 132. The bridge was made up of six sections or “modules.” RP 49, 126. Two of these modules were untouched, two of the modules were missing, and two modules were damaged. RP 133. Of the damaged modules, one module could be repaired and the other was damaged beyond repair. RP 133.

A company called “Big R Bridge” had originally supplied the bridge to the Forest Service. RP 46. Douglas Myers, a sales manager with Big R Bridge, testified at the restitution hearing that Mr. Henriquez provided him with a list of the bridge components requiring replacement. RP 44. Many of these components had to be fabricated elsewhere and shipped to Washington. RP 46-47. Based on the list provided by Mr. Henriquez, Big R Bridge provided an estimate for the cost of the parts to the Forest Service. RP 44; CP 27-28. This estimate

only provided a lump sum, which included freight, totaling \$188,000. CP 27. An attached computation sheet listed parts to be replaced, but did not provide the cost of any individual part. CP 28.

At the restitution hearing, Mr. Pettis sought to obtain a breakdown of the costs from Mr. Myers. RP 53. However, Mr. Myers explained that because he presumed all the parts would be needed for the repair, no costs were itemized. RP 54. Mr. Pettis asked him for a rough estimate of different parts, requesting a “ballpark” figure based on his experience, but Mr. Myers responded “[t]he basis of my experience tells me that ballparking it usually gets me in trouble.” RP 55. Mr. Myers was not prepared to provide a cost estimate for any individual components or the cost of freight. RP 55.

Mr. Pettis testified he received a total of \$260 from the work he performed to remove the bridge components. RP 160. There was evidence he admitted making two trips to the Forest Service site and taking a total of five tons of steel. RP 88. Mr. Henriquez admitted he could not say when he had last visited the site, and the trial court found it was likely other people had stolen parts of the bridge at other points in time. RP 143, 188. The court held it could not find Mr. Pettis liable

for \$188,000 because it could not find he was responsible for the Forest Service's entire loss. RP 187.

In order to calculate the portion of the loss Mr. Pettis owed in restitution, the court performed its own calculation. RP 188-89. It found:

So the best I could do would be... To replace these you'd have to replace two that were gone entirely and replace or fix two that were damaged, so I basically assigned twice the value to the two that were gone entirely. I did an algebraic equation here and I figured, okay, the two that are gone entirely are going to be worth double the amount of the two that have to be repaired, and by doing that I figured that the cost of repairing the – a damaged module would be roughly \$31,333.00, and so there was [sic] two of them that were damaged – whereas the two that were totally removed I would've put a value on each of those of more like 62 [sic] or \$63,000, and so given that there was [sic] two that were damaged and needed to be repaired, I figured the value of those or the, the portion of \$188,000 attributable to those I would put at \$62,666.00.

RP 189. The court found that \$62,666 was its “best estimate, based on all the evidence” of what Mr. Pettis should be required to pay. RP 189.

However, the evidence did not support the court's estimate. No evidence was presented at the restitution hearing that the parts required to fully replace a module cost twice as much as the parts required to repair a module. There was also no evidence that the modules in need

of repair required the same components. In fact, the evidence showed that one of the remaining modules was beyond repair while the other was only missing its guardrail and supports for the guardrail, suggesting the cost of parts for each would be significantly different. RP 133. The court's "algebraic calculation" had no basis in the evidence and was grounded in nothing more than speculation and conjecture.

This Court has held that when the evidence is insufficient to allow the trial court to "estimate losses by a preponderance of the evidence without speculation or conjecture" the case must be remanded for a new hearing. State v. Hahn, 100 Wn App. 391, 400, 996 P.2d 1125 (2000). In Hahn, the defendant pled guilty to two counts of second degree assault. 100 Wn. App. at 393. The record contained evidence of the victims' substantial injuries, but one of the victim's medical reports failed to list any symptoms or treatment. Id. at 399-400. Because the trial court was forced to speculate that the medical bills were incurred as a result of the assault, this Court remanded the order for a new hearing. Id. at 400.

Similarly, here the State provided the court with very little specific information. The trial court noted that, despite the State's

representation to the contrary, it could find no evidence of the total weight of the materials requiring replacement. RP 188. Thus, using the evidence that Mr. Pettis removed two tons of material, the court was unable to calculate a percentage of the loss attributed to Mr. Pettis by weight. RP 188. Instead, the trial court relied on its own speculative formula that had no basis in fact. Because the court relied on speculation and conjecture for the its order of restitution, the order must be vacated and the case remanded for a new hearing. At this restitution hearing, no new evidence may be admitted. Griffith, 164 Wn.2d at 967, n.6 (“[i]ntroducing new evidence on remand would conflict with the statutory requirement that restitution be set within 180 days after sentencing”).

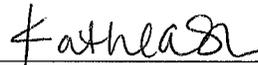
F. CONCLUSION

The restitution order must be reversed and dismissed because the trial court lacked statutory authority to enter the order.

In the alternative, Mr. Pettis is entitled to have the order vacated and his case remanded for a new hearing because he was denied the effective assistance of counsel and because the award was based on insufficient evidence.

DATED this 23rd day of June, 2014.

Respectfully submitted,



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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	NO. 45533-1-II
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JOSHUA PETTIS,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

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