

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 19-0089

BILLY JOE WATTS,

Petitioner and Appellant,

v.

STATE OF MONTANA,

Respondent and Appellee.

BRIEF OF APPELLEE

On Appeal from the Montana First Judicial District Court,
Lewis and Clark County, The Honorable Kathy Seeley, Presiding

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STATEMENT OF THE ISSUE

Whether the district court erred when it denied Watts' petition for postconviction relief.

STATEMENT OF THE CASE

After pleading guilty to his fifth partner/family member assault (PFMA), a felony, and admitting he violated the conditions of his felony probation in his fourth PFMA case, Billy Joe Watts was sentenced to the Montana State Prison (MSP) for a term of five years and a consecutive five-year term for the revocation. *See Watts v. Green*, 2017 Mont. LEXIS 664 (hereinafter, *Watts III*). This Court affirmed his conviction. *State v. Watts*, 2016 MT 331, 386 Mont. 8, 385 P.3d 960 (hereinafter, *Watts I*). Watts petitioned the district court for postconviction relief on March 5, 2018. (Doc. 1.) The district court entered an order denying Watts' petition on January 28, 2019. (Doc. 10.) Watts appealed.

STATEMENT OF THE FACTS

When Watts was charged with PFMA in July 2014, he had at least four prior PFMA convictions, so he was charged with a felony under Mont. Code Ann. § 45-5-206 (2013). *Watts I*, ¶ 3. At the time, Watts was also on felony probation for his fourth PFMA (charged in 2012). *Id.* The State filed notice of its intent to

seek a persistent felony offender (PFO) designation based on Watts' two prior felony PFMA convictions (2003 and 2012). *Id.*

In exchange for the State's agreement to withdraw the PFO notice, Watts agreed to plead guilty to felony PMFA. *Watts I*, ¶ 4. The written plea agreement signed by Watts included a complete acknowledgement and waiver of rights which set forth that Watts: "understood and had the opportunity to examine the charges against him with his attorney; that his attorney fully advised and explained to him his rights, and the possible punishment for his crime; that Watts waived all the rights guaranteed by a trial, except the right to effective assistance of counsel; and that Watts was not threatened, coerced, forced, intimidated, or influenced in any way." *Watts I*, ¶ 4.

On December 18, 2014, pursuant to the plea agreement, Watts plead guilty to the new felony PFMA and entered admissions in the revocation proceeding. *Watts I*, ¶ 5. Watts did not reserve any appeal issues as part of his plea agreement. *Id.* The district court ensured Watts knew he had the right to remain silent and confirmed he waived that right by pleading guilty. *Id.* The court also confirmed that Watts "was of sound mind, not under the influence of any drugs or alcohol, was happy with his attorney's work and understood the maximum punishment for his crime as well as the fact he could receive consecutive sentences for violating his parole." *Id.*

Sentencing was continued because Watts filed a motion challenging the constitutionality of the PFMA statute in both the 2014 case and 2012 revocation.

Watts I, ¶ 6. Watts argued that the PFMA statute he was convicted under was unconstitutional pursuant to the Equal Protection Clauses of both the Montana and United States constitutions because the definition of “partner” found at Mont. Code Ann. § 45-5-206 (2013) included an unconstitutional phrase, “of the opposite sex.” *Watts I, supra*. The district court rejected Watts’ constitutional arguments and found the alleged offending language was subject to a severability clause. *Id.* Watts was sentenced in both cases on July 28, 2015. (Doc. 10 at 2.)

Watts appealed the order denying his motion to dismiss his 2014 felony PFMA. *See Watts I, supra*. Watts also appealed his revocation case. *See State v. Watts*, Supreme Court Case No. DA 15-0628 (hereinafter, *Watts II*). An opening brief was not filed in *Watts II*. Instead, the State stipulated that Watts was entitled to additional credit for time served and Watts agreed his appeal should be dismissed. *See Watts II*, 01/10/17 Order dismissing appeal.

On December 20, 2016, this Court affirmed the district court’s order denying Watts’ motion to dismiss his 2014 felony PFMA. *Watts I, supra*. This Court held that because Watts pled guilty and did not reserve the right to appeal any issues, he waived any constitutional claims that occurred prior to his plea. *Watts I*, ¶¶ 4-10. Further, this Court observed that Watts had not alleged any facts or argument that would support good cause for him to withdraw his guilty plea. *Watts I*, ¶ 10. Finally, this Court declined to apply the rule under *State v. Lenihan*, 184 Mont.

338, 602 P.2d 997 (1979), which allows this Court to review any illegal sentence. *Watts I*, ¶¶ 11-13.

On February 27, 2017, Watts petitioned this Court for state habeas relief challenging the parole board's decision to deny his parole application. *Watts III*, *supra*. This Court denied Watts' petition on March 17, 2017. *Id.*

On March 2, 2018, Watts filed a petition for postconviction relief alleging ineffective assistance of counsel (IAC) claims against both trial counsel, Mariah Eastman, and appellate counsel, Moses Okeyo, in both his 2012 and 2014 cases. (Doc. 1.) Watts argued that these attorneys' deficient performance caused him prejudice because he would have not pled guilty to an unconstitutional statute. (*Id.*)

Watts claimed Eastman's performance was deficient in the following ways: allowed him to plead guilty before investigating the applicable law and challenging the constitutionality of the PFMA statute in the plea agreement; failed to properly preserve his right to challenge constitutionality of prior PFMA statute; and failed to include a request that Watts be allowed to withdraw his plea of guilty as part of the motion to dismiss prior to sentencing. (Doc. 1.)

Watts argued Okeyo's performance was deficient as follows: failed to raise record-based IAC (*i.e.*, Eastman's failure to investigate constitutionality of PFMA statute which lead to Watts pleading guilty and her failure to file a motion to withdraw guilty plea); failed to challenge the order denying motion to dismiss,

specifically the court’s conclusion that the alleged unconstitutional language could be severed from the statute without voiding the entire provision; and failed to anticipate/address the inevitable argument that Watts waived his right to appeal because Eastman had not moved to withdraw his plea/admission. (*Id.*)

Following the State’s response, the district court denied Watts’ postconviction petition. (Docs. 9, 10.) First, the district court concluded that Watts was time-barred from raising any claims in his 2012 case. (Doc. 10 at 2-3.) Next, the district court concluded that Watts failed to establish how either of his attorneys rendered ineffective assistance of counsel because he could not establish how, but for the alleged deficiencies, the outcome would have been different. (Doc. 10 at 6-7.)

STANDARD OF REVIEW

This Court reviews a district court’s denial of postconviction relief to determine if the court’s findings of fact are clearly erroneous, and if its conclusions of law are correct. *Lacey v. State*, 2017 MT 18, ¶ 13, 386 Mont. 204, 389 P.3d 233 (citation omitted). “[A] petitioner seeking to reverse a district court’s denial of a petition for postconviction relief . . . bears ‘a heavy burden.’” *Whitlow v. State*, 2008 MT 140, ¶ 21, 343 Mont. 90, 183 P.3d 861 (citation omitted). Ineffective assistance of counsel (IAC) claims are mixed questions of law and fact that are

reviewed *de novo*. *Wilkes v. State*, 2015 MT 243, ¶ 9, 380 Mont. 388, 355 P.3d 755 (citation omitted).

SUMMARY OF THE ARGUMENT

Although Watts’ petition for postconviction relief in his 2014 case was timely filed, the claims Watts asserted regarding his 2012 revocation case were untimely and properly dismissed by the district court.

To prevail on his IAC claims related to his 2014 case, Watts had to establish that his attorneys’ performances were deficient *and* that those deficiencies caused him prejudice. Watts argued that he suffered prejudice because he would not have pled guilty to an unconstitutional statute. Thus, all of Watts’ IAC claims were based on his argument that the pre-2013 PFMA statute was unconstitutional under Equal Protection principles based on the fact the definition of “partners” included the phrase “of the opposite sex.”

However, in *State v. Theeler*, 2016 MT 318, 385 Mont. 471, 385 P.3d 551, *petition for writ of certiorari denied*, *Theeler v. Montana*, 2017 U.S. LEXIS 5375 (Oct. 2, 2017), this Court held that the pre-2013 PFMA statute remained constitutional when the invalid or unconstitutional portion of the statute was stricken. *Theeler*, ¶¶ 14-15. The district court did not err by only issuing findings

on the prejudice prong of Watts' IAC claims because if an appellant makes an insufficient showing under either IAC prong, the other prong need not be addressed.

In light of *Theeler*, Watts cannot demonstrate the prejudice prong for any of his IAC claims since they all hinged on the pre-2013 PFMA statute being unconstitutional. Watts was not prejudiced by Eastman's alleged failure to challenge the constitutionality of the PFMA statute prior to his change of plea because in *Theeler* this Court has concluded the statute is constitutional. Watts cannot demonstrate how there was "good cause" to withdraw his guilty plea because he cannot establish that Eastman provided deficient advice to plead guilty to a constitutional statute. Since Eastman was not ineffective, Okeyo did not error by failing to raise IAC on direct appeal. And, since this Court affirmed application of severability principles to the pre-2013 PFMA statute in *Theeler*, Okeyo was not ineffective for failing to raise that same argument.

Finally, the district court did not abuse its discretion when it denied Watts' petition without conducting a hearing since the court correctly determined Watts failed to establish that his IAC claims were meritorious given that this Court's holding in *Theeler* conclusively established that the statute Watts pled guilty to was not unconstitutional.

ARGUMENT

I. The district court correctly dismissed claims associated with Watts' 2012 case as time-barred.

Postconviction relief is a civil remedy provided solely by statute. Before reaching the merits of alleged postconviction claims, it is necessary to determine whether such a claim was properly before the court or whether the claim is procedurally barred. *State v. Wright*, 2001 MT 282, ¶ 12, 307 Mont. 349, 42 P.3d 753 (citation omitted). A petition for postconviction relief must be filed within a year of the date a conviction becomes final, unless petitioner demonstrates newly discovered evidence. Mont. Code Ann. § 46-21-102(1).

Watts' conviction for his 2014 case became final on March 16, 2017 (90 days from December 16, 2017, the date of this Court's Opinion in *Watts I.*). See Mont. Code Ann. § 46-21-102(1)(b); *State v. Root*, 2003 MT 28, ¶ 9, 314 Mont. 186, 64 P.3d 1035 (citing *Rule 11, Rules of the Supreme Court of the United States*; *State v. Abe*, 2001 MT 260, ¶ 7, 307 Mont. 233, 37 P.3d 77). Watts' petition for postconviction relief was filed on March 2, 2018. Therefore, Watts' postconviction claims related to his 2014 case were filed by the one-year deadline (March 16, 2018). However, his claims related to his 2012 revocation case are time-barred.

Pursuant to joint stipulation between the parties, the appeal from his 2012 case was dismissed on January 10, 2017, thus making his conviction final. Any postconviction petition in that case had to be filed by January 10, 2018. Mont. Code

Ann. § 46-21-102(1). However, Watts did not file the postconviction petition until March 2, 2018. The district court correctly determined Watts' claims related to the 2012 case were time-barred. (Doc. 10.)

Accordingly, Watts' claims related to his revocation proceeding were correctly dismissed and consideration of additional procedural bars or the merits of those related claims, including the imposition of an MSP sentence rather than a commitment to the Department of Corrections, is unnecessary. *See also State v. Torres*, 2017 MT 177, 388 Mont. 161, 398 P.3d 279 (Court rejected attempt to collaterally challenge constitutionality of pre-2013 PFMA statute in revocation proceedings; time to challenge the original conviction had passed).

II. The district court properly denied Watts' postconviction claims related to his 2014 case.

In assessing IAC claims, this Court applies the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *Whitlow*, ¶ 10. A petitioner must prove by a preponderance of the evidence that he is entitled to relief. *Ellenburg v. Chase*, 2004 MT 66, ¶ 16, 320 Mont. 315, 87 P.3d 473 (emphasizing "petition for postconviction relief must be based on more than mere conclusory allegations"). Proving an IAC claim requires the defendant to establish that his counsel's performance was deficient and that as a result, he suffered prejudice. *Whitlow*, ¶ 15

(quoting *Strickland*, 466 U.S. at 689); *Baca v. State*, 2008 MT 371, ¶ 16, 346 Mont. 474, 197 P.3d 948.

To demonstrate the representation was deficient, the defendant “must show that counsel’s representation fell below an objective standard of reasonableness.” *Whitlow*, ¶ 14 (citing *Strickland*, 466 U.S. at 688). An attorney’s performance was deficient if his or her “conduct fell below an objective standard of reasonableness measured under prevailing professional norms and in light of the surrounding circumstances.” *Baca*, ¶ 17 (internal quotations omitted) (quoting *Whitlow*, ¶ 20).

To establish the second *Strickland* prong, prejudice, the defendant must “demonstrate a reasonable probability that, but for counsel’s deficient performance, the result of the proceeding would have been different.” *Baca*, ¶ 17 (citation omitted); *Strickland*, 466 U.S. at 687 (defendant must demonstrate counsel’s alleged mistake was so serious he was deprived of a fair trial and reliable result); *State v. Peart*, 2012 MT 274, ¶ 23, 367 Mont. 153, 290 P.3d 706. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the proceedings. *Riggs v. State*, 2011 MT 239, ¶ 12, 362 Mont. 140, 264 P.3d 693 (citation omitted) (inquiry focuses on whether counsel’s deficient performance rendered the trial result unreliable or the proceedings fundamentally unfair).

Watts incorrectly faults the district court for not completely “considering” his IAC claims. Watts misunderstands that by analyzing whether Watts was

prejudiced by his attorneys' alleged mistakes, the district court sufficiently considered whether Watts proved his IAC claims. It is well-settled that a court is not required to evaluate each alleged deficiency of counsel if the record does not establish those alleged deficiencies caused prejudice.

“If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.” *Strickland*, 466 U.S. at 697; accord *State v. Dubois*, 2006 MT 89, ¶ 48, 332 Mont. 44, 134 P.3d 82; *Whitlow*, ¶ 11; *Baca*, ¶ 16 (when insufficient showing is made on one prong, this Court need not address the other); *Guillen v. State*, 2018 MT 71, ¶ 9, 391 Mont. 131, 415 P.3d 1 (Court will deny an IAC claim if either of the *Strickland* prongs are not established); *Heavygun v. State*, 2016 MT 66, ¶ 10, 383 Mont. 28, 368 P.3d 707 (if appellant makes insufficient showing under either *Strickland* prong, the other prong need not be addressed).

Therefore, and contrary to Watts' arguments, the district court did not err by relying upon its conclusion that Watts' failed to establish the prejudice prong of *Strickland* to deny all of his IAC claims. See, e.g., *Ariegwe v. State*, 2012 MT 166, ¶ 16, 365 Mont. 505, 285 P.3d 424 (even when mistakes or omissions of counsel are assumed to be deficient, counsel's performance will be constitutionally ineffective only if it is reasonably probable under the totality of the circumstances that the outcome would have been different but for the deficient performance).

The district court properly concluded there was no reasonable probability that the alleged mistakes by Eastman or Okeyo did not undermine the confidence on the outcome, render an unreliable result, or deprive Watts of fundamentally fair proceedings. *Baca*, ¶ 17; *Peart*, ¶ 23; *Riggs*, ¶ 12.

The court correctly observed that the only basis Watts advanced for how the outcome of his case would have been different is that he would not have pled guilty and/or been convicted because the PFMA statute was unconstitutional under Equal Protection. The constitutionality of the pre-2013 PMFA was the linchpin of all Watts' IAC claims because:

Watts faulted Eastman for not realizing the pre-2013 PMFA statute was unconstitutional prior to him pleading guilty;

Watts faulted Eastman for not preserving the right to challenge the constitutionality of the pre-2013 PFMA statute in his plea agreement;

Watts faulted Eastman for not moving for withdrawal of his guilty plea based on her failure to tell Watts the pre-2013 PFMA statute was unconstitutional (*i.e.*, not a knowing, voluntary, intelligent waiver);

Watts faulted Okeyo for not asserting those three IAC claims against Eastman; and

Watts faulted Okeyo for not challenging the order denying his motion to dismiss, specifically the court's conclusion that the alleged unconstitutional language could be severed from the statute without voiding the entire provision.

(Doc. 1.) For Watts to establish IAC, he had to prove that but for these “mistakes” by Eastman and Okeyo, he would not have chosen to plead guilty to the 2014 charges *because the statute violated Equal Protection and was unconstitutional*.

However, Watts’ claims fail because in *Theeler*, this Court conclusively determined that the pre-2013 PFMA statute remained constitutional when the invalid or unconstitutional portion of the statute was stricken. *Theeler*, ¶¶ 14-15.

As this Court explained, “if a statute ‘contains both constitutional and unconstitutional provisions, we examine the legislation to determine if there is a severability clause.’” *Theeler*, ¶ 12 (citation omitted); *United States v. Jackson*, 390 U.S. 570, 585 (1968) (applying severability in a criminal case and concluding that the “unconstitutionality of a part of an Act does not necessarily defeat . . . the validity of its remaining provisions”). This Court has “long held that ‘[i]f an invalid part of a statute is severable from the rest, the portion which is constitutional may stand while that which is unconstitutional is stricken out and rejected.’” *Theeler*, ¶ 12 (citing *Sheehy v. Public Employees Retirement Div.*, 262 Mont. 129, 141, 864 P.2d 762, 770 (1993); *Mont. Auto. Ass’n v. Greely*, 193 Mont. 378, 399, 632 P.2d 300, 311 (1981)).

Next, this Court determined the “Legislature ‘desired a policy of judicial severability to apply’” to the PFMA provision given that the original version and the 1995 amendment adding the definition of “partners.” *Theeler*, ¶ 13. Moreover, this Court further concluded that “[w]ith or without severability clauses in each

amendment since the statute's enactment, we conclude that the unconstitutional provision is unnecessary "for the integrity of the law." *Theeler*, ¶ 13. Accordingly, this Court held that "severing the unconstitutional provision so as to construe the statute 'in a manner that avoids unconstitutional interpretation' leaves the 'remainder of the statute . . . complete in itself and capable of being executed in accordance with the apparent legislative intent.'" *Theeler*, ¶ 14 (citing *Williams v. Bd. of County Comm'rs*, 2013 MT 243, ¶ 64, 371 Mont. 356, 308 P.3d. 88).

Watts cannot demonstrate the prejudice prong for any of his IAC claims against Eastman since they all hinged on the pre-2013 PFMA statute being unconstitutional. Moreover, Watts fails to also appreciate that he reaped the benefit of the plea agreement by avoiding a PFO designation. Had he been successful in withdrawing his plea, Watts would have lost that benefit and faced up to a 100-year sentence as a PFO.

Watts cannot establish how Okeyo's decision not to assert an IAC claim on direct appeal was deficient since he could not have established both prongs of *Strickland*, specifically, how he was prejudiced. *See, e.g., State v. Frasure*, 2004 MT 305, ¶ 12, 323 Mont. 479, 100 P.3d 1013 ("counsel are not expected to make motions that theoretically might help their clients if the motions lack merit"); *State v. Hildreth*, 267 Mont. 423, 432-33, 884 P.2d 771, 777 (1994) (the failure to object does not constitute IAC where the objection lacks merit and would have been

properly overruled). Finally, Watts cannot establish that Okeyo's decision not to challenge the district court's analysis using the severability clause because that argument was rejected by this Court in *Theeler*.

Watts argues that the district court improperly applied *Theeler* "retroactively" when it concluded none of his IAC claims established the prejudice prong. Watts' argument ignores that the district court used the same rationale, severability, in its order dismissing his motion to dismiss. *Watts I*, ¶ 6. The fact this Court did not reach the issue of the district court's application of the severability clause does not mean such rationale did not exist. Even if *Theeler* had not been decided by the time Watts filed his postconviction petition, the same analysis found in the district court's order dismissing his motion would have been considered and argued on appeal and, arguably, would have resulted in the same holding that this Court made in *Theeler*. The same is true had Watts filed his motion to dismiss prior to entering his guilty plea, or had he sought to withdraw his guilty plea on the basis that the pre-2013 PFMA statute was unconstitutional.

Watts is mistaken that *Theeler* is distinguishable because that case was a direct appeal. (Br. at 12.) The procedural posture of *Theeler*'s appeal and Watts' appeal does not distinguish the ultimate holding and rationale from *Theeler*. Notably, in *Theeler*, this Court chose to affirm the lower court's order denying the motion to dismiss using the principles of severability, instead of addressing the

lower court's constitutional analysis. *Theeler, supra*. Here, the district court applied these same severability principles in its order denying Watts' motion to dismiss.

Watts incorrectly asserts that it was "impossible for the district court to predict the outcome" had Watts been able to either (1) directly appeal the constitutionality of the pre-2013 PFMA statute; or (2) seek to withdraw his guilty plea based on his belief the pre-2013 PFMA statute was unconstitutional. (Br. at 12.) As explained, the district court did not "retroactively" apply *Theeler* when it denied Watts' postconviction petition. Rather, the court relied on the rationale from *Theeler* to establish that even if the issue had been preserved and appealed, this Court would have concluded that the severability clause did not render Watts' plea and convictions infirm because the same rationale was argued in Watts' motion to dismiss.

Watts cannot establish both *Strickland* prongs concerning Eastman's performance. Nor can Watts demonstrate that Okeyo's performance constituted IAC for not raising IAC claims against Eastman. Finally, in light of *Theeler*, Watts cannot establish how Okeyo's performance was deficient for not challenging the district court's order denying his motion to dismiss, specifically its conclusion that the legislature intended any unconstitutional portions of the statute to be severed leaving the remainder a valid and constitutional provision. Not only would such a

motion be meritless and, thus, not constitute deficient performance, Watts cannot establish how even if Okeyo had advanced such an argument that he would have been successful given this Court's holding in *Theeler*.

A person requesting postconviction relief has the burden to show, by a preponderance of the evidence, that the facts justify relief. *Griffin v. State*, 2003 MT 267, 317 Mont. 457, 77 P.3d 545. The district court did not err by addressing only the second *Strickland* prong because Watts failed to demonstrate how the result of the proceedings would have been different had Eastman or Okeyo performed differently. *Strickland*, 466 U.S. at 689; *Whitlow*, ¶¶ 11, 14; *Peart*, ¶ 22. If the petition fails to state a claim for relief, the district court may dismiss the petition as a matter of law, pursuant to Mont. Code Ann. § 46-21-201(1)(a).

III. The district court did not abuse its discretion by not conducting a hearing on Watts' petition.

The district court did not abuse its discretion when it denied Watts' petition without conducting a hearing. *See Hamilton v. State*, 2010 MT 25, ¶ 7, 355 Mont. 133, 226 P.3d 588 (Court reviews discretionary rulings in postconviction relief proceedings, including rulings related to whether to hold an evidentiary hearing, for an abuse of discretion). If the postconviction claims are without merit or would not otherwise entitle the petitioner to relief, the court may deny the petition without holding an evidentiary hearing. *Hamilton*, ¶ 7.

The court was justified in not holding a hearing given the clear state of the law under *Theeler, supra*. The crux of every IAC claim advanced by Watts was that the pre-2013 PFMA statute was unconstitutional and that the principles of severability did not apply. However, as established above, this Court's decision in *Theeler* directly rejected this argument. Accordingly, Watts could not establish the prejudice prong of *Strickland* to support any of his IAC claims. Watts could not meet his burden to show, by a preponderance of the evidence, that the facts justify relief, so it was not an abuse of discretion for the court to deny his petition without conducting a hearing. *Herman v. State*, 2006 MT 7, ¶ 44, 330 Mont. 267, 127 P.3d 422.

CONCLUSION

The district court's order denying Watt's petition for postconviction relief should be affirmed.

Respectfully submitted this 9th day of September, 2019.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 4,147 words, excluding certificate of service and certificate of compliance.

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CERTIFICATE OF SERVICE

I, Kathryn Fey Schulz, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 09-09-2019:

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