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STATE OF WASHINGTON
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NO. 28167-1-III

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

In re Detention of Rolando Reyes

STATE OF WASHINGTON,

Respondent,

v.

ROLANDO REYES,

Appellant.

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

The Honorable Craig J. Matheson, Judge

REPLY BRIEF OF APPELLANT

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A. ISSUES IN REPLY

1. Whether a person has standing to raise the court's failure to fulfill its obligations under article I, § 10 to administer justice in the open, when that person is a named party to the action?

2. Whether article I, § 10 requires a court to conduct a hearing in public when the court adjudicates a contest to its jurisdiction and exercises its discretion to maintain jurisdiction?

3. Whether the evidence is insufficient to support a diagnosis of pedophilia when the evidence cited by the State's expert fails to support the diagnostic criteria pronounced by that same expert?

B. STATEMENT OF THE CASE IN REPLY

The State acknowledges the verbatim record of proceedings states the hearing at question was heard in chambers. Brief of Respondent (BOR) at 2 (citing 1RP 2¹). The State then asserts, "there was no mention of the fact that the hearing was in chambers[.]" BOR at 2. In the absence of anything to suggest the hearing was not held in chambers, the record is sufficient to establish the hearing was not held in open court.

¹ As in the opening brief, this brief refers to the Verbatim Report of Proceedings as follows: 1RP – May 22, 2009 and June 1, 2009; 2RP – June 2, 2009 and June 3, 2009; 3RP June 4, 2009 and June 5, 2009.

C. ARGUMENT IN REPLY

1. THE COURT'S FAILURE TO FULFILL ITS CONSTITUTIONAL OBLIGATION TO OPENLY ADMINISTER JUSTICE REQUIRES REVERSAL.

The State presents two arguments to excuse the court's failure to fulfill its obligation, under article I, § 10,² to administer justice openly. The State asserts Reyes, as a named party to this case, lacks standing to raise the court's failure. BOR at 5-10. The State also asserts the hearing at which both counsel presented arguments on the court's jurisdiction, and at which the trial court made a discretionary ruling to affirm its jurisdiction, was not required to be subject to public scrutiny at the time it occurred. BOR at 10-14. Both arguments exhibit a common misunderstanding of the court's obligation to conduct its business in full view of public scrutiny.

Case law has addressed article I, § 10 in terms of a "right" held by the public, and the press as part of that public, to attend judicial proceedings. See, e.g., State v. Strode, 167 Wn.2d 222, 236, 217 P.3d 310 (2009) (Fairhurst, J., concurring) (distinguishing the public's right to open justice from the right to public trials held by defendants to criminal proceedings); State v. Bone-Club, 128 Wn.2d 254, 258, 906 P.2d 325

² Const. art. I, § 10 provides, "Justice in all cases shall be administered openly, and without unnecessary delay."

(1995) (discussing the public's right to open proceedings under article I, § 10); Seattle Times, Inc. v. Ishikawa, 97 Wn.2d 30, 36, 640 P.2d 716 (1982) (article I, § 10 clearly establishes a right of access to court proceedings); Cohen v. Everett City Council, 85 Wn.2d 385, 388, 535 P.2d 801 (1975) (article I, § 10 entitles the public to openly administered justice); Beuhler v. Small, 115 Wn. App. 914, 920, 64 P.3d 78 (2003) (article I, § 10 provides right of access). By its terms, however, article I, § 10 does not mention any "rights" held by anyone. Rather, it states a clear obligation on courts to openly administer justice. The "right" of the public and the press to be present derives from this obligation. Cohen, 85 Wn.2d at 388.

That right, however, does not define the boundary of article I, § 10, because even if no one asserts the right, the court is still obligated to ensure the upmost openness, consistent with actual justice. See Presley v. Georgia, ___ U.S. ___, 130 S. Ct. 721, 724-25, 175 L. Ed. 2d 675 (2010) (public has right to be present whether or not any party has asserted the right; where court finds overriding interest in closure, duty is on court to consider all reasonable alternatives); In re Orange, 152 Wn.2d 795, 809-12, 100 P.3d 291 (2005) (discussing trial court's failure to fulfill its affirmative duty to engage in Bone-Club analysis); State v. Paumier, 155 Wn. App. 673, 230 P.3d 212, rev. granted, 169 Wn.2d 1017 (2010) (trial

court's failure to sua sponte consider alternatives to closure and to make appropriate findings requires reversal). That obligation exists in both civil and criminal proceedings. In re Det. of Campbell, 139 Wn.2d 341, 355-56, 986 P.2d 771 (1999), cert. denied, 531 U.S. 1125, 121 S. Ct. 880, 148 L. Ed. 2d 789 (2001); Cohen, 85 Wn.2d at 387-89.

Thus, because the open administration of justice is an obligation on the court, standing cannot be invoked to excuse a dereliction of the court's constitutional duty. Rather, as discussed above, the court is required to act sua sponte to ensure its own compliance with the mandate.

Even if standing could be appropriately applied in the abstract, it must fail when the person raising the issue is a party to the proceeding. See United States v. Sherman, 581 F.2d 1358, 1360 (9th Cir. 1978) (in the 9th circuit, standing to appeal order proscribing post-trial contact of jurors by media is limited to parties to the action below; media proceed by writ of mandamus); United States v. Brooklier, 685 F.2d 1162, 1165 (9th Cir. 1982) (in the 9th circuit, standing to appeal closure order is to the parties; third party media proceed by writ of mandamus). Clearly, Reyes is a party to the proceeding and has standing.

Further, nothing in the record indicates he waived the public's presence at the hearing. Indeed, he could not possibly do so because, even if he had requested a closure, the court would still be required to conduct

the Ishikawa/Bone-Club analysis on the record. State v. Easterling, 157 Wn.2d 167, 180, 137 P.3d 825 (2006) (co-defendant cannot waive criminal defendant's or public's right to public trial); State v. Duckett, 141 Wn. App. 797, 806-07, 173 P.3d 948 (2007) (proposition that criminal defendant could waive public's presence questionable because Bone-Club analysis required prior to any closure); see also Dreiling v. Jain, 151 Wn.2d 900, 914, 93 P.3d 861 (2004) (regarding motion to seal records in shareholder derivative suit, anyone present when the closure motion made must be given opportunity to object).

The issue of standing in the context of article I, § 10 was addressed by the concurrence in State v. Strode, 167 Wn.2d 222, 231-36, 217 P.3d 310 (2009) (Fairhurst, J., concurring). There, Justice Fairhurst objected to the lead opinion's conflation of the defendant's right to a public trial under article I, § 22 with the right of the public and press to attend judicial proceedings under article I, § 10. "A defendant should not be able to assert the right of the public or the press in order to overturn his conviction when his own right to a public trial has been safeguarded as required under Bone-Club or has been waived." Strode, 167 Wn.2d at 236.

This passage, however, should not be read as a blanket exclusion of respondents at RCW 71.09 proceedings from standing under article I, §

10. In cases where the public trial right has been protected by a proper application of the Bone-Club criteria, there is no violation under either article I, § 10 or article I, § 22. Bone-Club, 128 Wn.2d at 258-60 (adopting the Ishikawa closure requirements as protective of both criminal public trial and open administration of justice provisions). Thus, Justice Fairhurst's analysis should be seen as a warning against permitting a second bite of the constitutional apple by a defendant in a criminal trial who has waived his own public trial right under article I, § 22, with either an explicit or functional Bone-Club analysis, and who has derived some benefit from a closed hearing.

In an RCW 71.09 proceeding, however, there is only one provision involved, article I, § 10. In this context, circumstances may arise where a trial respondent who brought a motion for closure could not then come back on appeal and complain about the fact of the closure. But where the court conducts a closed hearing sua sponte without making its own motion before those assembled in the courtroom, including the respondent, and without Bone-Club analysis, then the constitutional violation impacts the respondent in precisely same manner as the public and media present. Their interests are not conflated. Rather, they are identical. Under such circumstances, our constitutional tradition requires the respondent as a

“person” who is necessarily part of the “public” be able to challenge the closure under article I, § 10.

In support of its standing argument, the State relies heavily on State v. Wise, 148 Wn. App. 425, 200 P.3d 266 (2009), rev. granted, ___ Wn.2d ___, 236 P.3d 207 (2010). BOR at 5-7. That reliance is misplaced. Wise largely ignored established precedent of the Washington Supreme Court, and the Supreme Court has taken review. In addition, subsequent decisions from Division Two of the Court of Appeals, which decided Wise, show that division is not firm in its support of Wise. See Paumier, 155 Wn. App. at 683-86 (following the federal Supreme Court in Presley); State v. Leyerle, ___ Wn. App. ___, ___ P.3d ___, 2010 WL 3860487 (No. 37086-7-II, Oct. 5, 2010) (following Paumier and Presley); State v. Bowen, ___ Wn. App. ___, ___ P.3d ___, 2010 WL 3666766 (No. 39096-5-II, Sept. 21, 2010) (without citing Wise, following Strode and deciding case under criminal defendant’s public trial right).

Presley’s clear statement that a trial court must consider alternatives to closure even when they are not offered by the parties, effectively renders Wise’s discussion about third-party standing a nullity. Compare Presley, 130 S. Ct. at 725 (“trial courts are required to consider alternatives to closure even when they are not offered by the parties” (emphasis added)) with Wise, 148 Wn. App. at 441-43 (discussing article

I, § 10 and third-party standing). Clearly the standing question has no relevance to this case.

The State also contends the trial court's hearing on the jurisdictional matter should not have been held open to public scrutiny because it was a "trivial 'closure'" BOR at 13. The State argues the court was within its rights to conduct the hearing, where it made a discretionary ruling on its own jurisdiction, without any regard to its obligations to administer justice openly under article 1, §10. BOR at 10-13. The State, however, supports its argument with a misstatement of a Supreme Court holding and with inapplicable case law addressing a criminal defendant's right to be present.

The State bases this argument on the proposition that legal arguments are exempt from the open administration of justice obligations of the courts. BOR at 12-13. In this argument, the State lumps legal arguments on motions with ministerial acts of the court. BOR at 10-14. The two are distinct.

The line to be drawn is between discretionary acts and ministerial duties. "Where the law prescribes and defines an official's duty with such precision and certainty as to leave nothing to the exercise of discretion or judgment, the performance of that duty is a ministerial act. Where the act to be done involves the exercise of discretion or judgment, performance of

that duty is not merely ministerial.” City of Bothell v. Gutschmidt, 78 Wn. App. 654, 662-63, 898 P.2d 864 (1995). Thus, a court acting in its ministerial capacity does not exercise its discretion. Compare State v. Swanson, 116 Wn. App. 67, 78, 65 P.3d 343 (2003) (quoting Gutschmidt) (addressing restoration of gun rights statutes; once threshold requirements are met, court’s acts under a non-discretionary ministerial duty), with State v. Davenport, 140 Wn. App. 925, 932-33, 167 P.3d 1221 (2007) (quoting Gutschmidt) (in a re-sentencing hearing where court exercises discretion, the act is not merely ministerial).

To be clear, the case scheduling matters and, arguably, the uncontested adjustment of the Guardian ad Litem’s status are ministerial matters. The arguments heard on the court’s jurisdiction, however, were addressed to a contested legal issue, which was decided by the trial court’s exercise of discretion. That is the matter which is subject to the obligations of article I, § 10.

The State argues only hearings which adjudicate the substantive rights of the parties are subject to public scrutiny under the article I, § 10 obligations. BOR at 10-11. The hearing in this case, however, adjudicated Reyes’s right to be tried in front of a court that has jurisdiction over the matter. Jurisdiction is a matter of significance, and under the

State's own logic, the hearing on this issue was required to be heard in a public courtroom.

In addition, the Washington Supreme Court has determined the open administration of justice mandate of article I, § 10 cannot be limited to dispositive motions and hearings.

[T]he right is not concerned with merely whether our courts are generating legally sound results. Rather, we have interpreted this constitutional mandate as a means by which the public's trust and confidence in our entire judicial system may be strengthened and maintained. [Citation omitted.] To accomplish such an ideal, the public must – absent any overriding interest – be afforded the ability to witness the complete judicial proceeding, including all records the court has considered in making any ruling, whether “dispositive” or not. There is good reason to diverge from federal open courts jurisprudence where appropriate. While our state constitution has an explicit open courts provision, there is no such counterpart in the federal constitution, and much of the federal right is grounded in federal common law.

Rufer v. Abbott Laboratories, 154 Wn.2d 530, 114 P.3d 1182 (2005) (emphasis in original) (addressing a party's challenge to unsealing documents used in pretrial motions); see also State v. Heath, 150 Wn. App. 121, 127-29, 206 P.3d 712 (2009) (conducting portions of pre-trial hearing on motions in limine without Bone-Club analysis requires reversal).

In support of the court's failure to fulfill its article I, § 10 obligation to openly administer justice, however, the State relies on State

v. Rivera, 108 Wn. App. 645, 32 P.3d 292 (2001). BOR at 12-13. At issue in Rivera was a judge dealing with a juror's complaint about the personal hygiene of a fellow juror, obviously a ministerial matter. Rivera, 108 Wn. App. at 652. A case so obviously on the margins of the issue should not be read as authority to shield all legal argument from public scrutiny.

The State also attempts to bolster its position by reference to cases, which address rights to be present during trial proceedings. BOR at 12-13. Those cases address the right to confront witnesses under the Sixth Amendment³ and due process concerns of the Fifth Amendment.⁴ United States v. Gagnon, 470 U.S. 522, 526-27, 105 S. Ct. 1482, 84 L. Ed. 2d 486 (1985). Thus, unlike the right to an open public trial, the right to be present is intimately identified with the right of confrontation, and may be limited according to its origins.

The right to an open and public trial in Washington, however, is not so constrained. "The public trial right protected by both our state and federal constitutions is designed to 'ensure a fair trial, to remind the

³ The Sixth Amendment provides in part, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, . . . [and] to be confronted with the witnesses against him[.]"

⁴ The Fifth Amendment provides in part, "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law[.]"

officers of the court of the importance of their functions, to encourage witnesses to come forward, and to discourage perjury.” Strode, 167 Wn.2d at 226. In contrast to the personal rights of a criminal defendant to be present during trial proceedings, the public trial mandate is addressed to the entire justice system, criminal and civil, and is intended to promote the integrity of the courts and the public’s faith in that system. Because the right to be present and the open trial right derive from different constitutional provisions and address different constitutional values, the State reliance on right-to-presence analysis is misplaced.

The State’s relies on State v. Sadler, 147 Wn. App. 97, 193 P.3d 1108 (2008), to exclude legal argument from the open administration of justice mandate. BOR at 12-13. In Sadler, the Court addressed the closure of a Batson⁵ hearing, which the Court said “involves both factual and credibility determinations and is relevant to the fairness and integrity of the judicial process as a whole.” Sadler, 147 Wn. App. at 118. Thus, Sadler falls in the center of the open trial right and does not define the line between ministerial judicial operations and those proceedings that require the court to perform a Bone-Club analysis before operating outside of

⁵ Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

public scrutiny. Its assertion that hearings on legal issues are not subject to the open administration of justice mandate is dicta.

More instructive on the status of legal argument under article I, § 10 are cases like Rufer and Dreiling, which address the presumption under that provision that papers filed in civil motions be open to the public view. See Rufer, 154 Wn.2d at 541-44 (heightened presumption of openness applicable to trials applies equally to dispositive motions in civil cases; Ishikawa factors must be addressed when considering whether to seal attached documents); Dreiling, 151 Wn.2d at 908-10, 913-15 (previously sealed discovery attached to dispositive motions are presumptively open to the public; Ishikawa provides appropriate analysis for motions to seal). Both cases addressed whether previously sealed pretrial discovery would remain under seal if attached to dispositive motions. What underlies this issue, however, is the presumption that written legal motions, composed primarily of legal arguments, are open to the public. In regard to written legal arguments placed before the court, there is no question that those legal arguments are presumed open to the public. See also Brooklier, 685 F.2d at 1171-72 (closure of hearing on defendants' motion for access to tape of third-party interview requires same procedural prerequisites as closure to protect right to fair trial).

The State, however, would hold legal argument falls outside the mandate for openly administered justice. BOR at 12-13. If the State is correct, however, and oral legal argument is categorically excluded from the open administration of justice mandate, why should the written legal motions in civil and criminal trials be presumptively open to public scrutiny? Carried to its logical conclusion, the State's position would exempt all appellate argument, which is limited to legal issues, from public scrutiny under article I, § 10.

The right to be present and the right to have an open and public trial are distinct rights, derived from different traditions of analysis and, to some extent, serving different purposes. The interests protected by the open administration of justice requirement serve the significant social and judicial functions of permitting the public to ascertain whether the defendant has been fairly dealt with and of keeping the triers focused on their responsibilities. State v. Momah, 167 Wn.2d 140, 148, 217 P.3d 321 (2009). “[P]ublic trials embody a view of human nature, true as a general rule, that judges, lawyers, witnesses, and jurors will perform their respective functions more responsibly in an open court than in secret proceedings.” Strode, 167 Wn.2d at 226 (citing Waller v. Georgia, 467 U.S. 39, 46 n.4, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984) (internal quotations omitted)).

These social and judicial functions cannot be fulfilled if the court's obligation to openly administer justice is constrained by the defendant's right to be present. Appellant urges this Court to distinguish these rights, and to recognize the broader, structural justice interests served by the open administration of justice.

In support of its assertion that a contested jurisdiction is a "trivial" matter subject to secret procedures at the court's whim, the State says, "As the Washington State Supreme Court has noted, ". . . a trivial closure does not necessarily violate a defendant's public trial right." BOR at 13 (quoting State v. Brightman, 155 Wn.2d 506, 517, 122 P.3d 150 (2005)). That statement, however, is taken out of context because the Court there rejected the State's argument that the closure of voir dire was de minimis and trivial. Brightman, 155 Wn.2d at 517. In regard to the federal cases cited by the State, the Brightman court observed those "closures involve only brief and inadvertent closures." Id.; see also State v. Erickson, 146 Wn. App. 200 208-09, 189 P.3d 245 (2008) (detailing inadvertent nature of closures in federal cases distinguished in Brightman). Indeed, the Washington Supreme Court "has never found a public trial right violation to be [trivial or] de minimis." Strode, 167 Wn.2d at 230 (quoting State v. Easterling, 157 Wn.2d 167, 180, 137 P.3d 825 (2006) (brackets in original)).

The State also misstates the Supreme Court when it asserts the Court had adopted the proposition that “a literal interpretation of section 10 would wreak havoc with established judicial practices in that it would allow public access to all phases of the administration of justice, including chambers conferences, plea bargaining and settlement conferences, adoption proceedings, those juvenile proceedings presently closed, and appellate court conferences.” See BOR at 11 (citing Federated Publications, Inc. v. Kurtz, 94 Wn.2d 51, 60 n.3. 615 P.2d 440 (1980)). The Court there, however, was merely noting an argument of amici, which the court did not address because it was not reading article I, § 10 in “absolute terms.” Federated Publications, 94 Wn.2d at 60 n.3. Thus, the quoted section does not represent a position adopted by the Court.

In addition, there is a decided difference between not reading the article I, § 10 obligations in absolute terms and granting courts absolute license to conduct hearings on significant legal questions in private chambers. That difference, currently articulated in Ishikawa and Bone-Club, is the requirement for the court to engage in the required procedures and analysis prior to conducting such business outside of public scrutiny. And, the Court in Federated Publications adopted a preliminary version of that requirement in its adoption of workable standards for the application of article I, § 10, when that provision conflicted with a criminal

defendant's right to a fair trial. Federated Publications, 94 Wn.2d at 61-65. The State's reliance on Federated Publications completely misses the mark.

The State also argues that reversal is not the appropriate remedy for closure of the hearing on jurisdiction. BOR at 14-16. The State asserts that the mere fact the open administration of justice obligation has not yet led to reversal in an RCW 71.09 context is reason to reject the application of criminal trial precedents. BOR at 14-15. That argument ignores the hybrid nature of matters raised under RCW 71.09. See In re Young, 122 Wn.2d 1, 43-49, 857 P.2d 989 (1993) (recognizing heightened due process protections required when State moves to confine a person under RCW 71.09 includes the criminal trial standard of a commitment finding beyond a reasonable doubt by a unanimous 12 member jury); Kansas v. Hendricks, 521 U.S. 346, 364-65, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997) (in Kansas civil commitment case, discussing the presence of procedural safeguards typically found in criminal trial).

In addition, as noted above, that argument flies in the face of precedent. In Bone-Club, the court applied the same standards under both article I, §§ 10 and 22, and rejected a defense argument that application of the article I, § 10 standard was any less protective than the Sixth Amendment criminal trial right. Bone-Club, 128 Wn.2d at 259-60; see

also In re Det. of Campbell, 139 Wn.2d at 355-56 (article I, § 10 requires RCW 71.09 proceedings to be open to the public).

The State also argues reversal is not required here, calling for either a new hearing on jurisdiction or filing the transcript of the original hearing. BOR at 15-16. As discussed above, Washington courts have recognized that the significance of the open administration of justice obligation extends beyond the parties appearing before the courts. Rather, as Washington courts have recognized, the values secured by the open administration of justice obligation reflect upon the judicial system itself, as well as the public's perception of that system. A hearing where the court decides on its own jurisdiction in the closed confines of chambers is ultimately corrosive of those values and taints the judicial system itself. Everything that follows such a hearing is contaminated by that corrosive taint.

The court's failure to fulfill its obligation to administer justice in open court, or to explain why a closure is required under Ishikawa/Bone-Club analysis, impacts the parties, compromises the justice system and prejudices the public. Such failure is structural error. Bone-Club, 128 Wn.2d at 262. This Court should reverse.

2. BASED SOLELY ON THE CRITERIA ESTABLISHED BY STATE'S EXPERT, THE EVIDENCE OF PEDOPHILIA IS INSUFFICIENT.

The argument on insufficient evidence is covered in the opening brief. Brief of Appellant (BOA) at 40-49. There, Reyes argues the evidence for the pedophilia diagnosis fails, based solely on the criteria presented by the State's expert, Dr. Douglas Tucker, and on the evidence he cited to support his opinion. BOA at 45-49.

The State here, however, attempts to recast that argument into a credibility assessment between Tucker and Dr. Robert Halon, Reyes's expert. BOR at 22. That is not the argument presented by Reyes. Rather, Reyes's argument is, based on the criteria for a diagnosis of pedophilia as presented by Dr. Tucker, there was insufficient evidence to support such a diagnosis. BOA at 45-49. The main point of that argument is that only one of Reyes's sexual acts with minors occurred when he was over the age of 16 and the diagnostic criteria stated by Dr. Tucker requires recurrent behaviors by a person over the age of 16. See BOA at 45-46 (quoting Dr. Tucker's evaluation and arguing the insufficiency of the behavioral evidence to support the pedophile diagnosis).

Discussing the "sexually arousing fantasies [or] sexual urges" bases for a pedophile diagnosis, the State here relies on Tucker's assessment that he could read Reyes's fantasies or urges into the nature of

the act he committed when he was 14 years old. BOR at 19. As noted above, that falls below the criteria Tucker said were required for a pedophile diagnosis. Ultimately, the State's position on fantasies and urges is either absent or non-recurrent. The State, however, does not cite any authority for the proposition that a lack of evidence is sufficient to support a pedophilia finding. The standard is substantial evidence, and as discussed in the opening brief, the evidence of a pedophile diagnosis is not substantial.

Finally, the State alludes to an allegation of rape that had been raised by an inmate at the SCC regarding Reyes and a third party. BOR at 21. That allegation was addressed in the opening brief where it was noted no formal action had been taken by the SCC against Reyes based on this allegation. BOA at 13 n.10. The State has presented no evidence here that this incident ever went beyond the level of mere allegation.

D. CONCLUSION

For the reasons presented above and in the opening brief, this Court should reverse.

DATED this 9th day of November 2010.

Respectfully submitted,

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