STATE OF WISCONSIN

C O U R T OF APPEALS

DISTRICT II

Case No. 2015AP791-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ERNESTO LAZO VILLAMIL,

Defendant-Appellant.

On Appeal From an Amended Judgment of Conviction and Order Denying Postconviction Relief Entered in the Waukesha County Circuit Court, the Honorable Michael J. Aprahamian, Presiding

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REPLY BRIEF OF DEFENDANT-APPELLANT

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I. This Court Cannot Resolve the Ambiguity Created By the Redundancy of Wis. Stat. § 343.44(2)(ar)4.

The parties agree that the plain reading of Wis. Stat. § 343.44(2)(ar)4 is ambiguous because the knowledge required to enhance the penalty from a misdemeanor to a class H felony is repetitive. (State's Br. at 1-2). The parties also agree that it would be absurd for an individual to have the penalty enhanced for committing the base offense of Operating After Revocation, (OAR), "knowingly" because "knowing" is an element of the base offense. (State's Br. at 8).

Before addressing each of the state's proposals for construing the statute, it is important to clarify that contrary to the state's reading of the previous version of Wis. Stat. § 343.44, that Operating While Suspended, (OWS), as a base offense, did not require knowledge as an element. Wis. Stat. § 343.44(1)(a) (2009-2010) explicitly stated, "A person's knowledge of his or her operating privilege is suspended is not an element of the offense under this paragraph." (State's Br. at 3). The base offense of OWS was punished as an ordinance violation. Wis. Stat. § 343.44(2)(a) (2009-2010). Knowingly operating after suspension was a separate violation, Wis. Stat. § 343.44(1)(am) (2009-2010), that was only punished when in the course of driving, damage, injury or death resulted. *See* Wis. Stats. § §§§ 343.44(2)(e), (f), (g), (h).

A. Interpreting the word "violate" to refer only to the acts necessary to violate the base statute is an unreasonable construction of the statutory language because it creates more ambiguity.

A statute may not be construed in a way that leads to absurd or unreasonable results. ***State ex rel. Kalal v. Circuit Court for Dane County***, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 682 N.W.2d 110. As the parties agree, the plain language of the statute leads to the absurd result of enhancing the penalty for OAR causing death when the defendant knows their license has been revoked, because knowledge is already an element of the base offense under Wis. Stat. § 343.44(1)(b).

The state, however, proposes that to resolve this ambiguity, this court interpret the word "violate" in Wis. Stat. § 343.44(2)(ar)4 to refer only to the revocation of the license and operation of a vehicle of the base offense. (State's Br. at 10). While the court will reject an unreasonable construction of a statute, a reasonable construction must be possible. ***State v. Yellow Freight Sys., Inc.,*** 101 Wis. 2d 142, 153, 303 N.W.2d 834 (1981). This court should reject the state's proposed interpretation of the statute because it is unreasonable and results in further ambiguity.

Although the court must avoid absurd results when giving meaning to the plain language of the statute, it must also consider the "[c]ontext and structure of a statute, [which] are important to the meaning of the statute. 'Therefore, statutory language is interpreted in the context in which is it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely related statutes[.]'" ***State v. Quintana*** 2008 WI 33 ¶ 14, 308 Wis. 2d 615, 748 N.W.2d 447; *quoting* ***Kalal***, 271 Wis. 2d 633 ¶ 46.

Here, the word "violate" in Wis. Stat. § 343.44(2)(ar)4 refers to violation of the base offense OAR, which requires knowledge. The state, however, wants this court to ignore the usual and plain meaning of the word "violate," which is to break the law, and construe it to refer only to the acts, and not the mental state of the base offense for purposes of giving meaning to the ambiguous statute. (State's Br. at 9-10). However, Wis. Stat. § 343.44(1)(b) and Wis. Stat. § 343.44 (2)(ar)4 must be taken in context together, as the latter is the penalty provision of the former. And, as noted above, the language must be interpreted in context of the whole, not in isolation as the state wishes in this situation. This court cannot isolate one word and give it a separate meaning than that word would have in other subsections of the same statute. To do so would violate the principles of statutory construction that the separate parts of the statute operate as a whole and should be taken as such. ***State v. Quintana*** 2008 WI 33 ¶ 14, 308 Wis. 2d 615, 748 N.W.2d 447; *quoting* ***Kalal***, 271 Wis. 2d 633 ¶ 46.

Interpreting the word "violate" in Wis. Stat. § 343.44(2)(ar)4 to mean only the conduct creates significant problems with the other parts of the statute. Subsection 2 is the penalty provision. The term "violate" is found in all of the other subsections that refer to the offenses and the corresponding penalties. Since language is not construed in isolation, *see* ***Quintana*** 2008 WI 33 ¶ 14, 308 Wis. 2d 615, 748 N.W.2d 447; *quoting* ***Kalal***, 271 Wis. 2d 633 ¶ 46, it would be reasonable to interpret the word "violate" to refer to only the conduct and not the mens rea in all the penalty provisions. Therefore, it would be reasonable to interpret Wis. Stat § 343.44(1)(b) as being violated when one drives while revoked, regardless of knowledge; thereby impliedly repealing the knowledge requirement of the base offense.

And, as the state noted, repealing a statute by implication is disfavored. (State's Br. at 11).

Giving a word a special meaning in only one context of the statute, and retaining the plain, common meaning in the other parts of the statute defies the principles of statutory construction. Moreover, giving the word "violate" the meaning the state propose would create ambiguity as to what the word "violates" means in other subsections of the statute, thereby causing confusion for courts, prosecutors and defense attorneys state-wide, as OAR is a common offense. This court should reject the state's proposal to isolate the word "violate" and give it a meaning narrower than its plain commonly-understood one.

B. The element of knowledge cannot be impliedly repealed because doing so creates a new offense without notice, and violates separation of powers.

While the state's proposed interpretation of the word "violate" creates further ambiguity, it is also another way of arguing for implicit repeal of "knowledge" as an element in the base offense of OAR. In addition to requesting implicit repeal and calling it a narrow interpretation of violate, the state also explicitly suggests that this court rewrite the statute to resolve the drafting error that created the ambiguity in the first place by impliedly repealing knowledge from the base offense. (State's Br. at 11).

The court has the authority to implicitly repeal an older version of a statue when the conflicting provisions are irreconcilable. ***State v. Matthew A.B.***, 231 Wis. 2d 688, 706, 605 N.W.2d 598 (Ct. App. 1999). Appellate courts, however, have consistently, since the infancy of statehood, disfavored repeal by implication. *See e.g.*, ***Attorney General ex. Rel.***

Taylor v. Brown, 1 Wis. 513, 525 (1853). This court should continue to disfavor repeal by implication, particularly in this case, where doing so would create a new offense, thereby violating the separation of powers doctrine, and creating constitutional problems in relation to notice of the newly create offense.

Mr. Lazo Villamil acknowledges that the legislative memo purported to repeal knowledge as an element, but the final draft did not do so. It is not for this court to save the legislature from its drafting errors. *See e.g.*, ***State v. Reagles***, 177 Wis. 2d 168, 176, 501 N.W.2d 861 (Ct. App. 1993) (holding that the remedy for a statute's failure to cover a particular situation lies with the legislature). Moreover, this court presumes that the legislature knows the law and the legal effect of its actions. ***In re Commitment of West***, 2011 WI 83, ¶ 61, 336 Wis. 2d 578, 800 N.W.2d 929, (*citing* ***Shill v. Wis. Rapids Sch. Dist.***, 2010 WI 86, ¶ 103, 327 Wis. 2d 572, 786 N.W.2d 177).

If this court interprets the "knowledge" element to be implicitly repealed from the base offense, it is creating a strict liability offense of OAR, regardless of knowledge. Doing so rewrites the statute, which would require this court to usurp the power of the legislature and rewrite the statute. Under the Wisconsin Constitution, Article 4, the power to enact law lies with the legislature, not the judiciary. It is not for this court, or any court, to rewrite statutes or create laws.

Also problematic with the state's proposed solution, impliedly repealing "knowledge" violates procedural due process because it lowers the threshold for violating OAR without proper notice. Due process requires fair notice and proper standards for adjudication. ***State v. Lopez***, 207 Wis. 2d 412, 434-435, 559 N.W.2d 264 (Ct. App. 1996). (internal

citation omitted). A penal statute must define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a matter that does not encourage arbitrary and discriminatory enforcement.'" ***State v. Cissell***, 127 Wis. 2d 205, 224, 378 N.W.2d 691 (1985); (quoting ***Kolender v. Lawson***, 461 U.S. 352, 357 (1983)).

This court cannot resolve the ambiguity in the statute by impliedly repealing the element of knowledge from the base offense because doing so violates the separation of powers, and creates a new offense without notice. The error can only be remedied by the legislation. Because this court cannot remedy the ambiguity through an alternate statutory construction, the rule of lenity must apply. ***State v. Cole***, 2003 WI 112, ¶ 13, 264 Wis. 2d 520, 665 N.W.2d 328.

Finally, Mr. Lazo Villamil maintains his constitutional challenges as outlined in his brief-in-chief. (Lazo Villamil Br. at 17-20). The state's only response to the constitutional challenges raised was that the statute "was never unconstitutionally vague because even without judicial explanation, it gives persons of ordinary intelligence a reasonable opportunity to what is prohibited so they may conform their conduct to the proscription." (State's Br. at 16).

However, the state agrees that on its face, the statue is ambiguous and argues that it requires judicial interpretation to resolve the ambiguity. (State's Br. at 8). Moreover, there must be notice not only of the prohibited conduct, but of the consequences for violating a particular criminal statute. ***Cissell***, 127 Wis. 2d at 216-217. (internal citation omitted). Here, as the state agrees, there is ambiguity as to the penalties and how to apply them. Therefore, its contention that the statue was never unconstitutionally vague seems to be at odds

with its position regarding the necessity for judicial interpretation of the statute.

II. Mr. Lazo Villamil Had A Constitutional Right to An Adequately Explained Sentence, and the Court Had Statutory Duty to the Use of the OAR Guidelines.

A. The circuit court's failure to consider the statutory guidelines constitutes an erroneous exercise of discretion.

1. The proper exercise of discretion at sentencing cannot be waived.

The state seems to agree that the circuit court's failure to use the statutory guideline was an erroneous. (State's Br. at 17). The state argues, however, that this issue is waived because Mr. Lazo Villamil did not object at the time of sentencing to the circuit court's failure to use the guidelines. (State's Br. at 17). The state contends that Mr. Lazo Villamil cannot wait until after sentencing to pull out his "trump card," and that this court "will not find that a lower court erroneously exercised its discretion where the defendant did not ask the court to exercise its discretion." (State's Br. at 17-18). Waiver simply does not apply to this case, and the state's contention that Mr. Lazo Villamil had an affirmative obligation to request that the circuit court properly exercise its discretion at the time of sentencing is truly odd.

To support this proposition, the state relies on ***State v. Gollon***, 115 Wis. 2d 592, 604, 340 N.W.2d 912 (Ct. App. 1983). ***Gollon***, however, has nothing to do with the exercise of discretion at sentencing; rather, it refers to a defendant's failure to renew a pretrial motion for severance when he became aware that a witness would not testify. ***Id***. at 604. This case is entirely distinguishable. The issue here is the

circuit court's obligation, not Mr. Lazo Villamil's failure to raise and preserve a particular motion.

A defendant does not have an obligation to request a circuit court's compliance with its statutory duties, or to object to its failure to do so. *See* ***State v. Hou Erik Vang***, 2010 WI App 118 ¶ 14, 328 Wis. 2d 251, 789 N.W.2d 115. In that case, the circuit court failed to inform the defendant of the immigration warnings as mandated by Wis. Stat. § 971.08(1)(c). ***Id***. The state argued that the defendant waived any right to be informed of the immigration consequences because he declined any further plea colloquy. ***Id***. ¶13. This court rejected that argument and held that the defendant could neither waive nor forfeit a duty that is imposed on the court. ***Id***. ¶ 14. In other words, it is not incumbent upon a defendant to remind or request from a circuit court that it comply with its duties.

Similarly, defendants are not required to request a plea colloquy from the circuit court. Rather, it is the duty of the circuit court to engage in a colloquy with the defendant at the time of the plea to determine whether the plea is being made voluntarily, intelligently, and knowingly, and that the defendant is aware of the nature of the charge and the maximum potential punishment. Wis. Stat. § 971.08(1)(a). A circuit court must also ascertain that there is a factual basis for which to accept a plea. Wis. Stat. § 971.08(1)(b). The plea colloquy must also:

> (1) Determine the extent of the defendant's education and general comprehension so as to assess the defendant's capacity to understand the issues at the hearing;
>
> (2) Ascertain whether any promises, agreements, or threats were made in connection with the defendant's

anticipated plea, his appearance at the hearing, or any decision to forgo an attorney;

(3) Alert the defendant to the possibility that an attorney may discover defenses or mitigating circumstances that would not be apparent to a layman such as the defendant;

(4) Ensure the defendant understands that if he is indigent and cannot afford an attorney, an attorney will be provided at no expense to him;

(5) Establish the defendant's understanding of the nature of the crime with which he is charged and the range of punishments to which he is subjecting himself by entering a plea;

(6) Ascertain personally whether a factual basis exists to support the plea;

(7) Inform the defendant of the constitutional rights he waives by entering a plea and verify that the defendant understands he is giving up these rights;

(8) Establish personally that the defendant understands that the court is not bound by the terms of any plea agreement, including recommendations from the district attorney, in every case where there has been a plea agreement;

(9) Notify the defendant of the direct consequences of his plea; and

(10) Advise the defendant that "If you are not a citizen of the United States of America, you are advised that a plea of guilty or no contest for the offense [or offenses] with which you are charged may result in deportation, the exclusion from admission to this country or the denial of naturalization, under federal law," as provided in Wis. Stat. § 971.08(1)(c).

State v. Brown, 2006 WI 100 ¶ 34, 293 Wis. 2d 594, 719 N.W.2d 906. (internal citations omitted).

When a circuit court fails to fulfill its duties and a defendant alleges that they did not understand an aspect of the plea due to the circuit court's omission, an evidentiary hearing will be necessary. ***Id***. ¶ 35. "Whenever the sec. 971.08 procedure is not undertaken or whenever the court-mandated duties are not fulfilled at the plea hearing, the defendant may move to withdraw his plea." ***State v. Bangert***, 131 Wis.2d at 274, 389 N.W.2d 12(1986).

Nowhere in the procedure is there mention of a defendant's duty to request a colloquy, or waiver if they fail to do so. Moreover, under the plea withdrawal rules of ***Bangert***, a defendant can wait until they know their sentence to withdraw their plea. ***Id***. at 275. If defendants were required to alert the circuit court when it omits an aspect of the colloquy in order to preserve the issue, there would be no plea withdrawals under ***Bangert*** because the circuit court would have been made aware of the omission and be able to correct it at the time of the plea.

The circuit court's mandated duties of a plea are analogous to the circuit court's duty in this case to consider the statutory aggravating and mitigating circumstances in the guidelines and as outlined in Wis. Stat. § 343.44(2)(b). Here, Mr. Lazo Villamil was not required to remind the court to use the guidelines, or request that it do so. Just as this court rejected the state's argument in ***Vang*** that the defendant had waived or forfeited a complete colloquy by not requesting any further instruction from the court, so too it should reject the state's argument in this case that Mr. Lazo-Villamil had an affirmative duty to ask the court to fulfill its duties. The circuit court's are to comply with its obligation to consider

the statutory guidelines constituted an erroneous exercise of discretion.

2. Interpreting the word "shall" as mandatory does not lead to absurd results.

The state argues next that even if Mr. Lazo Villmil did not waive the circuit court's duty to consider the sentencing guidelines, it had no obligation to consider them. (State's Br. at 18). Although Wis. Stat. §343.44(2)(b) provides that:

> In imposing a sentence under par. (ar) or (br), the court ***shall*** review the record and consider the following:
>
> 1. The aggravating and mitigating circumstances in the matter, using the guidelines described in par. (d).
>
> 2. The class of vehicle operated by the person.
>
> 3. The number of convictions of the person for violations of this section within the five years preceding the person's arrest.
>
> 4. The reason that the person's operating privilege was revoked, or the person was disqualified or ordered out of service, including whether the person's operating privilege was revoked for an offense that may be counted under s. 343.307(2).
>
> 5. Any convictions for moving violations arising out of the incident or occurrence giving rise to sentencing under this section.

(emphasis added), the state argues that this court should designate the word "shall" as directory, rather than assign it its presumptively mandatory definition. (State's Br. at 18). Paragraph (d) states that "[t]he chief judge of each judge of each judicial administrative district shall adopt

guidelines, ... for the consideration of aggravating and mitigating factors." Wis. Stat. § 343. 44(2)(d).

The presumption in statutory interpretation is that the word "shall" is mandatory. ***State ex rel. Marberry v. Macht***, 2003 WI 79 ¶16, 262 Wis. 2d 720, 665 N.W.2d 155. "Whether or not a statutory provision is mandatory or directory is a matter of statutory interpretation." ***Id***. ¶15. The state argues that the legislature intended for the guidelines to be directory and that this court can discern that intent from the absurd results that use of the guidelines produces. Namely that they do not apply to OWS crimes and because varying degrees of homicide offenses do not require use of the guidelines.

Use of the guidelines do not produce absurd results. To the contrary, the guidelines help minimize disparate sentencing and provide courts with guidance about important factors to consider in these particular cases. While Wis. Stat. § 343.44(2)(b) does not require the use of the guidelines in OWS offenses, the state-wide guideline includes OWS offenses. The guideline indicates that its production is required by Wis. Stat. § 343.44(2)(d) and SCR 70.34 for violations occurring after March 1, 2012. (31:8-9),[1] thereby suggesting that sentencing courts apply them to both types of cases.

The language of this statute demonstrates that the legislative intent was for the word "shall" to be mandatory. This court has considered sentencing guidelines in relation to

[1] Guidelines can be found at: http://www.wisbar.org/Directories/CourtRules/OWI%20Guidelines/Statewide%20-%20OAR-OAS%20Guidelines%20for%20violations%20on%20or%20after%20March%201,%202012.pdf

operating while intoxicated offenses (OWI). In ***State v. Smart***, 2002 WI App 240 ¶15, 257 Wis. 2d 713, 652 N.W. 2d 429, this court stated that use of the OWI guidelines pursuant to Wis. Stat. § 346.65(2m)[2] was not mandatory. The language of that statute provided:

> In imposing a sentence under sub. (2) for a violation of s. 346.63 (1) (b) or (5) or a local ordinance in conformity therewith, the court shall review the record and consider the aggravating and mitigating factors in the matter. If the level of the person's blood alcohol level is known, the court shall consider that level as a factor in sentencing. The chief judge of each judicial administrative district shall adopt guidelines, under the chief judge's authority to adopt local rules under SCR 70.34, for the consideration of aggravating and mitigating factors.

In that statute, the legislature simply stated that a court should consider the mitigating and aggravating factors, but did not describe what the factors were. In a separate sentence, the statute obligated the creation of guidelines for consideration of mitigating and aggravating factors. However, there is nothing in the statutory language that specifically required courts to use the guidelines. In contrast, Wis. Stat. § 343.44(2)(b) specifically tells the sentencing court to use the guidelines for consideration of mitigating and aggravating factors. The phrase "using the guidelines described in par. (d)" demonstrates a clear legislative intent that the use of the guidelines is mandatory and not discretionary because it directs the sentencing court to a specific set of factors. If the legislature had intended for use of the guidelines to be discretionary, it could have used the word "may" when

[2] The statutory language from that time of that case is essentially the same, with the exception that the current version of the statute includes "urine" and "controlled substance." Wis. Stat. § 346.65(2m).

referring to use of the guidelines. Similarly, it could have written the statute to mirror the OWI penalty provision referring to the guidelines, which had already been determined to be directive. It did not. Instead it directed the court to consider the specific mitigating and aggravating factors as outlined in the guideline.

Moreover, giving "shall" its presumptively mandatory meaning, does not produce absurd results. As this court observed, sentencing guidelines generally function to reduce sentencing disparity among persons who commit similar offenses. ***Smart***, 257 Wis. 2d 713, ¶6. *Citing* ***State v. Speer***, 176 Wis. 2d 1101, 1124, 501 N.W.2d 429 (1993). Contrary to the state's suggestion, the offense in this case is not comparable to offenses such as intentional homicide, felony murder, reckless homicide, homicide by intoxicated use of a vehicle, or homicide by negligent use of a vehicle. Those offenses are contained within an entirely separate chapter of the statutes. More importantly, all require some mens rea as to the resulting death. Here, there is no mens rea required for producing the result, only for knowledge of the revocation of a driver's license. Therefore, the absence of sentencing guidelines for those offenses does not make the mandated use of guidelines in OAR offenses absurd. This court should find that the word "shall" is mandatory, and that the circuit court's failure to consider the applicable guideline constituted an erroneous exercise of discretion.

B. Valid points do not render a sentencing explanation adequate.

The state characterizes the circuit court's sentencing rationale as sparse, but seems to indicate that because it made "valid points", it should be upheld as a proper exercise of discretion. (State's Br. at 20-21). "Valid points," however, do

not make for a proper exercise of discretion. Rather, discretion signifies that the court has gone through a process of reasoning "by identifying the most relevant factors and explaining how the sentence imposed furthers the sentencing objectives" ***State v. Harris***, 2010 WI 79, ¶ 29, 326 Wis. 2d 685, 786 N.W.2d 409.

Here, the circuit court failed to properly exercise its discretion when it imposed the maximum term of imprisonment. In addition to failing to use the guidelines, its other rationale was largely lacking. The court discussed Mr. Lazo Villamil's driving record, which included his conviction for a prior OAR and for an OWI. As noted in his brief in-chief, those were proper considerations. (Lazo Villamil Br. at 23). However, the court provided no further justification for imposing the maximum sentence.

The court seemed to find elements of the offense such as driving without a license and getting into an accident causing death to be aggravating. (44: 22). These, however, are the elements of the offense. By this rationale, committing a violation of the offense will always justify a maximum sentence. The circuit court's lack of sentencing rationale is also illustrated by its remark that all it could "do to respond to the needs of the community as it best can under the facility of the law and for Mr. Lazo is the maximum number six years" (44:22). This statement again suggests that the fact that Mr. Lazo-Villamil committed the offense is enough to justify the maximum penalty.

Permitting commission of the offense to be enough to justify the maximum penalty would run contrary to requirement that the sentencing court impose the minimum amount of custody necessary. *See* ***McCleary v. State***, 49 Wis. 2d 263, 276, 182 N.W.2d 512 (1971). Moreover, it would run

afoul of individualized sentences, and the obligations of the sentencing court to explain the rationale behind the sentence. *See*, ***State v. Gallion***, 2004 WI 42, ¶ 4, 270 Wis. 2d 535, 678 N.W.2d 197 and ***McCleary***, 49 Wis. 2d 263.

Because the sentencing court erroneously exercised its discretion by failing to adequately explain why a maximum sentence was necessary, and by failing to use the guidelines pursuant to Wis. Stat. § 343.44(2)(b), Mr. Lazo-Villamil is entitled to resentencing.

CONCLUSION

For the reasons set forth in this brief, and his brief-in-chief, Mr. Lazo Villamil respectfully requests that this Court reverse the decision of the circuit court denying him postconviction relief, vacate the judgment of conviction and apply the rule of lenity, thereby commuting the conviction to a misdemeanor. Additionally he respectfully requests that this Court order resentencing.

Dated this 7th day of January, 2016.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 4,362 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

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.

Dated this 7th day of January, 2016.

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