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IN THE SUPREME COURT OF FLORIDA
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JAMES CUDA A/K/A JAY CUDA,)
)
Petitioner,)
)
vs.)
)
STATE OF FLORIDA,)
)
Respondent.)
_____)

SUPREME COURT NO. 82,203

ON DISCRETIONARY REVIEW FROM THE
DISTRICT COURT OF APPEAL, FIFTH DISTRICT

AMICUS CURIAE BRIEF OF FLORIDA
ASSOCIATION OF CRIMINAL DEFENSE
LAWYERS (FACDL) ON BEHALF OF PETITIONER

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PRELIMINARY STATEMENT

FACDL is a not for profit Florida corporation formed to assist in the reasoned development of the criminal justice system. Its statewide membership of over 1,000 includes lawyers who are daily engaged in the defense of individuals accused of criminal activity. The founding purposes of FACDL include the promotion of study and research in criminal law and related disciplines, the promotion of the administration of criminal justice, fostering and maintaining the independence and expertise of the criminal defense lawyer, and furthering the education of the criminal defense community through meetings, forums, and seminars. FACDL members serve in positions which bring them into daily contact with the criminal justice system.

FACDL has an interest in this case because it involves the constitutionality of a State statute. The presence of important constitutional principles and the statewide impact of the decision in this case are the basis for FACDL participation in this cause.

FACDL will rely upon the record designations used by Petitioner and Respondent. The Fifth District Court of Appeal invalidated part of the statute in question and upheld another part of it. To avoid unnecessary duplication of Petitioner's brief, FACDL will address only the portion of the opinion below which upheld the portion of Section 415.111(5), Florida Statutes (1991), concerning the illegal use or management of an aged person's or disabled adult's funds.

STATEMENT OF THE CASE AND FACTS

FACDL adopts the Statement of the Case and Facts in
Petitioner's Brief.

SUMMARY OF ARGUMENT

This cause is an important case for this Court because the ultimate issue in this cause is which is the paramount constitutional issue: The prohibition of judicial legislation by the re-writing of vague laws contrary to the separation of powers doctrine or the duty of courts to uphold a law against a vagueness challenge by essentially re-writing it?

The decision below re-wrote the provisions of Section 415.111(5), Florida Statutes, by construing the phrase "illegal" use or management of the funds, assets, property, etc., of an aged person to mean the violation of another criminal statute with the intent to profit to the detriment of the aged person. This construction was blatant judicial legislation because there is no express legislative intent for such an interpretation. A judicial construction can delete unconstitutional provisions of a statute, but a court cannot add missing deficiencies to uphold a law. The conviction below added the terms - with the intent to profit to the detriment of the aged person. This Court has held that the prohibition against judicial legislation (separation of powers doctrine) is superior to the general duty of a court to uphold a law by construction. See Delmonico v. State, 155 So. 2d 368 (Fla. 1963). This Court has also held that the strict scrutiny standard applies to criminal cases - all doubts must be resolved in favor of the defendant, not the statute. State v. Wershow, 343 So. 2d 605 (Fla. 1977). FACDL suggests that if this Court allows judicial re-writing of a statute in a criminal case, then the

strict scrutiny standard has been , in effect, abolished. A court cannot apply both the strict scrutiny standard and re-write a statute to uphold it.

Even if it was proper to re-write Section 415.111(5), the convictions by the Fifth District Court of Appeal created other constitutional problems. The construction that a violation of other criminal laws was also a violation of Section 415.111(5) obviously includes all present and future federal laws. In the area covered by Section 415.111(5), several federal laws could be easily violated See Title 18 U.S.C. §1001; 1341; 1343; 1344. The inclusion of those federal laws, without an express incorporation by the Legislature, was an improper delegation of legislative power under Article 2, Section 3 and Article 3, Section 1 of the Florida Constitution and State v. Carswell, 557 So. 2d 183 (Fla. 3d DCA 1990); Adoue v. State, 408 So. 2d 567 (Fla. 1981) and Freimuth v. State, 272 So. 2d 473 (Fla. 1972).

The construction given Section 415.111(5) renders it meaningless and violates Section 775.021(4)(b).1, Florida Statutes. The violation of other criminal laws (especially theft or fraud) will include all the elements of Section 415.111(5). A theft or fraudulent act obviously includes an intent to profit to the detriment of the victim. This Court has held that a more specific statute will prevail over a general law when the laws cover the same subject. Adams v. Culver, 111 So. 2d 665 (Fla. 1959). Section 775.021(4)(b).1 prohibits multiple prosecutions for different offenses where the proof at trial will be identical. The construction given Section 415.111(5) violates

Section 775.021(4)(b).1 because the proof of each offense would be identical at trial. (775.021(4)(b).1 also permits the prosecution of all separate offenses. Section 415.111(5) and the other criminal violation are unquestionably separate offenses). Therefore, under 775.021(4)(b).1, either the Section 415.111(5) violation or the other criminal violation could not be prosecuted. Consequently, the construction given 415.111(5) makes it meaningless and unconstitutional.

ARGUMENT

ISSUE I

THE DECISION BELOW IMPROPERLY UPHELD THE PHRASE "ILLEGAL USE OR MANAGEMENT OF AN AGED PERSON'S FUNDS" IN SECTION 415.111(5), FLORIDA STATUTES, BY ENGAGING IN JUDICIAL LEGISLATION AND DEFINING THE PHRASE "AS A VIOLATION OF OTHER CRIMINAL STATUTES" BECAUSE SUCH DEFINITION IS STILL VAGUE AND IS A VIOLATION OF THE SEPARATION OF POWERS DOCTRINE.

A. The issue addressed by FACDL.

The opinion below focused on two phrases in Section 415.111(5): improper use or management of an aged person's funds and illegal use or management of an aged person's funds. The Fifth District Court of Appeal (hereafter DCA) decided that the phrase improper use was unconstitutionally vague. FACDL agrees with this well-reasoned and supported opinion and will not address it in this brief.

The Fifth DCA upheld the phrase illegal use by redefining the phrase as "the commission of an act which subjects one to criminal penalties." To support this definition, the court below relied upon Gates v. Chrysler Corp., 397 So. 2d 1187 (Fla. 4th DCA 1981). The Fifth District also found that the phrase improper use was severable from the phrase illegal use.

Although FACDL does not dispute the attempted application of the severability doctrine to this cause, it was improper to uphold the statute because the Fifth DCA did not correct all the constitutional infirmities of the phrase "illegal use." More-

over, the judicial re-writing of the statute invaded legislative intent - a violation of Section 415.111(5) is now limited to a violation of another criminal statute. Consequently, the judicial surgery of the Fifth DCA does not comply with the test enunciated in Cramp v. Board of Public Instructions of Orange County, 137 So. 2d 828 (Fla. 1962). Under Cramp, supra, as interpreted by the Fifth DCA, a complete and separate act (from all other statutes) no longer exists and the intent of the statute may now be thwarted.

The Legislature obviously intended something different than the construction given Section 415.111(5) by the Fifth DCA: a violation of any other criminal law with the intent to profit from the illegal act. If this was the intent of the Legislature, then the language of the statute could have easily been changed to incorporate such meaning; the construction also renders Section 415.111(5) meaningless because such conduct is already covered by other statutes. The Legislature is presumed to know existing laws when it enacts new legislation - why would the Legislature intend to pass a law already covered by other statutes?

In summary, the issue in this cause is whether the judicial construction of illegal use as "the violation of another criminal statute with the intent to profit from the illegal act to the detriment of the aged person" is consistent with legislative intent and constitutional principles. FACDL submits that this judicial cure was worse than the disease; FACDL will now address each of the significant constitutional problems created by the judicial legislation below.

B. The construction of the phrase illegal use was blatant judicial legislation which violated the separation of powers doctrine.

The construction below invaded the province of the Legislature. Although FACDL appreciates the concern of the Fifth DCA to its duty to uphold a law if possible, the judicial construction below went far beyond a mere interpretation of the plain meaning of a statute and the excision of unconstitutional language. The construction literally re-wrote a statute - the construction gave a special meaning to the word illegal and added the requirement of intent to profit to the detriment of an aged person. A reviewing court should uphold a law by construction, if the construction is not contrary to the legislative intent or the constitutional rights of the litigants. See State v. Bussey, 463 So. 2d 1141 (Fla. 1985); Falco v. State, 407 So. 2d 203 (Fla. 1981); Corn v. State, 332 So. 2d 4 (Fla. 1976); Miller, "The Medium is the Message: Standards of Review in Criminal Constitutional Cases in Florida," 11 Nova L. Rev. 97-137 (1986).

The common definition of the word illegal is: not legal, contrary to existing statutes, regulations, etc., unauthorized. Synonyms for illegal are unlawful, illegitimate, illicit, unlicensed. Random House Dictionary of the English Language, pg. 710 (1967). The Fifth DCA construed the word illegal to mean a violation of criminal statutes. This construction may be contrary to legislative intent because there is no indication that the Legislature intended to limit Section 415.111(5) to criminal

violations. The construction, even if it otherwise saves the statute, must be consistent with legislative intent. Vildibill v. Johnson, 492 So. 2d 1047 (Fla. 1986); Goddard v. State, 458 So. 2d 230 (Fla. 1984). "The Search For Intent: Aids to Statutory Construction in Florida-an Update," 13 Fla.State L.Rev. 485 (1985).

The word "illegal" generally encompasses the plain meaning of the violation of any law or regulation. Section 415.111 (5), Florida Statutes, does state that the legislative intent of Chapter 415 is to place the fewest possible restrictions on personal liberty and the exercise of constitutional rights consistent with due process and protection from abuse, neglect and exploitation. However, there is no definition of the phrase "illegal" in Section 415.111(5) and nothing else in Chapter 415 to indicate an intent to limit Section 415.111(5) to criminal violations. Consequently, even if this construction does save Section 415.111(5) from vagueness, it was still an improper construction because it was contrary to legislative intent. The plain language of illegal encompasses more than the violation of criminal laws. A reviewing court must use the plain meaning of a statute, unless legislative intent indicates a contrary meaning. See 49 Fla. Jur. 2d, Statutes, Section 110. Therefore, the limitation of the term by the Fifth DCA could be proper only if it was consistent with legislative intent. See State v. Hodges, 506 So. 2d 437 (Fla. 1st DCA 1987).

Even if Section 415.111(5) was properly limited to the violation of criminal statutes, the question arises to what set of criminal laws - state or federal? In this area of the management

and investment of funds by individuals or investment companies, several federal laws could be violated and also violate Section 415.111(5). See e.g., Mail Fraud, Title 18 U.S.C. Section 1341; False Statements to Defraud, Title 18 U.S.C. Section 1001; Wire Fraud, Title 18 U.S.C. Section 1343; Bank Fraud, Title 18 U.S.C. Section 1344. The lack of certainty as to whether Section 415.111(5) applies to both federal and state laws demonstrates: 1) The statute is still vague and, 2) the construction may violate legislative intent (there is no express indication that the Legislature intended to incorporate federal laws).

FACDL understands that the construction by the Fifth DCA was an attempt to narrow a possibly overbroad and vague law to make it constitutional. However, the construction of the term "illegal" to mean a violation of a criminal statute, coupled with the added construction, with the intent to profit to the detriment of the elderly person, was a judicial re-writing of the statute. A reviewing court can narrow a statute by eliminating unconstitutional language. See e.g. State v. Reese, 222 So. 2d 732 (Fla. 1969). The Fifth DCA below cited Reese as authority for its opinion. However, in Reese, supra, this Court did not re-define a term, but only eliminated a word in a phrase (statute prohibited sale or possession of obscene, lewd, lascivious, filthy, indecent, immoral, sadistic or masochistic literature - the word immoral was removed). See also, K.L.J. v. State, 581 So. 2d 920 (Fla. 1st DCA 1991), (construing phrase "legitimate business" in curfew law); State v. Bales, 343 So. 2d 9 (Fla. 1977), (construction of massage parlor statute); State v. Wershow, 343 So. 2d 605 (Fla. 1977);

State v. Keaton, 371 So. 2d 86 (Fla. 1979). In this cause, the Fifth DCA did not remove the word "illegal" - it gave it a special meaning beyond the ordinary meaning of the word. The Fifth DCA acknowledged that this Court has held that a reviewing court cannot supply deficiencies or re-write a vague statute to make it definite and certain. See e.g. State ex. rel. Lee v. Buchanan, 191 So. 2d 33 (Fla. 1966); compare Brown v. State, 358 So. 2d 16 (Fla. 1978), (court would not re-write public profanity law) with State v. Mayhew, 288 So. 2d 243 (Fla. 1973), (court re-wrote public profanity later held unconstitutional in Brown v. State, supra).

This Court in Wyche v. State, 619 So. 2d 23 (Fla. 1993), recently considered the issue of whether a court should re-write a criminal law to make it constitutional. This Court divided on the issue of whether it was improper for a court to re-write a law to uphold it. See opinion of Justice Barkett, joined by Justice Shaw, and concurring opinion of Justice Harding and opinion by Justice Kogan. Justice Kogan noted that this Court recently re-wrote a statute and added several new paragraphs to the law. See Garden v. Frier, 602 So. 2d 1273 (Fla. 1992).

FACDL suggests that Justice Barkett was correct in her opinion and Garden v. Frier can be distinguished from this cause. Garden v. Frier was a civil case - this cause involves a criminal offense, with its attendant due process requirement of adequate notice. See Gardner v. Johnson, 451 So. 2d 477 (Fla. 1984); State V. Wershow, 343 So. 2d 605 (Fla. 1977). Even in civil cases, some courts have suggested it is improper to re-write a law. See e.g.,

Capeletti Bros., Inc. v. D.O.T., 499 So. 2d 855 (Fla. 1st DCA 1986). This Court has resolutely applied a strict scrutiny standard to criminal laws - if there is doubt about the meaning of a law, then a reviewing court must resolve the doubt in favor of the defendant. See State v. Wershow, 343 So. 2d 605 (Fla. 1977).

FACDL suggests that a judicial re-writing of a criminal statute violates the separation of powers doctrine and, in effect, negates the strict scrutiny standard of review. This Court should uphold the strict scrutiny standard of review by ruling that a Court cannot re-write a criminal statute to uphold it - such judicial legislation would, by definition, not resolve all doubts about constitutionality in favor of defendants. The re-writing of a criminal statute resolves all doubts in favor of the statutes. See e.g., Schultz v. State, 361 So. 2d 416 (Fla. 1978); State v. Dinsmore, 308 So. 2d 32 (Fla. 1975); Miller, "The Medium is the Message," supra, at 98-103. FACDL strongly urges this Court to not repudiate the strict scrutiny standard by allowing the judicial re-writing of a criminal statute. The strict scrutiny standard would become meaningless if a reviewing court is allowed to re-write a criminal statute. In State v. Elder, 382 So. 2d 687 (Fla. 1980), this Court held that a judicial construction must be consistent with the constitution and legislative intent - a court cannot otherwise resolve all doubts in favor of constitutionality.

The judicial re-writing of a statute is a significant violation of the doctrine of separation of powers. Although this Court has sometimes said that a court has a duty to uphold a law, this Court in Delmonico v. State, 155 So. 2d 368 (Fla. 1963), held

that the duty to uphold the constitution was greater than the duty to uphold a law. The duty to uphold a law is not inconsistent with Delmonico v. State, supra; there is a duty to uphold a law, if the decision is consistent with the constitution. See Powell v. State, 345 So. 2d 724 (Fla. 1977).

FACDL urges this Court to follow its decision in Brown v. State, 358 So. 2d 16 (Fla. 1978). Justice Sundberg eloquently described the evils of judicial re-writing of a law by construction - he noted there were two evils with judicial legislation: 1) If the legislative intent was not apparent from statutory language, judicial reconstruction of vague or overbroad statutes could frustrate the true legislative intent; and 2) doubts about judicial competence to construe legislation are warranted because a court has neither the legislative fact-finding machinery nor the experience with the particular statutory subject matter to construe a statute authoritatively.

The use of Gates v. Chrysler Corp., 397 So. 2d 1187 (Fla. 4th DCA 1981), by the Fifth DCA to uphold Section 415.111(4) is an example of these evils. Gates v. Chrysler Corp., supra, was a civil case involving a violation of the Maguson-Moss Warranty Act and the issue of treble damages and attorney fees. A reviewing court cannot simply say, with any degree of certainty, that the use of the same word (illegal) in a car warranty statute and a criminal statute involving financial exploitation of the elderly was intended by the Legislature to have the same meaning. Such a strained analogy (between a car warranty statute and a criminal fraud/theft statute) is a serious invasion of the

Legislature's power. This Court in Holly v. Auld, 450 So. 2d 217 (Fla. 1984), decided that a court could not construe an unambiguous statute in a way which would extend, modify or limit its express terms. The construction below violated the principle enunciated in Holly v. Auld, supra.

FACDL usually welcomes judicial attempts to narrow the scope of vague criminal laws. However, if the narrowing construction results in a judicial re-writing of the statute, then such a construction cannot be condoned by FACDL, even if the construction arguably cures the vagueness problem. Laws must be created by our elected, legislative representatives, not the judiciary. This case ultimately revolves around the question of which is the more important constitutional principle - invading the province of the Legislature by judicial legislation or upholding a law by judicial construction? This Court should resolutely hold that, in this case, the principle of separation of powers is the paramount constitutional principle, not the upholding of a law.

C. The construction of "illegal" to mean the violation of a criminal law, including federal laws, was an improper delegation of legislative power under Article 2, Section 3, and Article 3, Section 1, of the Florida Constitution.

The decision of the Fifth DCA expressly creates an improper delegation of legislative power. The construction of the word "illegal" to mean the violation of a criminal statute obviously includes the violation of federal statutes. As was noted above,

the type of conduct covered by Section 415.111(5) can include the violation of many federal laws. See Title 18 U.S.C. Section 1001; Title 18 U.S.C. Sections 1341, 1343 and 1344. Therefore, the decision effectively incorporates by reference the violation of all federal laws which are also a violation of Section 415.111 (5).

The Legislature may expressly adopt the regulatory and statutory standards of the federal government so long as those standards are in existence at the time of the enactment of the statute. State v. Carswell, 557 So. 2d 183 (Fla. 3d DCA 1990); Adoue v. State, 408 So. 2d 567 (Fla. 1981); State v. Rodriguez, 365 So. 2d 157 (Fla. 1978). However, in this cause, there was no express legislative adoption of any particular federal statutes. Consequently, the Fifth DCA could not judicially create a legislative adoption of other laws which was not expressly stated in the statute. In the cases cited above, there was an express reference to the particular federal statutes adopted by the State legislation. The Legislature may not adopt any future laws on regulations of another legislative body. See State v. Carswell, supra, and Freimuth v. State, 272 So. 2d 473 (Fla. 1972). The Fifth DCA cited State v. Rodriguez, supra, for the proposition that Section 415.111(5) was not vague. In Rodriguez, this Court upheld a law which prohibited the use of food stamps not authorized by law. The statute in Rodriguez made direct reference to federal laws and regulations.

The decision of the Fifth DCA in this case effectively adopts the future laws of the federal government. The decision below held that the illegal use of funds included all violations

of criminal law with the intent to profit to the detriment of an aged person. This holding unquestionably includes the violation of federal laws. The Fifth DCA did not limit its holding to the violation of state laws. The Court below also did not limit its incorporation by reference to current federal laws. Consequently, the decision by the court below creates an unconstitutional statute on two grounds under Article 2, Section 3, and Article 3, Section 1, of the Florida Constitution: 1) It improperly created an adoption of federal statutes without an express adoption by the Legislature; and 2) the decision improperly incorporated future federal statutes and regulations. The de facto incorporation also creates possible ex post facto violations because the incorporation by reference was not limited to laws currently in existence. See State v. Carswell, supra; Freimuth v. State, 272 So. 2d 473 (Fla. 1972).

D. The judicial construction of illegal to mean the violation of any criminal statute renders Section 415.111(5) meaningless and violates Section 775.021(4)(b).1.

1. The construction of Section 415.111(5) makes its meaningless.

If the Fifth DCA construed the term illegal to mean a violation of any state criminal law with the intent to profit to the detriment of the victim, then this construction renders Section 415.111(5) meaningless and vague. FACDL cannot think of a

single instance where the violation of a criminal statute in this area (coupled with the intent to profit to the detriment of the victim) would have different proof than Section 415.111(5), as construed by the Fifth DCA. For example, an individual commits theft (by fraud or deception) of the funds of an aged person. Such theft would obviously include the intent to profit to the detriment of the victim. Consequently, Section 415.111(5) is meaningless. If an individual committed forgery against an aged person, then the same elements created by the Fifth DCA's opinion would be present. The violation of any criminal state statute applicable and analogous to Section 415.111(5) would, by definition, include the intent to profit to the detriment of the victim. See e.g., Section 517.302, Florida Statutes (violations of Securities Transactions Laws); Chapter 817, et. seq., (Fraudulent Practices); Section 812.014, Florida Statutes (Theft); Section 812.081, Florida Statutes (embezzlement); Chapter 818, Florida Statutes (sale of mortgaged personal property); Chapter 831, Florida Statutes (Forgery).

The proof of a violation of any other applicable criminal statute renders the judicial construction of Section 415.111(5) meaningless. Section 415.111(5) will not have a field of operation which is different from other state statutes. A reviewing court should avoid a construction which renders a law meaningless or void. See St. Petersburg v. Siebold, 48 So. 2d 291 (Fla. 1950), (court applied the maxim "ut res magis valeat quam pereat" - that the thing may rather have effect than be destroyed); 49 Fla. Jur. 2d, Statutes, Section 178.

A court should also give effect to a more specific statute to a general statute covering the same and other subjects in general terms. See Adams v. Culver, 111 So. 2d 665 (Fla. 1959); 49 Fla. Jur. 2d, Statutes, Section 182. The more specific statute in this cause is the other criminal law referenced by Section 415.111(5), as construed by the court below. The more general statute is obviously Section 415.111(5) which encompasses all other applicable criminal statutes. Therefore, the construction by the Fifth DCA creates a meaningless law.

If this Court gives effect to specific statutes governing criminal conduct instead of the general law, Section 415.111(5) (which incorporates by reference other laws), then it can better ensure that the legislative intent will be followed. However, even if the Legislature did intend to incorporate all other criminal laws, then the construction Section 415.111(5) may still not cover any new criminal conduct - the elements of the incorporated laws and Section 415.111 may be identical. Consequently, the construction given by the Fifth DCA may have violated Section 775.021(4)(b).1, Florida Statutes.

2. The construction of Section 415.111(5) violates Section 775.021(4)(b), Florida Statutes.

Section 775.021(4)(a)(b) permits separate punishments for separate offenses unless, for example, the offenses require identical elements of proof. Even though offenses are separate

under Section 775.021(4)(a), there can be only one prosecution if the offenses require identical elements of proof.


Under the construction of the court below, such possibilities are manifest. For example, an individual is entrusted with the funds of an aged person. The individual then commits theft of the funds - the taking of the property with the intent to permanently or temporarily deprive the owner of the property (to the obvious detriment of the true owner). Section 415.111(5), as construed, involves the violation of another criminal law with the intent to profit to the detriment of the victim. The intent to profit to the detriment of the victim is inherent in all theft, fraud and embezzlement statutes.

Although the theft, fraud and embezzlement laws have different statutory elements, Section 775.021(4)(b).1 involves identical elements of proof. Section 775.021(4)(b).1 recognizes that if different laws with different statutory elements involve identical proof at trial, then Section 775.021(4)(b).1 prohibits multiple prosecutions of each different offense. The construction given Section 415.111(5) gives the different offenses identical elements of proof. Stated another way, the incorporation of other laws by a law ensures that there will be identical elements of proof with Section 415.111(5). The clear legislative intent expressed in Section 775.021(4)(b).1 is to prohibit the construction given Section 415.111(5). Therefore, the construction given Section 415.111(5) created a law which can have no practical effect.

CONCLUSION

This Court should affirm the holding of the Fifth DCA that the phrase "improper" in Section 415.111(5) is unconstitutional and it should hold that the phrase "illegal use of funds" is also unconstitutional.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing has been furnished, by mail, to the Office of the Attorney General, 210 N. Palmetto Ave., Suite 447, Daytona Beach, FL 32114, Counsel for Respondent, and Flem Whited, 630 N. Wild Olive Ave., Daytona Beach, FL 32118, Counsel for Petitioner, this 6th day of October, 1993.



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