

CANADA / JUDGMENT

R. v. Merkley

2024 BCSC 159

COURT

Supreme Court of British Columbia

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2024 BCSC 159 R. v. Merkley

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Merkley,

2024 BCSC 159

Date: 20240125

Docket: 35527W

Registry: Vancouver

Between:

Rex

v.

Lawrence Alan Merkley

Before: The Honourable Justice MacNaughton

Oral Reasons for Judgment

(Section 525 Detention Review Hearing)

Counsel for the Crown:

P. Corbett

Counsel for the Accused:

M. Patterson

Place and Date of Hearing:

Cranbrook, B.C.

January 24, 2024

Place and Date of Judgment:

Cranbrook, B.C.

January 25, 2024

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Introduction

[1] Mr. Merkley was detained by Judge S. Keyes on November 21, 2023. He is charged with a number of property offences, break and enters, theft of credit cards and then use of those cards, theft from vehicles, and theft from commercial properties. All of the offences occurred between September 28 and December 28, 2022. Between those dates, Mr. Merkley went on a crime spree in Cranbrook, Kimberley, and Fernie.

[2] Mr. Merkley has already pled guilty to the charges on three informations for offences relating to the same spree in 2022. Those offences were:

- Information 36414: Trespass at night on November 20, 2022;
- Information 36458: Possession of stolen property, a credit card taken from a vehicle in Kimberley and used at a Walmart in Cranbrook on November 19, 2022; and
- Information 36487: Charges of theft from a vehicle of property belonging to three individuals on December 26, 2022. This offence was incorrectly described in Judge Keyes' reasons as para. 26.

The New Charges

- [3] Mr. Merkley is also before the court on a new set of charges set out in Information 37401, relating events between July 1-10, 2023. He is charged with break and enter into a refrigerated storage area at the St. Eugene Resort, flight from a police officer, and use of a stolen credit card. With respect to those offences, he has not had a bail hearing in Provincial Court.
- [4] The circumstances of those offences are alleged by the Crown to be as follows. On July 10 at 5:45 p.m., an RCMP officer observed Mr. Merkley driving a White Subaru Forrester ("Subaru") on Ridgeview Rd. in Cranbrook. The officer was aware that there was an unendorsed warrant for Mr. Merkley's arrest and that the licence plate on the Subaru had been stolen in Kelowna on June 26, 2023. Mr. Merkley went into the Dairy Queen drive-through, and the officer pulled in behind him and activated his emergency equipment. Mr. Merkley rolled forward and, concerned that he would flee, the officer positioned his car at an angle in front of the Subaru. He confirmed that Mr. Merkley was the driver and was able to identify the passenger. Mr. Merkley began to reverse and, as the officer repositioned his vehicle, Mr. Merkley accelerated forward and fled, driving through a stop sign at a high rate of speed, northbound on Cranbrook St. The officer did not pursue him but reported the last location of the Subaru. Police were unable to locate Mr. Merkley on July 10.
- [5] The officer then looked into the Subaru that Mr. Merkley was driving. On July 1, 2023, Mr. Merkley was seen on CCTV driving the Subaru, with the same stolen licence plate, in the parking lot at the Esso Food & Stuff in Cranbrook. Earlier that day, an individual reported that his wife's wallet had been stolen from a campground. Credit cards in her name were used to purchase over \$200 in items in the Esso store and \$100 in gas.
- [6] On July 6, 2023, the RCMP received a call from the St. Eugene Casino Resort advising that on July 5, 2023, at about 11:40 p.m., a review of CCTV footage showed that there had been theft from a refrigerated storage locker at the resort. Earlier that night, Mr. Merkley can be seen on the CCTV, approaching the storage locker, trying the door, opening it and looking inside. He used a shovel to change the security camera angle then closed the latch and put the lock through it to make it look as though it was locked. Mr. Merkley is wearing patterned board shorts and white shoes. He and others returned later that night, entered the storage locker, and stole cases of beer. In the footage, Mr. Merkley can be seen driving the Subaru and is wearing the same clothing.
- [7] Charges with respect to these offences have recently been approved.

- [8] I agree with Justice Birn's interpretation of the direction set out by the Supreme Court of Canada in *R. v. Myers*, 2019 SCC 19, that if there is a matter on which there has been no initial bail hearing, the s. 525 judge should conduct one, accounting for the time the accused has already spent in pretrial custody: *R. v. Morin*, 2022 BCSC 2401. Counsel for Mr. Merkley did not dispute that this s. 525 detention review can function as the bail hearing in relation to Information 37140.

The Alleged Offences

- [9] Briefly, the offences charged in the informations on which Mr. Merkley was detained are as follows:

- Information 36401-1 involves allegations of a September 28, 2022 break-in to the property of the Kootenay Lawn Doctor in Cranbrook and the theft of a STIHL leaf blower, a trimmer, and a can of gas. Mr. Merkley was apprehended by the RCMP nearby and cooperated with the police. He was released on an undertaking. Mr. Merkley was recorded on security video footage.
- Information 36460 involves allegations of the theft of a wallet from a car in a garage, adjacent to a residential home in Marysville. Cards in the owner's name were used in Kimberley and Cranbrook. Mr. Merkley can be seen on video using the victim's credit card at Walmart and receipts were found for his use of the credit card at a Petro Canada gas station. Apparently, food was also tossed out of the homeowner's freezer. Mr. Merkley was confronted by a neighbour who will identify him.
- Information 36488: Between November 7-14, 2022, Mr. Merkley is alleged to have stolen property from the Western Lodge in Cranbrook. Mr. Merkley can be seen on video footage, on two occasions, climbing over the front desk of the lodge, rifling through the drawer contents, and removing room access records and other items. He is also alleged to have stolen a DeWalt drill from a storage room. He can also be seen going into rooms in the lodge. Mr. Merkley was found sleeping in a room he did not pay for, giving rise to a break and enter charge. Mr. Merkley was released on an undertaking.
- Information 36547: On November 16, 2022, Mr. Merkley is alleged to have broken into and entered the storage area of the Centex convenience store in Kimberley and stolen crates of empty milk bottles. This offence was two days after he was released on an undertaking with respect to events at the Western Lodge. He was confronted by the Centex owner.
- Information 37055: On December 15 and 16, 2022, Mr. Merkley is alleged to have smashed a truck window in Fernie and stolen a credit card from a wallet that was in the truck. He then used the credit card at a number of different businesses in the Fernie area.

· Information 36481-C-2: On December 28, 2022, Mr. Merkley is alleged to have broke into two vehicles parked outside the Days Inn Motel in Cranbrook and stolen ski and snow-boarding equipment from one of the vehicles and cans of gas and a duffle bag from the other. Mr. Merkley can be observed on video "car hopping" or trying to get into a number of different vehicles in the parking lot. The stolen items were recovered. Mr. Merkley was also charged with breaking and entering into a room at the Days Inn as he was seen coming out of a room he had not paid for.

· Information 36401-2-A: This information relates to Mr. Merkley's failure to report between May 8 and June 8, 2023.

[10] I accept that all of Mr. Merkley's alleged offences were non-violent, including when Mr. Merkley was confronted by others during the course of them. He did not resist arrest when located by the RCMP after the alleged theft at the Kootenay Lawn Doctor, in fact, he cooperated with them. Although he was accompanied by a dog, a pit bull, after the break-in at the Kootenay Lawn Doctor and when he was found at the Western Lodge, the Crown is not alleging that the pit bull was intended to intimidate anyone who confronted Mr. Merkley.

[11] Mr. Merkley is presumed innocent of all of the offences with which he is charged.

Mr. Merkley's Personal Circumstances

[12] Mr. Merkley was born in 1966 and is the father of three adult sons with whom he has a good relationship. He worked in the forestry industry for most of his working life before running his snow removal business. He has a grade 12 education.

[13] His mother died in 2022, and, shortly thereafter, his wife suffered a devastating stroke that has resulted in left-side paralysis and an inability to speak. She is currently receiving rehabilitation services at a care home in Kelowna.

[14] Mr. Merkley advised me that his drug of choice has always been cocaine. A review of Mr. Merkley's criminal history does not indicate that he was released into a treatment centre between 1987 and 2008.

Earlier Release Order

[15] On February 3, 2023, Judge Leven released Mr. Merkley on condition that he was to be picked up by a representative of VisionQuest Recovery Society and reside at the Society's residential treatment program. Mr. Merkley perfected that release on February 8.

[16] On February 21, 2023, Mr. Merkley's bail supervisor was advised by VisionQuest that he had self-discharged from the program. He did so without his bail supervisor's permission. Mr. Merkley said that he left because he was being assaulted at the centre by another resident. At the time, his bail supervisor did not immediately breach Mr. Merkley because he accepted reports that Mr. Merkley was trying to find another recovery facility that would accept him. There was evidence of Mr. Merkley's attempts to be admitted into another recovery facility.

- [17] On April 25, Mr. Merkley's bail supervisor learned that he was a suspect on new charges in Kelowna, for incidents alleged to have happened in April and June 2023. I was advised at this s. 525 hearing that the Kelowna Crown has decided not to proceed with those charges.
- [18] On May 2, Mr. Merkley was directed to report by phone on May 8. He failed to do so, and, as a result, on June 8, 2023, Information 36401-2-A was sworn and submitted to the Crown. He was also to attend court in June 2023 but failed to do so.
- [19] His first attendance was after he was arrested on August 21 or 22, 2023.
- [20] On November 7, 2023, he pled guilty on the three files referred to above and used up 99 days of his in-custody credit. He was then detained on November 21, 2023, by Judge Keyes.

Detention Order

- [21] At the hearing before Judge Keyes, Mr. Merkley was in a reverse onus situation because he committed offences while on release for other offences and was in breach of a release order. Mr. Merkley's counsel did not dispute the reverse onus, and I am satisfied that he continues to be in a reverse onus situation.
- [22] In her reasons at paras. 13-22, Judge Keyes summarized the facts of the charges Mr. Merkley is facing in Informations 36401-1, 36460-1, 36488, 36547, 37055, 36481-C-2, and 36401-A-2, the breach allegation. I note that these are allegations only.
- [23] The Crown sought Mr. Merkley's detention on all three grounds in the Criminal Code, R.S.C., 1985, c. C-46. Although Mr. Merkley had then been accepted into the New Visions Society Program, and a suitability report for electronic monitoring had been obtained, he did not wish to pursue recovery as an option at that time. The plan was for him to reside in Beaverdell, where his sister lives, and to start up a snow-removal business like the one he had previously operated with his wife in Kimberley. He also said he would abide by a curfew.
- [24] Judge Keyes was satisfied that Mr. Merkley should be detained on the secondary ground. Despite the long gap in his criminal record between 2008/09 and 2022, she concluded that it was substantially likely, "near a certainty", that Mr. Merkley would commit further offences if released and that he would carry on with his addiction and his crimes to support it. She was of the view that the plan presented did not mitigate the risk of him committing offences while on release. She was concerned that the release plan did not involve a residential treatment program to deal with his addiction. As she said at para. 38 of her reasons:

he will live in a community where his sister lives, but otherwise he has no connections, and undertake a business that he has not operated since 2021 in a community that he does not belong to and, aside from that, there is really no plan.

- [25] Judge Keyes commented on the fact that, had Mr. Merkley proposed release to a treatment centre, her decision might have been different.

- [26] Having found that Mr. Merkley should be detained on the secondary ground, Judge Keyes did not find it necessary to address the primary or tertiary grounds for detention.

The s. 525 Hearing

- [27] At this hearing, the Crown provided me with a very helpful timeline of the offences and, for all of the outstanding matters, the dates of disclosure, first appearance, plea, the number of appearances, and the dates set for trial.
- [28] There are two matters that have not been set for trial but discussions, as to dates, are ongoing between the Crown and counsel for Mr. Merkley. Although some of the trial dates are in the fall of 2024, that is because of Mr. Merkley's counsel's schedule. Delay in proceeding to trial was not suggested as an issue in this case. I am also satisfied that the time Mr. Merkley has served in custody, after accounting for the credit already applied to the three offences to which he has pled guilty, does not approach his likely sentences if convicted.
- [29] In addition, the Crown provided me with Mr. Merkley's JUSTIN conviction list and CPIC criminal history. As I have said, he has a number of dated offences in Ontario and a few in B.C. all predating 2009, a 13- or 14-year break in his offending, and then the three most recent convictions following his guilty pleas.
- [30] For most of the outstanding charges, the Crown will rely on eye witness evidence, police identification, video surveillance evidence, and the doctrine of recent possession. Based on the Crown's submissions, the cases against Mr. Merkley appear to be strong. Mr. Merkley's counsel did not argue otherwise.
- [31] The Crown continues to oppose Mr. Merkley's release on all three grounds but, primarily, on the secondary ground.

The Change in Mr. Merkley's Circumstances Since the Detention Order

- [32] After he was detained in November 2023, Mr. Merkley applied, and was accepted into the Right Living Community ("RLC") at the Kamloops Regional Correctional Centre ("KRCC"). He was one of 13 residents accepted into the RLC program.
- [33] As described by the materials provided by KRCC, the RLC is an approach to housing detainees that involves positive role-modelling, social learning, and peer accountability to bring about genuine and lasting changes in residents' thinking and behaviour.

- [34] Intake criteria for the RLC includes demonstrating a willingness to change and actively participating in all community activities. Residents must abstain from medication diversion, drugs, and violence, and are expected to leave their "jail mentality" behind. When accepted into RLC, residents must sign a community contract in which they commit to change unhealthy lifestyles that have contributed to their criminal behaviour, including being substance- and violence-free.
- [35] Each RLC develops its own community moral code that helps residents change themselves in a safe and secure setting outside the usual prison setting. Residents are required to care for their surroundings, which are less institutional, and participate in the highly structured activities. Residents help plan, coordinate, and manage their community's operations and activities, and each resident has specific roles and responsibilities. Mr. Merkley spoke about how they are responsible for cooking their own meals.
- [36] Residents are required to participate in programs and to respect each other's participation. They are also actively engaged in work programs offered by KRCC.
- [37] While in the RLC, Mr. Merkley has participated in three units in a program called Healthy Relationships. On December 14, 2023, he completed Unit 2 entitled "Taking Those Initial Steps". On January 2, 2023, he completed Unit 3 entitled "You and Your Children, for Fathers". And on January 4, 2024, he completed Unit 4 entitled "Parenting Resources and Exploring Possibilities". Although the Crown suggested that none of these programs addressed addiction, they are evidence of steps that Mr. Merkley is taking in the right direction.

Mr. Merkley's Release Plan

- [38] Mr. Merkley proposes that he be released into a residential program offered by the New Vision S.H. Society ("NVS").
- [39] In a letter provided to Mr. Merkley's counsel by NVS, it describes its program for those suffering from chemical dependency.
- [40] Their homes are monitored and staffed 24 hours a day, and they work closely with probation officers, bail supervisors, and local police. They report all infractions and breaches of their rules immediately.
- [41] The program is based on cognitive behavioural therapy and the 12-step program. They emphasize unresolved grief and loss.
- [42] NVS has advised, at least as of November 2023, that it has a bed available for Mr. Merkley, and will admit him conditional on the following requirements. He must:
1. be released into their custody;
 2. agree to reside in the facility and abide by their rules and guidelines;

3. understand that his failure to abide by their rules and guidelines, or any other conditions I impose, will result in immediate eviction from their facility and their program and that they will immediately notify the authorities of the particulars of his breach; and
4. only be picked up by NVS.

The Legal Application of s. 525

- [43] The question I must address on this s. 525 detention review is whether the continued detention of Mr. Merkley is justified under any of the three grounds for detention set out in s. 515(10) of the Criminal Code.
- [44] The Supreme Court of Canada explained the approach to a detention review in *R. v. Myers*, 2019 SCC 18 at para. 63:
- [63] In determining whether the detention of the accused is still justified, the reviewing judge may consider any new evidence or change in the circumstances of the accused, the impact of the passage of time and any unreasonable delay on the proportionality of the detention, and the rationale offered for the original detention order, if one was made. Ultimately, s. 525 requires a reviewing judge to provide accused persons with reasons why their continued detention is -- or is not -- justified. ...
- [45] Briefly, the first or primary ground for detention under s. 515(10) deals with whether detention is necessary to ensure his attendance in court. In this case, Mr. Merkley has a number of dated convictions for failure to abide by the terms of release orders and bail. His offending history shows a gap from 2008/09 to 2022. His most recent breaches of his terms of release are troubling, but the Crown fairly concedes that the primary ground could be met by strict conditions or by electronic monitoring.
- [46] The secondary ground deals with whether detention is necessary for the protection or safety of the public. In *R. v. Abdel-Rahman*, 2010 BCSC 189 at para. 23, this Court said that the findings required of a judge in concluding that detention is justified on the secondary ground are that:
- a. there is a risk that the accused will either commit an offence, or will interfere with the administration of justice, if released;
 - b. this risk is of such magnitude that it amounts to a "substantial likelihood;"
 - c. if released, the risk would constitute a danger to public safety (in general, or to a specific victim or witness); and
 - d. the detention of the accused is "necessary," because the identified danger to public safety cannot be prevented or reduced to an acceptable level by bail conditions.

- [47] I agree with the Crown's submission that public safety includes the public's right to live and work in communities that, to the greatest extent possible, are safe from crime, including property crime. The crime spree engaged in by Mr. Merkley leaves members of our communities feeling unsafe.
- [48] Businesses protect themselves with fences, locks, and CCTV cameras, and homeowners protect themselves with alarms, motion activated lights and cameras, and formal and informal neighbourhood watches. Despite the use of those protections, in this case, Mr. Merkley's offences affected the safety of a number of members of the community and businesses in the East Kootenays.
- [49] With respect to the tertiary ground, s. 515(10)(c) provides that detention is justified if necessary to maintain public confidence in the administration of justice having regard to all the circumstances, including: (i) the apparent strength of the Crown's case; (ii) the gravity of the offence(s); (iii) the circumstances surrounding the commission of the offence(s), including whether a firearm was used; and (iv) the fact that the accused is liable, on conviction, for a potentially lengthy term of imprisonment or, in the case of an offence that involves, or whose subject-matter is, a firearm, a minimum punishment of imprisonment for a term of three years or more.
- [50] In that regard, I have considered the factors set out in *R. v. St-Cloud*, 2015 SCC 27 at para. 88. However, the Court in *St-Cloud* emphasized that the factors are not exhaustive and that the ultimate question is whether detention is necessary to maintain confidence in the administration of justice.
- [51] The focus of s. 515(10)(c) is on detention for serious crimes, for which the accused is likely to be convicted, and, if convicted, will be incarcerated for a significant period. In such circumstances, it would undermine public confidence if an accused were released into the community.
- [52] In this case, based on the number of offences Mr. Merkley committed over an eight- or nine-month period, and if sentenced separately, he is likely to be sentenced to increasingly lengthy prison terms and may well be facing a penitentiary sentence of more than two years. At a minimum, the Crown submits that four-month sentences would be appropriate for each offence. Nonetheless, I am not persuaded that the allegations Mr. Merkley faces engage the tertiary ground for detention.
- [53] A reasonably informed member of the public would consider the fact that for about 13 years, Mr. Merkley was able to lead a pro-social life and managed his sobriety with the assistance of his wife. After the 2022 death of his mother, and his wife's devastating stroke, he turned to drugs to deal with his grief and sorrow. A reasonably informed member of the public would not lose confidence in the administration of justice, recognizing the presumption of innocence, which is inherent in the Canadian Charter of Rights and Freedoms.

- [54] In my view, this case turns on this secondary ground.
- [55] Relapses from sobriety are common but Mr. Merkley demonstrated that he is capable of maintaining sobriety for long periods. A review of his criminal record shows that Mr. Merkley has not completed a rehabilitation program from at least 2008 onwards. His earlier offending resulted in jail sentences not admission into a rehabilitation facility.
- [56] I accept that there are safety concerns in releasing Mr. Merkley, but I am satisfied that release into a treatment program, and the hope that Mr. Merkley will again return to sobriety, is in the public's interest. Mr. Merkley's crimes, although significant in number, were non-violent and were the kind of offences often engaged in to support a drug habit. If Mr. Merkley's drug dependency and his grief over the losses that triggered his relapse can be addressed, the community will be safer in the long run.
- [57] Pursuant to para. 67 of Myers, I am directed to carefully consider a release plan that involves supervised treatment for Mr. Merkley who clearly has a substance abuse problem. As the Chief Justice said:

Release into treatment with appropriate conditions will often adequately address any risk raised under s. 515(10), and such a strategy is a less onerous alternative than provincial remand. It may also substantially address the root causes of the accused person's alleged criminal behaviour and reduce the likelihood of future criminal conduct. In accordance with the principles articulated in Antic, we must not lose sight of the fact that pre-trial detention is a measure of last resort.

- [58] It is clear that Mr. Merkley is capable of living a pro-social life. He did so between 2008 and 2022. He had a troubling record before that but was able to turn himself around. I accept that, as a result of his mother's death in 2022, followed by his wife's significant stroke that has resulted in her living in an assisted living facility in Kelowna, his sobriety suffered.
- [59] While he did not succeed in the VisionQuest program, he did not complete it. He did not advise his bail supervisor about what he says was going on at VisionQuest, but, because of his efforts to find a new treatment facility, his bail supervisor did not pursue breach charges based on him leaving VisionQuest
- [60] His admission into the RLC, his signing of the community contract that is required, and his course work while in that community is likely to have given him some insights into the triggers for his addiction. I am satisfied that he should be given another chance at a recovery program. I conclude that with respect to the matters before me for a s. 525 review, and the matters on which he has had his initial bail hearing before me, he should be released into a treatment program at the New Visions Society on the following conditions.

Conditions

- [61] Subject to comments from counsel, I would propose to impose the following conditions on Mr. Merkley's release:

1. Once a bed has become available, you will be released only to a representative of the New Visions Society. You are to be picked up by their representative and taken directly to their facility.
2. You must agree to reside in at the New Visions Society facility, and abide by their rules and guidelines and understand that the failure to do so will result in immediate eviction and a report to the police and your bail supervisor.
3. You must remain on the New Visions Society's facility 24 hours a day.
4. You must report by telephone to a bail supervisor by 3:00 p.m. the day you are released from custody. If the office is closed, you must continue calling daily during regular business hours until you have spoken to a bail supervisor and received further direction to report. After that, you must report as directed by a bail supervisor.
5. You must present yourself immediately at the door to the New Visions Society facility or answer the phone when any peace officer or bail supervisor attends or calls to check on you.
6. You may be away from the New Visions Society facility with the written permission of your bail supervisor. Such permission is to be given only for employment or other compelling reasons. When permission is given, you must comply with any conditions set for being away from the facility, as set by your bail supervisor.
7. You may also be away from the New Visions Society facility while at, or going directly to, or returning directly from, a healthcare appointment or due to a medical emergency. If asked, you must provide your bail supervisor with proof of your attendance at the medical appointment.
8. If you are given written permission by your bail supervisor, you must carry it with you in paper or electronic format at all times when you are outside the facility. If a peace officer stops you for any reason, you must immediately show the permission and a copy of this order upon the request of the peace officer.
9. You must not possess, directly or indirectly, any weapon as defined by the Criminal Code, including firearms, ammunition, crossbows, prohibited or restricted weapons, prohibited devices, explosive substances, anything used, designed to be used, or intended for use in causing death or injury to any person or to threaten or intimidate any person, any imitation firearms or weapons, including any compressed air guns and/or pellet guns.
10. You must not possess any instruments that could be used to break into premises.

[Discussion with the Crown and Mr. Merkley's representative about additional protective conditions]

[62] In addition to the above conditions. I order the following further protective conditions:

1. You will not go to or be within 50m of the following locations in Cranbrook, B.C. except while travelling in a moving vehicle on your way to some other place:
 - a. the business premises of the Kootenay Lawn Doctor;
 - b. the Esso Food and Stuff;
 - c. the St. Eugene Casino Resort and its associated Campground; and
 - d. the Walmart Store.
2. You will not go to or be within 50m of the following locations in Kimberley, B.C. except while travelling in a moving vehicle on your way to some other place:
 - a. the Western Lodge; and
 - b. the Centex Gas Station and associated convenience store.
3. You must have no contact or communication, directly or indirectly, with Vincent Hummelle, and you must not go or be within 50m of Vincent Hummelle's his residence in Marysville, B.C. or be within 50m of it except while travelling in a moving vehicle on your way to some other place. If you see Mr. Hummelle, you must leave his presence immediately without any words or gestures.
4. You must have no contact or communication, directly or indirectly, with Bradley Filgate. If you see Mr. Filgate, you must leave his presence immediately without any words or gestures.

"MacNaughton J."

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