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IN THE SUPREME COURT OF THE STATE OF MONTANA

No. OP 24-0341

DAWSON DENNIS PATRICK, DYLAN TODD LEE OVITT, SAMUAL MURRELL GREEN, JOHN ARISPE, JOHN BLACKBURN, JAMES HORODYSKI, JAMES LONDON, HARLEY MCDONALD, TROY PARKER, BRANDON ROSENHAHN, ANDREW SUITONU,

Petitioners,

v.

MONTANA FOURTH JUDICIAL DISTRICT COURT, MINERAL COUNTY, HONORABLE SHANE A. VANNATTA, PRESIDING JUDGE,

Respondent.

STATES'S RESPONSE TO PETITION FOR WRIT OF SUPERVISORY CONTROL

INTRODUCTION

Petitioners Dawson Patrick (Patrick), Dylan Ovitt (Ovitt), and Samual Green (Green) seek supervisory control based on the Honorable Judge Shane Vannatta's orders reversing the Mineral County Justice Court's orders granting suppression of all evidence seized during arrests by deputies of the Mineral County Sheriff's Office who had mental health evaluations completed by a physician's assistant, rather than by a physician or mental health evaluator, as Mont. Code Ann. § 7-32-303(2)(g) specifies.

In compliance with this Court's May 30, 2024 Order, for these Petitioners, the State responds that supervisory control is not appropriate because all three Petitioners have an adequate remedy of appeal or, alternatively, the district court did not proceed under a mistake of law resulting in a gross injustice since Petitioners have alleged a technical statutory violation, for which the exclusionary rule should not apply.

Petitioners John Arispe, John Blackburn, James Horodyski, James London, Harley McDonald, Troy Parker, Brandon Rosenhahn, and Andrew Suitonu have appeals pending before the Honorable Judge John Larson but seek supervisory control anticipatory to Judge Larson's rulings. For these Petitioners, the State responds that supervisory control is not an available remedy since Judge Larson has not yet affirmed or reversed the Mineral County Justice Court's orders

suppressing all evidence in the Petitioners' misdemeanor cases. Presently, there is no way of knowing how Judge Larson will rule or what rationale Judge Larson will provide to support his rulings. These Petitioners cannot establish that Judge Larson is proceeding under a mistake of law resulting in a gross injustice.

STATEMENT OF RELEVANT PROCEDURAL HISTORY AND FACT[1]

I. *State v. Patrick*, Cause No. DC-23-25

On August 14, 2022, David Kunzelman and Eric Lindauer were deputies with the Mineral County Sheriff's Office (MCSO). (1/22/24 Finds. Fact, Concl. Law & Order Reversing, attached as Ex. 1 at 2:1.) Both deputies had signed Public Safety Officer Standards & Training (POST) certifications and the then-current Mineral County Sheriff had executed a certification that the deputies met all statutory requirements to serve as peace officers. (*Id*. at 4:9.) As part of the deputies' qualification process, they had both received a mental health evaluation from a physician's assistant prior to the sheriff appointing them to their positions with the MCSO. (*Id*. at 5:10.)

[1] Since there were no factual disputes, the district court did not hold a hearing on the Petitioners' suppression motions. The State takes the relevant facts from the district court's orders reversing the justice court. The State has focused the procedural history and facts on the three Petitioners whose cases are properly before this Court.

When Mineral County officials later learned that the mental health evaluations performed by a physician's assistant did not meet the statutory requirement of Mont. Code Ann. § 7-32-303(2)(g), which sets forth that the evaluation must be completed by a physician or a licensed mental health professional, the deputies with the MCSO completed evaluations with a licensed mental health professional and all were found to be free of any mental condition that might adversely affect performance of their duties as peace officers. (*Id*. at 5:11.)

On August 14, 2022, Deputy Kunzelman observed a vehicle, which Patrick was driving, that appeared to be speeding. Since Deputy Kunzelman was on another investigation, he asked Deputy Lindauer to follow the vehicle and initiate a traffic stop if necessary. Deputy Lindauer attempted to initiate a traffic stop but Patrick failed to pull over. After Deputy Kunzelman assumed the lead position pursuing the vehicle, Patrick pulled over but refused to get out of the vehicle. The deputies had to remove Patrick from the vehicle. Deputy Kunzelman smelled the odor of an alcoholic beverage coming from Patrick's vehicle and observed that Patrick had bloodshot, watery, and glassy eyes. Deputy Kunzelman performed the Horizontal Gaze Nystagmus (HGN) test, but Patrick refused to cooperate with other sobriety tests. Patrick also refused to submit to a blood test. Deputy Lindauer observed Deputy Kunzelman's DUI investigation. (*Id*. at 3:4.)

Deputy Kunzelman verified that Patrick had a prior DUI conviction and test refusal in Washington. He applied for and received a search warrant to require a blood test. The blood test results showed that Patrick's blood alcohol content was .241. (*Id*. at 3:5.) Deputy Kunzelman cited Patrick with numerous misdemeanor offenses including aggravated DUI (third offense), which was later amended to DUI (third offense). (*Id*. at 4:6.)

On July 18, 2023, the Mineral County Justice Court granted Patrick's motion to suppress evidence. (Pet'r's Ex. A.) The justice court summarily concluded:

> As Kunzelman did not complete the required mental health evaluation as required under 7-32-303(2)(g) he forfeits the authority and arrest powers and therefore all evidence obtained during the investigation and subsequent arrest should be suppressed.

(*Id*. at 8.)

The State filed a notice of appeal to the district court pursuant to Mont. Code Ann. § 46-20-102(2)(e). (Pet'r's Ex. B at 1.) After the State filed an opening brief (Pet'r's Ex. C), Patrick filed a response brief (Pet'r's Ex. D), and the State filed a reply (Pet'r's Ex. E), the district court issued its findings of fact, conclusions of law, and an order reversing the justice court's order suppressing evidence. (Ex. 1.)

The district court disagreed with Patrick's assessment that because the deputies forfeited their authority to arrest as a peace officer by getting a mental

health evaluation from a physician's assistant, they were acting as private persons under Mont. Code Ann. § 46-6-502. The district court stated, "Although there were issues with completion of the qualification process of § 7-32-303(2)(g), Deputies Kunzelman and Lindauer were still certified peace officers—certified both by POST and the then-current Mineral County Sheriff." (Ex. 1 at 8:D.)

The district court relied on this Court's holding and reasoning in *State v. Updegraff*, 2011 MT 321, 363 Mont. 123, 967 P.3d 28, to support its conclusion. (*Id*. at 8:E.) The court also relied upon this Court's decision in *State v. Robertson*, 2019 MT 99, 395 Mont. 370, 440 P.3d 17, although it recognized that the issue before the Court in *Robertson* was different, it still "gives insight into the technical non-compliance with Mont. Code Ann. § 7-32-303(2)(g)." (*Id*. at 11:J.) The court observed that the technical non-compliance was remedied when it was discovered. (*Id*.)

The district court further concluded that suppression was not warranted because:

> M. There is no prejudice to Defendant because Deputies Kunzelman and Lindauer were certified, appointed, and free of any mental condition that would adversely affect [their] performance when [they] encountered the Defendant.
>
> N. Former Deputy Kunzelman effectuated a lawful stop and DUI investigation with reasonable suspicion when he observed indicators that Defendant was likely under the influence.

O. Former Deputy Kunzelman was appropriately authorized to apply for a search warrant under Mont. Code Ann. § 46-5-220(1).

(*Id.* at 12.)

II. *State v. Ovitt*, Cause No. DC-23-24[2]

On August 26, 2022, Deputies Kunzelman and Lindauer received a phone call from an off-duty Mineral County dispatcher and a detention officer reporting a possible impaired driver leaving a bar in Superior. The witnesses had seen Ovitt leave the bar and stumble towards a parked vehicle, enter the vehicle on the passenger side, and then crawl to the driver's side. Ovitt drove away without his headlights on. (1/22/24 Finds. Fact, Concl. Law & Order Reversing, attached as Ex. 2 at 2:1.)

Deputy Kunzelman determined the driver was Ovitt and proceeded to Ovitt's residence in Superior. Deputy Kunzelman found Ovitt's vehicle parked in the driveway and watched Ovitt exit the vehicle from the passenger side door. Deputy Kunzelman initiated a DUI investigation. Deputy Lindauer arrived while Deputy Kunzelman was completing the HGN test. (*Id*. at 3:2-3.) After Ovitt

[2] Since Judge Vannatta's facts related to the deputies' mental health evaluations, ruling and rationale are the same for each case, the State will not repeat that information for Petitioners Ovitt and Green unless there is additional analysis.

submitted to a preliminary breath test, Deputy Kunzelman placed him under arrest. (*Id*. at 3:3.)

Deputy Kunzelman read Ovitt the Montana Implied Consent Advisory. Ovitt submitted to a breath test, which showed his blood alcohol content to be .207. Ovitt waived his *Miranda* rights and admitted to drinking 12 large beers throughout the course of the day. (*Id*. at 4:5.)

The district court again reversed the justice court's order suppressing evidence. (Ex. 2.) In so doing, it additionally concluded:

> K. Moreover, Deputy Kunzelman and Deputy Lindauer were certified peace officers performing law enforcement duties and were serving as public officers. Mont. Code Ann. § 46-1-202(17).
>
> > A person who assumes and performs the duties of a public office under color of authority and is recognized and accepted as a rightful holder of the office by all who deal with him is a *de facto* officer, even though there may be defects in the manner of his appointment, or he [was] not eligible for the office, or failed to conform to some condition precedent to assuming the office.
>
> *Wood v. Butorovich*, 220 Mont. 484, 488, 716 P.2d 608, 611 (1986 *quoting* *State v. Miller*, 222 Kan. 405, 414, 565 P.2d 228, 235 (1977).
>
> L. Most compelling for the Court is the fact that all deputies—including Deputy Kunzelman—passed their subsequent mental health evaluations meaning that they were free of any mental condition that might adversely affect their performance of the duties of a peace officer. There is no serious question as to whether they were free of [a] mental condition. Even though their initial mental health evaluation was statutorily non-compliant, their subsequent evaluation by a statutorily permitted professional was appropriate and all deputies passed. The Court must conclude that Deputy Kunzelman

was free of any mental condition that would adversely affect his performance at all times pertinent to the subject DUI investigation, and arrest. Defendant has not established any facts to the contrary.

M. There is no prejudice to Defendant because Deputy Kunzelman was certified, appointed, and free of any mental condition that would adversely affect his performance when he encountered the Defendant.

N. Former Deputy Kunzelman effectuated a lawful DUI investigation with reasonable suspicion when presented with witness accounts of Defendant's apparent inebriated state and observed further indicators that Defendant was likely under the influence.

(*Id*. at 11-12.)

III. *State v. Green*, Cause No. DC-23-26

When Deputy Kunzelman observed a red Subaru leaving the Travel Center in St. Regis at a high rate of speed, he followed the vehicle, which Green was driving, and estimated Green was traveling at 50 miles per hour in a 35 miles per hour zone. Deputy Visintin also observed Green turning into the Travel Center without using a turn signal, and intended to initiate a traffic stop, but Deputy Kunzelman was already following Green's vehicle. (1/16/24 Finds. Fact, Concl. Law & Order Reversing, attached as Ex. 3 at 2:1-3.)

Deputy Kunzelman initiated a traffic stop for speeding. As Deputy Kunzelman spoke with Green, he smelled the odor of an alcoholic beverage coming from Green's breath. By this time, Deputy Visintin was also on the scene. He observed two open containers of alcohol, a Mike's Hard Lemonade and a

Smirnoff Ice, in the back seat of Green's vehicle. Both containers appeared empty. Deputy Visintin also smelled the odor of an alcoholic beverage emanating from Green. (*Id*. at 3:4-8.)

Green agreed to perform field sobriety tests and to submit to a preliminary breath test. Afterwards, Deputy Kunzelman arrested Green for DUI and other traffic offenses. Green submitted to a blood draw. (*Id*. at 3-4:9-14.)

The district court reversed the justice court's order suppressing evidence based on the same rationale it articulated in its order reversing the justice court's order suppressing evidence in Ovitt's case. (Ex. 3.)

ARGUMENT

I. Standards

This Court has supervisory control over all other courts in Montana and may, on a case-by-case basis, supervise another court through a writ of supervisory control. *Tipton v. Mont. Thirteenth Judicial Dist. Court*, 2018 MT 164, ¶ 9, 393 Mont. 59, 421 P.3d 780, citing Mont. Const. art. VII, § 2(2); M. R. App. P. 14(3). Supervisory control is an extraordinary remedy, appropriate when the normal appeal process is inadequate, when the case involves purely legal questions, *and* when one or more of the following exists: (1) the lower court is proceeding under a mistake of law and is causing a gross injustice; (2) constitutional issues of state-

wide importance are involved; or (3) the lower court has granted or denied a motion for substitution of judge in a criminal case. *Tipton*, ¶ 9. This Court is reluctant to exercise this extraordinary remedy. *Potter v. Dist. Court of the Sixteenth Judicial Dist.*, 266 Mont. 384, 388, 850 P.2d 1319, 1322 (1994).

This Court reviews a district court's denial of a suppression motion to determine whether its findings of fact are clearly erroneous, and whether its interpretation and application of the law were correct. *State v. Neiss*, 2019 MT 125, ¶ 13, 396 Mont. 1, 443 P.3d 435.

II. Supervisory control is not warranted because the Petitioners have an adequate remedy of appeal and the district court is not operating under a mistake of law resulting in a gross injustice.

A. Petitioners Arispe, Blackburn, Horodyski, London, McDonald, Parker, Rosenhahn, and Suitonu cannot meet the standard warranting supervisory control because their appeals are still pending in district court.

Since these Petitioners' appeals are still pending before Judge Larson, they cannot meet the standard to warrant supervisory control because they cannot prove that Judge Larson is proceeding under a mistake of law resulting in a gross injustice. *See Zindell v. Mont. Eighth Jud. Dist. Court*, 411 Mont. 386, 521 P.3d 1159 (2022). These Petitioners are asking this Court to speculate about how Judge Larson will analyze and rule on their pending appeals and to grant supervisory control in anticipation of that ruling. This Court should decline to do so because

the Court is not in the practice of giving an opinion based on anticipatory rulings. *See Arnone v. City of Bozeman*, 2016 MT 184, ¶ 7, 384 Mont. 250, 376 P.3d 786.

Judicial economy alone does not warrant supervisory control. Petitioners still must prove that the district court is operating under a mistake of law resulting in a gross injustice or that there are constitutional issues of statewide importance. Since Judge Larson has not yet ruled on their appeals, they cannot meet their burden.

B. Petitioners Patrick, Ovitt and Green all have an adequate remedy of appeal.

Petitioners Patrick, Ovitt, and Green claim that they do not have an adequate remedy of appeal based solely on judicial economy, and urge they are conserving the judicial resources of Mineral County. Petitioners cite *Truman v. Mont. Eleventh Judicial Dist. Court*, 2003 MT 91, 315 Mont. 165, 68 P.3d 654, to support this position. The circumstances in *Truman* are distinguishable from those here.

Truman filed a civil negligence suit against a driver who hit her. Although the district court granted Truman's motion for summary judgment in part, and prohibited the defendant from asserting a non-party affirmative defense, it also permitted the defendant to introduce evidence of Truman's subsequent accidents to dispute causation. In her petition Truman alleged that the district court was proceeding under a mistake of law *Id*. ¶ 1. This Court concluded that if the district court was incorrect, the incorrect conclusions would impact all aspects of the

proceeding from trial preparation and settlement negotiations to the trial itself. This would cost Truman excessive time and money. *Id*. ¶ 16.

In contrast, the denial of a motion to suppress evidence in a criminal case happens daily. It is commonplace for this Court to consider such denials on direct appeal. The circumstances here are no different than those this Court routinely considers on direct appeal. The concerns attendant to civil litigation, including the enormous costs to civil litigants, are not the same in criminal cases. For example, with the State's consent, these Petitioners have the option of pleading guilty while reserving their right to appeal the denial of the suppression motion. Mont. Code Ann. § 46-12-204(3).

In *Case v. Mont. Third Jud. Dist. Court*, 408 Mont. 542, 507 P.3d 142 (2022), this Court declined to exercise supervisory control over the denial of Case's suppression motion when Case argued that the ordinary appeal process would be inadequate because he would be forced to go through a trial on a felony assault of a peace officer, alleged to have occurred after the officer illegally entered his home. The circumstances in *Case* are like those here except Petitioners here are alleging a statutory violation from which they suffered no prejudice.

This Court will not allow supervisory control to substitute for the ordinary appeal process because it may be more convenient for the parties, and will generally exercise supervisory control "[o]nly in the most extenuating

circumstances." *State ex rel. Ward v. Schmall*, 190 Mont. 1, 4, 617 P.2d 140, 141 (1980).

Even if this Court were to conclude there is not an adequate remedy of appeal, supervisory control is not warranted.

C. The district court is not operating under a mistake of law resulting in a gross injustice.

Petitioners argue that the district court could only interpret Mont. Code Ann. § 7-32-303(5) to mean that, because the deputies had mental health assessments from a physician's assistant, which is not authorized by Mont. Code Ann. § 7-32-302(2)(g), the deputies forfeited any authority as deputies, and thus the deputies had no power to initiate traffic stops or make arrests because they were no longer peace officers. Petitioners assert that the district court incorrectly relied on *Updegraff* to conclude otherwise.

In *Updegraff*, Jefferson County Reserve Deputy Janik happened upon a parked car in a posted "day use only" fishing assess site in Madison County. The car's driver appeared motionless and unresponsive. Upon contacting the driver, Updegraff, Deputy Janik quickly concluded Updegraff was intoxicated. Jefferson County Deputy Wharton responded to the scene and ultimately arrested Updegraff. *Updegraff*, ¶ 1. Updegraff moved to dismiss the charge or to suppress the evidence gained from the arrest, arguing that his arrest was illegal because the two deputies had been out of their jurisdiction, without authority to arrest, and the deputies,

acting as private citizens, had failed to comply with the mandates and limited authority of Mont. Code Ann. § 46-6-502, the private person arrest statute. *Id*. ¶ 3.

In *Updegraff*, after reviewing prior cases involving peace officers and the private person arrest statute, this Court held that the private person arrest statute applies only to actual "private persons," meaning non-peace officers, and those whose arrest authority is, by statute, limited to that of a "private person." The Court concluded that an out-of-jurisdiction officer is still a "peace officer" and does not morph into a "private person." But because an officer is out of her jurisdiction, the officer may still make an arrest if the circumstances would give a private person sufficient grounds to make an arrest—meaning probable cause that a person is committing or has committed an offense and the circumstances require an immediate arrest. *Id*. ¶¶ 51-52. If that standard is met, the officer "may follow the procedures applicable to peace officers in processing the arrest, and the lawfulness of the officer's actions in this regard will be judged under the constitutional and statutory rules applicable to peace officers." *Id*. ¶ 53.

Judge Vannatta correctly concluded that the deputies here were similarly situated to the out-of-jurisdiction peace officers in *Updegraff* and had probable cause to arrest as well as circumstances requiring an immediate arrest. Judge Vannatta therefore correctly rejected Petitioners' assertions that their arrests were all "illegal."

Judge Vannatta also correctly reasoned that, despite the technical non-compliance with Mont. Code Ann. § 7-32-303(2)(g), the deputies met all the qualifications as reserve deputies pursuant to Mont. Code Ann. § 7-32-213. Thus, if the out-of-jurisdiction reserve deputy in *Updegraff* could investigate and detain Updegraff, the same rationale should apply to the circumstances here, especially when both the sheriff and POST had certified the officers.

Judge Vannatta's reasoning is also supported by the de facto officer doctrine, which this Court recognized in *Wood v. Butorovich*, 220 Mont. 484, 716 P.2d 608 (1986), and which Judge Vannatta relied upon. Wood was a police officer who was suspended from duty and later dismissed from his position after a hearing before the Butte-Silver Bow Law Enforcement Commission. *Id.* at 485, 716 P.2d at 608. Wood argued on appeal that his dismissal was not valid because two commissioners were not properly empaneled under Mont. Code Ann. § 7-32-4155. *Id*. at 487, 716 P.2d at 610. This Court adopted the reasoning of the Kansas Supreme Court in *State v. Miller*, 565 P.2d 228 (Kan. 1977), and quoted from that opinion:

> A person who assumes and performs the duties of a public office under color of authority and is recognized and accepted as a rightful holder of the office by all who deal with him is a de facto officer, even though there may be defects in the manner of his appointment, or he was not eligible for the office, or failed to conform to some condition precedent to assuming the office.

Wood, 220 Mont. at 488, 716 P.2d at 610, quoting *Miller*, 565 P.2d at 235.

The de facto officer doctrine is longstanding and well recognized in various jurisdictions. *See Waite v. Santa Cruz*, 184 U.S. 302, 323 (1902); *Alabama & v. R. Co. v. Bolding*, 13 So. 844, 846 (Miss. 1891); *Acevedo v. Cook City Sheriff's Merit Bd.*, 129 N.E.3d 658 (Ill. App. 2019). And other jurisdictions have applied the de facto officer doctrine in the context of criminal cases. For example, in *State v. Oren*, 627 A.2d 337 (Vt. 1993), the State of Vermont charged Oren with hindering a law enforcement officer. Oren moved to dismiss, arguing that the officer was not an "officer" because her commission had expired. *Id.* at 338. The court held that the officer was a de facto officer. *Id.* at 339. *See also State v. Mitchell*, 458 A.2d 1089, 1090 (Vt. 1983) (conviction for impeding a law enforcement officer upheld even though the officer had not completed all statutory training requirements); *Stevenson v. State*, 733 So. 2d 177, 184 (Miss. 1998) (capital murder upheld because the victim/jailer was a de facto deputy sheriff acting under the sheriff's appointment even if deficiencies existed in that appointment); *Fields v. State*, 91 N.E.3d 597, 599-600 (Ct. App. Ind. 2017) (police officer was a de facto officer when he initiated traffic stop even though he had not taken oath as statute required).

Finally, the purpose of the exclusionary rule itself supports Judge Vannatta's decision. Here, the Mineral County Sheriff appointed the deputies and POST certified them. The deputies and members of the public had every reason to believe

they were authorized to carry out their duties as peace officers. As this Court recognized in *State v. Pipkin*, 1998 MT 143, ¶ 12, 289 Mont. 240, 961 P.2d 753, when it reversed the lower court's suppression of evidence based on a technical statutory violation, the purpose of the exclusionary rule is to deter law enforcement officers from conducting unconstitutional searches and seizures. Here, the deputies exercised their authority within the bounds of the constitution. The facts established particularized suspicion to investigate and probable cause both to arrest and to seek search warrants.

In the context of search warrants, this Court has explained that technical attacks on warrants "must be dealt with in a realistic manner." *Id.* ¶ 27. The correct approach is to "analyze the facts and circumstances of each case to determine whether the irregularity in procedure has had an [effect] on the substantial rights of the accused." *Id.* This is precisely the approach Judge Vannatta employed here. The Petitioners did not suffer prejudice from the technical statutory violation.

/ / /

CONCLUSION

The State requests that this Court deny the Petition for Writ of Supervisory Control.

Respectfully submitted this 28th day of June, 2024.

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By: /s/ *Tammy K Plubell*
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this response 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 3,967 words, excluding caption, signatures, certificate of compliance, certificate of service, and any exhibits.

/s/ *Tammy K Plubell*
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IN THE SUPREME COURT OF THE STATE OF MONTANA

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EXHIBITS

State v. Patrick, Cause No. DC-23-25,
1/22/24 Findings of Fact, Conclusions of Law, and Order Reversing ..... Ex. 1

State v. Ovitt, Cause No. DC-23-24,
1/22/24 Findings of Fact, Conclusions of Law, and Order Reversing..... Ex. 2

State v. Green, Cause No. DC-23-26,
1/18/24 Findings of Fact, Conclusions of Law, and Order Reversing ..... Ex. 3

CERTIFICATE OF SERVICE

I, Tammy K Plubell, hereby certify that I have served true and accurate copies of the foregoing Response/Objection - Petition for Writ to the following on 06-28-2024:

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Dated: 06-28-2024