IN THE SUPREME COURT
OF THE STATE OF FLORIDA

ERNEST FITZPATRICK, JR.,

Appellant,

vs. Case No. 70,927

STATE OF FLORIDA,

Appellee.

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APPELLANT'S REPLY BRIEF

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ARGUMENT

I. APPELLANT'S DEATH SENTENCE IS INAPPROPRIATE, EXCESSIVE AND DISPROPORTIONATE IN VIOLATION OF FLORIDA LAW AND THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

The State simply is incorrect when it states "this court rejected the proportionality argument in [Fitzpatrick I]." State's Brief at 8. The proportionality argument was not raised by Appellant on his first appeal.

Moreover, this general theme in the State's brief - that this Court is bound in this Appeal by its Fitzpatrick I decision -is patently inconsistent with this Court's decision on habeas corpus to "reverse the sentence of death and remand for a new sentencing hearing before a new jury specially empanelled for this purpose." A new hearing would provide no cure for prejudicial and reversible error if the old record remained authoritative.

In contrast to the record in Fitzpatrick I, the instant record contains express findings of three statutory mitigating circumstances, strong evidence of nine non-statutory mitigating circumstances,[1] and evidence that contradicts the resentencing court's determination that several aggravating circumstances exist. The resentencing court expressly recognized in its resentencing order the marked difference between the evidence presented in Fitzpatrick I and the evidence presented in the proceeding below. (R. 1721-22).

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[1] The resentencing court declined to find any of these non-statutory mitigators. See Issues VIII and IX in Appellant's Main Brief.

The State seems to ask this Court to apply the "law of the case" principle in an effort to ignore this overwhelming evidence that it cannot refute. However, that doctrine applies only to legal principles announced in a decision and only "so long as the facts on which the decision was predicated continue to be the facts in the case." 30 Fla. Jur. 2d, Appellate Review, Section 414. Indeed, in Proffit v. State, 510 So.2d 896 (Fla. 1987), this Court reduced Proffit's sentence to life imprisonment, noting that "the case presents a somewhat different record from Proffit's earlier sentencing appeal and includes more mitigating evidence." Id. at 897. Thus, Appellant turns to the record below.

The State concedes, as it must, that the extensive neurological, psychiatric, psychological, and lay evidence of Appellant's neurological disorder and insanity was unrebutted and that Appellant is the only death row inmate with his three mitigator psychiatric profile. **And, the State fails to cite a single case with similar aggravating and mitigating circumstances in which this Court has upheld the imposition of the death sentence.**

The State attempts to distinguish some, but not all, of the proportionality cases cited by Appellant, but the distinctions are unpersuasive. For example, while the defendants may have been initially found incompetent in Miller v. State, 373 So.2d 882 (Fla. 1979), and Mines v. State, 390 So.2d 332 (Fla. 1980), like Appellant, they were competent at the time of trial. The dispositive similarity between Miller and Mines, on the one hand, and Appellant's case, on the other, is that in all three cases mental

illness led to the crime. If there are dissimilarities, they are that Appellant, unlike Mines or Miller, established all three mental health related statutory mitigators and, unlike Mines or Miller, Appellant's crime was not heinous, atrocious, or cruel. Thus, proportionality review dictates that Appellant's death sentence cannot possibly stand while Mines' and Miller's are reversed.[2]

Moreover, the State's attempt to distinguish Proffit v. State, 510 So.2d 896 (Fla. 1987), is far from convincing. In both cases, there were felony murders that were not cold or calculated and did not involve abuse or torture of the victim. Although the other mitigating circumstances in Proffit were substantial (e.g., possible intoxication, no prior criminal record, the brevity of the capital offense), they were either similar to, or no more substantial than the three statutory, and many non-statutory mitigators that exist in Appellant's case.

The State implies that Appellant went into the real estate office with "a highly detailed plan" to commit murder; nothing could be further from the truth. To the contrary, the record undeniably shows that Appellant lacked the mental ability to form

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[2] The State does not attempt to distinguish Burch v. State, 343 So.2d 831 (Fla. 1977); Ross v. State, 474 So.2d 1170 (Fla. 1985); Thompson v. State, 456 So.2d 444 (Fla. 1984), all of which have been relied upon by Appellant. The State's attempt to distinguish Ferry v. State, 507 So.2d 1373 (Fla. 1987) and Jones v. State, 332 So.2d 615 (Fla.1976), because they involved jury overrides, is unavailing. A jury, like a sentencing judge, simply cannot conduct a Statewide proportionality review. Regardless of how a jury may have voted, only this Court can compare and reconcile the imposition of death sentences imposed throughout the State to guarantee proportionality.

any realistic plan. Indeed his "plan" was to take a bus to a bank, take a hostage outside the bank, march that hostage 500-900 feet up an open highway in broad daylight to the bank, rob the bank to obtain funds for the poor and to patent inventions like bionic body parts, and then "just sort of mingle with the crowd until things had quieted down and get back on the bus and leave." See Appellant's Main Brief at 6-13. Within a minute or two he had locked himself in a room within the real estate office. Within eight (8) minutes he was under arrest. Every witness - prosecution and defense, lay and expert - described Appellant as disordered, confused, out of touch with reality, and child-like. The death penalty is plainly disproportionate under all these circumstances.

II. FOUR AGGRAVATING CIRCUMSTANCES FOUND BY THE TRIAL COURT LACK A SUFFICIENT FACTUAL FOUNDATION

The State again contends that this Court may not re-examine whether the resentencing evidence established the aggravating circumstances because of this Court's decision in Fitzpatrick I. Appellant reiterates that, in light of the very different record in the instant appeal, this argument is totally without merit.[3] Indeed, in King v. State, 514 So.2d 354, 360 (Fla. 1987), this Court did precisely what Appellant asks the Court to do in this case.[4]

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[3] See the discussion, supra at 1-2, on the inapplicability of the doctrine of "law of the case" to this situation.

[4] The State seems to argue that King is limited to "evolving" areas of law [spelled in the State's Brief at 10 as "involving"]. This argument is without merit. It clearly is not just new legal principles, but also changes in facts proven at a resentencing hearing that require this Court to take a fresh look

Concerning the "great risk of death" aggravating circumstance, the State fails to even attempt to distinguish this case from Johnson v. State, 393 So.2d 1069 (Fla. 1980), or Lucas v. State, 490 So.2d 943, 946 (Fla. 1986), both of which were relied upon by Appellant.[5] Although the State describes the eight (8) minutes in the real estate office as a "raging gun battle," the facts show that Appellant fired one shot at the victim before Mr. Parks "immediately sprang forward and grabbed Appellant's arm ... and we started wrestling." (R. 632). While the gun went off during the wrestling because Mr. Parks attempted to discharge the weapon in order to unload the gun (R. 637-38), the other witnesses were outside of the room. Moreover, it is uncontradicted that Appellant was subdued and under arrest by the time the other officers arrived at the crime scene.

In response to Appellant's assertion that the evidence did not establish the "pecuniary gain" or "preventing lawful arrest" aggravating circumstances, the State concedes Appellant's points by making no argument other than reiteration of its flawed "law of the case" theme. The evidence in the proceeding below did not prove that Appellant shot the victim to facilitate a robbery. Indisputably, there was no robbery, nor even an attempt to rob. Indeed, the evidence shows quite the contrary; the shooting was a reflexive action as the victim's gun approached Appellant's head,

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at a resentencing appeal. See, Proffit v. State, 510 So.2d 896, 897 (Fla. 1987).

[5] Nor has the State attempted to distinguish the numerous other cases cited on page 24 of Appellant's Main Brief.

after Appellant had locked himself in a room within an office 500-900 feet from the bank. See Appellant's Main Brief at 12.

Similarly, the State does not respond to the argument that Appellant did not shoot the victim for the purpose of avoiding arrest. The evidence shows that if Appellant intended to avoid arrest he could, and would have left the realty office when he had many unobstructed opportunities to do so.

Finally, with respect to the finding of the previous conviction of a felony, for the reasons set forth in his Main Brief at 27, Appellant asserts that Wasko v. State, 505 So.2d 1314 (Fla. 1987) requires this Court to revisit and reverse its Fitzpatrick I holding on this aggravating circumstance. Cf. Ruffin v. State, 397 So.2d 277 (Fla. 1981); King v. State, 390 So.2d 315 (Fla. 1980).

III. SEVERAL AGGRAVATING CIRCUMSTANCES WERE BASED ON THE SAME ASPECT OF THE CRIME

The State makes no substantive response to Appellant's argument that the aggravating circumstances in his case were at least doubled, and often tripled. Specifically, the State fails to explain why the kidnapping aspect of Appellant's case could be used to establish the underlying felony and, in whole or major part, four different aggravating circumstances. Nor does the State even address any of the holdings of numerous applicable cases cited by Appellant, many of which were decided after Fitzpatrick I, e.g., Griffin v. State, 474 So.2d 777 (Fla. 1985); Oats v. State, 446 So.2d 90 (Fla. 1984); See also White v. State, 403 So.2d 331 (1981).

IV. THE STATE INTENTIONALLY PLACED BEFORE THE JURY

APPELLANT'S JUVENILE HISTORY EVEN THOUGH THIS COURT REVERSED THE PREVIOUS SENTENCE BECAUSE THIS SAME EVIDENCE WAS IMPROPERLY ADMITTED

In response to this argument, the State relies upon Muehleman v. State, 503 So.2d 310 (Fla. 1987) and Parker v. State, 476 So.2d 131 (Fla. 1985), both of which are distinguished from this case on their facts in Appellant's Main Brief at 40. Indeed, Parker was decided by this Court prior to its habeas corpus decision in Appellant's case, indicating that this Court found it readily distinguishable. The State makes no response to these dispositive distinctions, e.g., the defense in Parker and Muehleman "opened the door" to the criminal history evidence, while Appellant did not.

The State's unlimited contention that the jury "should not be forced to analyze a defendant's character in a vacuum," State's Brief at 13, intentionally ignores the fact that it was sanity, not character or criminal history, that was at issue below.

In Robinson v. State, 487 So.2d 1040, 1042 (Fla. 1986), during cross-examination of defense witnesses, the State brought up crimes that Robinson was supposedly involved in, but with which he had been neither charged nor convicted. Like here, the State argued that this evidence was admissible to cross-examine witnesses. This Court wrote:

> Arguing that giving such information to the jury by attacking a witness' credibility is permissible is a very fine distinction, a distinction we find to be meaningless because it improperly lets the state do by one method something which it cannot do by another. Hearing about other alleged crimes could damn a defendant in the jury's eyes and be excessively prejudicial. We find the state went too far in this instance.

Whatever doctrinal distinction may be abstractly devised in an advocate's attempt to distinguish between using the juvenile evidence to rebut a phantom mitigator and using it to cross-examine a witness who did not rely on it, nor testify inconsistently with it, (R. 8, 692-94), "the result of such evidence being employed will be the same, improper considerations will enter into the weighing process." Dragovich v. State, 492 So.2d 350, 355 (Fla. 1987). In short, "the state may not do indirectly that which [this Court has] held they may not do directly." Dragovich at 355.

The State's contention that Skipper v. South Carolina, 106 S. Ct. 1669 (1986) "announced an open door policy of the admission of character evidence in capital cases," State's Brief at 14, is a gross misreading of that case. Skipper reaffirms the rule of Lockett v. Ohio, 438 U.S. 586 (1978), that a defendant has the right to introduce at sentencing any evidence that could be considered by the sentencer as mitigating. Skipper does not stand for the proposition that the State can dump into the record anything about a defendant's character it may wish, regardless of whether it is relevant to an aggravating or mitigating circumstance, or whether it is reliable.

In any event, it was the plainest error to allow the State below to use partial fragments of remote, destroyed and unreliable juvenile records to intentionally inflame the jury about an indisputably fictitious "criminal history" (R. 694) and "previous criminal record" (R. 703).

For all of these reasons, the State's deliberate defiance of this Court's order in Fitzpatrick II should not be sanctioned.

V. THE INTRODUCTION INTO EVIDENCE OF APPELLANT'S PRIOR TESTIMONY, GIVEN UNDER COMPULSION AT HIS FIRST SENTENCING HEARING, VIOLATED HIS PRIVILEGE AGAINST SELF-INCRIMINATION

The State argues that the coercion that produced Appellant's prior testimony in Fitzpatrick I was different from the coercion that produced the prior testimony in the Hawthorne trilogy, discussed in Appellant's Main Brief at 44. This argument wholly misses the mark. Testimony is coerced and involuntarily whether it is the product of an illegal confession or, as in the instant case, an illegally and unconstitutionally admitted juvenile history.[6] The specific reason that the defendant is compelled to give involuntary testimony in each case may be different, but in both cases the defendants are compelled to give involuntary testimony because of the State's illegal and unconstitutional practices, and in both cases the subsequent use of that coerced testimony by the State allows it to benefit from its own illegal acts.

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[6] Although this Court in Fitzpatrick II did not have to reach the constitutional issue in light of the Maggard basis for its decision, it is clear that the Florida death penalty statute would be unconstitutional, as applied, if the State were able to routinely introduce in its sentencing case-in-chief evidence, like Appellant's juvenile history, that is relevant to no aggravating or mitigating circumstance in issue. To be constitutional, the discretion of the capital sentencing decision-maker must be limited to a consideration of evidence relevant to aggravating or mitigating circumstances. Gregg v. Georgia, 428 U.S. 153 (1976).

VI. THE STATE'S USE OF PEREMPTORY CHALLENGES WAS RACIALLY BIASED

In response to the overwhelming evidence that thet State used its peremptory challenges in a racially biased manner, the State argues that a "racially biased prosecutor would hardly agree to leave any blacks on the jury much less these [two] particular women." State's brief at 16. This precise argument -- that in order to establish a Neil violation, a defendant must show that all blacks were removed from the jury because of their race -- has been expressly rejected by every court that has considered it. Fleming v. Kemp, 794 F.2d 1478, 1483 (11th Cir. 1986); Floyd v. State, 12 F.L.W. 2105 (3rd DCA 1987); Hale v. State, 487 So.2d 115 (Fla. 2nd DCA 1985); U.S. v. Gordon, 817 F.2d 1538 (11th Cir. 1987); U.S. v. David, 803 F.2d 1567 (11th Cir. 1986); Powell v. State, 355 S.E. 2d 72 (Ga. Ct. App. 1987); Rodgers v. State, 725 S.W. 2d 477 (Tex. Ct. App. 1987).[7]

The State also argues that this Court is bound to accept the prosecutor's self-serving explanation that he struck Juror Jackson because of her uncertainty about the death penalty, when the record unequivocally establishes that she gave the identical answers on the death penalty as white jurors who were not challenged.[8] Where

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[7] Although the State cites Griffith v. Kentucky, 93 L.Ed. 2d 649 (1987) and Parker v. State, 476 So.2d 134 (Fla. 1985) for the proposition that the State must attempt to remove all blacks from the venire in order to establish a Neil violation, neither of these cases establishes, or even suggests this proposition.

[8] Ms. Jackson stated that "in some cases I can see [imposing the death penalty]; and in some cases I can't." (R. 281). She stated that she would listen to, and apply the law, that she could vote for the death penalty, and that such a

a prosecutor asserts a motivation that is diametrically opposed to the record, the prosecutor's asserted reason plainly is pretextual.

Moreover, in the instant case it was the resentencing judge, who the State concedes was in the best position to detect bias, State's Brief at 17, who made an apparent determination that race was involved in the prosecutor's voir dire decisions. (R. 374). The only reason that the resentencing court took no remedial action is because it erroneously beieved it had no power to do so.

Once again, the State makes little or no attempt to distinguish the cases relied upon by Appellant, e.g., Floyd v. State, 12 F.L.W. 1205 (Fla. 3d DCA 1987); Hale v. State, 480 So.2d 115 (Fla. 2d DCA 1985); Slappy v. State, 503 So.2d 350 (Fla. 3d DCA 1987), except for an unhelpful and inaccurate rhetorical argument that Slappy "appears to be bottomed on cases decided by the California Supreme Court during the tenure of the now repudiated Chief Justice Rose Bird."

Finally, the State's effort to convert a racial slur-certain black voir dire jurors were better "as far as black people go" - into a statement of racial neutrality is remarkably unpersuasive. Jurors must be selected on racially neutral criteria[9];

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decision would be her own. (R. 281-85). See Appellant's Main Brief at 47.

[9] Indeed, the Constitution so requires. Batson v. Kentucky, 106 S.Ct. 1712 (1986). Although the Courts have continually rejected challenges to the death penalty based upon statistics which demonstrate racial disparity, McCleskey v. Kemp, __U.S.__, 107 S. Ct. 1756 (1987), it is because there are "safeguards designed to minimize racial bias in the process." Id. at 1778. One of the most important safeguards is the prohibition against the exercise of prosecutorial discretion on

the fact that the prosecutor below knew he could not strike all black venire jurors without inviting reversal does not validate the peremptory disqualification of some black jurors for patently racial reasons.

VII. THE COURT ERRED IN FAILING TO STRIKE FOR CAUSE MRS. HARRIET MAJORS, A VENIRE JUROR

The record demonstrates that one of the jurors was one of the "very closest friends" of the critical State's witness and one of the victims. (R. 458-59). The State contends that Appellant is prohibited from making this argument because Appellant could have challenged her peremptorily. However, at the time Appellant challenged for cause Mrs. Majors, he had one remaining peremptory challenge, which he used against another prospective juror. (His request for additional peremptory challenges was denied (R. 530).) Thus, appellant was unable to use that challenge to "backstrike" Mrs. Majors. As this Court stated in Hill v. State, 477 So.2d 553, 556 (Fla. 1985):

> [I]t is reversible error for a court to force a party to use peremptory challenges on persons who should have been excused for cause, provided the party subsequently exhausts all of his or her peremptory challenges and an additional challenge is sought and denied.

Finally, it is no defense for the State that Ms. Majors stated that she would "do the best that I could" to be fair. (R. 466). See State's Brief at 19. She also said that "it would be hard, I think, to be totally impartial. I don't know. I don't know how I would react to [my personal friendship with one of the

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the basis of race. Id. at 1775, n. 30.

victims]." (R. 460). It is difficult to seriously argue that Ms. Major's ability to be fair was not "substantially impaired." Wainwright v. Witt, 105 S.Ct. 844 (1985).

VIII. THE COURT ERRED BY FAILING TO FIND AND WEIGH SEVERAL NON-STATUTORY MITIGATING CIRCUMSTANCES

The State responds to this argument merely by stating that a sentencing court is not required to find non-statutory mitigating factors in every case. Of course, this is true. However, a sentencing court's discretion in this regard is not unlimited. Where evidence, especially uncontradicted evidence as in the instant case, clearly establishes non-statutory mitigating circumstances, they should be weighed in the life-death equation.

In this case, there is no factual dispute about the existence of the first seven non-statutory mitigating circumstances identified in Appellant's Main Brief at 58-59, nor about the two identified at 59-61. To find that none of these nine uncontradicted mitigators is entitled to any weight is a clear abuse of discretion.

ARGUMENTS IX AND X

Appellant relies on his main brief to refute the State's arguments on these points.[10]

XI. THE STATE'S MISREPRESENTATIONS THROUGHOUT THE SENTENCING HEARING THAT MENTAL ILLNESS THAT IS NOT "EXTREME" OR "SUBSTANTIALLY" IMPAIRING IS NOT MITIGATING, AND THE

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[10] Appellant adds only, with respect to his Argument IX, that nothing but the fact there absolutely was no evidence to support it prevented the prosecutor from contending that Appellant's crime was cruel or calculated. Thus, the factual absence of these two severe aggravators was very mitigating, which Appellant should have been allowed to argue.

RESENTENCING COURT'S FAILURE TO SPECIFICALLY INSTRUCT THE JURY TO THE CONTRARY, DENIED APPELLANT A FAIR SENTENCING HEARING AND VIOLATED LOCKETT V. OHIO, 438 U.S. 586 (1978)

XII. THE KNOWINGLY IMPROPER USE BY THE STATE THROUGHOUT THE SENTENCING HEARING OF THE LEGAL STANDARDS FOR COMPETENCY AND RESPONSIBILITY RATHER THAN THE APPROPRIATE MITIGATION STANDARDS, AND THE RESENTENCING COURT'S FAILURE TO LIMIT THE STATE'S MISUSE OF THE COMPETENCY AND RESPONSIBILITY STANDARDS, DENIED APPELLANT A FAIR RESENTENCING HEARING

In these arguments, Appellant does not, as the State suggests, complain merely about the State's use of the enhanced statutory modifiers: "extreme" and "substantial". Rather, Appellant complains of the manner in which the prosecutor and resentencing court misused those terms (and the competency and responsibility tests) to confuse the jury by effectively informing it, throughout the hearing, that mental illness that is not "extreme" or "substantially" impairing is not mitigating. Appellant's brief adequately sets out the pervasive method by which this was accomplished, including the use of these modifiers twenty-three (23) times in the State's closing argument, referring to them as the "key" to the entire case.

The State responds with a simple citation to Johnson v. State, 438 So.2d 774 (Fla. 1983) which, the State claims, rejects Appellant's position. However, the State reads Johnson too broadly.

Although Johnson held the use of the objectionable adjectives was not inherent error "when coupled with the jury's ability to consider other elements in mitigation ...," as Appellant argued in his main brief, the jury's "ability to consider other elements in mitigation," i.e., mitigating evidence of mental illness and

disorder short of the statutory standards was substantially impaired. The jury heard repeatedly that the appropriate standards were competency and responsibility or the enhanced statutory standards, watched the court overrule repeated defense objections to these misrepresentations, and listened, over objection, to the prosecutor's misleading final argument. Under these facts, it is apparent there was a "reasonable possibility" that jurors were confused. Peek v. Kemp, 784 F.2d 1479, 1489 (11th Cir. 1986); California v. Brown, 107 S.Ct. 837 (1987).

XIII, XIV, XV, XVI, XVII, XVIII, XIX, XX, AND XXI

Appellant relies upon his Main Brief for these arguments.[11]

CONCLUSION

For all of the foregoing reasons, the judgment below should be reversed with directions that a life sentence be imposed.

Respectfully submitted,

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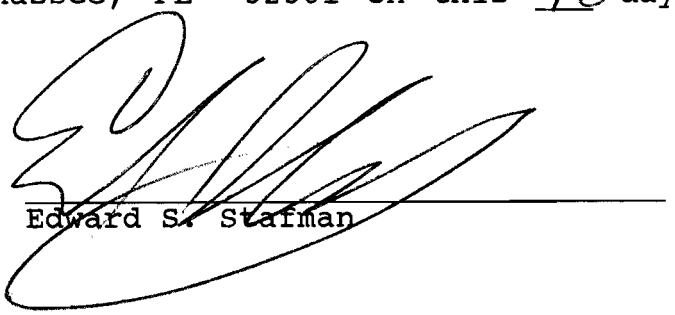
[11] With respect to argument XIX, where error is claimed based upon the Court's refusal to instruct on "lingering" doubt, there is one matter worthy of note. While the State argues that a doubt of guilt is wholly irrelevant to the sentencing process, State's Brief at 32, it argues in other places that the jury should not be forced to analyze the character of the defendant or the circumstances of the offense "in a vacuum," see, e.g., State's Brief at 13, 25, when charged with the awesome responsibility of determining whether death is the appropriate penalty. It seems that if the jury is permitted to review all of the facts of the offense, the facts establishing a doubt become important. It would be odd if the State could have it both ways.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by U.S. Mail to Gary Printy, Assistant Attorney General, The Capitol, Tallahassee, FL 32301 on this 18th day of January, 1988.



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