UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
LAKEVILLE DIVISION

SHERYL JORDAN, as Personal Representative of the Estate of DAVIS JORDAN, JR., *Plaintiff,*	§	
v.	§	Case No. 2:20cv15994
SHERIFF DEREK MICHAELS in his Official Capacity as Sheriff of Midland County, and ERIC WATSON, an individual *Defendants.*	§	

DEFENDANT'S MEMORANDUM IN SUPPORT OF THE DEFENDANT'S MOTION IN LIMINE REGARDING THE EXPERT TESTIMONY OF FRANK EDWARDS AND IN OPPOSITION TO THE PLAINTIFF'S MOTION TO STRIKE THE AFFIRMATIVE DEFENSE

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Introduction

Plaintiff filed a cause of action alleging excessive use of force under 42 U.S.C. § 1983 in violation of the Fourth and Fourteenth Amendments of the United States Constitution against Defendant Watson. Plaintiff also filed a state law claim of negligence against Defendant Michaels. Subsequent to filing the complaint, Plaintiff filed notice of intent to call an expert witness, Frank Edwards, Ph.D., to testify regarding racial bias at the Midland County Sheriff's Office.

In response to Plaintiff's 42 U.S.C. § 1983 claim, Defendant Watson asserted the affirmative defense of qualified immunity. Plaintiff moved to strike this defense on grounds of insufficiency, or redundancy, immateriality, impertinence, or scandal. Because Defendant Watson acted within his discretionary authority and Plaintiff is unable to show that Defendant Watson violated a clearly established federal or constitutional right Defendant Watson is entitled to rely upon the defense of qualified immunity. Plaintiff's Motion to Strike the affirmative defense should be denied.

On August 5, 2020 Defendants filed a Motion in Limine seeking to exclude the expert testimony of Frank Edwards, Ph.D. on three grounds. First, Dr. Edwards's testimony is irrelevant under Federal Rule of Evidence 401. Second, any probative value of the testimony is substantially outweighed by unfair prejudice under the balancing test required by Federal Rule of Evidence 403. Third, the testimony will not help the trier of fact understand the evidence or determine a fact in issue as required by Federal Rule of Evidence 702. For these reasons Defendants' Motion in Limine should be granted.

Statement of Facts

On February 14, 2019, Defendant Watson responded to a noise complaint related to loud music at 1501 58th Street South, Fort Hampton, Midland County, Florida. (Watson Aff. ¶ 14, 19.) Officer Eddie Rivera and Defendant Watson arrived at Jordan's home at around 3:15 p.m. (Rivera Aff. ¶ 12, 18.) They parked their vehicles along the street in front of the home, which sat opposite of Fort Hampton Elementary School. (*Id.* at 19.) The two officers knocked on the front door of the residence several times but received no response. (*Id.* at 21.) Defendant Watson then walked to the to the side door and knocked on it several times, again receiving no response. (*Id.* at 22.) Moments later, Jordan opened the front door wide enough to allow Rivera to see Jordan holding what Rivera believed to be a small black handgun in his right hand. (Rivera Aff. ¶ 26.) Rivera then shouted "gun, gun, gun, drop the gun," at which point Jordan raised his arm holding the gun in Rivera's direction while at the same time closing the front door. (*Id.* at 30.)

As these events unfolded, Defendant Watson was walking back to the front of the house permitting him to see the events from a 45-degree angle. (Watson Aff. ¶ at 23–27.) Believing Jordan was going to shoot through the door at Deputy Rivera and fearing he may inadvertently would the children outside the elementary school, Defendant Watson shot Jordan through the door four times. (Watson Aff. ¶ 33–36.)

Subsequent to the events described, above Plaintiff engaged Dr. Frank Edwards to conduct a review of Midland County Sheriff's department data. (Edwards Aff. ¶ 5.) Dr. Edwards reviewed 380 randomly selected case files. (*Id.* at ¶ 7.) The case files concerned stops for non-traffic misdemeanors and ordinance violations between February 2016 and

February 2019. (*Id.* at ¶ 6–7.) Based on this review, Dr. Edwards concluded that racial bias plays a statistically significant role in whether officers in the Midland County Sheriff's department draw their weapons in the course of a stop. (*Id.* at ¶ 8.)

Argument and Authorities

Plaintiff asserts two causes of action: a claim of excessive force in violation of the Fourth and Fourteenth Amendments under 42 U.S.C. § 1983; and a state law claim of negligence. Both causes of action arise from the application of force by Defendant Watson on February 14, 2019. "Florida courts have consistently and unambiguously held that 'it is not possible to have a cause of action for negligent use of excessive force because there is no such thing as the negligent commission of an intentional tort.'" *Secondo v. Campbell*, 327 F. App'x. 126, 131 (11th Cir. 2009) (quoting *City of Miami v. Sanders*, 672 So. 2d 46, 48 (Fla. Dist. Ct. App. 1996)) (affirming summary judgment for defendant on both 42 U.S.C. §1983 and state law negligence claims). Separate negligence claims brought in conjunction with claims of excessive force "must pertain to something other than the actual application of force during the course of arrest." *Id.* Here, all claims stem from the same application of force by Defendant Watson. As such, Plaintiff's negligence claim fails, and the remainder of this memorandum will address the pending motions as they pertain to Plaintiff's remaining claim. Beginning with an explanation of the two reasons why Plaintiff's Motion to Strike the affirmative defense of qualified immunity should be denied. Followed with a discussion of the three reasons why Defendants' Motion in Limine should be granted.

I. Defendant Watson is entitled to rely upon the defense of qualified immunity against Plaintiff's 1983 claim

Defendant Watson is entitled to rely upon the defense of qualified immunity against Plaintiff's § 1983 claim. This defense protects government officials from liability for civil damages. *Melton v. Abston*, 841 F.3d 1207, 1220 (11th Cir. 2016). To be entitled to rely upon the defense of qualified immunity, a defendant must raise the defense, and the plaintiff must be unable to overcome it. *Id.* at 1221.

To raise the defense of qualified immunity, a defendant must show that he was acting within his discretionary authority at the time he performed the actions a plaintiff alleges violated a constitutional or federal right. *Id.* It is undisputed that Defendant Watson was acting within his discretionary authority. Plaintiff's complaint acknowledges this by stating Defendant Watson was "acting within the scope and course of his employment" with the Midland County Sheriff's Office. (Compl. ¶ 10.) Hence, Defendant Watson can raise the affirmative defense of qualified immunity.

Once the defense of qualified immunity has been raised, the burden shifts to the plaintiff to overcome it. *Melton*, 841 F.31d at 1221. To do so, a plaintiff must show that the defendant (1) violated a constitutional or federal right of the plaintiff, and (2) if so, that the violated right was clearly established. *Id.* at 1220. The Supreme Court has held that a claim for excessive force in the context of an arrest or investigatory stop of a free citizen, like the claim in this case, must be analyzed under the Fourth Amendment and not the Fourteenth Amendment. *Graham v. Connor*, 490 U.S. 386, 388 (1989). To overcome Defendant Watson's qualified immunity defense, Plaintiff must show that Defendant

Watson violated a clearly established Fourth Amendment right held by Jordan. Plaintiff cannot show this.

a. Plaintiff cannot show that Defendant Watson's actions violated Jordan's Fourth Amendment rights

Use of deadly force by a police officer during an investigative stop of a free citizen violates the Fourth Amendment if it is excessive under objective standards of reasonableness. *Id.* Use of deadly force in such cases is not violative of the Fourth Amendment if an officer had arguable probable cause at the time of his use of deadly force to believe that the suspect he used it on posed a threat of serious physical harm, either to himself or others. *Tennessee v. Garner*, 471 U.S. 1, 11 (1985). An officer only needs "arguable probable cause" because the issue is not whether "probable cause existed, but whether the officer reasonably believed it existed based upon the information he or she possessed at the time of the incident." *Garczynski v. Bradshaw*, 573 F.3d 1158, 1167 (11th Cir. 2009).

In analyzing qualified immunity defenses, the facts must be taken in the light most favorable to the plaintiff. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). However, whether an officer had arguable probable cause must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight, and the determination "must allow for the fact that police officers are often forced to make split second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Graham*, 490 U.S. at 386. Whether the force used in such a situation was justified must be determined based on a

totality of the circumstances. *Id*. In support of the broader policy of qualified immunity to allow officers to take reasonable actions to protect themselves and the public, the Eleventh Circuit has opined that it is hesitant to second guess police officers' decisions in the field. *Vaughan v. Cox*, 343 F.3d 1323, 1331 (11th Cir. 2003). It has used this framework to find tragic police shooting cases with facts similar to this case not to have resulted in Fourth Amendment violations.

In *Carr*, the Court determined that in a "split-second, rapidly escalating situation involving perceived deadly force," an officer had probable cause to use deadly force on a suspect because he believed he saw the suspect pointing a gun towards a fellow officer and he heard the sound of a gun reloading, even though the suspect turned out to not actually have a gun. *Carr v. Tatangelo*, 338 F.3d 1259, 1269 (11th Cir. 2003), as amended (Sept. 29, 2003). The Court explained that in shooting the suspect, considering the totality of the circumstances and determining the reasonableness of the officer's use of force from his perspective in the moment he used the force, "Officer Fortson acted in an objectively reasonable manner to the apparent imminent threat to his fellow officers to save his life." *Id.* at 1269. In doing so, the Court explained that "a reasonable but mistaken belief that probable cause exists for using deadly force is not actionable under § 1983" to affirm Fortson's qualified immunity defense. *Id.*

Likewise, in *Garczynski*, the Court determined that the officer had probable cause to use deadly force on a suspect. *Garczynski* at 1158. There, police responded to a call from a wife reporting that her husband was missing, suicidal, and armed. *Id.* at 1161. When police found the husband in his vehicle, they told him to step out and saw that he had a

gun. *Id*. at 1164. Over several seconds, they told him to drop the weapon, but he refused, and instead pointed it at himself, then at police. *Id*. The Court held that when the suspect pointed the gun at the officers, they reasonably reacted to what they perceived as an immediate threat of serious harm to themselves by shooting him. *Id*. at 1668. It acknowledged that the situation was "undeniably a tragedy," but that the officers' use of force was objectively reasonable considering all the circumstances from a reasonable officer's viewpoint, so no constitutional violation occurred. *Id.* at 1170.

Penley is a similar case in the Eleventh Circuit. There, police responded to a call about an armed student. *Penley v. Eslinger*, 605 F.3d 846, 854 (11th Cir. 2010). Once they arrived at the school, the armed student was in the bathroom. *Id*. One officer apprehended him there, and the student pointed a bean bag gun appearing to be a real gun at him. *Id*. Another officer serving as a "spotter" witnessed this and gave the signal to another officer to shoot the student, and that officer did. *Id*. at 847. The court determined that the shooting officer had probable cause to believe the life of the officer apprehending the student was in peril, since the student was not responding to commands to drop his weapon, was not responding to the negotiator's questions, and pointed his weapon at an officer. *Id*. at 853. It reasoned that, "under the tragic circumstances of the case and in light of the Court's binding precedent," Penley would have appeared to reasonable officers to have been gravely dangerous, and thus, the shooting officer did not violate his constitutional rights. *Id*. at 854.

In these three cases, officers were determined to have reasonable but mistaken beliefs that suspects posed serious threats of harm. Even taken in a light most favorable to

the Plaintiff, the facts in the case at bar lead to the same conclusion. Officer Rivera and Defendant Watson responded to a noise complaint at Jordan's home. They both knocked on the front door to speak with Jordan. When he was unresponsive, Defendant Watson went to the side door to knock. Seconds later, Jordan opened the front door and pointed something at Rivera, which Rivera believed to be a gun. Rivera feared for his life and shouted "gun, gun, gun, drop the gun." Defendant Watson heard this and saw what he believed to be Jordan pointing a gun at Rivera as he closed the door. Defendant Watson then shot four times through the closed door, believing Jordan was going to shoot through the door at Rivera, and could potentially hit the school children directly across the street. With the facts in this light, Jordan's death is undeniably a tragedy.

However, courts have repeatedly held that qualified immunity allows for tragedies like these in support of its broader policy of encouraging officers to take reasonable actions to protect themselves and the public. Analyzing this situation from Defendant Watson's perspective, as is required, it is clear that he had reason to believe that Jordan posed a serious threat of harm to Rivera and the school kids behind him. Like in *Penley*, Defendant Watson based his belief on what another officer shouted. Like in *Penley* and *Carr*, with the facts most favorable to Plaintiff, there was no actual threat to any officer. And, like in all three cases, Defendant Watson made a split-second decision based on limited information and in order to protect himself and the public he shot Jordan.

Hence, Defendant Watson had arguable probable cause to use deadly force on Jordan, thus his actions did not violate Jordan's Fourth Amendment right. Based on this alone, Plaintiff cannot overcome the qualified immunity defense that Defendant Watson

can successfully raise. Even if Defendant Watson violated Jordan's Fourth Amendment right, Plaintiff cannot show that the right was clearly established.

b. Plaintiff cannot show that Jordan's Fourth Amendment right was clearly established

A constitutional right may be clearly established for the purposes of qualified immunity when there is (1) case law with indistinguishable facts clearly establishing the constitutional right; (2) a broad statement of principle within the Constitution, statute, or case law that clearly establishes a constitutional right, or (3) conduct so egregious that a constitutional right was clearly violated, even in the total absence of case law. *Lewis v. City of W. Palm Beach, Fla.*, 561 F.3d 1288, 1291–92 (11th Cir. 2009). None of these are present here.

Indistinguishable case law must come from a controlling court. *Id.* There is no such case law with facts indistinguishable to the case at bar, and the ones with marginally similar facts—discussed above—find the opposite of the conclusion Plaintiff seeks this Court to draw. Additionally, there is no broad statement or principle within the Constitution holding that the Fourth Amendment protects suspects from deadly force by police in fact scenarios like the one at bar. Finally, Defendant Watson's conduct was not so egregious that a constitutional right was clearly violated even in the absence of case law. To meet that standard, Plaintiff must show that the official's conduct was so far beyond the hazy border between excessive and acceptable force that the officer had to know he was violating the Constitution without case law on point. *Id*. at 1292. The standard is met when every reasonable officer would conclude that excessive force used was plainly unlawful. *Id.* The analysis above makes clear that every reasonable officer would believe the opposite in the case at bar.

For these reasons, even if Plaintiff could show that Defendant Watson violated Jordan's Fourth Amendment right, Plaintiff would be unable to show that Jordan's Fourth Amendment right was clearly established as is required. Thus, Plaintiff is unable to overcome Defendant Watson's successfully raised qualified immunity defense, and Defendant is entitled to rely upon it.

II. Argument in support of Defendant's Motion in Limine regarding Plaintiff's expert witness Frank Edwards, Ph.D.

The testimony of Dr. Edwards should be excluded because it is irrelevant to the 42 U.S.C. § 1983 cause of action under current Supreme Court and Eleventh Circuit case law. Further, permitting Dr. Edwards's testimony would result in unfair prejudice to Defendant Watson—holding him guilty of the alleged racial bias of fellow officers by mere association. Finally, Dr. Edwards's testimony would not help the trier of fact understand the evidence or determine a fact at issue.

a. The expert testimony of Professor Edwards should be excluded as irrelevant

Professor Edward's testimony regarding whether there is a statistical probability that racial bias exists in the Midland County Sheriff's department is irrelevant to Plaintiff's claim that Defendant Watson used excessive force. Evidence is relevant if "it has any tendency to make a fact more or less probable than it would be without the evidence" and that fact "is of consequence in determining the action." Fed. R. Evid. 401. The relevant inquiry in an excessive force case invoking the protections of the Fourth Amendment is "whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation."

Graham, 490 U.S. at 397; *Jackson v. Sauls*, 206 F.3d 1156, 1170 (11th Cir. 2000); *Phillips v. Irvin*, 2007 U.S. Dist. LEXIS 54810, at *7 (S.D. Ala. July 27, 2007).

In *Phillips*, the plaintiff filed a claim under 42 U.S.C. §1983 for excessive use of force during his arrest. *Phillips*, 2007 U.S. Dist. LEXIS 54810, at *2. The plaintiff sought to introduce evidence of prior complaints and violations relating to other instances where the arresting officer used excessive force. *Id.* at *3–4. Applying *Graham* and Eleventh Circuit precedent regarding Fourth Amendment claims of excessive force, the court found that evidence of prior wrongdoing by the defendant was inadmissible. *Id.* at *8. Neither the motive or intent of the officer are relevant to the analysis in a cause of action for excessive force. *Id.* at *11–12; *see also Lee v. Ferraro*, 284 F.3d 1188, 1193 n.2 (11th Cir. 2002) (stating "past incidents and allegations are not relevant" to Fourth Amendment causes of action under 42 U.S.C. § 1983).

"Relevancy is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case." Fed. R. Evid. 401 advisory committee's note. Defendant Watson's bias, or lack of bias, is not a matter provable in this case. Just as evidence about the defendant officer's individual actions was irrelevant to the cause of action in *Phillips* and *Lee*. Here, Professor Edwards's testimony about the potential presence of bias in the actions of some officers in the sheriff's department identified in a random sampling of case files is irrelevant under the "objectively reasonable" standard that governs 42 U.S.C. § 1983 claims for violations of Fourth Amendment rights. Because his testimony does not make a fact of consequence more or less probable his testimony is not relevant and should be excluded.

b. Any probative value associated with the testimony of Professor Edwards is outweighed by its prejudicial effect

Even if this Court finds that the testimony of Professor Edwards is relevant, any probative value is substantially outweighed by the danger of unfair prejudice. Unfair prejudice exists when testimony has "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." Fed. R. Evid. 403 advisory committee's note. Evidence that "appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish," or "any form of evidence that may cause a jury to base its decision on something other than the established propositions in the case" creates an unfair prejudice." 2 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE § 403.04 (2020).

Professor Edwards's statement makes clear that his research involved the review of a random sample of cases from them Midland County Sheriff's department. From that review, based on his professional opinion, Professor Edwards determined that racial bias exists at the Midland County Sheriff's department. Notably, Professor Edwards did not review Defendant Watson's cases or behavior specifically. Permitting the testimony of Professor Edwards creates an unfair prejudice of guilt by association—because some members of the Sheriff's department may act on racial bias and Defendant Watson is a member of the department, he must also be guilty of the same bias.

"[G]uilt by association is a philosophy alien to the traditions of a free society." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 932 (1982). In *Gamory*, the Eleventh Circuit found that it was error for the district court to permit the introduction of a rap video

to evidence. *United States v. Gamory*, 635 F.3d 480, 493 (11th Cir. 2011). The lyrics rapped in the video contained "violence, profanity, sex, promiscuity, and misogyny and could reasonably be understood as promoting a violent and unlawful lifestyle." *Id.* The defendant was not in the video, there was no evidence that he authored the lyrics, and there was no indication in the video that the defendant had adopted or shared the views and values expressed in the video—but he owned the production company that made the video. *Id.* The Court held that what little probative value might be ascribed to the video was substantially outweighed by the unfair prejudice created by the association of inflammatory words of a third party to the defendant. *Id.* at 27.

Even where affiliation is with an illegal organization, like a gang, courts generally do not permit use of mere membership to create guilt by association; limiting the introduction of evidence of membership to instances where it is incidental to other allowable evidence. *United States v. Bradberry*, 466 F.3d 1249, 1253–1254 (11th Cir. 2006) (evidence of defendant's gang affiliation, though a close call, was permitted because it "did not simply imply that Bradberry was a bad person or that, by virtue of being a gang member, he knowingly possessed a gun. Instead, evidence of Bradberry and Jordan's gang membership helped explain why they were at the school at that time."); *United States v. Jernigan*, 341 F.3d 1273, 1284 (11th Cir. 2003) (evidence of codefendant's gang membership is close call but here was especially probative because it explained activity peculiar to the organization); *United States v. Van Dorn*, 925 F.2d 1331, 1338–1339 (11th Cir. 1991) (trial court did not abuse its discretion in admitting testimony of expert who

explained hierarchy of Gambino crime family where the structure of the organization had been placed before the jury by both sides).

Here, like *Gamory*, there is no indication that Defendant Watson has adopted the racial bias attributed to some members of the Sheriff's department. Further, the testimony of Professor Edwards about racial bias is not incidental to other allowable evidence. Evidence of racial bias in the Sheriff's department may be probative in a claim against the Sheriff's department, but the claim here is specific to the actions of Defendant Watson. Professor Edwards analysis of the Sheriff department as a whole cannot be attributed to Defendant Watson as an individual. Any probative value associated with the testimony of Professor Edwards is minimal and is far outweighed by the unfair prejudice to Defendant Watson. The testimony should not be admitted.

c. The testimony of Professor Edwards will not assist the trier of fact in understanding the evidence or determining a fact at issue

Professor Edwards's testimony should be excluded pursuant to Federal Rule of Evidence 702. The district court functions as a gatekeeper regarding expert testimony. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 597 (1993). In the Eleventh Circuit, this gatekeeping function is accomplished by employing a three-part inquiry to determine whether:

> "(1) the expert is qualified to testify competently regarding the matters he intends to address; (2) the methodology by which the expert reaches his conclusions is sufficiently reliable as determined by the sort of inquiry mandated in Daubert; and (3) the testimony assists the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue."

United States v. Hansen, 262 F.3d 1217, 1234 (11th Cir. 2001) (citing *City of Tuscaloosa v. Harcros Chems., Inc.*, 158 F.3d 548, 562 (11th Cir. 1998)). Here, the parties stipulate that the first two parts of the inquiry are satisfied. The remaining question for the Court is whether the testimony of Professor Edwards will assist the jury in understanding the evidence or determining a fact at issue. It will not.

To determine if expert testimony is helpful to the fact finder "the court must ensure that the proposed expert testimony is relevant to the task at hand, . . . i.e., that it logically advances a material aspect of the proposing party's case." *Allison v. McGhan Med. Corp.*, 184 F.3d 1300, 1312 (11th Cir. 1999) (internal quotations and citations omitted); *Boca Raton Cmty. Hosp., Inc v. Tenet Health Care Corp.*, 582 F.3d 1227, 1232 (11th Cir. 2009); *Tompkins-Holmes v. Gualtieri*, 2018 U.S. Dist. LEXIS 53882, *14 (M.D. Fla. March 30, 2018). In *Tompkins-Holmes*, the plaintiff sought to introduce expert testimony in their excessive force complaint against a Deputy of the Pinellas County Sheriff's department. *Tompkins-Holmes*, 2018 U.S. Dist. LEXIS 53882, *3. The expert's report and deposition focused primarily on the training procedures of the Sheriff's department and discussed use of force only in general terms. *Id.* at *14–*15. The expert did not address whether the shooting incident at the heart of the plaintiff's complaint was an excessive use of force nor did the expert discuss prior conduct by the Deputy defendant. *Id.* The court granted the defendant's *motion in limine* excluding the expert's testimony because it was "not helpful on the sole issue remaining: whether [defendant] used excessive force when he shot [plaintiff]."

Here, like in *Tompkins-Holmes*, the expert testimony is not relevant to the task at hand and does not advance a material aspect of the Plaintiff's case. Professor Edwards's testimony addresses the probability of racial bias in the actions of some members of the Midland County Sheriff's department. His testimony does not address the actions of Defendant Watson—either on February 14, 2019 or on any other date. As in *Tompkins-Holmes*, the proffered testimony is about the Sheriff's department as a whole and is not relevant to the issue before the trier of fact: whether excessive force was used by the Defendant on February 14, 2019. The testimony should be excluded as unhelpful under Federal Rule of Evidence 702.

Conclusion

Defendants pray that this court deny Plaintiff's Motion to Strike Defendant Watson's Affirmative Defense of Qualified Immunity and grant Defendant's Motion in Limine as to Plaintiff's expert, Frank Edwards, Ph.D.

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