STATE OF WISCONSIN COURT OF APPEALS DISTRICT IV

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

Appeal No. 2020AP1578-CR
Circuit Court Case No. 19CM120

TIMOTHY D. WRIGHT,

Defendant-Appellant.

ON APPEAL FROM THE AMENDED JUDGMENT OF CONVICTION AND RESTITUTION ORDER ENTERED IN THE SAUK COUNTY CIRCUIT COURT, THE HONORABLE MICHAEL P. SCRENOCK, PRESIDING.

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

I. When the disorderly conduct involved overtly threatening statements made to specific employees of the corporation, directed at the corporation, was the corporation itself a victim for restitution purposes?

II. Were costs associated with the armed guard special damages recoverable by the corporation as restitution under Wis. Stat. § 973.20(5)(a)?

III. Did defendant-appellant forfeit the "civil action" claim in § II as it was not raised in the circuit court?

IV. Did the circuit court erroneously exercise its discretion by ordering the defendant-appellant to pay $14,755 restitution without properly considering his ability to pay?

STATEMENT ON ORAL ARUGMENT AND PUBLICATION

The State is not requesting oral argument or publication.

STATEMENT OF FACTS

The State is not offering facts in addition to those listed in the criminal complaint, transcript, or the defendant-appellant's brief.

ARGUMENT

Contrary to the defendant-appellant's assertions, the State contends that the it is clear from the record that the corporation in this case is just as much of a victim of the defendant-appellant's actions as the individual employees who heard the threatening comments. While the defendant-appellant's threatening statements

were made to the person-victims in this case, they were directed at both the individuals (who were acting as employees of the corporation at the time of the threats) and the corporate-victim. Both groups were disturbed. Due to the disturbance, the corporate victim hired an armed guard in order to reasonably protect itself and its staff. Further, whether a direct victim of the defendant-appellant's actions or not, the corporation should be able to recover restitution as special damages recoverable in a civil action per Wis. Stat. § 973.20(5)(a)[1] as his actions constituted a private nuisance (*see* Wis. J.I.—Civil 1926 (2020)). Additionally, as the defendant-appellant did not raise the "civil action" issue in circuit court, but is now raising it for the first time on appeal, it should be deemed forfeit. Finally, though the record is not robust on the issue, it is clear that the circuit court took the defendant-appellant's ability to pay into consideration when determining the amount of restitution to be ordered as well as the time in which it was to be paid. For these reasons, the State requests that the circuit court's restitution order be affirmed and the defendant-appellant's appeal be denied.

STANDARD OF REVIEW

A circuit court's restitution order is reviewed

> under the erroneous exercise of discretion standard. A circuit court erroneously exercises its discretion when its decision is based on an error of law. Whether the restitution statute … provides a circuit court with the authority to order restitution under a certain set of facts is a question of law that [the court of appeals] review[s] de novo.

State v. Haase, 2006 WI App 86, ¶ 5, 293 Wis. 2d 322, 326, 716 N.W.2d 526, 528 (internal citations omitted).

[1] All references to statutes are 2019-20 unless otherwise noted.

I. Both the Corporation and the Individual Employees of that Corporation Threatened by the Defendant-Appellant are Victims of his Criminal Conduct.

The defendant-appellant correctly notes that there may be cases of disorderly conduct with no victim. *See* Def.-App. Brief, 8 citing *State v. Vinje*, 201 Wis. 2d 98, 104, 548 N.W.2d 118, 120-21 (Ct. App. 1996). This case is, however, not one of them. As is clear from the record, the individual people to whom the defendant-appellant made the threats (CES, KKD, JJH, and CZ) are victims of his criminal conduct per Wis. Stat. § 973.20(1r). It should be clear, however, that the corporation itself is also a victim of the criminal conduct.

Though the term "victim" is not really defined in Wis. Stat. § 973.20(1r), another statutory definition of the term would seem to fit this scenario. Specifically, Wis. Stat. § 950.02(4)(a)1 defines a victim as "[a] person against whom a crime has been committed." A "person" is defined as including "all partnerships, associations[,] and bodies politic or corporate." Wis. Stat. § 990.01(26). Thus it seems clear that both the individual people to whom the defendant-appellant made the threats as well as the corporation at which he directed the threats can fit within this statutory definition of "victim." The question then becomes whether the defendant-appellant's disorderly conduct was sufficiently directed at the corporation to "provoke a disturbance" in the corporation's perspective. *See* Wis. Stat. § 947.01(1). Based on the facts of the case, the defendant-appellant's was sufficiently directed at the corporation to "provoke a disturbance" in the corporation's perspective.

As described in the criminal complaint, the defendant-appellant directly threatened the corporate office ("Tim said fuck all of those assholes down at Corporate. I will go down to Boca and shoot them all."). Complaint, 2; appendix 101. What is more, he made threats toward the corporate office and officers while

in a conversation with his supervisor, employed by the corporation (CES). *Id*. He further threatened the corporation and the corporate offices while in a conversation with an individual from the corporate office (CZ), stating, "I will kill them all from Corporate…I will kill them all." *Id*. Later that day, he apparently stated that "the fucker from corporate is a joke and all of those [f]uckers from corporate need to be taken out." *Id*. Given these facts, the corporation itself was concerned about and disturbed by the statements made the defendant-appellant. Thus, the corporation should be considered a victim of the crime, specifically a direct victim.

The distinction between a direct and indirect victim of a crime is discussed in *State v. Ortiz*, 2001 WI App 215, ¶ 20, 247 Wis. 2d 836, 845-46, 634 N.W.2d 860, 865. There, the court of appeals noted that

> [w]here the defendant's conduct indirectly causes damage or loss to the governmental entity, the entity is a passive, not a direct, victim and is not entitled to restitution…. Conversely, where the defendant's conduct directly causes damage or loss to the governmental entity, the entity is a direct or actual victim and is entitled to restitution.

While the distinction being discussed in *Ortiz* was in the context of a governmental entity (the City of Racine) attempting to recover restitution (in the form of overtime wages paid during a police standoff with the defendant), it can serve as a useful analogy to the case at bar when the facts are viewed through the *Ortiz* lens. Here, the defendant-appellant was directly threatening to kill the individual employees of the corporation as well as threatening to kill individuals at the corporation's home office. *See* Complaint, 2, appendix 101. The corporation (an entity) is not a "passive" victim, as described above. Rather, it is a victim "where the defendant's conduct directly cause[d]… loss to the… entity." *Ortiz*, 2001 WI App 215, ¶ 20. As such, it is both statutorily and constitutionally entitled to restitution. *See* Wis. Stat. § 973.20(1r); *State v. Johnson*, 2002 WI App 166, ¶ 16, 256 Wis. 2d 871, 882-83, 649 N.W.2d 284, 289; and Wis. Const. art. I §

9m(2)(m). The next issue which must be broached is under which statutory mechanism restitution may be ordered.

II. The Costs Associated with the Armed Guard Hired by the Corporation are Special Damages Recoverable as Restitution Under Wis. Stat. § 973.20(5)(a).

As discussed above, it is the State's contention that the corporation in this case is a direct victim of the defendant-appellant's criminal conduct. However, regardless of that determination, the corporation should still be allowed to recover the cost of the armed guard as "special damages" pursuant to Wis. Stat. §§ 973.20(5)(a) and (d).

As discussed by the court of appeals in *State v. Johnson*,

> We have held that Wis. Stat. § 973.20(1r) creates a presumption that restitution will be ordered in criminal cases and that the restitution statute should be interpreted broadly to allow victims of crime to recover their losses. The circuit court's authority to order restitution extends to certain types of lost income and reasonable out-of-pocket expenses resulting from cooperating in the investigation and prosecution of the crime, as well as to "all special damages, but not general damages, substantiated by evidence in the record, which could be recovered in a civil action against the defendant for his or her conduct in the commission of a crime considered at sentencing." Section 973.20(5). Additionally, before a circuit court orders restitution, there must be a showing that the defendant's criminal activity was a substantial factor in causing the claimed losses.

2002 WI App 166, ¶ 16 (internal citations omitted).

In *Johnson*, the defendant was convicted of false imprisonment and disorderly conduct for crimes committed against two young children, one of whom lived near to his parents' home. *Id*. ¶ 2. Johnson was ordered to pay restitution to the child-victim's step-father in part to cover the expense of the installation of a home security system. *Id*. ¶ 6. He appealed the restitution order. *Id*.

The court of appeals upheld the restitution order concerning the home security system, noting the quote above, and agreed with the defendant that the

step-father was not a statutory victim for restitution purposes but that he was nevertheless entitled to restitution as a "person who has compensated a victim for a loss otherwise compensable under this section" pursuant to Wis. Stat. § 973.20(5)(d). *Id*. ¶¶ 16 – 21. Much like the defendant in *Johnson* did not challenge that his criminal activity was a substantial factor in causing the claimed losses (*see Johnson*, 2002 WI App 166, ¶ 16 and n. 5), the defendant-appellant here similarly does not seem to challenge that his conduct (overt threats to kill corporate employees) was a substantial factor in the corporation's decision to hire an armed guard. Thus, based on the defendant-appellant's arguments, if Wis. Stat. §§ 973.20(5)(a) and/or (d) apply to this case, then restitution was properly ordered to the corporation.

The defendant-appellant has claimed that the aforementioned statutory provisions do not apply to the corporation's restitution claim because the claim is not something "which could be recovered in a civil action against the defendant." Def.-App. Brief, 10. It is clear that the cost of the guard was a "specific expenditure by the victim [or on the victim's behalf] paid out because of the crime," thus it falls within the definition of a "special damage" (*State v. Behnke*, 203 Wis. 2d 43, 61, 553 N.W.2d 265, 273 (Ct. App. 1996)), However, the question remains as to whether those costs would be recoverable in a civil action.

The State asserts that the corporation's costs for hiring a guard would be recoverable as special damages, specifically in an action for private nuisance by intentional conduct. As described in Wis. J.I. Civil—1926 (2020), there are four elements to an intentional private nuisance. First, it must be shown that a private nuisance (which is an interference with the private use and enjoyment of the land) existed. *Id.* The State believes that this can readily be shown from the case facts as the defendant-appellant threatened to kill multiple people "in Boca" as well as mentioning that other individuals from corporate needed to be "taken out." Complaint, 2, appendix 101. It stands to reason that each employee threatened, and

the corporation as a whole, would be less able to enjoy/use their workplace/property.

Second, it requires a "significant harm." Wis. J.I.—Civil 1926 (2020). Here, "significant harm means harm involving more than a slight inconvenience or petty annoyance." *Id.* "If the ordinary persons living in the community would regard the interference as substantially offense, seriously annoying[,] or intolerable, then the interference is significant." *Id.* As noted in the instruction, "it is sometimes difficult to determine whether the interference is significant;" however, the State contents that it is clear in this case that the interference was significant. Given today's political climate and the overall recent trend of increased mass-shootings per year[2] (with the exception of 2020, likely due to the pandemic), the State does not believe it would be possible that any of the defendant-appellant's co-workers or supervisors could feel anything but substantially offended, seriously annoyed, and that his actions were intolerable. Thus, his actions here can only be categorized as a "significant" interference.

The third element is that the defendant-appellant intentionally caused the private nuisance. Wis. J.I.—Civil 1926 (2020). Given the facts already provided in this brief as well as those of the complaint and transcript from the restitution hearing recited by the circuit court, it is absolutely clear that the defendant-appellant intentionally made the at-issue statements.

The fourth and final element is that the defendant-appellant's actions "in causing the nuisance [were] unreasonable." *Id.* The intentional private nuisance "is unreasonable if the gravity of the harm outweighs the utility of the actor's conduct." *Id.* It would seem impossible to the State that the defendant-appellant could possibly claim his conduct had any utility whatsoever, as it was indeed (and

[2] Number of Mass Shootings in the United States between 1982 and 2020. Statista. https://www.statista.com/statistics/811487/number-of-mass-shootings-in-the-us/. Accessed 1/6/2021.

admittedly plead-to) criminal disorderly conduct. It also seems clear that the demonstrated gravity of harm to the other employees' and the corporation's enjoyment of its property was substantial.

As has been shown, the corporation paid to provide an armed guard in direct response to the defendant-appellant's conduct. This was done to protect both the corporation and its employees, and to restore a sense of security to its property. As has also been shown, the defendant-appellant's conduct constituted a private intentional nuisance. Therefore, the amount paid for the armed guard's services are recoverable under either Wis. Stat. § 973.20(5)(a) if the court determines that the corporation was a victim, or under Wis. Stat. §§ 973.20(5)(a) and (d) if the corporation is not a victim.

III. The Defendant-Appellant Forfeited the "Civil Action" Claim in § II as it was not Raised in the Circuit Court.

The claim addressed in the preceding section should be deemed forfeited as it was not raised in the circuit court. While both the arguments regarding the corporation being a victim and concerning the defendant–appellant's ability to pay were raised in circuit court, the "civil action" claim was not. Generally speaking, when an argument is advanced for the first time on appeal, it is deemed forfeited. *See*, *e.g.*, *Marotz v. Hallman*, 2007 WI 89, ¶ 16, 302 Wis. 2d 428, 441, 734 N.W.2d 411, 417. While an appellate court has discretion to ignore the forfeiture/waiver, it is also recognized that the "normal procedure in criminal cases is to address waiver within the rubric of the ineffective assistance of counsel." *State v. Erickson*, 227 Wis. 2d 758, 766, 596 N.W.2d 749, 754 (1999).

In order to have been ineffective, the defendant-appellant's trial counsel must have performed deficiently and that deficient performance must have prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Not only

must the performance have been deficient, but it must have been "outside the wide range of professionally competent assistance." *Id*. It also must be shown that, absent counsel's errors, there exists "a reasonable probability that… the result of the proceeding would have been different." *Id*. at 694. Given that there are multiple published cases in which security systems or locks[3] were deemed to be appropriate subjects of restitution orders[4], yet seemingly only one, unpublished but citable case (*State v. Steppke*, No. 2017AP1683-CR, unpublished slip op. (Wis. Ct. App. Mar. 1, 2018))[5] discussing the "civil action" portion of Wis. Stat. § 973.20(5)(a), it can hardly be said that failure of trial counsel to raise the "civil action" issue rises to the level of deficient performance under *Strickland* or ineffective assistance of counsel.

As the "civil action" issue was not raised in the circuit court, but is only now being raised on appeal, the issue should be deemed forfeited and reviewed through the lens of ineffective assistance of counsel. Further, trial counsel was not ineffective for failing to raise the issue considering the current state of the law. Therefore, the restitution order was properly made.

IV. The Circuit Court did not Erroneously Exercise its Discretion by Ordering the Defendant-Appellant to pay $14,755 Restitution, and it Properly Considered his Ability to pay.

The defendant-appellant is indeed correct that, once at issue, the circuit court must take his ability to pay into consideration when ordering restitution. *See*,

[3] Security systems and locks are not the same as armed guards; however, the systems, guards, locks, and other security measures serve the same purpose: to restore a sense of security to the victims who have lost that sense of security.

[4] *State v. Johnson*, 2002 WI App 166; *State v. Behnke*, 203 Wis. 2d 43 (Ct. App. 1996); etc.

[5] It should be noted that in *Steppke*, the court of appeals took the "civil action" issue as being conceded by the State due to it not being addressed in the State's response brief. *Steppke*, No. 2017AP1683-CR, ¶ 1. While the State is not suggesting that the *Steppke* decision was incorrect, it merits notation that only one side of the argument was explored in that case, thus overt reliance on it may be misplaced.

e.g., *State v. Fernandez*, 2009 WI 29, ¶ 23, 316 Wis. 2d 598, 613, 764 N.W.2d 509, 516. However, the State disagrees with his assertion that the circuit court in this case did not take his ability to pay into consideration.

As discussed in the defendant-appellant's brief (at 16), Wis. Stat. § 973.20(13)(a) lists a number of factors which a court must consider "in determining whether to order restitution and the amount thereof." *Id*. The defendant-appellant also presented evidence concerning his ability to pay, specifically that he makes approximately $960 per month with monthly expenses of between $800 and $900 per month and that he is $10,000 in debt. Def.-App. Br. at 15. At the conclusion of the restitution hearing, the circuit court noted, "And I'm mindful that Mr. Wright current does not have the ability to pay, write out a check for $14,755. I do need to take into account his ability to pay, as well as I believe the statute allows me to set a payment plan." Appendix 131: 17-21. While this is perhaps not the most lengthy, full, or robust record that could have been made on the issue, the record still shows that the circuit court considered the defendant's ability to pay when determining how much restitution to order and when to order that it be paid. Thus the question is not whether his ability to pay was considered, but rather whether the circuit court abused its discretion in making its restitution determination.

As noted in *State v. Queever*,

> the purpose of restitution is to return crime victims to the position they were in before the defendant injured them. [Wis. Stat.] § 973.20 reflects a strong equitable public policy that victims should not have to bear the burden of losses if the defendant is capable of making restitution. We therefore construe the restitution statute broadly and liberally to allow victims to recover their losses resulting from the criminal conduct. Moreover, we have consistently recognized that § 973.20 creates a presumption that restitution will be ordered in criminal cases.

State v. Queever, 2016 WI App 87, ¶ 20, 372 Wis. 2d 388, 398-99, 887 N.W.2d 912, 917 (internal citations and quotations omitted).

Additionally, since *Queever*, the Wisconsin State Constitution has been amended to specifically provide victims the right "[t]o full restitution from any person who has been ordered to pay restitution to the victim and to be provided with assistance collecting restitution." Wis. Const. art. I § 9m(2)(m).

Ultimately, the amount of restitution and when that amount is to be paid in any given case are not dictated by statute, and would therefore seem to be discretionary decisions of the trial court. *See State v. Kennedy*, 190 Wis. 2d 252, 261, 528 N.W.2d 9, 13 (Ct. App. 1994). A trial court properly exercises discretion when "it examine[s] the relevant facts, applie[s] the proper legal standard[,] and reache[s] a conclusion that a reasonable judge could reach." *Id*. at 261-62. Here, the State believes that the circuit court reached a reasonable conclusion, based on "a logical interpretation of the facts." *Fernandez*, 2009 WI 29, ¶ 20.

In the current case, while the amount of restitution ordered is a large sum of money, so are (for example) the prices of most new and used vehicles. Indeed, many Americans could not walk into car dealership and pay, in-full, on-the-spot, for a new or working-used vehicle. But most Americans, especially in rural areas, nevertheless have vehicles which they have purchased in a manner (payment plan to a lender) similar to that utilized by the circuit court when it ordered the defendant-appellant to pay restitution (payment plan to a creditor). Had the circuit court ordered the defendant-appellant to immediately pay the total sum owed, that very likely would have been unreasonable; however, it did not. It ordered that he pay the whole sum, but also took his ability to pay into account by ordering him to pay at a set rate: $100 per month. Quite clearly, this shows that the circuit court took the defendant-appellant's ability to pay the restitution into consideration when formulating its restitution order.

The defendant-appellant's argument seems to be that the circuit court erroneously exercised its discretion simply because the defendant-appellant would not be able to pay the restitution immediately, or—because of his financial situation—the amount is just too much (though no "recommended appropriate amount" is proffered). While the State is unable to find any case that is directly on point for these issues, both the primary legal issue and the background facts of the *Fernandez* case may be instructive.

In *Fernandez*, the defendant was an 18-year-old man, living with his mother and attempting to get his GED while working as a dishwasher and making $5.15 per hour. *Id.* ¶ 14. After his conviction for taking and driving a vehicle without consent, two restitution hearings were held, wherein the victims and insurers requested restitution in the amount of $68,794.27. *Id*. ¶¶ 12, 13, 15. During the restitution hearing, Fernandez presented evidence on his ability to pay and indicated that he could perhaps pay $50 to $70 per month in restitution. *Id*. ¶ 14. "The circuit court found that if Fernandez quit his GED program and got a second job, he could afford $400 a month in restitution," and ordered the full amount of restitution at $68,794.27. *Id*. ¶ 15. Fernandez challenged the order, post-conviction, on numerous grounds, including that the total amount of restitution needed to be reduced to or capped at what could be paid during the term of probation (two years), and that justice did not require him paying restitution to insurers (who were awarded collectively $47,984.27 in restitution) "given the disparity between" their levels of poverty. *Id.* ¶¶ 16, 17. The circuit denied Fernandez's motions, upholding its own order, and Fernandez appealed. *Id*. ¶¶ 18, 19.

The case made its way to the Wisconsin Supreme Court. The court rejected Fernandez's argument about capping restitution to that which could be paid within a period of probation, specifically noting, "that there would be circumstances where all the necessary restitution amounts often would not and could not be paid

before the completion of the sentence or probationary period." *Id*. ¶¶ 40, 47. While this is not precisely analogous to the case at bar, given that Fernandez was working for $5.15 an hour and ordered to, in installments, pay nearly $70,000 in restitution, it would stand to reason that the defendant-appellant here, who has monthly income exceeding his monthly expenses by $60 to $160 per month (other debt not withstanding) could make payments of $100 per month to satisfy a $14,755 judgement.

The *Fernandez* court additionally rejected the claim that justice did not require payment to the insurers given their disparate poverty levels. *Id*. ¶ 62. The court wrote,

> It is within the court's discretion to award restitution…. The circuit court appears to have applied the correct legal standard and to have arrived at a logical interpretation of the facts in ordering restitution from Fernandez. The defendant's ability to pay was clearly considered by the circuit court. Such an award should not be reversed.

Id.

Again, while the record in this case could have been more fully developed, it still adequately reflects that the circuit court considered the defendant-appellant's ability to pay when crafting its restitution order. It took into consideration the financial information that he provided, and—rather than ordering the full amount of restitution due immediately—put him on an installment plan to pay restitution to the victim-corporation. And notably, both the overall amount and the installment amount were significantly less than the upheld restitution order in *Fernandez*.

As demonstrated by comparison to *Fernandez*, the circuit court neither erroneously exercised its discretion nor failed to consider the defendant-appellant's ability to pay in its restitution order. Thus, the restitution order should be affirmed.

CONCLUSION

For the reasons as outlined above, the State respectfully requests that the court affirm the restitution order in this case in its entirety.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §§ 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 4,870 words.

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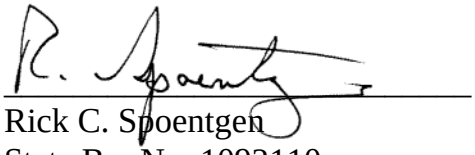

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CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

I certify that an electronic copy of this brief complies with the requirement of Wis. Stat. § 809.19(12). The electronic brief is identical in content and format to the printed brief filed this date. A copy of this certificate has been served with the paper copies of this brief and served upon all opposing parties.

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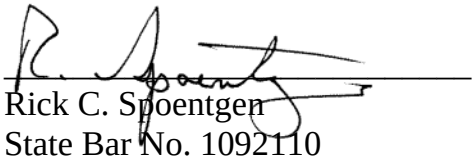

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CERTIFICATION OF COMPLIANCE WITH RULE 809.19(3)(b)

I hereby certify that filed with this brief, as a separate document, is an appendix that complies with Wis. Stat. § 809.19(3)(b) and that contains a table of contents and that complies with the confidentiality requirements of §§ 809.19(2)(a) and (b). I further certify that it contains portions of the record essential to an understanding of the issues raised.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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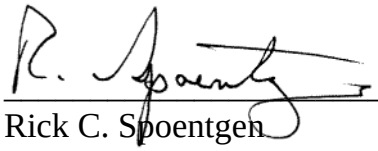

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