No.

IN THE

SUPREME COURT OF THE UNITED STATES

CRONIE LLOYD

Petitioner,

v.

STATE OF OHIO

Respondent.

PETITON FOR WRIT OF CERTIORARI

Cronie Lloyd respectfully petitions this Court for a writ of certiorari to review the judgment of the Supreme Court of Ohio rejecting his Sixth Amendment ineffective assistance of counsel claim, and in doing so applied an irrebuttable presumption that trial counsel's performance was competent.

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QUESTIONS PRESENTED

When this Court established a presumption of competence and reasonable trial strategy in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), did it create an irrebuttable bar to performance competency challenges in the ineffective assistance of counsel context?

If the answer to that question is no, when a record shows that counsel based a defense on convincing the jury of a fact both legally and factually irrelevant, has counsel been shown to have misunderstood the law?

And when counsel has been shown to have misunderstood the law, is the presumption of competence and reasonable trial strategy overcome?

LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW AND RULE 29.6 STATEMENT

All parties appear in the caption of the case on the cover page. None of the parties thereon have a corporate interest in the outcome of this case.

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JURISDICTION

Petitioner seeks review of the decision of the Supreme Court of Ohio in *State v. Lloyd*, Slip Opinion No. 2022-Ohio-4259, issued on December 1, 2022.

On January 8, 2019, Justice Kavanaugh extended the time within which to file a petition for writ of certiorari until April 30, 2023.

Jurisdiction is conferred on this Court pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

INTRODUCTION

Lloyd's Case:

Because Cronie Lloyd was charged with Murder B under Ohio Revised Code 2903.02 (B) – Ohio's felony murder statute – the prosecution only had prove that Lloyd committed a felony and that Gary Power died as a result. The fact that Lloyd did not have the *mens reas* to commit murder was irrelevant. It just so happened that Lloyd's felony involved a single punch during an argument following a minor car accident. Even if the jurors understood – as they likely did – that Lloyd did not intend to kill Power with one punch, that fact could not save him from a conviction. Yet this record reflects that defense counsel repeatedly resorted to the irrelevant argument that Lloyd should not be convicted because he did not mean to kill Power.

Because trial counsel was focused on an irrelevant theory, Lloyd was deprived of a meaningful defense. But that is only part of the problem. All aspects of counsel's performance were necessarily informed by her misunderstanding of the law surrounding Murder B.

The Ohio Supreme Court accepted jurisdiction over the proposition of law that:

> For the purposes of a claim of ineffective assistance of counsel, the presumption of reasonable trial strategy can be rebutted by evidence of trial counsel's persistent misunderstanding of the elements of the offense charged.

Lloyd explicitly asked the Ohio Supreme Court to address Ohio's Eighth District Court of Appeal's failure to analyze the presumption of competence in light of a record that demonstrates that counsel misunderstood the law. In a 4-to-3 decision,

the Ohio Supreme Court affirmed the Eighth District. There too, the Ohio Supreme Court failed to analyze how the presumption of competence is impacted when there is evidence that counsel misunderstood the law.

To the contrary, the Ohio Supreme Court concluded that Lloyd's counsel did not misunderstand the law but, even when the court *assumed* for the sake of argument "that Lloyd's counsel misunderstood the law," it still did not address the impact on the presumption of competence. Rather Ohio's high court simply found that even if it assumed counsel was incorrect about the law, it was not an error for counsel to fail to ask for the proper jury instructions. This mangled analysis is indicative of how Ohio's reviewing courts have lost their way in considering ineffective assistant of counsel claims.

The Ohio Supreme Court failed to acknowledge that a demonstrated misunderstanding of the law rebuts the presumption of competence and, thus, the lens through which counsel's actions are viewed must necessarily change. As the dissent in *Lloyd* so aptly put it:

> Lloyd's only viable defense in this context would have been to claim that he lacked the mens rea required for felonious assault and instead committed the offense of assault under R.C. 2903.13(A) or (B), which provide that '[n]o person shall knowingly cause or attempt to cause physical harm to another * * *' and '[n]o person shall recklessly cause serious physical harm to another * * *.' But instead of taking that approach, defense counsel told the jury that they should find Lloyd not guilty because he did not knowingly or intentionally *kill* Power. Defense counsel's misstatements of the law were irrelevant to the elements of felonious assault, and her credibility before the jury was surely compromised when her framing of the law differed so markedly from that of the trial-court judge, who had already accurately instructed the jury on 'knowingly' and on 'serious physical harm.'

Lloyd at ¶ 44.

This Court should grant this Petition for Certiorari to provide guidance to courts, especially Ohio's, about the impact of counsel's demonstrated misunderstanding of the law on the presumption of competence in an ineffective assistance of counsel analysis.

Legal Context

This Court has long recognized that a criminal defendant's right to counsel is that from which all others flow. Sixth and Fourteenth Amendments, United States Constitution. In 1932, in *Powell v. Alabama*, 287 U.S. 45, 68 (1932), this Court found that "the right to the aid of counsel is of [a] fundamental character." *Powell* at 68. And in 1938, in *Johnson v. Zerbst*, 304 U.S. 458 (1938), this Court found that the right to assistance of counsel is "one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty." *Johnson* at 462-3. There, this Court also acknowledged that a criminal defendant needs the assistance of an attorney because the "average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel." *Johnson* at 462-3. And, of course, those concepts eventually led to the landmark Sixth Amendment case, *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

But a constitutional right of a "fundamental character" and one that "insure[s] fundamental human rights of life and liberty," cannot be a right in name

only. It must also provide the meaningful protections it promises. And, so, this Court has made clear that "'the right to counsel is the right to the *effective assistance* of counsel.'" *Strickland v. Washington*, 466 U.S. 668, 686 (1984) quoting *McMann* v. *Richardson*, 397 U.S. 759, 771, n. 14 (1970). And in *Strickland* this Court resolved that a litigant demonstrates *ineffective* assistance of counsel upon a showing that counsel's performance was objectively unreasonable, and that the deficient performance prejudiced the client.

The question then becomes, what is reasonable trial strategy? In *Wiggins v. Smith*, 539 U.S. 510 (2003), this Court found that, whatever strategy counsel employed regarding mitigation, it needed to be informed by a complete investigation into the defendant's background. Specifically, this Court observed,

> We base our conclusion on the much more limited principle that 'strategic choices made after less than complete investigation are reasonable' only to the extent that 'reasonable professional judgments support the limitations on investigation.' *Id.,* at 690-691, 80 L Ed 2d 674, 104 S Ct 2052. A decision not to investigate thus 'must be directly assessed for reasonableness in all the circumstances.' *Id.,* at 691, 80 L Ed 2d 674, 104 S Ct 2052.

Wiggins at 514. True, *Wiggins* was a death penalty case and the ineffective performance claimed there involved an inadequate mitigation investigation. But the analysis should reflect similarly on the predicament Lloyd faced.

Counsel's choices in Lloyd's case were not strategic because they were based on a misapprehension of, or unfamiliarity with, the applicable law of the case. When a legal professional makes legal decisions on behalf of their client that are uninformed, those decisions are not reasonable. Under such a circumstance, the

presumption of competence should be overcome.[1] Cronie Lloyd is asking this Court to grant certiorari to consider the question presented above and reach the following conclusion:

> When a record shows that counsel based a defense on convincing the jury of a fact both legally and factually irrelevant, it proves that counsel misunderstood the law. And when counsel has been shown to have misunderstood the law, the presumption of competence and reasonable trial strategy is overcome.

STATEMENT OF THE CASE

On February 26, 2019, Cronie Lloyd was indicted with one count of Murder B and one count of felonious assault because Gary Power died two days after a single punch from Lloyd. The felonious assault charge also had notice of prior conviction and repeat violent offender specifications.

Lloyd was charged under Ohio's felony murder statute:

> Ohio Revised Code 2903.02 (B): No person shall cause the death of another as a proximate result of the offender's committing or attempting to commit an offense of violence that is a felony of the first or second degree and that is not a violation of section 2903.03 or 2903.04 of the Revised Code.

Here, the felonious assault served as the predicate offense to murder because it was alleged that Power's death resulted from Lloyd's punch.

Prior to trial, an informal plea offer of one count of manslaughter with a repeat violent offender specification was discussed on the record. While the offer was not an official one, the prosecutor anticipated that such an agreement – if it included a

[1] A "presumption" has been defined as "a rule of law, statutory or judicial, by which [a] finding of a basic fact gives rise to existence of presumed fact, until [the] presumption is rebutted." *United States v. Chase*, 18 F.3d 1166, 1172 n. 7 (4th Cir. 1994) (quoting Black's Law Dictionary 1185 (6th ed. 1990)).

sentence of no less than 12 years – would be approved. That offer was rejected by the defense. During jury selection, the State made a formal plea offer of one count of felonious assault and one count of manslaughter with a repeat violent offender specification. The State would agree to a sentence of no less than 10 years but would not ask for a sentence of greater than 20 years. And the trial court said that it would impose a sentence of 15 years if Lloyd entered guilty pleas to the charges as set out by the State. Lloyd declined the offer and proceeded to a jury trial.

The jury convicted Lloyd of felony murder and felonious assault, as well as both specifications. The counts merged and the State elected to sentence Lloyd on felony murder and, as such, the trial court sentenced Lloyd to a statutorily mandated term of 15 years to life.

In his appeal before Ohio's Eighth District Court of Appeals, Lloyd argued that he received ineffective assistance of counsel because his attorney failed to ask for lesser-included or inferior offense jury instructions. And Lloyd demonstrated with the record that the failure was predicated on counsel's misunderstanding of the law.

The Eighth District began its analysis of Lloyd's ineffective assistance of counsel claims by declaring that "a licensed attorney is presumed to be competent." *State v. Lloyd*, 8th Dist. Cuyahoga No. 109128, 2021-Ohio-1808, ¶ 30. And the court found that it was "not permitted to second-guess the strategic decisions of trial counsel" and that, by failing to request the lesser-included or inferior offense

instructions, counsel was engaging in a permissible "all-or-nothing" strategy. *Id.* at ¶¶ 30-31.

The Eighth District affirmed Lloyd's convictions. Mr. Lloyd appealed to the Ohio Supreme Court and it accepted jurisdiction over the proposition of law that:

> For the purposes of a claim of ineffective assistance of counsel, the presumption of reasonable trial strategy can be rebutted by evidence of trial counsel's persistent misunderstanding of the elements of the offense charged.

On December 1, 2022, in a four-to-three decision, the Ohio Supreme Court affirmed the Eighth District's decision. *State v. Lloyd*, 2022-Ohio-4259.

REASONS FOR GRANTING THE PETITION

I.

When counsel pursues a legally and factually irrelevant theory, it rebuts the presumption of competence and reasonable trial strategy.

A. Arguing a legally and factually irrelevant theory should prove to a reviewing court that counsel misunderstood the law:

In its majority opinion the Ohio Supreme Court found that Lloyd's counsel did not misunderstand the law. Yet the record throughout belies that conclusion. In closing argument counsel said:

> "[T]here is no way that Mr. Lloyd could have **knowingly** been aware that hitting someone with one punch **would cause the death** of that individual."
>
> "[D]id he [Mr. Lloyd] **knowingly cause the death** of this gentleman?"
>
> "And so we're not asking you to ignore the punch, but to know that generally and in this case the one punch, my client **could not have known that that one punch would lead to the death** of Mr. Power."

> "Unfortunately, he did assault Mr. Power. But he did **not knowingly do so with the intent to cause death**. We're asking you to find him not guilty of murder."
>
> "… when you think about all of those scenarios, are any or all of those people **intending to cause the death** of the person that they threw a punch at?"
>
> "… unfortunately, a person could fall to the ground, hit a corner of a table or a machine and **eventually die** from the impact."

Trial counsel was attempting to convince the jury that, if the State did not prove that Lloyd intended to kill Power, then it must acquit. But that is a factually and legally irrelevant defense to Murder B and it left Lloyd with no defense at all. On this record, a reviewing court must conclude that counsel misunderstood the applicable law of the case.

The prosecution saw what was happening and perfectly summarized defense counsel's mistake:

> [Defense counsel] says, oh, well, he had no intention to cause death. All I can argue to you is the evidence that we presented. And the evidence that we presented is that he knowingly struck Mr. Powers and knocked him to the ground causing that skull fracture and brain bleed.

There, in three sentences, the prosecution said it all. Even if the jury believed every word of counsel's arguments, the outcome would be the same. The jurors would soon understand that when they received their instructions regarding the elements of felony murder.

B. <u>A reviewing court must address the impact of counsel's misapprehension of the law on the presumption of competence and reasonable trial strategy:</u>

The Ohio Supreme Court may not have believed that this record showed that trial counsel misunderstood the law, but even when it "assume[d] that Lloyd's counsel misunderstood the law" it still failed to say what impact that would have on the presumption of competence. *Lloyd* at ¶¶25-26. Instead, the court went directly to determining that lesser-included and inferior offense instructions were not warranted in Lloyd's case. Thus, the court failed to even allow for the rebuttal of the presumption at all or how it would have impacted the remainder of the analysis.

But the three dissenting justices in *Lloyd* would have found:

> [T]he presumption of sound trial strategy is rebutted when, as here, that strategy entails defense counsel's repeated misrepresenting the law in closing argument, conceding the defendant's guilt to lesser-included offenses, and then failing to seek instructions on those lesser-included offenses even thought they were the only reasonable alternative to Lloyd being convicted of the charged offenses.

And this Court has been clear that decisions made by an attorney laboring under a misunderstanding of the elements of the crime charged should not enjoy the presumptions of competence and reasonable strategy. As cited by the dissent in *Lloyd*, this Court found in *Kimmelman v. Morrison*, 477 U.S. 365, 385 (1986), "decisions based on factual, procedural, and legal misunderstandings are not 'strategy' as contemplated by *Strickland*."

In *Wiggins*, *supra*, this Court considered whether counsel's decisions can be deemed reasonable when they have based their decisions on an incomplete investigation. This Court found that Wiggins' counsel did not conduct a complete investigation into his background for mitigation purposes and that they had been

wrong to limit the investigation. Accordingly, Wiggins' counsel's decisions were not informed ones and not reasonable:

> We base our conclusion on the much more limited principle that 'strategic choices made after less than complete investigation are reasonable' only to the extent that 'reasonable professional judgments support the limitations on investigation.' *Id.,* at 690-691, 80 L Ed 2d 674, 104 S Ct 2052. A decision not to investigate thus 'must be directly assessed for reasonableness in all the circumstances.' *Id.,* at 691, 80 L Ed 2d 674, 104 S Ct 2052.

Wiggins at 514. (Emphasis added.)

That reasoning applies here. An attorney's professional judgment is only reasonable when it is premised on having acquired, through reasonable preparation, the information needed to make an informed decision – whether that information involves facts or the law. In *Wiggins* that preparation should have been a complete factual investigation. In Lloyd's case, counsel needed to undertake legal research into the applicable law.

Lloyd's attorney's choices can only be considered reasonable to the extent that she demonstrated an understanding of the elements of the offense of which her client stood accused. Here, the record demonstrates the exact opposite – counsel did not understand the elements of felony murder. Strategic decisions are not due deference when they are based upon incomplete investigations or misunderstanding of the law.

II.

There is no coherence in how State and Federal Courts determine what constitutes reasonable trial strategy in the ineffective assistance of counsel context.

With alarming consistency, Ohio reviewing courts casually reject performance prong challenges to trial counsel's work as "reasonable trial strategy." See, e.g. *State v. Lewis*, 8th Dist. Cuyahoga No. 108463, 2020-Ohio-5265; *State v. Clayton*, 62 Ohio St.2d 45, 402 N.E.2d 1189 (1980); *State v. Jackson*, 6th Dist. Sandusky No. S-15-020, 2016-Ohio-3278; *State v. Vogt*, 4th Dist. Washington No. 17CA17, 2018-Ohio-4457; *State v. Viers*, 7th Dist. Jefferson No. 01JE19, 2003-Ohio-3483. But the willingness of Ohio courts to treat the presumption of competence and reasonable trial strategy as irrebuttable is not universally embraced by other State Court jurisdictions.

A) State Courts

When it comes to a decision premised on a misunderstanding of the law, for example, the Wisconsin Supreme Court has found:

> We cannot ratify a lawyer's decision merely by labeling it, as did the trial court, 'a matter of choice and of trial strategy.' We must consider the law and the facts as they existed when trial counsel's conduct occurred. Trial counsel's decision must be based upon facts and law upon which an ordinarily prudent lawyer could have then relied. We will in fact second-guess a lawyer if the initial guess is one the demonstrates an irrational trial tactic or if it is the exercise of professional authority based upon caprice rather than upon judgment.

State v. Felton, 110 Wis.2d 485, 502-503, 329 N.W.2d 161 (1983). There, Felton's counsel admitted ignorance of the statutes authorizing the heat-of-passion manslaughter as well as failing to give due consideration to the defense of not guilty

by reason of mental disease or defect. Under these circumstances, the high court of Wisconsin found ineffective counsel and ordered a new trial for Felton.

State v. Tucker, 97 Idaho 4, 10, 539 P.2d 556 (1975) and *Pratt v. State*, 134 Idaho 581, 584, 6 P.3d 831 (2000), both took place in a post-conviction context. There, Idaho's high court reiterated the view that it would not second-guess an attorney's tactical choices *unless* the decisions resulted from "inadequate preparation, ignorance of the relevant law, or other shortcomings capable of objective evaluation."

In Indiana, a strategic choice can still be deemed ineffective if that choice is "actually 'made due to unacceptable ignorance of the law or some other egregious failure rising to the level of deficient attorney performance.'" (Citations omitted.) *Brewington v. State*, 7 N.E.3d 946, 977-978 (Ind. 2014). It is, however, the defendant's burden to show "an actual blunder."

When it comes specifically to the issue of requesting jury instructions, numerous courts have arrived conclusions contrary to the one reached in *Lloyd*. Like the dissenting opinion observed in Lloyd's case, the Delaware Supreme Court in *Baynum v. State*, 211 A.3d 1075, 1083–85 (Del. 2019), found that trial counsel's failure to request a lesser-included offense instruction was objectively unreasonable and created a substantial risk that the jury's verdict would have been different had it been instructed properly. Likewise, in Tennessee, the high court found counsel's work was deficient because they failed to request a jury instruction on second degree murder in a felony murder case. *Wiley v. State*, 183 S.W.3d 317 (Tenn.2006).

Faced with similar facts alleging ineffective assistance of counsel, the Vermont Supreme Court reached a nearly identical finding. *In re Sharrow*, 205 Vt. 309, 2017 VT 69, 175 A.3d 1236.

B) Federal Split

Several federal courts have also considered the issue this case presents and handled it differently than the Ohio court.

The Third Circuit, for instance, found that trial counsel was ineffective when he refused an instruction on voluntary manslaughter, even after the trial court informed counsel of the law. *Massey v. Superintendent Coal Twp. SCI*, No. 19-2808, 2021 WL 2910930 (3d Cir. July 12, 2021). The Pennsylvania State Supreme Court had denied relief because it found counsel's decision to have been "strategic" and, as reviewing courts have done in the instant case, an attempt at a complete acquittal, i.e., an "all-or-nothing" strategy. The Third Circuit disagreed, finding that the record showed counsel was aware of the correct law and had simply pursued a legally flawed strategy instead.

The Ninth Circuit likewise found that ignorance of a critical point of law is a quintessential example of deficient performance under *Strickland*. In *Duarte,* counsel failed to object to an unlawful jury instruction – that could not have been a viable "all-or-nothing" strategy where actual knowledge of the law would have necessitated an objection. *Duarte v. Williams*, No. 19-17207, 2021 WL 4130075 (9th Cir. Sept. 10, 2021).

Ruiz v. Spearman, 2020 U.S. Dist. LEXIS 143009, 2020 WL 4726625, is also out of the Ninth Circuit. There, the court found that counsel erred by failing to

request a lesser-included offense instruction based on a mistake of law. In that case, counsel mistakenly believed that such an instruction was unavailable. The court found:

> The Supreme Court has repeatedly noted that where an attorney demonstrates ignorance of the law, his or her performance falls below 'the range of competence demanded of attorneys in criminal cases.' *Hill v. Lockhart*, 474 U.S. 52, 56, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985); *see also Hinton v. Alabama*, 571 U.S. 263, 274, 134 S. Ct. 1081, 188 L. Ed. 2d 1 (2014) ('An attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*.'). . . . **Where a trial attorney makes such a decision—based on a misunderstanding of the law, rather than a strategic calculation—that decision 'receives no deference.'** *Crace v. Herzog*, 798 F.3d 840, 852 (9th Cir. 2015) (quoting *Span*, 75 F.3d at 1387). *Cf. United States v. Alferahin*, 433 F.3d 1148, 1161 (9th Cir. 2006) (finding deficient performance where attorney 'did not intend strategically to forego the materiality instruction' but instead 'had no idea that such an instruction was available to his client as a matter of right'). Clearly, counsel's advice, based on his misapprehension of law, was deficient under the first prong of *Strickland*.'

Ruiz at *34-36. (Emphasis added.)

The Fourth Circuit, as well, has repeatedly noted that ignorance of the law cannot amount to viable strategy. *See Dodson v. Ballard*, 800 F. App'x 171 (4th Cir. 2020) (finding that counsel was deficient for offering advice to his client that was based on a misunderstanding of the elements of a lesser-included felony); *United States v. Carthorne*, 878 F.3d 458 (4th Cir. 2017) (finding IAC when counsel failed to grasp relevant legal standards and appropriately object to sentencing enhancements); and *United States v. Freeman*, 24 F.4th 320 (4th Cir. 2022) (finding

IAC when counsel failed to raise meritorious objections at sentencing because he believed none of them were relevant).

In the Fifth Circuit case, *Smith v. Dretke*, 417 F.3d 438 (5th Cir.2005), the court grappled with the issue of an attorney's failure to understand the self-defense law in the jurisdiction in which counsel was practicing:

> There is no question that Bruder's decision constitutes grievous legal error that seriously disadvantaged his client. Bruder argued at trial that Smith was innocent because he acted in self-defense; yet, as an attorney, Bruder failed to achieve a rudimentary understanding of the well-settled law of self-defense in Texas. By doing so, he neglected the central issue in his client's case. **Failing to introduce evidence because of a misapprehension of the law is a classic example of deficiency of counsel.**

Dretke at 442. (Emphasis added.)

These four circuits have found that counsel's misunderstanding or ignorance of the law, where the record illustrates it, cannot be "reasonable strategy" even when couched as an attempt at complete exoneration. There is no such thing as an "all-or-nothing" trial strategy when it is grounded in a mistake.

Accepting and considering this case will create consistency, promote fairness, and encourage litigators to more effectively represent their clients. In *Strickland* - this Court established a high bar for those seeking relief based on challenges to their attorney's performance. But that bar was not intended to be insurmountable. Realistically, on the ground, that is what the test has become. Surely, this Court did not intend, when deciding *Strickland*, to render the Sixth Amendment right to effective assistance of counsel – a right this Court has characterized as "fundamental" – illusory.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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