STATE OF WISCONSIN

IN SUPREME COURT

No. 2015AP671-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KEIMONTE ANTONIE WILSON, SR.,

Defendant-Appellant-Petitioner.

ON PETITION FOR REVIEW OF A DECISION OF THE WISCONSIN COURT OF APPEALS AFFIRMING A JUDGMENT OF CONVICTION AND AN ORDER DENYING A POSTCONVICTION MOTION, BOTH ENTERED IN THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE WILLIAM S. POCAN, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT STATE OF WISCONSIN

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QUESTIONS PRESENTED

1. Section 972.11(1) provides that "the rules of evidence and practice in civil actions shall be applicable in all criminal proceedings unless the context of a section or rule manifestly requires a different construction." Therefore, three statutes dealing with serving subpoenas "shall" apply in "all" criminal cases: Wis. Stat. §§ 801.11(1), 805.07, and 885.03. Did defendant-appellant-petitioner Keimonte Antonie Wilson, Sr., properly subpoena a witness for an evidentiary hearing on his suppression motion?
   - The circuit court answered "No."
   - By its decision, the court of appeals necessarily answered "No."
   - This Court should answer "No."

2. Did defense counsel provide ineffective assistance by failing to argue that he properly subpoenaed a witness to attend the evidentiary hearing on Wilson's suppression motion?
   - The circuit court answered "No."
   - The court of appeals answered "No."
   - This Court should answer "No."

3. Did defense counsel provide ineffective assistance by failing to properly subpoena a witness to attend the evidentiary hearing on Wilson's suppression motion?
   - The circuit court answered "No."
   - The court of appeals answered "No."
   - This Court should answer "No.

POSITION ON ORAL ARGUMENT AND PUBLICATION OF THE COURT'S OPINION

Oral argument. Cases accepted by this Court warrant oral argument.

Publication. Opinions issued by this Court warrant publication.

STATUTES INVOLVED[1]

Wis. Stat. § 972.11 Evidence and practice; civil rules applicable.

> **972.11 Evidence and practice; civil rules applicable.**
> **(1)** Except as provided in subs. (2) to (4), the rules of evidence and practice in civil actions shall be applicable in all criminal proceedings unless the context of a section or rule manifestly requires a different construction. No guardian ad litem need be appointed for a defendant in a criminal action. Chapters 885 to 895 and 995, except ss. 804.02 to 804.07 and 887.23 to 887.26, shall apply in all criminal proceedings.

Wis. Stat. § 801.11 Personal jurisdiction; manner of serving summons for.

> **801.11 Personal jurisdiction; manner of serving summons for.** A court of this state having jurisdiction of the subject matter and grounds for personal jurisdiction as provided in s. 801.05 may exercise personal jurisdiction over a defendant by service of a summons as follows:
>
> **(1)** NATURAL PERSON. Except as provided in sub. (2) upon a natural person:

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[1] Unless indicated otherwise, all citations to Wisconsin Statutes refer to the 2013-14 edition.

(a) By personally serving the summons upon the defendant either within or without this state.

(b) If with reasonable diligence the defendant cannot be served under par. (a), then by leaving a copy of the summons at the defendant's usual place of abode:

1. In the presence of some competent member of the family at least 14 years of age, who shall be informed of the contents thereof;

1m. In the presence of a competent adult, currently residing in the abode of the defendant, who shall be informed of the contents of the summons; or

2. Pursuant to the law for the substituted service of summons or like process upon defendants in actions brought in courts of general jurisdiction of the state in which service is made.

(c) If with reasonable diligence the defendant cannot be served under par. (a) or (b), service may be made by publication of the summons as a class 3 notice, under ch. 985, and by mailing. If the defendant's post-office address is known or can with reasonable diligence be ascertained, there shall be mailed to the defendant, at or immediately prior to the first publication, a copy of the summons and a copy of the complaint. The mailing may be omitted if the post-office address cannot be ascertained with reasonable diligence.

(d) In any case, by serving the summons in a manner specified by any other statute upon the defendant or upon an agent authorized by appointment or by law to accept service of the summons for the defendant.

Wis. Stat. § 805.07 Subpoena.

805.07 Subpoena. (1) ISSUANCE AND SERVICE. Subpoenas shall be issued and served in accordance with ch. 885. A subpoena may also be issued by any attorney of record in a civil action or special proceeding to compel attendance of witnesses for

deposition, hearing or trial in the action or special proceeding.

. . . .

(5) SUBSTITUTED SERVICE. A subpoena may be served in the manner provided in s. 885.03 except that substituted personal service may be made only as provided in s. 801.11 (1) (b) and except that officers, directors, and managing agents of public or private corporations or limited liability companies subpoenaed in their official capacity may be served as provided in s. 801.11 (5) (a).

Wis. Stat. § 885.03 Service of subpoena.

885.03 Service of subpoena. Any subpoena may be served by any person by exhibiting and reading it to the witness, or by giving the witness a copy thereof, or by leaving such copy at the witness's abode.

STATEMENT OF THE CASE: FACTS AND PROCEDURAL HISTORY

As respondent, the State opts not to present a full statement of the case. Wis. Stat. § (Rule) 809.19(3)(a)2 (2015-16). Instead, the State will present additional facts in the "Argument" portion of its brief.

STANDARDS OF REVIEW

A. Statutory interpretation.

"Interpretation of a statute is a question of law that [an appellate] court reviews de novo while benefitting from the analyses of the lower courts." *State v. Buchanan*, 2013 WI 31, ¶ 12, 346 Wis. 2d 735, 828 N.W.2d 847. "'The purpose of statutory interpretation is to determine what the statute means so that it may be given its full, proper, and intended effect.'" *State v. Ziegler*, 2012 WI 73, ¶ 42, 342 Wis. 2d 256, 816 N.W.2d 238 (citation omitted).

Statutory interpretation "'begins with the language of the statute.'" *State ex rel. Kalal v. Circuit Ct. for Dane Cty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110 (citation omitted). An appellate court "must construe statutory language reasonably; an unreasonable interpretation is one that yields absurd results or one that contravenes the statute's manifest purpose." *Buchanan*, 346 Wis. 2d 735, ¶ 23; *see also Ziegler*, 342 Wis. 2d 256, ¶ 43. "In interpreting multiple statutes, a court interprets them together and harmonizes them to avoid conflict if at all possible. [An appellate] court attempts to harmonize statutes in a way that will give effect to the legislature's intent in enacting both statutes." *State v. O'Brien*, 2014 WI 54, ¶ 70, 354 Wis. 2d 753, 850 N.W.2d 8 (footnotes omitted). *See also State v. Anthony D.B.*, 2000 WI 94, ¶ 11, 237 Wis. 2d 1, 614 N.W.2d 435.

B. Ineffective assistance of counsel.

"The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984). To prove ineffective assistance of trial counsel, a defendant bears the burden of proving that trial counsel performed deficiently and that counsel's deficient performance caused prejudice to the defendant:

> To establish deficient performance, the defendant must show that counsel's representation fell below the objective standard of "reasonably effective assistance." *Strickland*, 466 U.S. at 687-88. Reviewing courts should be "highly deferential" to counsel's strategic decisions and make "every effort . . . to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from

> counsel's perspective at the time." *State v. Carter*, 2010 WI 40, ¶ 22, 324 Wis. 2d 640, 782 N.W.2d 695 (quoting *Strickland*, 466 U.S. at 689). There is a "'strong presumption' that [counsel's] conduct 'falls within the wide range of reasonable professional assistance.'" *Id.* (quoting *Strickland*, 466 U.S. at 689).

State v. Domke, 2011 WI 95, ¶ 36, 337 Wis. 2d 268, 805 N.W.2d 364 (alterations in original). "To prove deficient performance, a defendant must show *specific acts or omissions* of counsel that are 'outside the wide range of professionally competent assistance.'" *State v. Arredondo*, 2004 WI App 7, ¶ 24, 269 Wis. 2d 369, 674 N.W.2d 647 (emphasis added) (quoting *Strickland*, 466 U.S. at 690). *See also, e.g.*, *United States v. Trevino*, 60 F.3d 333, 338 (7th Cir. 1995) (citing *Strickland*, 466 U.S. at 690).

An appellate court strongly presumes that counsel acts reasonably within professional norms. *Arredondo*, 269 Wis. 2d 369, ¶ 24. *See also State v. Koller*, 2001 WI App 253, ¶ 8, 248 Wis. 2d 259, 635 N.W.2d 838.

"Prejudice occurs where the attorney's error is of such magnitude that there is a reasonable probability that, absent the error, 'the result of the proceeding would have been different.' *Strickland*, 466 U.S. at 694; *Johnson*, 153 Wis. 2d at 129." *State v. Erickson*, 227 Wis. 2d 758, 769, 596 N.W.2d 749 (1999). "A criminal defendant who claims ineffective assistance of counsel cannot ask the reviewing court to speculate whether counsel's deficient performance resulted in prejudice to the defendant's defense. The defendant must affirmatively prove prejudice." *State v. Wirts*, 176 Wis. 2d 174, 187, 500 N.W.2d 317 (Ct. App. 1993). *See also Erickson*, 227 Wis. 2d at 774 (speculation does not satisfy the prejudice prong of *Strickland*).

"Whether counsel was ineffective is a mixed question of fact and law. The circuit court's findings of fact will not be disturbed unless shown to be clearly erroneous. The ultimate

conclusion as to whether there was ineffective assistance of counsel is a question of law." *State v. Balliette*, 2011 WI 79, ¶ 19, 336 Wis. 2d 358, 805 N.W.2d 334 (citations omitted). *See also id.* ¶¶ 21-27.

If the defendant fails on either prong — deficient performance or prejudice — the ineffective-assistance-of-counsel claim fails. *Strickland*, 466 U.S. at 697. Thus, "a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." *Id.* "[T]here is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one." *Id.*

Ineffective assistance of counsel does not result when an attorney refrains from pursuing a futile course of action or from raising a meritless issue or argument. *State v. Anderson*, 2005 WI App 238, ¶ 29, 288 Wis. 2d 83, 707 N.W.2d 159 ("[H]ad Anderson's attorney objected to this testimony, the objection would have been overruled. Anderson's attorney cannot be faulted for failing to make a meritless objection."), *rev'd on other grounds*, 2006 WI 77, 291 Wis. 2d 673, 717 N.W.2d 74. *See also Stone v. Farley*, 86 F.3d 712, 717 (7th Cir. 1996) (same under federal law).

C. Credibility.

When reviewing a suppression motion, an appellate court defers to the circuit court's credibility determinations and upholds its findings of fact unless the circuit court clearly erred in making those findings. *See State v. Flynn*, 92 Wis. 2d 427, 437, 285 N.W.2d 710 (1979); *cf.* Wis. Stat. § 805.17(2) ("In all actions tried upon the facts without a jury or with an advisory jury, . . . [f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall

be given to the opportunity of the trial court to judge the credibility of the witnesses.").

ARGUMENT

I. Summary of the issues.

This case presents two issues: first, a statutory-construction issue concerning whether (as Wilson contends) a single statute — Wis. Stat. § 885.03 — governs service of witness subpoenas in criminal cases, or whether (as the State contends) two other statutes — Wis. Stat. § 801.11 and Wis. Stat. § 805.07 — also govern service of witness subpoenas in criminal cases; second, whether Wilson's trial lawyer provided ineffective assistance (a) by failing to argue that he properly subpoenaed a witness to attend the evidentiary hearing on Wilson's suppression motion or (b) by failing to properly subpoena a witness to attend the evidentiary hearing on the motion.

II. Summary of facts.

The circuit court determined that Wilson did not properly serve the subpoena on Jacqueline A. Brown, the mother of Wilson's girlfriend (36:4; 37:47) and of Darryl Roberts (36:4; 37:66-67), Wilson's companion at the time of Wilson's arrest (37:47)). Substituted personal service on Jacqueline Brown occurred via Laquita A. Brown, Jacqueline Brown's daughter and Roberts's half-sister. (20:14; 36:4; 37:71.) The affidavit of service indicated only one attempt to serve the subpoena: the attempt that resulted in service on Laquita Brown. The affidavit included spaces for indicating other service attempts, but those spaces remained blank. (20:14; *see also* 37:72 (circuit court noting the spaces on the affidavit).) The court said that "[i]t looks like [the subpoena] was only served once and it was served by substituted service, and of course under Wisconsin law,

you have to attempt on a couple of occasions and make reasonable efforts before you can serve by substituted service." (37:71.) When asked by the court whether they disagreed with the court's understanding of the law, both defense counsel and the prosecutor replied that they did not disagree. (37:72.) The court concluded that because the affidavit did not indicate more than one effort to serve Jacqueline Brown before the server made substituted personal service, "this is not a valid subpoena." (37:72.) The court of appeals affirmed the circuit court's decision.

III. The Wisconsin Court of Appeals correctly affirmed the Milwaukee County Circuit Court's decision declaring, after reconciling applicable statutes, that Wilson had not properly subpoenaed a witness who failed to appear at the hearing on Wilson's suppression motion.

A. Section 972.11 makes three service-of-process statutes applicable in criminal cases.

Section 972.11(1) provides that "the rules of evidence and practice in civil actions *shall be applicable* in all criminal proceedings unless the context of a section or rule *manifestly requires* a different construction. . . . Chapter[ ] 885 . . . shall apply in all criminal proceedings." *See also State v. Popenhagen*, 2008 WI 55, ¶ 8, 309 Wis. 2d 601, 749 N.W.2d 611. Because of section 972.11(1), section 805.07 — a civil-action procedure for issuing and serving a subpoena — also applies in criminal cases. *Id.*[2] Section 805.07, in turn,

[2] Without section 972.11(1), Wisconsin criminal procedure would not provide a mechanism for subpoenaing witnesses: the statutory chapters specifically governing procedures in criminal cases — Chapters 967 to 979, *see* Wis. Stat. § 967.01 — do not provide procedures for subpoenas of witnesses. Section 968.135

specifies that "[s]ubpoenas shall be issued and served in accordance with ch. 885." Section 805.07 also specifies that "[a] subpoena may be served in the manner provided in s. 885.03 except that substituted personal service[3] may be made only as provided in s. 801.11 (1) (b)." Wis. Stat. § 805.07(5) (footnote added). Section 801.11(1)(b) provides that

> [i]f with reasonable diligence the defendant cannot be served under par. (a),[4] then by leaving a copy of the summons at the defendant's usual place of abode: 1. In the presence of some competent member of the family at least 14 years of age, who shall be informed of the contents thereof[.]

Wis. Stat. § 801.11(1)(b) (footnote added).

Consequently, contrary to Wilson's contention that only section 885.03 governs service of witness subpoenas in criminal cases (Wilson's Br. at 11-13), section 972.11(1) and *Popenhagen* make clear that section 805.07 and, derivatively, section 801.11(1)(b), also apply.

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delineates the procedure for subpoenas "requiring the production of documents," not for subpoenas for the attendance of witnesses.

[3] *Black's Law Dictionary* defines "substituted service" as "[a]ny method of service allowed by law in place of personal service, such as service by mail," with "constructive service" as an alternative term. *Substituted Service*, *Black's Law Dictionary* (10th ed. 2014). *Black's* defines "personal service" as "[a]ctual delivery of the notice or process to the person to whom it is directed." *Personal Service*, *Black's Law Dictionary* (10th ed. 2014). Finally, *Black's* defines "constructive service" as "[s]ervice accomplished by a method or circumstance that does not give actual notice." *Constructive Service*, *Black's Law Dictionary* (10th ed. 2014).

[4] Section 801.11(1)(a) provides for accomplishing service "[b]y personally serving the summons upon the defendant either within or without this state."

B. The explicit listing of Chapter 885 in Wis. Stat. § 972.11(1) as applicable "in all criminal proceedings" does not hold any legal significance in determining which statute controls the efficacy of service of a subpoena by substituted service in a criminal case.

The State agrees with Wilson that when statutes conflict, the more specific statute controls. *See* Wilson's Br. at 13-17. In addition, the State agrees that, as stated in section 972.11(1), civil rules of evidence and practice do not apply when "the context of a section or rule manifestly requires a . . . construction" that precludes application in a criminal case. *See id.* at 17-20.

The State disagrees, however, that the statutes conflict here, that section 885.03 qualifies as the more specific statute, and that the context of the civil sections or rules "manifestly require[ ] a . . . construction" precluding application in this case.

Wilson writes that "Wis. Stat. § 972.11(1) explicitly states that Wisconsin Chapter 885 '*shall* apply in all criminal proceedings.' (emphasis added)." (Wilson's Br. at 11.) He appears to infer that because section 972.11(1) refers explicitly to chapter 885 but not to sections 805.07 and 801.11(1)(b), chapter 885 necessarily controls for purposes of determining the efficacy of service of a witness subpoena in a criminal case. (Wilson's Br. at 11-13.)

The explicit reference to chapter 885 occurs for an obvious reason: if the third sentence in section 972.11(1) did not refer explicitly to chapter 885 (and to the other chapters listed in that sentence), those chapters would not have applied in criminal cases. The first sentence in section 972.11(1) explicitly applied "the rules of evidence and practice in civil actions . . . in *all criminal proceedings* unless

the context of a section or rule manifestly requires a different construction." Wis. Stat. § 972.11(1) (emphasis added). The civil procedure rules appear in chapters 801 through 847. *See* Wis. Stat. § 801.01(2) ("Chapters 801 to 847 govern procedure and practice in circuit courts of this state in all civil actions and special proceedings whether cognizable as cases at law, in equity or of statutory origin except where different procedure is prescribed by statute or rule."). The evidence rules appear in chapters 901 to 911. *See* Wis. Stat. § 901.01 ("Chapters 901 to 911 govern proceedings in the courts of the state of Wisconsin except as provided in ss. 911.01 and 972.11."). Neither the rules of civil procedure nor the rules of evidence include chapters 885 to 895 and chapter 995. Consequently, to make those chapters applicable, the legislature needed to list them specifically. The legislature did not need to do so for the specific rules of civil procedure and evidence because those rules appeared in statutorily identified sequences of statutory chapters.

In effect, in accord with section 972.11(1), unless "the context of a section or rule manifestly requires a different construction," civil procedure rules in sections 805.07 and 801.11(1)(b) apply in "all criminal proceedings" on an equal footing with section 885.03.

C. The context of Wis. Stat. §§ 801.11(1)(b) and 805.07 does not "manifestly require[ ]" precluding those statutes from applying in this case.

Wilson asserts that the context of section 805.07(5) — the statute specifically addressing "substituted service" — shows it does not apply to criminal proceedings. (Wilson's Br. at 17-20.) Specifically, he argues that "an examination of the language *within* Wis. Stat. § 805.07 reflects that it is civil in nature" (Wilson's Br. at 18) and that "an examination

of the surrounding statutes also reflect that Wis. Stat. § 805.07(5) is civil in nature" (*id.* at 19).

1. The language within section 805.07 does not "manifestly require[ ]" that section 805.07(5) not apply in criminal proceedings.

In arguing that section 805.07(5) can apply to civil actions only, Wilson quotes the second sentence of the section as proof of its exclusively civil nature: "A subpoena may also be issued by any attorney of record in a civil action or special proceeding to compel attendance of witnesses for deposition, hearing or trial in the action or special proceeding." (Wilson's Br. at 18.) But in advancing that argument, Wilson ignores a critical point. Specifically, he ignores the first sentence of the statute: "Subpoenas shall be issued and served in accordance with ch. 885." By incorporating the whole of Chapter 885, section 805.07(5) expanded the universe of persons and entities authorized to issue subpoenas while simultaneously expanding the types of proceedings beyond civil proceedings only.

For example, section 885.01 permits a broad universe of persons and agencies to issue subpoenas. None of those persons and agencies include "any attorney of record in a civil action or special proceeding." But that universe does include "the attorney general or any district attorney," who may issue subpoenas "to require the attendance of witnesses, in behalf of the state, in any court or before any magistrate and from any part of the state." Wis. Stat. § 885.01(2). The section does not limit subpoenas to appearances in only civil proceedings.

Similarly, section 885.01(1) authorizes issuance of a subpoena

> [b]y any judge or clerk of a court or court commissioner or municipal judge, within the territory in which the officer or the court of which he or she is the officer has jurisdiction, to require the attendance of witnesses and their production of lawful instruments of evidence in any action, matter or proceeding pending or to be examined into before any court, magistrate, officer, arbitrator, board, committee or other person authorized to take testimony in the state.

Again, none of those officials and agencies include "any attorney of record in a civil action or special proceeding," nor does the statute confine those officials' or agencies' authority to civil cases.

In short, by incorporating the whole of chapter 885, the first sentence in section 805.07(1) recognized that a wide array of a officials and agencies could issue subpoenas for witnesses to attend civil, criminal, and administrative proceedings — but none of those officials and agencies included "any attorney of record in a civil action or special proceeding." The second sentence of section 805.07(1) thus broadens the category of persons allowed to issue subpoenas for witnesses while restricting that authority to a narrow class of proceedings. If anything, rather than demonstrating the primarily civil nature of section 805.07(5), the context of the second sentence reinforces the view, evident from the first sentence, that section 805.07(5) applies when subpoenaing witnesses in a criminal case.

Wilson's reliance on *State v. Schaefer*, 2008 WI 25, 308 Wis. 2d 279, 746 N.W.2d 457, does not change the analysis. *Schaefer* "is a discovery case, notwithstanding the defendant's protestations to the contrary. Schaefer's appeal asks this court to approve the subpoena power to effect discovery in a criminal case prior to the preliminary examination." *Id.* ¶ 18. *See also id.* ¶ 1 (characterizing the document as "a subpoena duces tecum"). This Court did not need to consider — and did not consider — the applicability

or scope of the authority of a defendant to subpoena witnesses under section 885.03 or sections 805.07(5) and 801.11(1)(b).[5]

Similarly, other cases on which Wilson relies do not help him. (Wilson's Br. at 17-18.) *State v. Hyndman*, 170 Wis. 2d 198, 488 N.W.2d 11 (Ct. App. 1992), concerned a defendant's effort, via section 972.11(1), to obtain a summary judgment under Wis. Stat. § 802.08(1) dismissing the criminal complaint. *Hyndman*, 170 Wis. 2d at 203 (Hyndman filed "a motion for summary disposition on the grounds of outrageous governmental conduct"); *id.* at 204 ("Hyndman argues that his dismissal motion should be treated as a motion for summary judgment as provided by sec. 802.08, Stats. (summary judgment)."). For two reasons, the court of appeals rejected Hyndman's arguments. First, the facts would not have allowed summary judgment:

> A defendant who pleads "not guilty" to the charges set forth in the Information, sec. 971.01, Stats. (filing of the information), denies the charges, thereby requiring the State to prove every element of the charged offense(s). *See* Wis J I-Criminal 110. A plea of "not guilty" creates material issues of fact for the trier of fact to decide. Summary judgment lies only when no material issues of fact exist and a party, as a matter of law, is entitled to judgment. Section 802.08(2), Stats.

Id. at 205. "Hyndman entered a plea of 'not guilty,' thus creating issues of fact to be determined at trial." *Id.*

Second, the summary-judgment statute manifestly did not apply in criminal cases. "The context of sec. 802.08(1) manifestly requires that it not be applied to criminal actions. The words 'summons . . . scheduling order . . . claim,

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[5] This Court did not cite section 885.03, section 805.07(5), or section 801.11(1)(b).

counterclaim, cross-claim or 3rd party claim' are foreign to criminal pleadings and procedure and are solely within the domain of civil law." *Id.* at 206 (alteration in original). "In addition, summary judgment time constraints are entirely inconsistent with time constraints provided by statute for criminal proceedings." *Id.* at 207.

In short, unlike the subpoena statutes at issue here, the summary-judgment statute at issue in *Hyndman* did not have *any* role outside of civil proceedings.

Wilson's reliance on *State v. Henley*, 2010 WI 97, 328 Wis. 2d 544, 787 N.W.2d 350, does not fare any better. *Henley* concerned "whether and when certain provisions governing civil procedure in Wisconsin may be utilized by a convicted criminal defendant seeking a new trial." *Id.* ¶ 4. Specifically, this Court considered two questions relating to this issue:

> 1. May a circuit court award a new trial to a convicted criminal defendant in the interest of justice under Wis. Stat. § 805.15(1)? Relatedly, is such a challenge subject to the time limitations contained in Wis. Stat. § 805.16(1), or may a convicted criminal defendant file a motion for a new trial under § 805.15(1) at any time?
>
> 2. May a circuit court award a new trial to a convicted criminal defendant in the interest of justice under Wis. Stat. § 806.07(1)(g) or (h)?

Id.

This Court answered the first question negatively:

> We agree with the [amicus] State Public Defender that § 805.15(1) does not provide statutory grounds for a criminal defendant to seek a new trial in the interest of justice. We reach this conclusion because: (1) the text of § 805.15(1) suggests that it applies to civil cases only; (2) the text of § 805.16(1) suggests that the 20-day time limit applies to motions under § 805.15(1), but such a time limit is

> absurd in the criminal context; (3) §§ 974.02 and 974.06, by their terms, provide the primary statutory means of postconviction, appeal, and post-appeal relief for criminal defendants, and allowing motions under § 805.15(1) renders these provisions irrelevant; and (4) the statutory history of §§ 805.15, 805.16, and 974.02 reveal that §§ 805.15(1) and 805.16(1) do not apply to criminal cases.

Id. ¶ 39. Over the next several paragraphs, this Court elaborated on its summary. *Id.* ¶¶ 40-66. Most significantly, this Court held that "[a]llowing motions in the interest of justice under § 805.15(1) at any time renders limitations under § 974.02 and § 974.06 irrelevant. These statutes would make no sense if motions under § 805.15(1) could be brought at any time." *Id.* ¶ 55.

Likewise, on the second question, this Court rejected Henley's argument:

> Wisconsin law is clear that § 806.07(1)(g) applies only in equitable actions. *Nelson v. Taff,* 175 Wis. 2d 178, 187-88, 499 N.W.2d 685 (Ct. App. 1993). This is a criminal action, not an equitable action, and therefore the circuit court does not have authority under this subsection to grant Henley a new trial.
>
> Section 806.07(1)(h) is a civil procedure statute, and is unavailable for many of the same reasons § 805.15(1) is unavailable. If convicted criminal defendants can use § 806.07(1)(h) to challenge their conviction, why would they ever use §§ 974.02 and 974.06? The answer is, they would not.

Id. ¶¶ 69-70.

In short, as with *Hyndman*, the statutes at issue in *Henley* did not have *any* role outside of civil proceedings. Indeed, this Court even rejected the State's concession that one of the statutes could apply in criminal cases. *Id.* ¶¶ 34, 39, 43.

2. An examination of surrounding statutes does not show Wis. Stat. § 805.07(5) as a civil statute inapplicable in criminal cases.

Wilson quotes from the State's brief in *Schaefer*, 308 Wis. 2d 279, *see* Wilson's Br. at 19, and from *Popenhagen*, 309 Wis. 2d 601, *see* Wilson's Br. at 20, to prove that section 805.07(5) does not apply in criminal cases. The quotations, however, do not prove anything of the sort. As already noted in this brief (pp. 14-15, above), *Schaefer* concerns subpoenas for documents, not subpoenas for witnesses. This Court did not consider the interaction of the statutes at issue in this case — indeed, did not even cite any of those statutes (*see supra* note 5). *Schaefer* does not offer any support for the notion that (in Wilson's words) "Wis. Stat. § 805.07(5) is civil in nature." (Wilson's Br. at 19.)

Similarly, *Popenhagen* does not support Wilson's argument. As in *Schaefer*, *Popenhagen* concerned a subpoena for documents, not a subpoena for a witness. Notably, as Wilson acknowledges, the parties agreed that the prosecutor should have used a subpoena issued in accord with a specific criminal-procedure statute — Wis. Stat. § 968.135 — rather than a subpoena issued under the authority of a civil-procedure statute and that "[t]he sole issue raised for review was whether the suppression of evidence is a remedy when Wis. Stat. § 968.135 is violated." (Wilson's Br. at 20 n.11.) In effect, a civil-procedure rule does not have any role in a criminal case where criminal-procedure rules already provide for a corresponding procedure. In Wilson's case, criminal-procedure rules do not provide a procedure for subpoenaing witnesses, hence the need for the civil-procedure rules incorporated through section 972.11(1). And again, as in *Schaefer*, this Court did not consider the interaction of the statutes at issue in this case — indeed, did not even cite any of those statutes (*see supra* note 5).

D. A conflict does not exist between (on one hand) Wis. Stat. § 885.03 and (on the other hand) Wis. Stat. §§ 805.07(5) and 801.11(1)(b). In addition, as the more specific statute in Wilson's case, section 801.11(1)(b) prevails over section 885.03.

Wilson points to a footnote in the court of appeals' opinion as proof that a conflict exists between (on one hand) Wis. Stat. § 885.03 and (on the other hand) Wis. Stat. §§ 805.07(5) and 801.11(1)(b). (Wilson's Br. at 15.) He further contends that "Wis. Stat. § 885.03 controls because it is the more specific statute. Wis. Stat. § 885.03 expressly applies in criminal cases pursuant to Wis. Stat. § 972.11(1) (stating that Chapter 885 applies to 'all criminal proceedings')." (Wilson's Br. at 16.) Partly true, but fundamentally misleading. As rules of civil procedure, sections 805.07(5) and 801.11(1)(b) "shall be applicable in all criminal proceedings unless the context of a section or rule manifestly requires a different construction." Wis. Stat. § 972.11(1). As already explained in this brief (*see* pp. 12-18, above), the context of those statutes does not preclude their applicability here. And the necessity of specifically listing chapter 885 (*see* pp. 11-12, above) does not confer on that chapter any primacy over any equally incorporated but not specifically listed rules of civil procedure.

In addition, section 885.03 does not gain primacy as a statute more specific than sections 805.07(5) and 801.11(1)(b). As the court of appeals noted in determining that it need not resolve a seeming discrepancy between the statutes at issue, section 801.11 imposes a "stricter requirement" for serving a witness subpoena. *State v. Wilson*, No. 2015AP671-CR, 2016 WL 3606121, ¶ 9 n.2 (Wis. Ct. App. July 6, 2016) (unpublished). Moreover, section 885.03 deals with a form of service not employed in this case:

"Wilson did not simply leave the subpoena at Brown's home; he served a substitute." *Id.* Section 801.11(1)(b) deals specifically with the requirements of substituted service; section 885.03 does not.

E. Legislative history does not buttress Wilson's argument for section 885.03 as the standard for evaluating the efficacy of serving a subpoena on a witness in a criminal case.

Wilson invokes legislative history to prove that section 885.03 rather than sections 805.07(5) and 801.11(1)(b) governs the service of the witness subpoena in his case. (Wilson's Br. at 21-23.) "[I]f the meaning of the statute is unclear after examining the statute's language, [an appellate court] will consult extrinsic sources, including items of legislative history, to resolve any ambiguities." *State v. Houghton*, 2015 WI 79, ¶ 55, 364 Wis. 2d 234, 868 N.W.2d 143. "[A]mbiguity can be created by the interaction of two separate statutes." *State v. Strohbeen*, 147 Wis. 2d 566, 572, 433 N.W.2d 288 (Ct. App. 1988). The State does not regard the individual statutes as ambiguous, nor (as at least implied by the analysis in the preceding sections of this brief) does the State regard the statutes as ambiguous when read together. Consequently, the State does not regard legislative history as necessary to resolve this appeal.

But assuming the ambiguity exists, the legislative history shows the fallacy of Wilson's argument: none of the history deals with the relationship of section 972.11(1) to the sections at issue in this case. (Wilson's Br. App. at 246-53.) Moreover, the notes regarding section 805.07 reflect concern about the inadequacy of "[t]he general subpoena rules in ch. 885" (*id.* at 253) and include remarks about the rule on substituted service:

> Sub. (4) is based on the revision committee's concern that s. 885.03 is inadequate insofar as it permits service of a subpoena to be made simply by leaving a copy of the subpoena at the witness' abode. The proposed rule on substituted personal service is designed to insure that parties make good faith efforts to effect service and also to provide a basis for contempt proceedings for nonappearance that is not constitutionally vulnerable.

(*Id.*) In effect, the creation of the "substituted service" rule came about as a mechanism for curing a defect in section 885.03, with the rule designed to require "reasonable diligence" for service both on someone other than the person named in the subpoena (as in Wilson's case) and by merely leaving the subpoena at the residence of the named person. Consequently, if anything, the legislative history shows that the "reasonable diligence" requirement exists for the purpose of ensuring, as much as possible, that a witness receives actual notice before the subpoena's proponent can fall back on constructive notification.[6]

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[6] A "reasonable diligence" requirement in Wisconsin dates to at least 1875. *See Blackburn v. Sweet*, 38 Wis. 578, 582-83 (1875) ("[W]e have no doubt that under the provisions of our statute reasonable diligence should be used to obtain service upon all the defendants, and this should be made to appear, either by the return of the officer or from the affidavit of the party attempting to make service, before the judgment in form is entered against all the defendants jointly indebted. In the present case there is nothing whatever to show that any diligence was used to find the defendant *Hannibal L. Sweet,* or that service of process could not be had upon him.").

Before this Court created the rules of civil procedure that took effect on January 1, 1976, *see In the Matter of the Promulgation of the Rules of Civil Procedure for the State of Wisconsin*, 67 Wis. 2d. 585, 585 (1975) [hereinafter *Civil Procedure Rules Promulgation*], the rules for service of a summons included a "reasonable diligence" requirement, *see* Wis. Stat. § 262.06(1)(b) & (c) (1973). With the promulgation of the

In short, the legislative history Wilson offers shows an intention to have "reasonable diligence" serve as a prerequisite for any service of a subpoena in a manner other than by handing it directly to the named person. The reasonable-diligence requirement would apply explicitly under section 805.07(5) or implicitly under section 885.03. If anything, the legislative history shows that, in a contest between the applicability of section 805.07(5) and the applicability of section 885.03 in a case like Wilson's, section 805.07(5) wins.

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civil-procedure rules, this Court repealed chapter 262. *Civil Procedure Rules Promulgation*, 67 Wis. 2d at 758, § 22. Former section 262.06 became Wis. Stat. § 801.11, as shown in the conversion table on page 4115 of the 1973 edition of Wisconsin Statutes. Sections 801.11(1)(b) and (c) retained the "reasonable diligence" requirement. *See* Wis. Stat. § 801.11 (1975). In addition, this Court created section 805.07(5), which (as now) provided for substituted service of subpoenas. *See* Wis. Stat. § 972.11(1) (1975). The Judicial Council Committee's Note explained the purpose of subsection (5): "Sub. (5) is designed to make the service provisions respecting summonses and subpoenas more nearly identical." Judicial Council Committee's Note, 1974, *Civil Procedure Rules Promulgation*, 67 Wis. 2d at 698. At the time of the 1975 promulgation (as now), section 972.11(1) applied the rules of civil procedure and chapter 885 (then identified as Title XLIII) "in all criminal proceedings." *See* Wis. Stat. § 972.11(1) (1975).

F. Because Wis. Stat. § 805.07(5) governs the service of the witness subpoena in this case, and because Wilson's investigator did not exercise "reasonable diligence" before effecting substituted service on the witness's daughter, the Milwaukee County Circuit Court and the Wisconsin Court of Appeals correctly held that Wilson did not properly subpoena his witness.

Section 805.07(5), not section 885.03, establishes the proper manner for serving a subpoena to compel a witness to attend a proceeding in a criminal case. Section 805.07(5) imposes a "reasonable diligence" requirement as a condition for effective substituted service.

"Our supreme court has treated 'reasonable diligence' as a finding of fact to be affirmed unless against the great weight and clear preponderance of the evidence or, in the phraseology of the current statute, sec. 805.17(2), Stats., unless clearly erroneous." *Sprayer Supply, Inc. v. Feider*, 133 Wis. 2d 397, 403, 395 N.W.2d 624 (Ct. App. 1986) (citation omitted).

Here, the single attempt did not qualify as reasonable diligence. In *Haselow v. Gauthier*, 212 Wis. 2d 580, 569 N.W.2d 97 (Ct. App. 1997), a service effort functionally identical to the one in this case did not show reasonable diligence: "Because Haselow made only a single inquiry of Gauthier's father and immediately attempted substitute service, we agree with the trial court's finding of lack of due diligence." *Id.* at 589. Likewise, in *Beneficial Finance Co. of Wisconsin v. Lee*, 37 Wis. 2d 263, 155 N.W.2d 153 (1967), the court concluded that a single effort did not suffice to establish "reasonable diligence." *Id.* at 268-69. Even two attempts does not necessarily amount to reasonable diligence. In *Heaston v. Austin*, 47 Wis. 2d 67, 176 N.W.2d

309 (1970), the trial court determined that two attempts at personal service preceding substituted service did not qualify as reasonable diligence. This Court held that the trial court's conclusion "[was] not against the great weight and clear preponderance of the evidence." *Heaston*, 47 Wis. 2d at 74. In contrast, where a deputy sheriff had previously served a particular defendant on a "very large number of times" and "was well aware of circumstances at the [the defendant's] farm," two efforts sufficed to establish reasonable diligence before effecting substituted service on the defendant's son. *Sprayer Supply*, 133 Wis. 2d at 404.

"Wisconsin compels strict compliance with the rules of statutory service, even though the consequences may appear to be harsh." *PHH Mortg. Corp. v. Mattfeld*, 2011 WI App 62, ¶ 7, 333 Wis. 2d 129, 799 N.W.2d 455. Here, Wilson did not comply with the statutory obligation to exercise reasonable diligence before effecting substituted service on the witness's daughter. The circuit court correctly determined that without proper service, the court did not have any basis for issuing a body attachment or for otherwise compelling the witness's attendance. The court of appeals correctly affirmed that decision. This Court should do the same.

IV. Defense counsel did not provide ineffective assistance in connection with the subpoena of a witness to testify at the evidentiary hearing on Wilson's suppression motion.

In his postconviction motion, Wilson contended that, for two reasons, trial counsel provided ineffective assistance: counsel failed to argue that he properly subpoenaed Jacqueline Brown (20:8-10), and counsel did not properly subpoena Brown (20:11). The court of appeals affirmed the circuit court's denial of the ineffective-assistance claim. *Wilson*, 2016 WL 3606121, ¶¶ 12-25. In this Court, he reiterates his previous contentions. See Wilson's Br. at 23-27. This Court, like the court of appeals, should reject them.

A. Because arguing for the validity of the subpoena would have proved futile, defense counsel did not provide ineffective assistance when he did not make that argument.

Wilson's lawyer did not provide ineffective assistance by failing to argue that he properly subpoenaed Jacqueline Brown. The circuit court summarized the law regarding substituted service of a subpoena (37:71), and Wilson's counsel and the prosecutor said they did not disagree with that summary (37:72). Because the affidavit of service of the subpoena did not indicate more than one effort to serve Brown before the server made substituted personal service, the court correctly characterized the subpoena as "not a valid subpoena." (37:72.)

A lawyer does not provide ineffective assistance by refraining from pursuing a futile course of action. *See, e.g.*, *Stone*, 86 F.3d at 717; *State v. Berggren*, 2009 WI App 82, ¶ 21, 320 Wis. 2d 209, 769 N.W.2d 110.

Here, even assuming defense counsel's request for a body attachment (37:70) did not amount to an implicit argument for the validity of the subpoena, the court's reasoning and the applicable statutes show that any argument by defense counsel would have proved futile. Consequently, defense counsel did not provide ineffective assistance by refraining from making an argument for the validity of the subpoena.

B. Because the failure to properly serve the subpoena on Jacqueline Brown did not result in prejudice to Wilson, defense counsel did not provide ineffective assistance.

For purposes of this appeal, the State does not dispute that the failure to properly serve the subpoena on Jacqueline Brown amounted to deficient performance under

Strickland's two-part test for proving ineffective assistance of counsel. *See Strickland*, 466 U.S. at 687-91 (discussing deficient-performance component). This deficiency, however, did not result in prejudice to Wilson. *See id.* at 691-96 (discussing prejudice component).

At the suppression hearing, the circuit court heard four witnesses: Milwaukee Police Officer William Savagian (37:6-45, 105-08); Milwaukee Police Officer James Hunter (37:98-105); Darryl Roberts (37:47-64); and Wilson (37:75-97). The court identified "a key issue" as whether the officers had their guns drawn when approaching the vehicle occupied by Wilson and Roberts. (37:69; see also 37:125 ("the gun issue was the most significant to the Court").)

Roberts testified that two of the three officers who approached the vehicle had their guns drawn. (37:50.) He said that "[o]ne of the officers was on the driver's side pointing the gun at Keimonte Wilson. The other male officer was coming to the passenger side with his gun drawn telling me to get out of the car." (37:50-51.)

Wilson testified that "[w]hen I returned to the vehicle, I seen three officers running up with their guns pointed at -- in my direction." (37:77.) He said all three officers had their guns drawn. (37:89, 90.) He also said the white male officer wore a bulletproof vest. (37:80, 91, 93.)

Officer Savagian denied that he or the other officers had guns drawn as they approached Roberts and Wilson. (37:36, 40, 105-06.)

Officer Hunter denied that he or the other officers had guns drawn as they approached Roberts and Wilson. (37:102.) He also testified that he wore a bulletproof vest during the encounter and that "I normally wear a vest under my shirt." (37:99.)

During the discussion of Jacqueline Brown's failure to appear at the hearing, defense counsel summarized the testimony he expected Brown to give:

> It's my understanding that she would testify that she observed them with guns drawn approach the vehicle and take both my client and her son, Darryl, out of the vehicle. And I don't want to presume too much on the testimony, but it's my understanding that that is very clearly what she would be testifying to.

(37:66.)

The circuit court denied Wilson's suppression motion. (37:127-28.) The court said that it had "the opportunity to hear the testimony and assess the demeanor and I guess believability of the witnesses. And based on the totality of the circumstances and the credible evidence of the witnesses, I'm going to make some findings." (37:119-20.) The court found Officer Savagian "to be a very credible witness." (37:120.) The court doubted the reliability of Roberts's testimony. (37:121-22.) Similarly, the court expressed skepticism about Wilson's testimony and found it internally inconsistent as well as inconsistent with some of Roberts's. (37:122-24). The court also found Officer Hunter "very believable" (37:124):

> He was very calm as he testified. Not only what he was saying, but basically the way he was saying it led me to believe that he was true -- that he was telling the truth. And he was not in the courtroom when the other witnesses were testifying regarding the guns.

(37:124.) The court summarized its credibility determinations:

> So at the end of the day regarding this gun situation, I find the officers' testimony to be much more credible and believable than Mr. Wilson and Mr. Roberts. Specially given the inconsistencies between the testimony of Mr. Wilson and Mr.

> Roberts for some of the reasons that I've already indicated.

(37:124-25; *see also* 37:126 ("I found Officer Savagian and Officer Hunter's testimony to be credible.").) The court also discounted the likelihood that Brown's testimony would have changed anything:

> And also I couldn't help but wonder at this point that even if Ms. Brown -- even if we -- she had appeared or even if there had been a valid subpoena that I could take some action on, whether her testimony would really help. Because it would be one thing if both Mr. Roberts and Mr. Wilson had testified totally consistently, but they didn't. So it -- either she would be backing one or the other or maybe providing yet an additional explanation. So I don't see at the end of the day how that would have assisted the Court or assisted Mr. Wilson with his motion. It's unfortunate she chose not to be here, but -- because we know she got the subpoena, but because there's not proper service, I couldn't enforce it.

(37:125.)

Jacqueline Brown's absence did not cause Wilson any prejudice. Wilson has not provided any reason to believe Brown's testimony would have altered the circuit court's assessment of the officers' credibility. And the record does not provide any basis for assuming Brown's testimony would have done so. Moreover, defense counsel's summary of Brown's expected testimony confirmed the court's belief that because of inconsistencies between the testimony of Roberts and Wilson, Brown's testimony would buttress the testimony of one but not the other, or, worse (from Wilson's perspective), would create a third account, thus undermining both Roberts and Wilson.

In addition, as the mother of Roberts and of Wilson's girlfriend, Brown lacked any presumptive indifference to the impact of her testimony, increasing the likelihood that her

testimony would not undermine the court's assessment of the officers' credibility or would have improved the court's view of Roberts's and Wilson's believability. Defense counsel might have provided ineffective assistance if he had improperly served an indifferent witness — for example, a passerby who just happened on the encounter and didn't have any relationship to either Roberts or Wilson, hence had no personal stake of any sort in the impact of his or her testimony. Instead, the missing witness had a close personal relationship to Wilson and a familial relationship to Roberts and, based on defense counsel's proffer (37:66), would not have offered testimony that would have altered the circuit court's assessments of the other witnesses' credibility.

In summary, because testimony from Brown would not have changed anything, her absence did not harm Wilson. Consequently, defense counsel's failure to secure her presence did not cause Wilson any cognizable prejudice. Defense counsel therefore did not provide ineffective assistance in terms of failing to properly serve the subpoena on Brown.

CONCLUSION

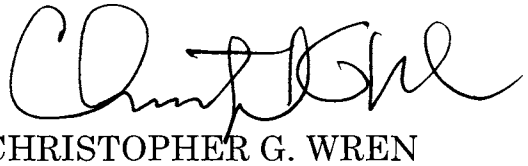
This court should affirm the court of appeals' decision affirming the circuit court's decision denying Wilson's postconviction motion and should affirm the judgment of conviction. The circuit court correctly decided that Wilson failed to properly subpoena a witness to testify at the evidentiary hearing on his suppression motion. Defense counsel did not provide ineffective assistance by refraining from making a futile argument to the circuit court. And because the absence of the improperly subpoenaed witness did not adversely affect the circuit court's decision denying Wilson's suppression motion, defense counsel's failure to properly subpoena the witness did not cause Wilson any

Strickland prejudice and therefore did not result in defense counsel providing ineffective assistance.

Date: December 28, 2016.

Respectfully submitted,

BRAD D. SCHIMEL
Wisconsin Attorney General



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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(8): FORM AND LENGTH REQUIREMENTS

In accord with Wis. Stat. § (Rule) 809.19(8)(d), I certify that this brief satisfies the form and length requirements for a brief prepared using a proportional serif font: minimum printing resolution of 200 dots per inch, 13 point body text, 12 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per line, and a length of 7,322 words.

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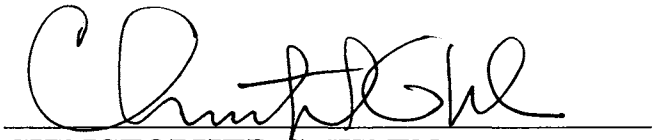

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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12): ELECTRONIC BRIEF

In accord with Wis. Stat. § (Rule) 809.19(12)(f), I certify that I have submitted an electronic copy of this brief (excluding the appendix, if any) via the Wisconsin Appellate Courts' eFiling System and that the electronic copy complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that the text of the electronic copy of this brief is identical to the text of the paper copy of the brief.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

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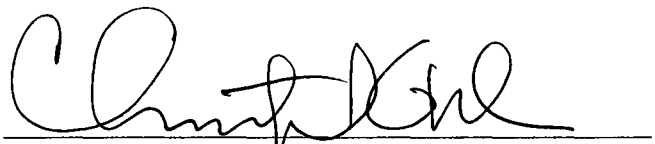

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