PUBLICATION UPDATE

Route to: ☐ ____ ☐ ____ ☐ ____ ☐ ____
☐ ____ ☐ ____ ☐ ____ ☐ ____

HANDBOOK ON WEST VIRGINIA CRIMINAL PROCEDURE

Publication 60852 Release 13 May 2023

HIGHLIGHTS

- Chapter 1—RIGHT TO COUNSEL
- Chapter 3—ARREST, EXTRADITION AND DETAINER
- Chapter 4—SEARCH AND SEIZURE
- Chapter 5—CONFESSIONS
- Chapter 8—JURISDICTION AND VENUE
- Chapter 12—DISCOVERY
- Chapter 16—INSANITY AND MENTAL COMPETENCY
- Chapter 22—APPEALS AND COLLATERAL ATTACKS
- Chapter 28—JUVENILE RIGHTS AND

PROCEDURE

Chapter 1—RIGHT TO COUNSEL

The obligation of police to warn a suspect of both his right to counsel and his right against self-incrimination applies only to custodial or other settings where there is a possibility of coercion. *State v. Delorenzo*, No. 21-0456, 2022 W. Va. LEXIS 704 (Nov. 17, 2022). Whether a person is in custody is an objective test where the court must consider, in the totality of the circumstances, whether a reasonable person in that individual's position would have considered his freedom of action restricted to the degree associated with a formal arrest. When determining the factual question of whether a person is subject to a

custodial interrogation, the factors the circuit court must consider include: the location and length of questioning; the nature of the questioning as it relates to the suspected offense; the number of police officers present; the use or absence of force or physical restraint by the police officers; the suspect's verbal and nonverbal responses to the police officers; and the length of time between the questioning and formal arrest. These factors are not all-inclusive. *Id.*

Chapter 3—ARREST, EXTRADITION AND DETAINER

The Fourth Amendment to the United States Constitution provides that citizens have the right "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures[.]" It protects against certain kinds of government intrusions, most particularly, "the physical entry of the home by law enforcement." However, in *Payton v. New York*, 445 U.S. 573, 603, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980), the Supreme Court held that: "for Fourth Amendment purposes, an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the [subject of the warrant] lives when there is reason to believe the [subject] is within." Indeed, where authorities have a valid arrest warrant, "it is constitutionally reasonable to require [the subject] to open his doors to the officers of the law." *Id.* at 602–03. The parties agree that the "pick-up" order directing that an individual be taken into custody and placed with the DHHR, which was founded upon probable cause to believe that her "health, safety and welfare" demanded it, *see* W. Va. Code § 49-4-705(a)(2), was the functional equivalent of an arrest warrant and was lawfully issued. *State v. Pennington*, No. 21-0396, 2022 W. Va. LEXIS 694, (Nov. 14, 2022).

Chapter 4—SEARCH AND SEIZURE

A search and seizure conducted without a warrant "may be constitutional if the search and seizure can be justified under one of the well-delineated exceptions [to the warrant requirement] or where both exigent circumstances and probable cause exist. *State v. Fowler*, No. 21-0328, 2022 W. Va. LEXIS 624 (Oct. 17, 2022).

In contrast to a review of the circuit court's factual findings, the ultimate determination as to whether a search or seizure was reasonable under the Fourth Amendment to the United States Constitution and W. Va. Const. art. III, § 6, is a question of law that is reviewed de novo it is unsupported by substantial evidence, based on an erroneous interpretation of the law, or, based on the entire record, it is clear that a mistake has been made. *State v. Pennington*, No. 21-0396, 2022 W. Va. LEXIS 694 (Nov. 14, 2022).

Chapter 5—CONFESSIONS

In determining the voluntariness of a confession, the trial court must assess the totality of all the surrounding circumstances. No one factor is

determinative. Misrepresentations made to a defendant or other deceptive practices by police officers will not necessarily invalidate a confession unless they are shown to have affected its voluntariness or reliability. *State v. Hager*, No. 21-0689, 2022 W. Va. LEXIS 629 (Oct. 17, 2022).

Chapter 8—JURISDICTION AND VENUE

Prohibition lies only to restrain inferior courts from proceeding in causes over which they have no jurisdiction, or, in which, having jurisdiction, they are exceeding their legitimate powers and may not be used as a substitute for writ of error, appeal or certiorari. In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only when it is claimed that the lower tribunal exceeded its legitimate powers, the Supreme Court of Appeals of West Virginia will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight. *State ex rel. W. Va. Dep't of Health & Human Res. v. Bloom*, No. 22-0027, 2022 W. Va. LEXIS 701 (Nov. 17, 2022).

Chapter 12—DISCOVERY

In the context of discovery orders, clear legal error warrants the exercise of the original jurisdiction of the Supreme Court of Appeals of West Virginia through the issuance of a writ of prohibition. A writ of prohibition is available to correct a clear legal error resulting from a trial court's substantial abuse of its discretion in regard to discovery orders. When a discovery order involves the probable invasion of confidential materials that are exempted from discovery under W. Va. R. Civ. P. 26(b)(1) and 26(b)(3), the exercise of the original jurisdiction of the Supreme Court of Appeals is appropriate. *State ex rel. Antero Res. Corp. v. McCarthy*, No. 22-0400, 2022 W. Va. LEXIS 697 (Nov. 17, 2022).

Chapter 16—INSANITY AND MENTAL COMPETENCY

The Supreme Court of Appeals of West Virginia held, in *State v. Drennan*, No. 21-0690, 2022 W. Va. LEXIS 623 (Oct. 17, 2022), held that the insanity issue is determined by the sufficiency of the evidence. Further, whether the State adduced suf-

ficient evidence to sustain the jury's guilty verdict is measured by the same standard that applies to any other sufficiency challenge. This Court has stated that: "[a] convicted defendant who presses a claim of evidentiary insufficiency faces an uphill climb." *State v. LaRock*, 196 W. Va. 294, 303, 470 S.E.2d 613, 622 (1996). In light of the competing expert testimony on the sanity issue as discussed above, a reasonable jury could find that petitioner was sane at the time of the crime spree. Applying our established jurisprudence and reviewing the jury's verdict in a light most favorable to the prosecution, we refuse to disturb the jury's verdict and we find that petitioner's first assignment of error is without merit.

Chapter 22—APPEALS AND COLLATERAL ATTACKS

West Virginia Rules of Appellate Procedure, Rule 8.

Alternative method—designated record.

(a) **When permitted.** The Intermediate Court or the Supreme Court may consider a case without an appendix record, or upon a partially designated record, when: (1) a scheduling order allows designation; or (2) an order allowing designation is entered by the court with **appellate** jurisdiction of the action, either by granting a motion to proceed on a designated record or on its own motion.

(b) **Petitioner's designation.** Within the time frame set forth by order, the petitioner shall file with the clerk of the circuit court or other lower tribunal an itemized designation of such pleadings, orders, exhibits, and transcripts to enable the Intermediate Court or the Supreme Court to decide the matters arising in the proceeding, with the appropriate bond for costs as required by subsection (g).

(c) **Respondent's designation.** Within the time frame set forth by order, the respondent shall file with the circuit clerk a designation of such additional parts of the record as considered necessary in view of the petitioner's designation.

(d) **Joint designation.** The Intermediate Court or the Supreme Court may, by order entered of record, require the parties to confer and submit a joint designation.

(e) **Form of Designation.** Designations shall be in such form as to guide the person assembling the record. Counsel may mark the docket sheet with appropriate notations. Asterisks or ellipses should be used to indicate omissions in testimony of witnesses or other parts of the record.

(f) **Assembling the designated record.** The circuit clerk, or other lower tribunal before transmitting the designated record, shall arrange the designated documents, as nearly as possible, in

chronological order of filing, number the pages as described in Rule 7(b), and prepare a table of contents as described in Rule 7(c)(3). Physical evidence or bulky items that have been designated by the parties may be omitted from the record transmitted, provided that the table of contents describes the omitted exhibits and makes a notation that the exhibits are available to the Court upon request. Original documents are not required to be transmitted unless expressly required by order.

(g) **Bond for Costs.** Before the designated record is transmitted, the petitioner shall deposit with the clerk of the circuit court sufficient money, or a bond conditioned to pay the same, in a penalty and with sureties to be fixed and approved by such clerk, to pay: (1) the expenses of preparing and indexing the record; (2) fees for certifying necessary copies of orders; (3) costs of transmission and return of the record; and (4) costs of the making of the transcript. The clerk shall endorse on the record that such deposit has been made or such bond fixed.

History: Amended by order adopted June 15, 2022, effective July 1, 2022.

* * * * *

West Virginia Rules of Appellate Procedure, Rule 10.

Briefs.

(a) **Format.** In addition to the specific requirements in this **Rule**, all briefs and summary responses are required to: (1) comply with the general format requirements and page limitations set forth in **Rule**38; and (2) avoid unnecessary use of personal identifiers as required by **Rule** 40(e).

(b) **Time for filing and method of filing.** Unless otherwise provided, briefs are due within the time frame set forth in the scheduling order. Typically, the petitioner's brief must be filed four months from entry of the final order being appealed, the respondent's brief must be filed forty-five days after the petitioner's brief, and any reply brief deemed necessary must be filed twenty days after the respondent's brief. The number of copies and page limitations for briefs and summary responses are set forth in **Rule** 38. Briefs and summary responses are deemed filed when they are received in the Clerk's Office in proper form, not when mailed.

(c) **Petitioner's brief.** The petitioner's brief shall contain the following sections in the order indicated, immediately following the cover page required by **Rule** 38(b).

(1) **Table of Contents:** If the brief exceeds five

pages it must include a table of contents, with page references to the sections of the brief and the argument headings. The table of contents does not count toward the page limit for briefs.

(2) **Table of Authorities:** If the brief exceeds five pages it must include a table of authorities with an alphabetical list of cases, statutes, and other authorities cited, and references to the pages of the brief where they are cited. The table of authorities does not count toward the page limit for briefs.

(3) **Assignments of Error:** The brief opens with a list of the assignments of error that are presented for review, expressed in terms and circumstances of the case but without unnecessary detail. The assignments of error need not be identical to those contained in the notice of appeal. The statement of the assignments of error will be deemed to include every subsidiary question fairly comprised therein. If the issue was not presented to the lower tribunal, the assignment of error must be phrased in such a fashion as to alert the Intermediate Court or the Supreme Court to the fact that plain error is asserted. In its discretion, the Intermediate Court or the Supreme Court may consider a plain error not among the assignments of error but evident from the record and otherwise within its jurisdiction to decide.

(4) **Statement of the Case:** Supported by appropriate and specific references to the appendix or designated record, the statement of the case must contain a concise account of the procedural history of the case and a statement of the facts of the case that are relevant to the assignments of error.

(5) **Summary of Argument:** The summary of argument should be a concise, accurate, and clear condensation of the argument made in the body of the brief, and need not contain extensive citation to legal authorities. The summary may not be a mere repetition of the headings under which the argument is arranged.

(6) **Statement Regarding Oral Argument and Decision:** The brief must contain a statement as to whether oral argument is necessary pursuant to the criteria in **Rule** 18(a). If the party deems oral argument to be necessary, the party must indicate whether the case should be set for a **Rule** 19 argument or a **Rule** 20 argument, and why. If the party requests a **Rule** 19 argument, the party must state whether the case is appropriate for a memorandum decision. If the party requests that the case be set for oral argument and believes that the minimum time for argument set forth in **Rule** 19 or **Rule** 20 will not be sufficient, the party may request a specific amount of additional time for argument and explain why the party believes that good cause exists for granting additional time.

(7) **Argument:** The brief must contain an argument exhibiting clearly the points of fact and law presented, the standard of review applicable, and citing the authorities relied on, under headings that correspond with the assignments of error. The argument must contain appropriate and specific citations to the record on appeal, including citations that pinpoint when and how the issues in the assignments of error were presented to the lower tribunal. The Intermediate Court or the Supreme Court may disregard errors that are not adequately supported by specific references to the record on appeal.

(8) **Conclusion:** The brief must end with a conclusion, specifying the relief the party seeks.

(9) **Certificate of Service:** A certificate of service as required by **Rule** 37 must be attached to the end of the brief. The certificate of service does not need a page number and does not count toward the page limit for briefs.

(10) The following requirements must be observed when counsel in a criminal, habeas corpus, or abuse and neglect case is directed by a client to file an appeal where counsel lacks a good faith belief that an appeal is reasonable and

warranted under the circumstances:

(a) Counsel must engage in a candid discussion with the client regarding the merits of the appeal. If, after consultation with the client, the client insists on proceeding with the appeal, counsel must file a notice of appeal and perfect the appeal on the petitioner's behalf. The petitioner's brief should raise any arguable points of error advanced by the client. Counsel need not espouse unsupportable contentions insisted on by the client, but should present a brief containing appropriate citations to the appendix and any case law that supports the assignments of error.

(b) In extraordinary circumstances, if counsel is ethically compelled to disassociate from the contentions presented in the brief, counsel must preface the brief with a statement that the brief is filed pursuant to **Rule** 10(c)(10)(b). Counsel should not inject disclaimers or argue against the client's interests. If counsel is ethically compelled to disassociate from any assignments of error that the client wishes to raise on appeal, counsel must file a motion requesting leave for the client to file a pro se supplemental brief raising those assignments of error that the client wishes to raise but that counsel does not have a good faith belief are reasonable and warranted.

(d) **Respondent's brief.** The respondent must file a brief in accordance with this subsection, or a summary response in accordance with subsection (e) of this **Rule**. The respondent's brief must conform to the requirements in subsection (c) of this **Rule**, except that no statement of the case need be made beyond what may be deemed necessary in correcting any inaccuracy or omission in the petitioner's brief, and except that the respondent need not specifically restate the assignments of error. Unless otherwise provided by the Intermediate Court or the Supreme Court, the argument section of the respondent's brief must specifically respond to each assignment of error, to the fullest extent possible. If the respondent's brief fails to respond to an assignment of error, the Intermediate Court or the Supreme Court will assume that the respondent agrees with the petitioner's view of the issue.

(e) **Summary response.** Instead of a brief, the respondent may file a summary response. A summary response need not comply with all the requirements for a brief set forth in this **rule** but must contain an argument responsive to the assignments of error with appropriate citations to the record on appeal, exhibiting clearly the points of fact and law being presented and the authorities relied on; a conclusion, specifying the relief the party seeks; and a certificate of service as required by **Rule** 37. A party who files a summary response is deemed to have consented to the waiver of oral argument.

(f) **Cross-assignments of error.** The respondent, if he is of the opinion that there is error in the record to his prejudice, may assign such error in a separate portion of his brief and set out authority and argument in support thereof in the manner provided in subsection (c) of this **Rule**. Such cross-assignment may be made notwithstanding the fact that the respondent did not perfect a separate appeal within the statutory period for taking an appeal. If the respondent's brief contains cross-assignments of error, the cover page of the brief must clearly so reflect. The petitioner may respond to the cross-assignment of errors in the reply brief.

(g) **Reply brief.** The petitioner may file a reply brief, which must comply with such parts of this **rule** applicable to the respondent, but need not contain a summary of argument, if appropriately divided by topical headings. If a timely-filed respondent's brief asserts cross-assignments of error, the applicable page limitation for a reply brief set forth in **Rule** 38 is extended to forty pages, and the time for filing a reply brief is automatically extended, without need for further order, until thirty days after the date the respondent's brief containing cross-assignments of error was filed. Unless otherwise provided by order, in cases where more than one respondent's brief is filed, the petitioner is limited to filing only a single reply brief that consolidates the reply to each of the responses. In cases where more than one response brief is filed, the page limitation for the reply brief under **Rule** 38 is automatically extended to thirty pages, without need for further order.

(h) **Supplemental brief.** The Intermediate Court or the Supreme Court may, on its own motion or upon motion of a party, direct that supplemental briefs be filed addressing a particular issue or circumstance. Unless otherwise provided, supplemental briefs need only comply with such parts of this **rule**

applicable that are appropriate under the circumstances.

(i) **Notice of additional authorities.** Whenever a party desires to present late authorities, newly enacted legislation, or other intervening matters that were not available in time to have been included in the party's brief, the party may briefly inform the Clerk by letter, with copy provided to opposing parties. If the Intermediate Court or the Supreme Court desires any further briefing or argument, it will so instruct by order.

(j) **Failure to file brief.** The failure to file a brief in accordance with this **rule** may result in the Intermediate Court or the Supreme Court refusing to consider the case, denying oral argument to the derelict party, dismissing the case from the docket, or imposing such other sanctions deemed appropriate.

History: Amended by order adopted June 15, 2022, effective July 1, 2022.

Chapter 28—JUVENILE RIGHTS AND PROCEDURE

The bedrock of our juvenile laws is rehabilitation, not punishment. *See State v. McDonald*, 173 W. Va. 263, 267, 314 S.E.2d 854, 858 (1984) ("We have long recognized that the purpose of our juvenile law is to promote the rehabilitation of troubled children, rather than to punish them."). West Virginia Code § 49-4-714(b)(6) provides, in part, that: "[t]he court shall make all reasonable efforts to place the juvenile in the least restrictive alternative appropriate to the needs of the juvenile and the community." Moreover, Rule 34(a) of the West Virginia Rules of Juvenile Procedure provides as follows:

Juveniles adjudicated as delinquent or status offenders are entitled to be sentenced in the least restrictive manner possible that will meet their needs and protect the welfare of the public. The goal in disposition should be the rehabilitation of the juvenile to enable and promote becoming a productive member of society. In disposition, the court has discretion when determining terms and conditions, and is not limited to the relief sought in the petition. The court shall consider the best interests of the juvenile and the welfare of the public when rendering its decision.

In re A.W., No. 21-0352, 2022 W. Va. LEXIS 490 (Aug. 30, 2022)

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Publication 60852 Release 13 May 2023

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VOLUME 1

Revision

☐	Title page.	Title page
☐	1-1 thru 1-3.	1-1 thru 1-4.1
☐	1-13 thru 1-17	1-13 thru 1-18.1
☐	1-29 thru 1-31	1-29 thru 1-32.1
☐	1-41 thru 1-46.5.	1-41 thru 1-46.7
☐	1-65 thru 1-74.1.	1-65 thru 1-74.1
☐	1-89 thru 1-141	1-89 thru 1-142.1
☐	1-153 thru 1-157	1-153 thru 1-157
☐	2-1 thru 2-93	2-1 thru 2-93
☐	3-1 thru 3-3.	3-1 thru 3-4.1
☐	3-18.1 thru 3-79.	3-19 thru 3-80.3
☐	3-93	3-93
☐	4-1 thru 4-3.	4-1 thru 4-3
☐	4-14.1 thru 4-27.	4-15 thru 4-28.5
☐	4-37 thru 4-45	4-37 thru 4-46.1
☐	4-59	4-59 thru 4-60.1
☐	4-75 thru 4-139	4-75 thru 4-140.1
☐	4-149 thru 4-195	4-149 thru 4-196.3
☐	4-209 thru 4-241	4-209 thru 4-237
☐	4-253 thru 4-255	4-253 thru 4-255
☐	4-264.1 thru 4-279	4-265 thru 4-277
☐	4-297 thru 4-312.5	4-297 thru 4-312.5
☐	4-327 thru 4-329	4-327 thru 4-331
☐	5-1 thru 5-3.	5-1 thru 5-3
☐	5-15	5-15
☐	5-31 thru 5-33	5-31 thru 5-33
☐	5-49 thru 5-55	5-49 thru 5-56.1
☐	5-81	5-81 thru 5-82.1
☐	5-93 thru 5-109	5-93 thru 5-109
☐	5-125 thru 5-127	5-125 thru 5-127
☐	5-135 thru 5-139	5-135 thru 5-139
☐	5-149 thru 5-177	5-149 thru 5-177
☐	6-1 thru 6-53	6-1 thru 6-51
☐	7-1 thru 7-27	7-1 thru 7-27
☐	8-1 thru 8-17	8-1 thru 8-18.1
☐	8-27 thru 8-61	8-27 thru 8-61
☐	9-11	9-11 thru 9-12.1

Check As Done	*Remove Old Pages Numbered*	*Insert New Pages Numbered*
☐	9-25 thru 9-39	9-25 thru 9-39

VOLUME 2

Revision

☐	Title page	Title page
☐	10-1 thru 10-119	10-1 thru 10-121
☐	11-1 thru 11-41	11-1 thru 11-42.1
☐	11-55 thru 11-85	11-55 thru 11-85
☐	12-1 thru 12-59	12-1 thru 12-60.3
☐	12-71 thru 12-83	12-71 thru 12-84.1
☐	12-97 thru 12-101	12-97 thru 12-102.1
☐	12-111 thru 12-117	12-111 thru 12-117
☐	13-1 thru 13-21	13-1 thru 13-19
☐	13-45 thru 13-73	13-45 thru 13-74.1
☐	13-85 thru 13-131	13-85 thru 13-131
☐	14-1 thru 14-19	14-1 thru 14-20.1
☐	14-29 thru 14-33	14-29 thru 14-34.1
☐	14-43 thru 14-75	14-43 thru 14-75
☐	14-93 thru 15-47	14-93 thru 15-48.1
☐	15-57 thru 15-65	15-57 thru 15-66.3
☐	15-79 thru 15-87	15-79 thru 15-87
☐	15-117 thru 15-171	15-117 thru 15-167
☐	16-1 thru 16-44.3	16-1 thru 16-44.3
☐	16-61 thru 16-77	16-61 thru 16-77
☐	17-1 thru 17-19	17-1 thru 17-20.1
☐	17-29 thru 17-56.13	17-29 thru 17-56.15
☐	17-91 thru 17-94.1	17-91 thru 17-94.1
☐	17-111	17-111 thru 17-112.1
☐	18-1 thru 18-17	18-1 thru 18-18.1
☐	18-49 thru 18-55	18-49 thru 18-56.1
☐	19-1 thru 19-7	19-1 thru 19-8.1
☐	19-37 thru 19-51	19-37 thru 19-51

VOLUME 3

Revision

☐	Title page	Title page
☐	20-1 thru 20-13	20-1 thru 20-14.1
☐	20-25 thru 20-47	20-25 thru 20-47
☐	21-1 thru 21-21	21-1 thru 21-22.1
☐	21-37 thru 21-45	21-37 thru 21-46.1

Check As Done	*Remove Old Pages Numbered*	*Insert New Pages Numbered*
☐	21-67 thru 21-285	21-67 thru 21-286.1
☐	21-305 thru 21-349	21-305 thru 21-350.1
☐	21-359 thru 21-361	21-359 thru 21-362.1
☐	21-379 thru 21-381	21-379 thru 21-381
☐	22-1 thru 22-21	22-1 thru 22-22.1
☐	22-31 thru 22-81	22-31 thru 22-82.1
☐	22-91	22-91 thru 22-92.1
☐	22-107 thru 22-123	22-107 thru 22-124.1
☐	22-135 thru 22-159	22-135 thru 22-159
☐	22-175	22-175 thru 22-176.1
☐	22-187 thru 22-197	22-187 thru 22-197
☐	23-1 thru 23-13	23-1 thru 23-14.1
☐	23-23 thru 23-25	23-23 thru 23-26.1
☐	24-1 thru 24-7	24-1 thru 24-8.1
☐	24-23 thru 24-29	24-23 thru 24-29
☐	25-1 thru 25-51	25-1 thru 25-52.1
☐	25-61 thru 25-67	25-61 thru 25-67
☐	26-1 thru 26-35	26-1 thru 26-37
☐	27-1 thru 27-39	27-1 thru 27-39
☐	28-1 thru 28-63	28-1 thru 28-63
☐	28-77 thru 28-89	28-77 thru 28-90.1
☐	TC-1 thru TC-191	TC-1 thru TC-191
☐	I-1 thru I-7	I-1 thru I-7

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