OA 11-3-87

IN THE SUPREME COURT OF FLORIDA

WALTER BLACKSHEAR,

Petitioner,

vs. CASE NO. 70,513

STATE OF FLORIDA,

Respondent.

_____/

RESPONDENT'S BRIEF ON THE MERITS

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RESPONDENT'S BRIEF ON THE MERITS

PRELIMINARY STATEMENT

Respondent accepts petitioner's preliminary statement and will use the designations set forth therein, subject to the following addition. The State of Florida was the prosecuting authority in the trial court and appellee in the district court. It will be referred to herein as "respondent" or "the State."

STATEMENT OF THE CASE AND FACTS

Respondent accepts petitioner's statement of the case and facts for the limited purpose of resolving the issues raised on appeal subject, however, to the following clarifications and additions:

With regard to the jury selection process, the record is silent as to the number of blacks and whites composing the venire. Black jurors, however, remained in the pool both after peremptory challenges and challenges for cause and after the jury had been struck. (R 82, T 172). The State used nine of its peremptory challenges to strike eight blacks and one white. (T 172, 179). Petitioner used his peremptory challenges to strike nine whites and one black. (R 83, T 172). An all-white jury resulted, with a black alternate juror. Of the jurors successfully challenged for cause, three or four were black. (T 37, 69, 85, 109, 151, 172).

The order in which the jurors were called and subsequently excused is summarized as follows:

FIRST ROUND: Six potential jurors, three black and three white, were questioned: Mr. B[redacted](B), Mr. E[redacted](B), Ms. B[redacted](W), Mr. P[redacted](W), Mr. S[redacted]W), and Ms. W[redacted](B). (T 6). Following questioning (T 8-33), the State removed one black, Mr. B[redacted] and petitioner removed two whites, Mr. S[redacted] and Ms. B[redacted]. (T 33-34). This left two blacks and one white.

SECOND ROUND: Mr. W[redacted](W), Mr. C[redacted](?) and Ms. M[redacted]W) were added. (T 33). C[redacted] was excused for cause since petitioner's trial counsel was representing him on a legal matter. (T 37). Ms. D[redacted](B) was added. This left a panel of three blacks and three whites. Following questioning, (T 38-57), the State excused two blacks, Ms. D[redacted] and Ms. W[redacted], and petitioner excused one white, Mr. W[redacted] (T 57).

THIRD ROUND: Mr. B[redacted](W), Mr. A[redacted](B) and Ms. S[redacted]?) were next chosen from the pool. (T 57). S[redacted] indicated she could not be fair and was replaced by Mr. E[redacted](W). (T 69). Thus, the panel from which to remove jurors consisted of two blacks and four whites. After questioning, (T 60-84), the State removed Mr. A[redacted] a black, and petitioner removed Mr. E[redacted] and Mr. B[redacted] both white. (T 84).

FOURTH ROUND: Mr. Poole(?), Ms. M[redacted](B), and Ms. R[redacted](W) were selected from the pool. (T 84). Mr. P[redacted] was excused because he was aware of the facts of the case, had been friends with the victim's family for several years, and his mother was the victim's godmother. (T 85-86). Mr. B[redacted](B) replaced Mr. P[redacted] (T 86). This left an even panel of three blacks and three whites. Following questioning, (T 87-106), the State excused one black, Ms. M[redacted] and petitioner excused one white, Ms. R[redacted]. (T 106).

FIFTH ROUND: Ms. H[redacted]W) and Ms. S[redacted](?) were selected. (T 106). Ms. S[redacted] said she could not be fair because she knew

petitioner and could not judge anyone. (T 109). Ms. O[redacted](W) replaced Ms. S[redacted]. (T 110). This left a panel of two blacks and four whites. After questioning, (T 110-121), the State excused one black, Mr. B[redacted] and petitioner excused one white, Ms. O[redacted]. (T 121).

SIXTH ROUND: After a lunch recess, Mr. B[redacted](W) and Ms. F[redacted](W) were selected. The panel was now composed of one black and five whites. Following questioning, (T 121-133), the State excused one black, Mr. E[redacted] and petitioner excused one white, Mr. B[redacted]. (T 133).

SEVENTH ROUND: Ms. C[redacted](B) and Mr. J[redacted]B) were selected, leaving a panel of two blacks and four whites. Following questioning, (T 133-146), the State excused Ms. F[redacted] (only white juror excused by State) (T 171-172) and petitioner excused Ms. C[redacted] (T 146).

EIGHTH ROUND: Ms. K[redacted](W) and Mr. C[redacted] were selected. (T 146). C[redacted] had discussed the case with one of the witnesses and was excused for cause. (T 151). Ms. F[redacted](W) replaced Mr. C[redacted] Thus, the panel was composed of one black and five whites. Following questioning, the State used its ninth peremptory challenge to remove Mr. J[redacted] a black, and petitioner used its tenth and final peremptory challenge to remove a white, Ms. K[redacted]. (T 162).

NINTH AND FINAL ROUND: Mr. B[redacted](W) and Ms. S[redacted](W) were selected. (T 162). Due to these additions, the panel was now

all-white. Petitioner's request for additional peremptories was denied. (T 172). Petitioner also moved at this point in the jury selection process to dismiss the entire panel:

> [M]y rationale for this is if the Court will examine the challenges exercised by the State Attorney of the nine challenges he has used, eight have gone to exclude black potential jurors, and he is obviously making an attempt to provide a jury that is of a different race than the Defendant.

(T 171). The court asked the assistant state attorney, Mr. Fina, if he wanted to put anything on the record. He responded by objecting to the untimeliness of the objection and requested an opportunity, if it were the court's desire, to go back through his notes, claiming he had a valid reason apart from race to exclude each one of these jurors. (T 172). The court denied petitioner's request to strike the panel. (T 172). The following jurors remained to compose the all-white jury: Mr. P[redacted], Ms. M[redacted] Ms. H[redacted] Ms. F[redacted], Ms. S[redacted] and Mr. B[redacted] The second alternate juror, Ms. D[redacted](B), was selected as the alternate. (T 179).

At the close of all the evidence the State, without any comment from petitioner, requested "five days or so" to submit a written statement regarding the reasons for his peremptory challenges, to which the court replied "okay". (T 349). Petitioner again raised his objection to the jury trial at his hearing on his motion for new trial. Referring to the procedure

set forth in State v. Neil, 457 So.2d 481 (Fla. 1984), petitioner claimed the court erred by denying his motion without making the proper inquiry under Neil, inasmuch as he had pointed out to the court when he made his motion that the overwhelming number of the State's challenges were made on blacks. Pursuant to Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965), petitioner claimed there should have been a cross section of the community on the jury, which to his knowledge was forty percent black. (R 62-65). The State responded by noting that the defendant, the victim and four of the remaining six witnesses were black and that therefore there was no necessity to strike blacks. (R 68-69). The State also argued no Neil inquiry was necessary inasmuch as the only showing by petitioner was that the State struck eight blacks out of its nine peremptories exercised. The State argued petitioner's showing did not tend to show that there was a substantial likelihood that the challenges were made solely on the basis of race. (R 69-70).

Reminding the court that he had offered to prepare a list of the reasons he excused each juror, Mr. Fina, on behalf of the State proceeded to explain the rationale for striking each juror. The reasons are quoted verbatim on pages six through eleven of petitioner's brief on the merits.(R 71-76).

Petitioner presented rebuttal argument. Specifically, petitioner contested the reason for striking Mr. B[redacted] Not unlike B[redacted], Mr. P[redacted] who sat on the jury, also had two

children; therefore, the only distinction petitioner could see was race. Petitioner also noted that E[redacted] was in the first round of potential jurors to be selected, but he was not removed until after lunch (sixth round). Noting the presumption that peremptories are exercised in a proper manner, petitioner nonetheless argued that this presumption could be overturned by demonstrating that the challenged persons are members of a distinct racial group. The State responded by claiming there is no constitutional right to have a black on a jury if the defendant is black, to have an all-white panel, or to have an all-black panel. Mr. Fina also commented that the distinction between B[redacted] and P[redacted] was that B[redacted] was single, never married, and his children were not living with him. (R 82-83).

At the conclusion of the hearing, the trial court held:

> As far as the jury pool, I think the State has put on the record sufficient reasons for striking the jurors that he did strike considering the fact that we had blacks--the black victim, black defendant, and several black witnesses.
>
> I noticed myself that a lot of those black jurors seemed reluctant and we're living in a small community here and a lot of the black jurors appeared reticent to me to serve on the jury. And I think that's probably one reason that the State wanted to strike so many of them.
>
> Also, I know there were a number struck for cause because they didn't want to sit and they made it fairly obvious they didn't want to sit. So, I don't

agree that there were systematic exclusions merely on the basis of race.

(R 86).

In connection with the remaining two issues, prior to the State's direct examination of [redacted], the court sua sponte questioned [redacted] on the difference between the truth and a lie. [redacted] explained that to tell the truth meant not to lie and agreed that her mom sometimes got mad when she did not tell the truth. She stated she would tell the truth during the trial. Following these questions by the court, both parties were given an opportunity to voir dire and both declined. After petitoner's attorney requested that this witness be sworn, the court asked [redacted] if she would promise to tell the truth, to which she replied yes. At that point, the State proceeded with its direct. (T 186-188). The State adds the following facts to [redacted] testimony as summarized on pages three and thirty through thirty-one of petitioner's brief on the merits. [redacted] testified she had known petitioner for a long time and that he was kin to her brother. (T 189-190). Using anatomically correct dolls to demonstrate to the jurors what Abraham Brooks had done to her at the abandoned house while petitioner was out buying beer, [redacted] inserted the male doll's penis into the girl doll's anus. [redacted] also indicated Brooks had put his penis in her mouth. (T 198-200). She further testified that when petitioner returned he "took out his dick and then he shot

off." Again using anatomically correct dolls, [redacted] showed the jury how petitioner masturbated. (T 203). [redacted] demonstrated with the dolls how petitioner placed his [redacted] in her mouth. She stated she saw a liquid that looked like milk coming out of the head of petitioner's penis. (T 205-206).

The record contains several indications that [redacted] was afraid of petitioner. (T 205, 215, 217). In petitioner's presence, Brooks threatened to kill [redacted] if she told anyone what happened. (T 206). Immediately after [redacted] denied on cross-examination that petitioner had placed his penis in her mouth and after the jurors had left the courtroom, [redacted] interrupted counsel's argument by asking, "why is he looking at me like that?" (R 215). After the court ruled the State could use leading questions on redirect, [redacted] admitted she was scared of petitioner and that she had told the truth when she said petitioner had put his penis in her mouth. She further indicated petitioner had used his hand to try to "pull her cherry out." [redacted] had not previously admitted that in front of the jury because petitioner had been looking at her and she was afraid. (T 217-218). This testimony was never elicited in the presence of the jury. Immediately after the proffer, Mr. Fina, the assistant state attorney, noted that he had been watching petitioner and that every time he turned around petitioner was making mouth movements, and [redacted] was watching him. (T 221). The court cautioned petitioner not to look at [redacted]

noting the right to confrontation did not include the right to stare down. (T 222).

Officer Harris interviewed both [redacted] and petitioner. When Harris first talked with [redacted] she was physically exhausted and in his opinion under the influence of alcohol. At that time [redacted] was not specific, but said both petitioner and Brooks had messed with her. The next day [redacted] gave more specific information, including her statement that petitioner "put his candy in her mouth," indicating his penis. (T 255-259).

On proffer, Harris testified that he had interviewed petitioner at the jail two times. The first time was in the early morning hours. At that time Harris told petitioner he was being charged with sexual battery upon a minor, that it was a capital offense, and that a capital offense could go as far as the electric chair. (T 262). Petitioner denied the allegations during this first interview. (T 261). Around 5:30 the next afternoon Harris and Sheriff Peavy interviewed petitioner. Prior to this interview petitioner was advised of his constitutional rights and he seemed to understand them. Harris stated they neither coerced petitioner to make a statement nor promised him anything to induce him to make a statement. (T 261-262). Neither Harris nor Peavy promised petitioner if he cooperated by confessing and testifying against Brooks he would get a light sentence. Harris told petitioner that [redacted] had told them

what had happened and that Harris had verified some of that information. Harris recalled that Sheriff Peavy simply told petitioner "it would be better to go ahead and admit his part in the crime." (T 266). Harris then related what petitioner told him concluding with petitioner's admission that when he was unable to insert his penis into [redacted] vagina, he put it in her mouth. (T 263-264).

Petitioner testified during the proffer examination that Harris told him at the first interview that if he did not tell what part he had in the event they were going to give him the electric chair. At the second interview they first told petitioner to make it easier on himself and that they would help him out if he testified against Brooks. They allegedly told him he would be charged with lewd and lascivious acts. (T 270). Petitioner admitted to making the statements to Officer Harris, however, he claimed it was not true and that he was just repeating what they had told him [redacted] had said. He denied that he had wanted to make the statement and said he made it only after he was told about the electric chair. (T 271). Petitioner remembered having his rights read to him and admitted he understood those rights. (T 272). He testified he had served time in prison twice: once for four months, the other time for three years. In addition, he had been arrested thirty to forty times and on several of those occasions he had been read the same rights by arresting officers. Petitioner knew on those occasions that he did not have to talk. (T 275-276).

Still on proffer, the court re-examined Officer Harris. Harris said no one had made a promise to petitioner that if he cooperated he would get three years community control. Petitioner was never threatened with the electric chair if he did not tell the truth about what had happened. Harris was not aware of any offer to petitioner that he could plead to lewd and lascivious acts if he testified against Brooks. Harris told him a capital offense carried the electric chair, because Harris thought at that time that it did. (T 278-280). At the end of the proffer the court made the following finding:

> Considering the totality of the circumstances, the fact that the Defendant has been arrested many times previously and knew the procedure, knew that he had a right to get a lawyer, knew that he could refuse to testify and judging the credibility of the witnesses, I find the statements to be freely, voluntarily and intelligently made.

(T 280).

Harris repeated to the jury the statements petitioner had made to him after being advised of his rights. (T 281-283). Petitioner told Harris he had attempted to put his penis in [redacted] vagina and that he had put his penis in her mouth. (T 284). Harris basically repeated the testimony he had given on proffer. (T 284-291).

Petitioner took the stand and denied that he inserted his penis in [redacted] mouth and denied that he put his penis in her vagina. (T 345). Petitioner admitted that he had told

Officer Harris otherwise, however, he explained that he was just repeating to Officer Harris what Harris had told him [redacted] had said. (T 321-322, 345). On direct examination, petitioner said he made the statement because Harris had threatened him with the electric chair and he thought he would get the chair. (T 322). On cross-examination, petitioner denied knowing that he was confessing to a crime for which he thought he could get the electric chair. He then explained that he remembered what he did that evening, but he could not "remember too good" what occurred at the jail. (T 346-347). Petitioner remembered having his rights read to him at the jail and he understood those rights. He remembered being told he could stop talking at any time and request a lawyer or just stop talking. (T 341-342).

In closing arguments, petitioner's attorney refuted the State's inference that [redacted] was slow or did not communicate well with these comments:

> Ladies and gentlemen, she gave a recitation up there on human anatomy that I would think I couldn't have given when I was 16 or 17 years old. So, the girl understood what I was asking her and she answered the questions. Now, I would argue to you strongly that the way I asked her the question with the knowledge that she indicated that she had, she understood what I asked her when she answered it.

(T 353-353).

At the hearing on the motion for new trial, petitioner alleged error in the admissibility of his confession. The court

denied the motion. No arguments were made at this hearing concerning [redacted] incompetency to testify at trial. (R 65-66, 76-78, 87).

SUMMARY OF ARGUMENT

With regard to the first issue, it is the State's position that petitioner has failed to carry his initial burden set forth in State v. Neil, 457 So.2d 481 (Fla. 1984). While agreeing that under State v. Castillo, 486 So.2d 565 (Fla. 1986), petitioner's objection as to the improper use of peremptories was timely in that it was made before the jury was sworn, the State contends that petitioner did not demonstrate on the record at voir dire that there was a strong likelihood that the prospective jurors were being challenged solely on the basis of race. Neil at 486. In the case below, petitioner merely pointed out that the State exercised eight of nine peremptories to remove prospective black jurors. Such is simply insufficient to trigger a Neil inquiry. Furthermore, the State submits that Neil is not inconsistent with the test set forth in Batson v. Kentucky, 476 U.S. ___, 90 L.Ed.2d 69, 106 S.Ct. ___ (1986) for the use of peremptory challenges and is distinguishable from the holdings in State v. Jones, 485 So.2d 1283 (Fla. 1986) and Slappy v. State, 503 So.2d 350 (Fla. 3d DCA 1987). Finally, should this Court choose to examine the prosecutor's reasons for the peremptory challenges, the State submits that the reasons are clearly sufficient. The trial judge specifically found there was no systematic exclusion of prospective jurors based on race. Similarly, the First District Court of Appeal found the reasons sufficient. (A 4-5).

With respect to the second issue, the State submits that petitioner has not demonstrated that the trial judge's conclusion that petitioner's confession was voluntary was without basis in the evidence or predicated upon an incorrect application of the law. The trial judge's conclusions are clothed with a presumption of correctness which petitioner has failed to rebut. Petitioner was advised of his rights, understood his rights, had ample experience with the criminal justice system to understand the impact his confession could have, and still voluntarily chose to make a confession. Being advised of an incorrect sentence did not induce petitioner to confess, nor did the advice that it would be better to admit his part in the crime render his confession involuntary.

In connection with the third issue, petitioner is estopped from arguing [redacted] did not understand the difference between truth and lies in light of his argument at trial. Petitioner chose not to question [redacted] on voir dire and never raised an objection to her competency to testify until the direct appeal. The admissibility of her testimony did not constitute fundamental error. The State submits to address the merits of the issue would thwart the interests of justice. Finally, the trial judge did not abuse his discretion in concluding [redacted] was competent to testify, and even if he did, such error was harmless in light of the overwhelming evidence of petitioner's guilt.

ARGUMENT

ISSUE I (Restated)

THE TRIAL COURT DID NOT ERR IN DENYING PETITIONER'S MOTION TO DISMISS THE JURY PANEL AND MOTION FOR NEW TRIAL, INASMUCH AS PETITIONER FAILED TO DEMONSTRATE ON THE RECORD THAT THERE WAS A STRONG LIKELIHOOD THAT THE EIGHT BLACK POTENTIAL JURORS WERE CHALLENGED SOLELY BECAUSE OF THEIR RACE.

Petitioner first contends that the trial court erred when it denied his motion to dismiss the jury panel, as well as when it denied his motion for a new trial, because petitioner made a prima facie showing of racial discrimination in the State's use of peremptory challenges that was not sufficiently rebutted by the prosecutor's reasons for those challenges. In support of this argument, petitioner contends that to the extent the test set forth in State v. Neil, supra, for evaluating peremptory challenges cannot be squared with the test delineated by the Supreme Court of the United States in Batson v. Kentucky, supra, it cannot constitutionally exist. The State strongly disagrees with this analysis.

In Neil, this court departed from the test established in Swain v. Alabama, supra, and held that a party may be required to state the basis for the exercise of peremptory challenges under certain circumstances. Neil, a black man, had a jury pool consisting of thirty-five prospective jurors, thirty-one whites and four blacks. The state used peremptory challenges to remove

the first three blacks called. The defense objected to each challenge and moved to strike the entire pool. After hearing argument on whether the state's challenges were discriminatory and violated Neil's sixth amendment right to a trial by an impartial jury, the court held that the state did not have to explain its challenges. In directing the district court to remand for a new trial, this court held that the following test should apply to the evaluation of peremptory challenges:

> The initial presumption is that peremptories will be exercised in a nondiscriminatory manner. A party concerned about the other side's use of peremptory challenges must make a timely objection and demonstrate on the record that the challenged persons are members of a distinct racial group and that there is a strong likelihood that they have been challenged solely because of their race. If a party accomplishes this, then the trial court must decide if there is a substantial likelihood that the peremptory challenges are being exercised solely on the basis of race. If the court finds no such likelihood, no inquiry may be made of the person exercising the questioned peremptories. On the other hand, if the court decides that such a likelihood has been shown to exist, the burden shifts to the complained-about party to show that the questioned challenges were not exercised solely because of the prospective jurors' race. The reasons given in response to the court's inquiry need not be equivalent to those for a challenge for cause. If the party shows that the challenges were based on the particular case on trial, the parties or witnesses, or characteristics of the challenged persons other than race, then the

> inquiry should end and jury selection should continue. On the other hand, if the party has actually been challenging prospective jurors solely on the basis of race, then the court should dismiss that jury pool and start voir dire over with a new pool. [Footnotes omitted].

Neil at 486-487.

In Batson v. Kentucky, supra, the defendant was a black man. During voir dire, the prosecutor used his peremptory challenges to strike all four black persons on the venire, resulting in an all-white jury. Defense counsel moved to discharge the jury; however, the trial judge observed that parties were entitled to use their peremptory challenges to "strike anybody they want to." Batson at 90 L.Ed.2d 78.

The Batson Court re-examined that portion of Swain v. Alabama, supra, dealing with how a black defendant established a prima facie case of purposeful discrimination. The Court found that the Swain standard which did not permit a defendant to rely on the facts of his individual case alone was a crippling burden of proof; accordingly, the following test for the establishment of a prima facie case of purposeful discrimination was delineated:

> To establish such a case, the defendant first must show that he is a member of a cognizable racial group, and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection

practice that permits "those to discriminate who are of a mind to discriminate." Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race. This combination of factors in the empanelling of the petit jury, as in the selection of the venire, raises the necessary inference of purposeful discrimination.

In deciding whether the defendant has made the requiste showing, the trial court should consider all relevant circumstances. For example, a "pattern" of strikes against black jurors included in the particular venire might give rise to an inference of discrimination. Similarly, the prosecutor's questions and statements during voir dire examination and in exercising his challenges may support or refute an inference of discriminatory purpose. These examples are merely illustrative. We have confidence that trial judges, experienced in supervising voir dire, will be able to decide if the circumstances concerning the prosecutor's use of peremptory challenges creates a prima facie case of discrimination against black jurors.

Once the defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging black jurors. Though this requirement imposes a limitation in some cases on the full peremptory character of the historic challenge, we emphasize that the prosecutor's explanation need not rise to the level justifying exercise of a challenge for cause. (Citations omitted).

Batson at 90 L.Ed.2d 87-88.

The State submits that the tests set forth in Neil and Batson are virtually identical. Without pointing to specific language, petitioner contends that Batson makes it clear that race cannot constitutionally be a factor in jury selection at all. The State adamantly disagrees. Such an analysis overlooks explicit language in Batson to the contrary: "Although a prosecutor ordinarily is entitled to exercise permitted peremptory challenges for any reason at all, as long as that reason is related to his view concerning the outcome of the case to be tried, the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race . . ." (citations omitted). Id. at 90 L.Ed.2d 82-83. (emphasis supplied). Such language makes it crystal clear that, due to the very nature of peremptory challenges, the race of a prospective juror may sometimes be a factor in the decision to exercise a peremptory challenge. It simply cannot, however, be the sole factor. On this point, Neil and Batson are identical. See Neil, supra, 457 So.2d at 483, n.10, 488.

Such an argument also overlooks the Court's statement in Taylor v. Louisiana, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975); and reiterated in Batson at 90 L.Ed.2d 80, that it has never held that a defendant is entitled to a jury that mirrors the composition of the community. "Indeed, it would be impossible to apply a concept of proportional representation to the petit jury in view of the heterogeneous nature of our society." Batson at 90 L.Ed.2d 80, n.6.

Next, petitioner contends that the presumption in Neil that peremptories will be exercised in a nondiscriminatory manner cannot constitutionally exist with that portion of Batson that states defendants are entitled to rely on the fact that peremptory challenges constitute a jury selection practice that permits those to discriminate who are of a mind to do so. Once again, the State disagrees and asserts that the two presumptions are not in conflict. On this point, Batson simply states the obvious, in that if a prosecutor (or defense counsel) wanted to discriminate, he could use his peremptory challenges as a means to do so. It does nothing toward establishing, however, a fact that all proseuctors or defense attorneys will utilize their peremptories in a discriminatory fashion. Stated another way, the Batson presumption would require an initial judicial finding that a prosecutor was discriminatory in the use of the peremptories, and this is no different than the procedure set forth in Neil. The Neil presumption, more simply put, is that the Supreme Court of Florida expects members of its bar to perform their professional functions in an ethical manner.

Thirdly, petitioner points to the fact that Neil, at note 10, specifically states that the exclusion of a number of blacks is insufficient by itself to trigger an inquiry into the reasons for the exercise of peremptories, while Batson recognizes that a "pattern" of strikes against prospective black jurors might give rise to an inference of discrimination. The State submits that

these premises are also compatible. Both are simply stating that the number of blacks struck from a particular jury is one of the factors that might be used to establish purposeful discrimination.

Furthermore, both Batson and Neil accord great deference to the trial judge's ability to discern discrimination in the exercise of peremptories. Inasmuch as the Batson and Neil tests are entirely capable of co-existing, the State asserts here, as it did below, that petitioner failed to carry his initial burden, of demonstrating on the record that there is a strong likelihood that the challenged persons were removed solely because of race.[1] The only argument petitioner raised at voir dire was that eight of the nine challenges exercised by the State had been used to exclude black potential jurors. According to petitioner, the prosecutor was obviously attempting to provide an all-white jury for a black defendant. At no time during voir dire did petitioner contest the exclusion of any one specific juror, nor did petitioner point out that the other remaining jurors were similar in any manner to the excluded jurors. Without requiring the State to provide its reasons for excluding the jurors, the trial court denied petitioner's request to strike the panel. The

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1 The State agrees that petitioner's objection, made before the jury was sworn, was timely raised under State v. Castillo, supra.

judge did not find a sufficient likelihood of discrimination; therefore, the State was not required to explain its motives.

Relying on Neil, supra, other Florida courts have similarly held that pointing out the exclusion of a number of blacks is, by itself, insufficient to trigger an inquiry into a party's use of peremptories. See, Finklea v. State, 471 So.2d 608 (Fla. 1st DCA 1985) (nine prospective jurors excluded upon peremptory challenges were black, appellant faced all-white jury); Cotton v. State, 468 So.2d 1047 (Fla. 4th DCA 1985) (record reflects exclusion of a number of blacks from jury, in almost each instance was a valid basis for exclusion other than race); Taylor v. State, 491 So.2d 1150 (Fla. 4th DCA 1986) (prosecutor used peremptories to exclude five blacks and three whites from jury pool); Macklin v. State, 491 So.2d 1153 (Fla. 3d DCA 1986); Rose v. State, 492 So.2d 1353 (Fla. 5th DCA 1986) (no error in trial court's exercise of discretion in overruling defense objection that two blacks were excluded based on race); Koenig v. State, 497 So.2d 875 (Fla. 3d DCA 1986); Robinson v. State, 498 So.2d 626 (Fla. 1st DCA 1986), Thomas v. State, 502 So.2d 994 (Fla. 4th DCA 1987).

In Woods v. State, 490 So.2d 24 (Fla. 1986), cert. denied, 107 S.Ct. 446, this Court reaffirmed the principles established in Neil. In Woods, after the State had used ten peremptories, the defense objected contending six of those had been exercised against blacks and that the State had removed every black that

was on the jury. The record actually showed that out of nine black prospective jurors, one was challenged for cause, five were excused by the State, and the remaining two were excused by defense. Citing to Neil's holding that the exclusion of a significant number of black potential jurors is insufficient to require an inquiry, this Court held that Woods had failed to demonstrate a substantial likelihood that the State exercised its peremptory challenges solely on the basis of race. Woods, supra, and the instant case are indistinguishable.

The State reiterates that, absent a showing made on the record by the complaining party that the challenged persons are members of a distinct racial group and that there is a strong likelihood that they have been challenged solely because of their race, no inquiry is needed pursuant to Neil and Woods. In the case at bar, the prosecutor placed his reasons for excluding the eight prospective jurors on the record at petitioner's hearing on a motion for new trial. Those reasons are quoted verbatim on pages six through eleven of petitioner's brief on the merits. Should this Court choose to examine the validity of those reasons, it is the State's position that each potential juror was excluded based on valid reasons. It is essential to remember that a reason for exercising a peremptory challenge does not have to rise to the level necessary to justify removal for cause. Batson, supra; Neil, supra. Rather, the reasons need only be based on the particular case at trial, the parties or witnesses,

or characteristics of the challenged persons other than race. Neil 457 So.2d at 487. As stated in Batson, supra, the prosecutor must articulate a neutral explanation related to the particular case to be tried. 90 L.Ed.2d at 88. Both Batson, supra, and Neil, supra, accord great deference to the trial judge's findings with regard to whether a sufficient showing has been made to trigger an inquiry.

Turning now to the specific reasons articulated by the prosecutor for exercising eight of the nine peremptories, the State submits that the reasons were valid. The fact as noted by petitioner that the prosecutor did not specifically question some of the jurors to elicit the information upon which he based his decision to exercise the peremptory, is not dispositive and does not render the reasons invalid. This is so, because in the present case, petitoner's crime was committed in a small rural community. Some of the reasons articulated for exclusion, therefore, were within the personal knowledge of the prosecutor. Indeed, such circumstances were specifically referred to by the trial judge when he found no systematic exclusion on the basis of race, (R 86), and are set out in full on pages seven through eight of this brief.

The prosecutor excused M[redacted]B[redacted] during the first round because, although he was single, he had two children who did not live with him. (R 72, T 16-17). As this was a child sexual abuse case, a prosecutor would obviously prefer jurors who

could sympathize with the victim as if she were their own child. The potential affinity to the victim would not be as great if the juror's own children did not live with him. In addition, the prosecutor noted he could not get a good feel for the truthfulness of B[redacted]'s answers by the way he was responding to questions. See, Woods, supra, at 26, n.4 (not wanting a reluctant juror is not evidence of discrimination); Taylor, supra, (prosecutor did not like the attitude of two jurors).

During the second round, the State struck two black jurors, E[redacted] W[redacted] and J[redacted] D[redacted] Ms. W[redacted] was single and had no children. (T 11-12). In addition, the prosecutor noted that before and after he questioned Ms. W[redacted], he observed her sitting with a family he presumed to be that of defendant (because he had observed petitioner talking with that family). (R 73). Ms. D[redacted] was single with three adult children. (T 40). The prosecutor knew that she worked in a place that frequently experienced criminal activity, that she had been called to testify as a witness many times, and was always hesitant to become involved. (R 74). See, Woods, supra.

W[redacted] A[redacted] was struck during the third round. He was single, had no children, and wanted to study criminal justice. (T 60-63). Although A[redacted] said he did not know anything about the prosecutor, the prosecutor remembered that he had prosecuted Mr. A[redacted]'s brother. See, Cotton, supra, (one prospective juror's son prosecuted by the state).

E[redacted] M[redacted] was excused by the State because she had served on a jury before and had a bad experience during jury deliberations. (T 90-94). Although she ultimately stated she felt she could be fair, the whole context of her comments illustrated an extreme reluctance to serve, an excusal for which in Woods, supra, was not equated with discrimination. See also, Taylor, supra. The State had also prosecuted her brother, which was a valid reason for exclusion in Cotton, supra.

R[redacted] B[redacted] was excused during the fifth round. The prosecutor did so because he "hit it off" wrong with B[redacted] initially and felt he did not want to respond. (R 76). Such behavior can clearly be categorized as a reluctance to serve or as attitude problems. See, Woods, and Taylor, supra.

R[redacted] E[redacted] was excluded because the prosecutor did not feel he was taking the proceedings seriously. (R 72-73). Again, this is a perception on the prosecutor's part of E[redacted]'s attitude. H[redacted] J[redacted] was excused during the final round because he knew some of the witnesses and was distantly related to the victim. (R 71, T 134-142). A close examination of the record, therefore, clearly reveals that the prosecutor's reasons for choosing to exercise eight peremptory challenges were entirely neutral and valid.[2]

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[2] Petitioner cites to Davis v. Georgia, 429 U.S. 122, 50 L.Ed.2d 339, 97 S.Ct. 399 (1976) for the proposition that if even one

We turn next to petitioner's assertion that he is not relying merely upon the numbers of blacks excluded by the prosecution, but also upon the reasons for exclusion. In this regard, petitioner contends that the court's opinion is in conflict with this Court's decision in State v. Jones, 485 So.2d 1283 (Fla. 1986), as well as with Slappy v. State, 503 So.2d 350 (Fla. 3d DCA 1987). The State strongly disagrees that Blackshear v. State, 12 F.L.W. 806 (Fla. 1st DCA March 20, 1987) is in conflict with either of these decisions. In fact, the State's position is that the instant case is actually consistent with both opinions.

In Jones, supra, this Court approved the Third District's reversal of the defendant's grand theft conviction on the basis that the trial court had erred in not conducting a Neil inquiry. In that case the State used five of its six peremptory challenges to remove the five black prospective jurors questioned on voir dire. As this Court pointed out, "[e]ach of these had declared that he or she could be fair and impartial and demonstrated no reluctance to sit on the jury. No apparent reason, other than color, for their removal exists." Jones at 1284. (emphasis added). Contrary to petitioner's analysis of

footnote cont.
potential juror is erroneously excluded, petitioner is entitled to a new trial. The State would submit, however, that Davis is inapplicable to the case at bar, in that it dealt with the exclusion of one juror from a death penalty case who voiced only a general objection to the death penalty.

Jones, this Court did not hold a Neil inquiry should have been conducted due to the number of blacks excluded. It was the prospective black jurors' responses and attitudes at voir dire and the fact that no apparent reason for their removal existed on the record that caused this Court to conclude the defendant had met his initial burden of demonstrating a strong likelihood that the peremptory challenges were exercised solely on the basis of race and that, therefore, a Neil inquiry should have been conducted.

Furthermore, the Blackshear opinion is not in express and direct conflict with this Court's decision in Jones. The First District held in Blackshear that the following objection made by petitioner's counsel would not suffice to trigger a Neil inquiry: "Eight challenges have gone to exclude black potential jurors, and [the State] is obviously making an attempt to provide a jury that is of a different race than the defendant" (A 2). In order to compel the State to explain its reasons for excluding prospective black jurors, petitioner first had to show there was no other apparent reason for their removal other than their race. Petitioner never made this showing, as obviously the defendant did in Jones. Accordingly, the First District, relying on this Court's comments in Neil, supra at 487 n.10, held that "the mere exclusion of a number of blacks by itself is insufficient to entitle a party to an inquiry into the other party's use of peremptories." This statement of law does not expressly and directly conflict with this Court's decisions, but

rather is consistent with this Court's prior opinions. See Neil, supra, and Woods v. State, supra.

In Slappy v. State, supra, the State would point out initally that it has nothing to say with regard to a defendant's initial burden of demonstrating that there is a strong likelihood that the State's peremptory challenges are being exercised against black prospective jurors solely because of their race. Rather, Slappy discussed the State's burden in articulating neutral reasons for the exclusion of blacks after a prima facie case had been established.

In that regard, the State asserts that the present case is also distinguishable from Slappy. In Slappy, the court found that the trial court had erred when it accepted the state's explanation for the exercise of its peremptories at face value. The court set out the colloquy between the trial judge and the prosecutor regarding those reasons and noted, "With a hint of frustration--as if legally obligated to accept the State's explanation--the trial judge concluded his questioning: THE COURT: Anyhow, I made the inquiry." Slappy, supra, at 352. Such is clearly not the case here. Sub judice, the trial judge specifically stated his reasons as to why he found the prosecutor's reasons for exclusion satisfactory. Furthermore, in the present case, unlike in Slappy, the trial judge specifically found that the peremptory challenges were not racially motivated. See also, Kibler v. State, 501 So.2d 76 (Fla. 5th DCA

1987); Parker v. State, 476 So.2d 134 (Fla. 1985).

Finally, petitioner relies upon Slappy to support his contention that the prosecutor's reasons for exercising his peremptories were not supported in the record because he used as reasons some points about which he failed to question individual jurors. Such reasoning ignores the fact that, due to the difference in the size of the communities involved, the prosecutor had personal knowledge of the reasons upon which he based some of his peremptories. In the present case, the crime occurred in the small town of Greenville in Madison County, while the offenses in Slappy, supra, occurred in Dade County. It would be highly unlikely that a prosecutor in Dade County would have personal knowledge regarding individual prospective jurors.

Inasmuch as petitioner has failed to demonstrate that a Neil inquiry was needed in the present case, or, alternatively, that any of the reasons used by the prosecution were invalid, the State submits that petitioner's sexual battery conviction must be affirmed.

ISSUE II (Restated)

PETITIONER HAS FAILED TO REBUT THE PRESUMPTION OF CORRECTNESS WHICH ATTENDS THE TRIAL JUDGE'S CONCLUSION THAT PETITIONER'S CONFESSION WAS FREELY AND VOLUNTARILY MADE; THEREFORE, THIS COURT SHOULD AFFIRM.

Petitioner argues on pages twenty-seven through twenty-nine of his brief that he was told he would be better off if he confessed and he was "threatened" with the electric chair. Petitioner therefore contends that the court erred in concluding the confession was voluntarily made. Petitioner's statement on page twenty-eight, that he was "threatened" with the death penalty, was an issue of fact that was to be determined by the trial court in determining whether the confession was voluntary. Petitioner maintained below that Officer Harris told him at the first interview that if he did not tell what part he had in the sexual battery they were going to give him the electric chair. Officer Harris testified he never "threatened" petitioner with the electric chair. Harris did, however, inform petitioner in the first interview that sexual battery was a capital offense which carried a possible penalty of the electric chair. Harris was unaware at that time that the law had changed and that the chair was no longer a potential penalty.

It is well-established that it is the role of the trial court to judge the credibility of witnesses and weigh conflicting evidence. The trial judge's conclusions come to the appellate

court clothed with a presumption of correctness. Acensio v. State, 497 So.2d 640 (Fla. 1986). It is not the function of an appellate court to substitute its judgment for that of the trier of fact. State v. Chorpenning, 294 So.2d 54 (Fla. 2d DCA 1974); see also, Cohen v. Mohawk, 137 So.2d 222 (Fla. 1962). The appellate court should interpret the evidence and all reasonable inferences capable of being drawn therefrom in the light most favorable to the trial judge's conclusions. DeCastro v. State, 359 So.2d 551 (Fla. 3d DCA 1978); McGriff v. State, 497 So.2d 1296 (Fla. 3d DCA 1986). Applying these principles to the instant case, petitioner cannot now argue he was "threatened" with the electric chair inasmuch as the trial court concluded that he was not.

The sole issue this Court must determine is whether the trial court's ultimate conclusion that the confession was voluntary is clearly without basis in the evidence or predicated upon an incorrect application of the law. State v. Riocabo, 372 So.2d 127 (Fla. 3d DCA 1979). It is undisputed that petitioner was informed of all his rights and that he understood them. Petitioner had been arrested thirty to forty times and on several of those occasions he had been informed of those same rights by arresting officers. Petitioner admitted that on those numerous occasions he knew that he did not have to talk. Petitioner made the confession in this case fully aware of his rights to remain silent, to discontinue questioning, and to request the presence

of an attorney. While he contends he made the confession because he was threatened with the electric chair, on cross-examination petitioner denied being aware of the fact that he was confessing to a crime for which he thought he could get the electric chair. It is interesting to note that after petitioner was allegedly "threatened" with the chair, he denied the allegations. Of course, Officer Harris knew nothing more at that point than [redacted] allegation that petitioner as well as Brooks, had "messed with her." Over twelve hours later petitioner finally felt the impact of the "threat" and confessed. This was after Harris had informed him that [redacted] had told them what had happened and his own investigation substantiated her accusations. Finally, petitioner claimed he was offered the chance to plead to a lewd and lascivious charge in exchange for testimony against Brooks; however, Harris denied such an offer was made.

Resolving these facts in the light most favorable to the trial judge's findings, it is clear petitioner did not confess because he was threatened with the electric chair or because he was told it would be better to admit his part in the crime. Confessions are not rendered inadmissible because the police tell the accused it would be easier on him if he told the truth. Paramore v. State, 229 So.2d 855 (Fla. 1969), modified on other grounds, 408 U.S. 935, 92 S.Ct. 2857, 33 L.Ed.2d 751 (1972); Bush v. State, 461 So.2d 936 (Fla. 1985), cert. denied, 106 S.Ct.

1237; Chorpenning, supra, at 56. The only time this would render a confession inadmissible is when the advice of the police officer is accompanied by an inducement or suggestion of a benefit. Frazier v. State, 107 So.2d 16 (Fla. 1958). The police never told petitioner they could get him a lighter sentence if he confessed. Telling petitioner he was charged with a crime punishable by the chair was certainly not an inducement or suggestion of a benefit. If anything it should have encouraged petitioner not to say a word, particularly since he was well aware of his rights from his wealth of experience with the criminal justice system. Even a statement by a law enforcement official, telling an accused only if he confessed would it be possible to escape the death penalty, has been held to be insufficient to render a confession inadmissible where the accused is informed of and understands his rights. Milton v. Cohran, 147 So.2d 137 (Fla. 1962). See also, United States v. Ballard, 586 F.2d 1060, 1063 (5th Cir. 1978) holding that a noncoercive statement of possible penalties which an accused faces may be given to the accused without leading to an involuntary statement.

Petitioner attempts to distinguish Milton, supra, on the basis that in the case below imposition of the death penalty was not a possibility, and thus, was coercive legal advice. Frazier, supra, at 24 makes it clear that the truth or falsity of an inducement is irrelevant. The issue is whether the inducement is

of a nature calculated under the circumstances to induce a confession. In this case Officer Harris gave petitioner a truthful statement of what he thought was the proper penalty. Petitioner responded by denying the allegations. The trial court concluded the subsequent admission under all the circumstances was not an induced confession. As petitioner has failed to demonstrate why that finding is clearly erroneous and has failed to overcome the presumption of correctness accorded to the judge's conclusions, this Court should uphold the admission of the confession in the instant case.

ISSUE III (Restated)

PETITIONER IS PRECLUDED FROM RAISING FOR THE FIRST TIME ON APPEAL ALLEGED ERROR IN THE TRIAL COURT'S DECISION TO ALLOW THE VICTIM TO TESTIFY; REGARDLESS OF THE FAILURE TO TIMELY OBJECT, PETITIONER HAS NOT DEMONSTRATED AN ABUSE OF DISCRETION TO CONSTITUTE ERROR.

With regard to this issue, on the one hand, petitioner's attorney at trial urged the jurors to recognize how bright [redacted] was and how well she understood and responded to the questions he asked her and to conclude her statement denying petitioner put his penis in her mouth was the truth. (T 352-353). On the other hand, petitioner now is taking the position that [redacted] was incompetent to testify at trial inasmuch as the record demonstrates she did not understand the difference between a truth and a lie. Not only is petitioner estopped from raising this argument, see, McPhee v. State, 254 So.2d 406 (Fla. 1st DCA 1971), but petitioner never objected to [redacted] testifying. The court specifically gave petitioner an opportunity to voir dire [redacted], which opportunity was declined. (T 187). Even after [redacted] changed her testimony on cross-examination (clearly related to the fact that petitioner was staring her down and [redacted] was afraid of him), petitioner did not see fit to object on the basis that [redacted] was incompetent to testify. After [redacted] indicated on proffer that she was scared of petitioner, she said she had told the

truth when she earlier testified petitioner had put his penis in her mouth. Petitioner did not see fit to object at that point on the grounds that she was incompetent to testify, and obviously so. Petitioner benefitted by [redacted] inconsistent testimony. Neither did petitioner raise this objection at either motion for judgment of acquittal. Finally, petitioner is now asking for a new trial. However, petitioner never raised this issue in his motion for new trial.

Petitioner contends he need not object because a determination of competency is the duty of the trial court. The Florida Supreme Court was not persuaded by a similar argument in Lucas v. State, 376 So.2d 1149 (Fla. 1979). In Lucas, the defendant alleged error in allowing undisclosed rebuttal witnesses to testify without a Richardson inquiry. The court clearly had a duty under case law to conduct the inquiry. In refusing to address the issue the Florida Supreme Court stated, "This court will not indulge in the presumption that the trial judge would have made an erroneous ruling had an objection been made and authorities cited contrary to his understanding of the law." Id. at 1152. The rationale for the rule requiring contemporaneous objections is clear:

> The requirement of a contemporaneous objection is based on practical necessity and basic fairness in the operation of a judicial system. It places the trial judge on notice that error may have been committed, and provides him an opportunity to correct it at an early stage of the

> proceedings. Delay and an unnecessary use of the appellate process result from a failure to cure early that which must be cured eventually. . . Except in the rare cases of fundamental error, moreover, appellate counsel must be bound by the acts of trial counsel.

Castor v. State, 365 So.2d 701, 703 (Fla. 1978); see also, Leon v. State, 498 So.2d 680 (Fla. 3d DCA 1986).

Petitioner next argues no objection was required because the error was fundamental. As stated in Clark v. State, 363 So.2d 331 (Fla. 1978), fundamental error is error which goes to the foundation of the case or goes to the merits of the cause of action. In making this argument petitioner is failing to acknowledge testimony from [redacted] mother, from Officers Harris and Livingston, Dr. Dulay, and most significantly, petitioner's confession. A thorough review of the record will indicate petitioner only stood to benefit from [redacted] testimony and her inconsistent statements. Without the opportunity to show inconsistency in [redacted] story, the statements [redacted] made to Dr. Dulay, her mother, and law enforcement officials would not have been questionable to the jurors in any manner. Clearly, fundamental error has not been demonstrated.

Petitioner next asks this Court to address the competency issue in the "interests of justice." Appellant relies on the case of Davis v. State, 348 So.2d 1228 (Fla. 3d DCA 1977), to support this request. The facts in this case do not indicate

whether the defendant raised a proper objection. The Davis court held that the trial court had abused its discretion in allowing a five-year old child to testify after hearing testimony that the child's mother told him what to say in court and had "refreshed" his memory regarding the incident many times. Accordingly, the court granted a new trial as that would best serve the interests of justice. Such circumstances are clearly absent in the case at bar. In this case, the State asserts addressing the merits of this issue, much less granting a new trial, would thwart the interests of justice. Addressing this issue would thwart estoppel principles as well as the purpose behind the contemporaneous objection rule.

In the event this Court addresses the merits of this issue, however, the State submits the following argument in support of the trial court's implicit ruling of competency. It is entirely within the sound discretion of the trial judge to decide whether an infant of tender years has sufficient mental capacity and sense of moral obligation to be competent as a witness. Such ruling will not be disturbed unless a manifest abuse of discretion is shown. Rutledge v. State, 374 So.2d 975, 979 (Fla. 1979), cert. denied, 446 U.S. 913, 100 S.Ct. 1844, 64 L.Ed.2d 267 (1980); Fernandez v. State, 328 So.2d 508 (Fla. 3d DCA), cert. denied, 341 So.2d 1081 (Fla. 1976). A decision regarding the competency of a child to testify is one peculiarly within the discretion of the trial judge because the evidence of

intelligence, ability to recall, relate, and to appreciate the nature and obligations of an oath are not fully portrayed by the bare record. Fernandez at 509. While [redacted] changed her testimony, the trial judge was able to view, first hand, why [redacted] denied the allegations on cross-examination which she had admitted as being true on direct. [redacted] explained why she changed her testimony and the trial judge was in the best position to determine the sufficiency of [redacted] explanation. The trial judge's reprimand to petitioner to not stare down the victim indicates his appreciation for what may not be absolutely clear on the bare face of the record. [redacted] knew that to tell the truth meant not to lie and she promised to tell the truth during the trial. Unlike the McKinnies, infra, case relied upon by petitioner, [redacted] testimony was not inconsistent because she was incompetent to testify; rather, her testimony was inconsistent because she was scared of petitioner and the entire courtroom setting. Compare, McKinnies v. State, 315 So.2d 211 (Fla. 1st DCA 1975). Simply stated, the record supports the judge's determination of competency. As no abuse of discretion has been demonstrated by petitioner, no error has been shown. Finally, to the extent any error may have occurred, the State contends in light of the overwhelming evidence of guilt, the error is harmless and does not require a new trial.

CONCLUSION

Based on all the foregoing, the State respectfully requests this Court to affirm Petitioner's sexual battery conviction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by hand delivery to Carl S. McGinnes, Assistant Public Defender, Post Office Box 671, Tallahassee, Florida 32302 on this 10th day of September, 1987.

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