FILED
SID J. WHITE
SEP 14 1992
CLERK, SUPREME COURT
By
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. Case No. 80,287

TONY GLYN SCHMIDT,

Respondent.

_____/

ON PETITION FOR REVIEW FROM CERTIFIED QUESTION
FIRST DISTRICT COURT OF APPEAL
CASE NO. 90-03619

PETITIONER'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

This is an appeal from a decision of the First District Court of Appeal reversing an Order of the Circuit Court for Leon County denying Schmidt's Petition for Writ of Habeas Corpus and or Petition for Writ of Mandamus construed as a petition for writ of habeas corpus. (R. 106-107.) Pursuant to Florida Rule of Appellate Procedure 9.030(a)(2)(A)(v), the panel certified as a question of great public importance the following:

> **MAY THE DEPARTMENT OF CORRECTIONS RELY ON INFORMATION IN THE PSI AS THE SOLE BASIS FOR DETERMINING AN INMATE'S ELIGIBILITY FOR PROVISIONAL CREDITS PURSUANT TO SECTION 944.277(1)(e), FLORIDA STATUTES?**

At issue is whether the Department of Corrections (DOC) may rely upon information contained within a presentence investigation report (PSI) to substantiate that Schmidt's conviction for battery in Case No. 1251 included a sex act that was attempted or completed and that Schmidt's conviction for burglary also in Case No. 1251 was committed with the intent to commit sexual battery. Commission of a battery where a sex act is attempted or completed and commission of a burglary with the intent to commit sexual battery both disqualify an inmate from receiving early release credits which are awarded purely to control prison overcrowding.

At the time Schmidt filed his petition he was serving an overall term of eleven and a half years (11 1/2) less jail time credit. (R. 41.) The PSI revealed that the circumstances surrounding Case No. 1251 were as follows:

> On 1-25-84, the defendant broke into the home of [the victim], while she was sleeping in her

> son's bedroom. The defendant woke the victim and said "I want to talk to you". [The victim] replied, "leave me alone". The defendant said, "I want you to touch my cock." [The victim] replied, "leave me alone". The suspect said "there is someone else in the living room, we have a gun. I just got out of prison and I am going to kill you if you don't cooperate". At this point [the victim's] son, woke up and the defendant said, "go back to sleep son, it's o.k". The defendant then stated, come on, if you don't cooperate, I am going to kill you and I'm going to kill him. The defendant then grabbed [the victim] in a headlock and started toward the bedroom.
>
> (R. 51-52.)

Two of several exceptions to eligibility for provisional credits provide that an inmate is not entitled to credits if the inmate,

> (d) Is convicted ... of committing ... battery ..., and a sex act was attempted or completed during commission of the offense; or
>
> (e) Is convicted ... of committing ... burglary and the offense was committed with the intent to commit sexual battery.

In addition the Legislature amended Section 944.277(1)(e) during the Special Session conducted between June 1 through July 10, 1992. Effective July 6, 1992, the amended section now reads:

> (e) Is convicted, or has been previously convicted, of committing or attempting to commit kidnapping, burglary, or murder, and the offense was committed with the intent to commit sexual battery <u>or a sex act was attempted or completed during commission of the offense</u>.

Ch. 92-310, Laws of Fla. (C.S. for H.B.'s 197-H, 19-H and 131-H)[1]

DOC officials relied upon the PSI to supply the fact that a sex act was attempted during commission of the battery because Schmidt attempted to have the victim "touch his cock" when he told her that was what he wanted and then proceeded to place her in a headlock pulling her toward the bedroom. (R. 49-60.) Further, officials also relied on the PSI to demonstrate that the burglary was committed with the intent to commit sexual battery because of the attendant circumstances surrounding the burglary. (Id.)

The recently amended subsection, 944.277 (1)(e), also allows officials to disqualify Schmidt because he was convicted of burglary (with the intent to commit battery) and a sex act was attempted or completed during commission of the burglary. These administrative determinations led to Schmidt's inability to qualify for the receipt of provisional credits.

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[1] The Legislature amended 944.277(1)(e) as a direct response to the Bishop v. Dugger, 582 So.2d 33 (Fla. 1st DCA 1991) case. The First District Court of Appeal ordered the Department of Corrections to award provisional credits to a man who had been convicted of "kidnapping with intent to commit sexual battery or lewd act". The Court reasoned the inmate could not be denied provisional credits because he "was charged in the disjunctive with kidnapping with intent to commit either sexual battery or a lewd act, rather than only with sexual battery".

SUMMARY OF THE ARGUMENT

Section 944.277(1)(d), Florida Statutes, (1991) prevents the award of provisional credits to any inmate who is convicted of battery and a sex act was attempted or completed during commission of the offense. Section 944.277(1)(e), as well as the recently amended provision, prevents the award of credits to any inmate convicted of burglary and the offense was committed with the intent to commit sexual battery. The amended section now prevents an award where a burglary is committed and a sex act was attempted or completed during the burglary. Because the commission of burglary or battery does not automatically disqualify the inmate, the Department is required to turn to additional documents to establish whether sexual battery was intended, or a sex act was attempted or completed during commission of the primary offense. In evaluating the factual circumstances underlying a conviction, the Department does no fact-finding in the sense of weighting certain portions of these documents or assessing the quality of information contained within the presentence (PSI) report, nor does it seek to conduct evidentiary hearings or mini-trials by obtaining affidavits from victims, witnesses, arresting officers, or attorneys or by obtaining extraneous documents produced by the defendant. Instead, the Department relies upon documents generated during the course of criminal proceedings from which the conviction results. Those documents include but are not limited to pre and post-sentence investigations, arrest reports, information and indictments, or

other such documents typically generated during criminal proceedings. The Department presumes these documents to be competent because they were generated for specific purposes during the course of the criminal proceedings, in accordance with statutes and rules governing such documents, and are relied upon by the Court in the disposition of its duties. Section 944.277, as recently amended, effective July 6, 1992, specifically authorizes the Department to rely on any document leading to or generated during the course of the criminal proceedings involving the inmate, including, but not limited to, any presentence or postsentence investigation or any information contained in arrest reports relating to circumstances of the offense.

In the instant case, the PSI used by the Department was also apparently relied upon by the sentencing court as an aid in determining the length of Schmidt's prison sentence. The contents of a PSI are also used by officials when making parole decisions, work release decisions, executive clemency decisions, and control release decisions.

In administrative disciplinary matters involving prisoners, the Department is only required to demonstrate that there is a modicum of evidence present and the nature of that evidence need not be direct evidence nor evidence which meets the evidentiary standards required in a criminal proceeding. To require something more for administrative eligibility determinations for early release credits would be inconsistent since (1) there is no protected liberty interest in receiving early release credits, (2)

the determination that an inmate is ineligible for provisional credits is not punishment, (3) the eligibility criteria is aimed at protecting the public safety so that doubts should be resolved in favor of protecting the public, and (4) the eligibility decision is one committed to the administrative expertise of the Department, and as such, presumptively correct.

For these reasons, the Court should find that a PSI is competent evidence which can be soley relied upon to make an administrative eligibility determination required under Section 944.277, Florida Statutes.

ARGUMENT

THE DEPARTMENT OF CORRECTIONS MAY RELY ON INFORMATION IN THE PSI AS THE SOLE BASIS FOR DETERMINING AN INMATE'S ELIGIBILITY FOR PROVISIONAL CREDITS PURSUANT TO SECTION 944.277(1)(d) AND (1)(e), FLORIDA STATUTES.

At issue is whether the DOC may use the contents of the PSI as the sole aid in determining whether a sex act was attempted or completed during commission of the battery and whether the burglary was committed with the intent to commit sexual battery or whether a sex act was attempted or completed during the commission of the burglary. The district court ruled that the following excerpt from the PSI was not competent evidence that can be used alone to deny Schmidt provisional credits. Schmidt v. State of Florida, ___ So.2d ___, 17 F.L.W. D1741 (Fla. 1st DCA Jul. 17, 1992).

> On 1-25-84, the defendant broke into the home of [the victim], while she was sleeping in her son's bedroom. The defendant woke the victim and said, "I want to talk to you". [The victim] replied, "leave me alone". The defendant said, "I want you to touch my cock". ... The defendant then stated, come on, if you don't cooperate, I am going to kill you and I'm going to kill him [her son]". The defendant then grabbed [the victim] in a headlock and started toward the bedroom.
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> Id.

The district court appeared disturbed by the fact that the PSI does not indicate where the facts were obtained, nor did the Department have any sworn material which substantiates this account. The Department responds that a PSI should provide competent evidence upon which the Department can rely when making eligibility determinations, and would make the following four arguments.

I. The Administrative Proceeding Argument

First, the Department emphasizes that making eligibility determinations for the award of early release credits is not equivalent to a criminal proceeding. It is an administrative determination. This Court has recognized that very important point in its recent decision in Dugger v. Rodrick, 584 So.2d (Fla. 1991), cert. denied, L.W. _____ (Jan. 13, 1992), in which the Court was required to determine whether Florida's early release statutes were substantive statutes related to punishment or reward. The Court concluded that the early release statutes were essentially remedial, not penal in nature. There can be no doubt from the legislative history' of the early release statutes that the sole

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[2] The provisional credits statute is one of several mechanisms enacted by the Florida Legislature to address the overcrowding crisis which has plagued the state prison system over the last decade. In the face of a federal court consent decree on overcrowding and delivery of health services in the Florida prison system, the Legislature opted to afford the Department of Corrections an emergency relief procedure to preclude the mass release of Florida inmates at the direction of the federal courts. (The consent decree in Costello v. Singletary, Case Nos. 72-109-Civ-J-14, 72-94-Civ-J-14, has been in place almost two decades.) The first emergency mechanism, enacted in 1983, provided for the emergency release of prisoners, after the declaration of a state of emergency, by the application of up to 30 days gaintime, in 5-day increments, to the overall term of each inmate in the system until the inmate population reaches 97% of lawful capacity. See §944.598, Fla. Stat. (1983). There were no exclusionary provisions contained in the emergency release statute. Although the emergency release statute is still in effect, its provisions have never been implemented. See Blankenship v. Dugger, 521 So.2d 1097, 1098 (Fla. 1988).

Because of the legitimate and compelling concern for public safety, the Legislature enacted a second early release mechanism which was designed to be triggered prior to the emergency release statute. The administrative gaintime statute, enacted at Section 944.276(1987), Florida Statutes, became operational at 98% of lawful capacity, and the emergency gaintime statute's triggering

purpose of the statutes is to provide an interim administrative solution to prison overcrowding. There also can be no doubt that the Legislature intended to provide this solution without jeopardizing the public safety. There has never been any intent expressed in the statutes that would lead one to believe that these statutes have been enacted, through the generosity of the Legislature, as a benefit to the prison population. Because it is now clear that the statutes are remedial in nature -- see Rodrick, supra -- the statutory provisions should be construed liberally, and the Department therefore, given latitude in making these administrative decisions.

The Department is administering the statute in accordance with the Department's informed knowledge of the Legislature's intent. The Legislature made clear, through the various exclusions enacted, that it did **not** intend **to** reduce overcrowding at the expense **of**

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level was raised to 99% of lawful capacity, as defined by the statute. The administrative gaintime statute contained a number of exclusions which eliminated from eligibility certain types of violent or **repeat offenders.** See **§944.276(1)** (a)-(d) , Fla. Stat. (1987). The Legislature repealed this statute effective July 1, **1988,** by Chapter **88-122,** Laws of Florida, and supplanted it with a more comprehensive early release scheme, which excluded mare classes of violent or habitual offenders, and which, in later versions, added a limited period of supervision after release. See **5944.277,** Fla. Stat. **(1988** - 1990). Most recently, the Legislature enacted another early release program, called control release, which is administered by the Florida Parole Commission, sitting as the Control Release Authority. See §947.146, Fla. Stat. (1989 - **1990).** The eligibility exclusions for control release are identical to those contained in the provisional credits statute: however, the control release program affords the Control Release Authority discretion in establishing control release dates for early release. Cf. **5944.277,** Fla. Stat. **(1990** Supp.) with **5947.146,** Fla. Stat **(1990 Supp.).** The provisional credits statute now serves as a backup early release mechanism to the control release program. **§947.146(3),** Fla. Stat. **(1990** Supp.)

public safety. Thus, any questions regarding an inmate's eligibility for provisional credits should be resolved in favor of protecting the public's interest in safety. It is well settled that statutes enacted for the public's welfare should be construed so that the public interest may be fostered to the fullest extent. Ideal Farms Drainage Dist. v. Certain Lands, 154 Fla. 554, 19 So.2d 234 (Fla. 1944); Vocelle v. Knight Bros. Paper Co., 118 So.2d 664 (Fla. 1st DCA 1960). Even where a statute enacted to protect a public interest has penal aspects, the statue should nonetheless be construed liberally in favor of the public interest. State v. Hamilton, 388 So.2d 561 (Fla. 1980); city of Miami Beach v. Berns, 245 So.2d 38 (Fla. 1971).

The provisional credits statute provides an administrative mechanism for resolving a problem. Although inmates ultimately receive the "benefit" of earlier release, the Legislature did not enact this statue with the rights, needs, or concerns of inmates in mind. Because a remedy for prison overcrowding had to be identified, the Legislature faced uncomfortable and complicated decisions regarding the kinds of inmates who were less of a risk for early release. The exclusions in Section 944.277, which for the most part concern violent and sexual offenders, demonstrate that the Legislature decided that these offenders pose special safety concerns for the public. The danger posed by individuals prone to commit, to attempt, or who intend to commit, nonconsensual sexual acts has been recognized by Florida courts. Miller v. Dusser, 565 So.2d 846 (Fla. 1st DCA 1990). Henderson v. State, 543

So.2d 344 (Fla. 1st DCA 1989), rev. denied 551 So.2d 461 (Fla. 1989). Further evidence of the Legislature's awareness of these dangers is that a conviction for a sexual crime is not necessary to deny an inmate provisional credits. See Fla. Stat. §§944.277(1)(d) and (e).

Therefore, because credits are not earned but are simply awarded as an administrative tool to relive overcrowding, a decision that an inmate is ineligible is not punishment or in any way related to punishment. Dugger v. Rodrick, susra. With this in mind, the Department submits that the "quality" or "weight" of the evidence used should be viewed within the context of the administrative determination being made. Criminal due process concerns should not be made a part of the analysis.

The Lack of Liberty Interest Argument

Second, Schmidt, contrary to his assertions, possesses no constitutionally based liberty interest in early release through provisional credits. A state may create a protected liberty interest through its laws and regulations, which imply "the repeated use of explicitly mandatory language in connection with requiring specific substantive predicates [which] demands a conclusion that the state has created [such an interest]". Hewitt v. Helms, 459 U.S. 460, 472 (1983). The State of Florida did not create a liberty interest when the Department implemented the provisional credits statute. Respondent has no right to require that the statute be implemented at any point in time. The Secretary of DOC is not required to make awards of provisional

credits whenever the triggering percentage is reached. On the contrary, the statute leaves to the Secretary's full discretion the decision as to whether the statute may be implemented:

> Whenever the inmate population of the correctional system reaches 98 percent of lawful capacity, the Secretary of the Department of Corrections shall certify to the Governor that such condition exists. When the Governor acknowledges such certification in writing, the Secretary may grant up to 60 days of provisional credits . . . .

Fla. Stat. §944.277(1), (1991). (emphasis supplied).

Because the Secretary retained full discretion over whether the statutory provisions would be implemented, Petitioner never accrued a liberty interest in receiving benefits under its provisions.[3] See Francis v. Fox, 838 F.2d 1147, 1149 (11th cir. 1988) (when the statue is framed in discretionary terms there is no liberty interest created).

Respondent, then, can only attack the procedures that may be due after a liberty interest is located. If an official can act for any reason or no reason at all, then there is no interest to protect and no process due. Olim v. Wakinekona, 461 U.S. 238, 250, 103 S.Ct. 1741, 1748, 75 L.Ed.2d 813 (1983). Respondent, therefore, has no interest in receiving credits and no process due.

Respondent also originally contended that he should be

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[3] The Secretary could decline to certify the overcrowding situation to the Governor. The Section 944.598, Florida Statutes (1983) could be activated which requires that the Secretary shall advise the Governor of the existence of a state of emergency in the state correctional system whenever the population exceeds 98 percent. Following the declaration of the sentences of all inmates in the system who are eligible to earn gaintime shall be reduced....

protected against arbitrary and capricious governmental action whether or not he has a liberty interest in the receipt of credits. He is incorrect. Typically substantive due process analysis first involves determination of the existence of the liberty or property interest. E.g. Hearn v. City of Gainesville, 688 F.2d 1328, 1332 (11th Cir. 1982).

In Ellard v. Alabama Board of Pardons and Paroles, 824 F.2d 937 (11th Cir. 1987), the court said:

> It is now well established that when a liberty interest arises out of state law, the substantive and procedural protection to be accorded that interest is a question of state law.

824 F.2d at 945.

Certainly then, within the Eleventh circuit, failure to show a liberty interest to the procedural due process claim is necessarily fatal to the substantive due process claim.

Assuming arguendo, however, that one accepts that a lack of liberty interest is not necessarily dispositive of the substantive due process claim, the next line of inquiry would address whether the Department's decision to prevent Schmidt **from** receiving credits is arbitrary and capricious. Wroblewski v. City of Washburn, 1992 U.S. **App.** Lexis 13382, pp. 12-13 (7th Cir. June 12, 1992) (arbitrary infringements that shock the conscience violate due process no matter what procedures employed). Does failure to award Schmidt credits shock the conscience? Petitioner submits it does not.

Fair consideration is given all inmates when credit

eligibility determinations are made. A grievance process operates which allows an inmate to question why he is not receiving credits. Fla. Admin. Code Chap. 33-29. Eligibility determinations are changed as a result of this process. If, however, an inmate is unhappy with the answer he receives during the grievance review, he has the ability to attack that decision in court.

Petitioner also emphasizes that the (1) determination that an inmate is ineligible for provisional credits is not punishment, (2) the eligibility criteria is aimed at protecting the public safety so that doubts should be resolved in favor of protecting the public and (3) the eligibility decision is one committed to the administrative expertise of the Department, (see Section 944.277, Florida Statutes), and as such, presumptively correct. State ex rel Seisendorf v. Stone, 266 So.2d **345,** 346 (Fla. **1972)** ("the decisions **of** public administrators made within the ambit of their responsibilities, and with due regard to law and due process, are presumptively correct and will be upheld, if factually accurate and absent some compelling circumstances, clear error or overriding legal basis **....**"); City of Hollywood v. Fla. Pub. Employees Relations Comm'n, **476 So.2d 1340, 1342** (Fla. 1st DCA 1985) ("the general rule in Florida is that a decision by an administrative body if made within its area of authority will be upheld if factually correct, absent some compelling circumstances).

In light of all the above, coupled with the fact that an inmate may pursue a remedy to any perceived injustice through the grievance process and the courts, Petitioner strongly contends that

the decision to withhold credits from Schmidt does not shock the conscience nor is it arbitrary and capricious without a rational basis. Schmidt stood convicted of burglary and battery. The contents of the PSI reflected that the burglary was committed with the intent to commit sexual battery and the battery and burglary were both committed with attendant sex acts that were attempted during the commission of these crimes.

11. The Lessons of Superintendent, Massachusetts Correctional Institution, Walpole v. Hill

"The fundamental fairness guaranteed by the due process clause does not require courts to set aside decisions of prison administrators that have some basis in fact." Superintendent, Massachusetts Correctional Institution v. Hill, 472 U.S. 445, 105 S.Ct. 2768, 86 L.Ed.2d 356 (1985). In this case the Court ruled that where a prisoner has a liberty interest in good time credits, minimum due process requires that "the findings of the prison disciplinary board are supported by some evidence in the record". 472 U.S. at 454, 105 S.Ct. at 2773. The Supreme Court rejected the argument that there must be substantial evidence in the record. "Revocation of good time credits is not comparable to a criminal conviction, and neither the amount of evidence necessaryto support such a conviction, nor any other standard greater than some evidence applies in this context." 472 U.S. at 456 (citations omitted). The court held that "the relevant question is whether there is any evidence in the record that could support the conclusion reached ..." Hill, 472 U.S. at 455-6 (emphasis supplied). While the Petitioner notes there may be a distinction

between the amount of evidence to be necessary to support the administrative determination and the quality or competency of the evidence, the facts of the Hill case are instructive as to the type of evidence which may be considered competent.

> [In Hill,] [t]he disciplinary board received evidence in the form of testimony of the prison guard and copies of his written report. That evidence indicated that the guard heard some commotion and, upon investigating, discovered an inmate who evidently had just been assaulted. The guard saw three other inmates fleeing together down an enclosed walkway. No other inmates were in the area. The Supreme Judicial Court found that this evidence was constitutionally insufficient because it did not support an inference that more than one person had struck the victim or that either of the respondents was the assailant or otherwise participated in the assault. (citations omitted) This conclusion, however, misperceives the nature of the evidence required by the Due Process Clause.
>
> The Federal Constitution does not require evidence that logically precludes any conclusion but the one reached by the disciplinary board. Instead, due process in this context requires only that there be some evidence to support the findings made in the disciplinary hearing. Although the evidence in this case might be characterized as measer, and there was no direct evidence identifying any one of three inmates as the assailant, the record is not so devoid of evidence that the findings of the disciplinary board were without support or otherwise arbitrary.

Hill, 472 U.S. at 456-457; 105 S.Ct. at ____, 86 L.Ed.2d at 365-366. (emphasis added).

It would be inconsistent to hold the Department to a higher standard of evidence, both in weight and competency, in reviewing its decision regarding provisional credits as contrasted with disciplinary loss of gaintime because there is no protected liberty

interest in receiving early release credits. See Blankenship v. Dusser, 521 So.2d 1097 (Fla. 1988); see also Francis v. Fox, 838 F.2d at 1149 (11th Circ. 1988) (when the statute is framed in discretionary terms there is not a liberty interest created).

In this case, the Department has relied on factual circumstances that were in no way rejected by a jury which were set forth in a reliable document. Dugger v. Grant, 587 So.2d 608, 609 (Fla. 1st DCA). The content of the document provides "some evidence" that Schmidt falls within the proscriptions of Section 944.277(1)(d) and (e) as recently amended by the Florida Legislature.

Finally, the district court infers that the Department may not look beyond the charging information because the court states "the charging document does not indicate that the intent to commit sexual battery was a part of the crime with which Schmidt was charged and to which be entered a plea of guilty". Schmidt, supra. Petitioner responds by focussing on the language of Section 944.277(1)(e). The subsection precludes credits for kidnappers, burglars, and murderers where the offense was committed with the intent to commit sexual battery. Murder is never charged as murder with the intent to commit sexual battery. Because all these crimes are in the same provision, Petitioner argues that the Legislature, therefore, did not intend that the Department only look at the specific crime as charged but look beyond the crime to determine if there was an intent to commit sexual battery. Amisub v. Department of Health and Rehabilitative Services, 577 So.2d 648 (Fla. 1st DCA

1991) (an agency's statutory construction is entitled to great weight, and will not be overturned on appeal unless it is clearly erroneous). Therefore, the Department is correctly interpreting the statute when it looks beyond the charging information.

Petitioner strongly urges this Court to recognize that the Legislature intended to protect the citizenry of Florida from being preyed upon by inmates who committed crimes with sexual overtones. Allowing the Department to use the PSI without qualifications will further that goal. The inmate is not punished. He is simply being required to serve the sentence originally imposed by the sentencing court.

CONCLUSION

Wherefore, for the foregoing reasons, Petitioner respectfully requests that the certified question be answered in the affirmative and the decision of the First District Court of Appeal in Schmidt v State of Florida be disapproved.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Tony Glyn Schmidt, DC # B-095309, Glades Work Camp, 2600 North Main Street, Belle Glade, Florida 33430, this 14th day of September, 1992.

ELAINE D. HALL

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