IN THE SUPREME CURT OF FORIDA

WILIAM TAYLOR,

Appellant,

vs. CASE NO. SC04-2243

STATE OF FLORIDA,

Appellee.
_____/

APPEAL FROM THE CIRCUIT COURT
OF THE THIRTEENTH JUDICIAL CIRCUIT
IN AND FOR HILLSBOROUGH COUNTY,
STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

The Appellant, William Taylor will respond to Issues II, III, IV, and VI of the Answer Brief. Mr. Taylor will rely upon the arguments and citations of authority contained in the Initial Brief regarding Issues I and V. Mr. Taylor further reaffirms all arguments and citations of authority as contained in the Initial Brief for Issues II-IV, and VI as well.

ARGUMENT

ISSUE II

THE SENTENCE OF DEATH IS DISPROPORTIONATE IN THIS CASE AS THIS IS NOT THE MOST AGGRAVATED AND LEAST MITIGATED OF MURDERS

In his Initial Brief, Mr. Taylor argued that the trial court erred in imposing a death sentence in this case because death was not a proportionate penalty. In this case the trial court found three aggravating factors: prior violent felony conviction, on felony probation, and that the murder was committed for pecuniary gain.(V8,R1315-1316). The trial court found numerous mitigating circumstances existed. The trial court determined that "some" evidence of mental or emotional disturbance existed in this case and assigned some weight to that mitigating

circumstance. Four additional mitigating circumstances were accorded some weight by the trial court: psychological trauma due to abuse and neglectful treatment Mr. Taylor's during formative years; psychological trauma due to deprivation in parental nurturing; documented history of early evidence of learning disabilities, attention deficit disorder, and problems with social interaction; and a history of substance abuse dating to preteen years. Seven additional mitigating circumstances were found and given modest, little, minimum or slight weight by the trial court. The trial court further noted that Mr. Taylor had neurological impairments that affect his ability to control his impulses and that he has neurological impairment in the frontal lobe and temporal lobes of his brain which impair function and affect his behavior, although not rising to the level of neurological damage. (V8,R1322)

The State counters that the sentence of death imposed where three aggravating factors were found and twelve mitigating circumstances were found including findings of mental health impairment is proportional. Mr. Taylor continues to disagree.

On page 18 of the Answer Brief, the State cites to six cases which it claims support the death sentence for Mr.

Taylor. Presumably, this claim hinges on the similarity of the aggravating factors and mitigating circumstances in each of those cases as compared with this case. However, the six cited cases bear little resemblance to this case when the aggravating factors and mitigating circumstances are compared with the facts of this case. When these dissimilarities are exposed in the cited cases they instead collectively demonstrate that a death sentence is disproportionate in this case.

The State first relies on Griffin v. State, 820 So.2d 906 (Fla. 2002). The defendant in Griffin pled guilty to a double homicide where a husband and wife were first locked in a cooler, then shot during a robbery of a warehouse. The trial court found and this Court affirmed four aggravating factors: the conviction of a prior violent felony predicated on the contemporaneous second homicide, that the murders were committed in the course of a felony, that the murders were committed to avoid arrest, and that the murders were committed for pecuniary gain. Each of the four aggravators was assigned great weight. Two statutory mitigators were considered by the trial court. The defendant's lack of a prior record and his role as a lesser participant were found to be established and assigned

little weight. Two other mitigating circumstances were found: positive family history was assigned great weight and positive jail behavior was assigned moderate weight by the trial court. No evidence of mental health mitigation was presented or found to exist by the trial court. This Court affirmed the sentence of death, noting that the defendant had a very positive family upbringing, but then became addicted to drugs.

Griffin is obviously distinguishable from this case. It contains one additional aggravator and the aggravators were more serious-including the fact that one was premised on the fact Griffin committed a double homicide. Even more significant is the contrast in mitigation between this case and Griffin. Griffin wholly lacked any mental health mitigation, whereas in this case substantial mental health issues were recognized by the trial court. The defendant in Griffin had a positive upbringing- drug addiction led to his crimes. In contrast, the evidence established that Mr. Taylor had a childhood replete with psychological trauma and abuse, suffered documented deficits in childhood, both intellectually and emotionally, and early on turned to alcohol to combat his childhood environment. Griffin represents a case that is far more aggravated and less

mitigated than this case.

The State relies as well on Zack v. State, 753 So. 2d 9(Fla. 2000) to support a death sentence. This reliance is also misplaced. In Zack the defendant had engaged in a crime binge of several days which had included other thefts and sexual assaults on different victims across the state of Florida. The defendant's crime spree ultimately culminated in the rape and murder of a woman he met in a bar and befriended in order to steal her car. While committing a sexual battery, the defendant beat and stabbed the victim to death.

This Court affirmed the lower court's finding as to aggravation. Four aggravating factors were deemed to exist in Zack: HAC, CCP, that the murder occurred during the commission of a robbery and sexual battery, and that the murder was committed for pecuniary gain. Both statutory mental health mitigators were found to be established, as well as non-statutory mitigation of remorse, that the defendant confessed, and the defendant had good behavior in prison.

A comparison of the aggravating factors present in Zack and this case demonstrates the inapplicability of Zack as basis to support that a death sentence is proportional

in this case. The presence of both HAC and CCP in addition to two other aggravators clearly renders Zack among the most aggravated cases of capital cases. In Mr. Taylor's case both HAC and CCP are notably absent. The absence of these two aggravators deemed among the most weighty by this Court makes Zack completely distinguishable from this case.

The State cites as well to Cole v. State, 701 So. 2d 845 (Fla. 1997) in support their position that a death sentence is proportional in this case. In Cole the defendant and his accomplice kidnapped a brother and sister while camping the victims were camping. Over a period of two days they tortured the two victims and raped the young woman. Ultimately the young man was murdered.

Similar to Zack, the HAC aggravating factor was found to exist and upheld by this Court in Cole. In addition to HAC, three other aggravators were present in Cole, including a prior violent felony, homicide committed in the course of a felony, and pecuniary gain. Only two mitigating circumstances were found in Cole, an abused childhood and some mental illness, each of which was afforded only slight weight by the trial court.

Cole is clearly less mitigated and clearly more aggravated than the case at bar, not only in the numbers of

aggravators and mitigators present, but in the quality of the mitigation and the seriousness of the aggravation. For example, the mental health mitigation in this case was assigned significantly more weight that that in Cole and was documented throughout Mr. Taylor's childhood. The facts outlined in the Cole (and Zack) opinions reflect that in both cases the female victims were sexually assaulted. In this case there was no evidence of sexual assault. The murders in both Cole and Zack were sufficiently tortuous to support HAC, CCP, or both. In this case a single gunshot was the cause of death.

The next two cases which the State asserts are similar to this case are Shellito v. State, 701 So. 2d 837 (Fla. 1997) and Moore v. State, 701 So. 2d 545 (1997). Both Shellito and Moore contain the prior violent felony aggravator and the pecuniary gain aggravator. Moore also contains the avoid arrest aggravator. However, the focus of this Court in finding the death sentences to be proportional in both Shellito and Moore was not as much the aggravation, but the paucity of mitigation in general and the complete lack of mental health mitigation in either case. In both Moore and Shellito the only significant mitigation was the relatively young age of the defendants.

Shellito had a very stable home environment and committed murder at age 18. Moore was 19 at the time of the homicide and presented some limited testimony that was positive about his character. Both cases, clearly due to the lack of mental health mitigation, fell into the category of least mitigated. The difference between Mr. Taylor's case and these two cases is the difference in both the quantity and quality of the mitigation evidence in this case. Unlike Shellito and Moore, Mr. Taylor presented substantial mental health mitigation as outlined in the Statement of Facts contained in the Initial Brief, substantial mitigation evidence of childhood abuse and trauma and substantial mitigation evidence of the effects this trauma had on his life as evidenced by his difficulties throughout his early years and adolescence and early substance abuse.

The final case relied upon by the State is that of Wickham v. State, 593 So. 2d 191 (Fla. 1991). Although not every aggravator is listed in the opinion, this was a five aggravator case which included CCP. Little mitigation is recited in the opinion. The opinion of the Court contains only comments that the mitigation which was presented in Wickham was undercut by the state. For example, the

opinion states that Wickham had claimed alcohol abuse as a mitigating circumstance but that he was not drinking when the murder occurred.

Not only does Mr. Taylor's case contain significantly fewer aggravators than Wickham, once again, this case does not contain CCP. Cases which contain either the HAC or CCP aggravating circumstance are inapplicable to this case and should not be relied upon in a proportionality analysis.

Mr. Taylor's case contains far greater mitigation than Wickham and that mitigation was not undercut by the State. For example, Mr. Taylor demonstrated long standing alcohol abuse stemming from childhood and the evidence supported the conclusion that he was intoxicated at the time of the murder. Mr. Taylor presented evidence of mental health issues that were not under cut by the State mental health expert. All three mental health professionals agreed that Mr. Taylor has mental impairment.

The State further attacks the Mr. Taylor's position on the mitigation in his case and argues that it should not be characterized as substantial or extensive. The trial court concluded that Mr. Taylor suffered from two personality disorders and was under the influence of some mental or emotional disturbance at the time of the homicide and

assigned this evidence some weight. The trial court found an additional four mitigating circumstances related to mental health concerns and assigned them some weight as well. The trial court found seven other mitigating circumstances and assigned them modest, little, minimum, or slight weight. Despite these findings from the trial court, the State contends that the mitigation in this case is comparable to the previously cited cases of Shellito, Ferrell, Cole, and Zack. (State's Brief at p. 21) The mitigation in those four cases is no more similar to this case than aggravation is.

In Shellito, the defense had contended that the defendant was emotionally disturbed, of low intellect, and suffered organic brain damage. Testimony establishing these claimed mitigating circumstances was presented solely from the defendant's mother. The trial court's sentencing order in Shellito noted that the family home was stable despite the father's alcoholism, that the defendant's parents were supportive of him, that his problems in school were primarily behavioral, and that the testimony was largely in conflict as to the defendant's mental state. Despite the apparent conflicts in the evidence, the trial court found two non-statutory mitigating circumstances and

assigned them slight weight. This Court affirmed, noting that no expert testimony was presented to support the claimed brain damage or mental impairment.

In contrast, Mr. Taylor presented the testimony of two mental health professionals. Both offered credible testimony about Mr. Taylor's mental health problems. There was no doubt as to the discord and abuse Mr. Taylor suffered as a child. This evidence and other circumstances of his childhood led to the trial court to consider and find that at least twelve mitigating circumstances were present, as compared to the two in Shellito. Thus, the present case is far more mitigated than Shellito in both quality and quantity.

In Cole the trial court found that the defendant had organic brain damage, which was assigned moderate weight, and that the defendant had an abused childhood, a circumstance assigned slight weight. Again, the quantity of mitigation present in Mr. Taylor's case far exceeds that found in Cole. Unfortunately, the Cole opinion does not reflect the specific facts which supported these findings, precluding a meaningful qualitative comparison of mitigation in that case with Mr. Taylor's case.

Similar to Cole, the opinion in Ferrell does not

contain sufficient facts as to the mitigation to allow for meaningful qualitative comparison. The mental health mitigation in Ferrell is not discussed save for a reference to the small number of pages in the record devoted to the presentation of testimony to support this factor. No additional factual information is given about the other mitigation in Ferrell aside from the conclusions that Ferrell was a good worker and good prisoner.

In Zack the trial court found three mental health mitigators, but assigned them slight weight. Expert testimony was in conflict over whether or not Zack suffered from post-traumatic stress disorder and fetal alcohol syndrome. Little evidence of additional mitigation was present according to the opinion. In Mr. Taylor's case, the trial court assigned significantly more weight to the mitigation in this case and found significantly more mitigation. Clearly, this case is more mitigated, both in the amount and quality of mitigation, than Zack.

The mental health testimony presented at trial in this case is recited in depth in the Statement of Facts in the Initial Brief, from both defense experts Dr. Harry Krop and Dr. David McCraney and from the state expert, Dr. Donald Taylor. All three doctors agreed that Mr. Taylor suffers

from mental illness, is appropriately diagnosed with Borderline Personality Disorder and Anti-Social Personality Disorder, and has suffered these disturbances since childhood. All three agreed that Mr. Taylor suffered an abusive and neglectful childhood which resulted in significant psychological trauma. All three agreed that Mr. Taylor, despite his chronological age, has the maturity and emotional functioning capacity of a teenager. All three agreed that substance abuse was present and a significant factor. The concurrence of the three mental health experts on this mitigation substantiates the position taken in the Initial Brief that the mitigation evidence was both “substantial” and extensive.

The State’s argument that death is a proportional punishment is not persuasive and not supported by the cases cited in the Answer Brief that this Court was asked to consider. The cases cited by the State demonstrate that this is neither one of the most aggravated or least mitigated of murders. Death is not a proportional penalty when the facts of this case are compared with the cases the State argues are similar where a sentence of death has been affirmed.

The State’s argument in the Answer Brief that the

death sentence in this case should be affirmed because no specific case was cited by Mr. Taylor as being factually similar to his on proportionality reflects the State's failure to grasp the fundamental premise of proportionality review. The function of proportionality review is to implement an individualized sentencing process that closely examines the facts and circumstances unique to each individual case. It is impossible to ever present a case that provides an identical precedent for either affirming or reversing a death sentence on proportionality grounds. However, there are cases more similar to Mr. Taylor's case where the sentence of death was set aside by this Court than those cited by the State.

The companion cases of Voorhees v. State, 699 So.2d 602 (Fla. 1997) and Sager v. State, 699 So.2d 619 (Fla. 1997), are more similar to this case in terms of mitigation. Sager and Voorhees were codefendants who beat and stabbed a man they had been drinking with. In Voorhees the trial court gave minor or very little weight to the statutory mitigating circumstance of "being under an extreme mental or emotional disturbance", his age of 24, and little weight to his accomplice role. With respect to Sager, the trial court gave little weight to the statutory

mitigating circumstance of “being under the influence of mental or emotional disturbance” and the “capacity to appreciate the criminality of his conduct”, very little weight to his age of 22, and little, if any weight to his accomplice role. In both cases the trial court gave great weight to HAC and that the murder was committed in the course of a felony. Under these facts, the this Court found that in neither case was this among the most aggravated or least mitigated cases for which the death penalty is reserved. This Court looked to the totality of the circumstances and the mitigation presented.

In Terry v. State, 668 So.2d 954 (Fla. 1996), this Court reversed a sentence of death imposed where the defendant had shot the victim during the robbery of a Mobil gas station. The trial court found two aggravating factors-pecuniary gain and prior violent felony. The trial court rejected all mitigation, despite the defendant’s evidence of emotional deprivation during adolescence, poverty, good family man, and a proportionality argument. This Court reversed, finding that although the murder was deplorable, it did not fall into the category of most aggravated and least mitigated under the totality of the circumstances.

Lastly, this Court should consider the ruling in Kramer v. State, 619 So.2d 274 (Fla. 1993). This Court set aside the sentence of death despite the existence of two aggravating factors (HAC and prior violent felony conviction in unrelated attempted murder) where the mitigation established that Kramer suffered from alcoholism, mental stress, severe loss of emotional control, and had the potential for productive functioning in a prison environment. This Court looked to the facts surrounding the mitigation and aggravation and determined that this murder did not rise to the level of the most aggravated and least mitigated.

Instead of searching for a case identical to this one, which would be an impossible task, it is appropriate for this Court to closely analyze the facts particular to this case alone under the precedent of Voorhees, Sager, and Kramer. When this analysis is conducted, it is clear that a death sentence in this case is not proportional because this is not among the most aggravated and least mitigated of murders for which the death penalty is reserved for.

In examining the aggravation, there were three factors relied upon by the state and found by the trial court in this case. The first, pecuniary gain is certainly not

unique exists in virtually every capital case where the desire to obtain something of value is present. It is likely one of the most common aggravators in capital cases. This factor hardly lies beyond the norm of countless capital cases.

The second factor found by the trial court was that Mr. Taylor was on felony probation at the time of the offense. While more serious than the pecuniary gain factor, this factor is certainly not one of the more uncommon or severe factors in the hundreds of capital cases reviewed by this Court. The felony probation aggravating factor focuses on the defendant and does not focus on the facts of the homicide. It does not separate murders into degrees of violence or take into consideration the victim like HAC and CCP accomplish. While the record in this case is largely silent as to the offense that Mr. Taylor was on federal probation for, it is clear that is was not for a crime of violence or it would have been considered in the prior violent felony aggravator as well. Under the facts of this case, the felony probation aggravator is not so severe as to warrant the affirmance of a death sentence.

The third aggravating factor considered by the trial court in this case was the prior violent felony aggravator.

The state did not rely on the convictions applicable to the injuries sustained by Mr. Maddox in support of this aggravating factor. The state did not argue to the jury that their recommendation should include consideration of the injuries inflicted on Mr. Maddox. The trial court did not rely upon any contemporaneous felony convictions to establish this aggravator in the sentencing order. It would be improper for this Court to consider factors related to Mr. Maddox in this instance where neither the jury nor trial court considered them. Instead, the trial court relied upon two prior convictions as established by the testimony of two witnesses at penalty phase, Ms. Stewart and Mrs. Kolluck.

The offenses against Ms. Stewart and Mrs. Kolluck both occurred in 1976, when Mr. Taylor was seventeen years old. Mr. Taylor was convicted and sentenced for burglary arising from the incident involving Ms. Stewart in 1977. He was not convicted of a violent crime in that incident.

Mr. Taylor was convicted of Assault in the First Degree after a trial in the case involving Mrs. Kolluck and was sentenced to 20 years in prison in 1980. Mr. Taylor served a substantial portion of that sentence. Mr. Taylor was a juvenile of 17 at the time that crime was committed.

Thus, the third aggravating factor was based upon twenty-seven-year old convictions committed while Mr. Taylor was juvenile.

It is Mr. Taylor's position that the three aggravating factors utilized by the trial judge in this case do not place this case into the "most aggravated" of first-degree murders.

Juxtaposed against these aggravating factors which are undisputable not the most serious or weighty factors was the mitigation in this case. Despite the State's assertion to the contrary and an attempt to minimize the mental health issues in this case, the record demonstrates the existence of significant mental health mitigation that must be considered in this case.

There was no dispute among all three mental health professionals that Mr. Taylor suffered from what is appropriately described as a cocktail of mental health and substance abuse issues. There is no question and there was no disagreement among the defense and state experts that Mr. Taylor suffered psychological abuse and trauma as a child, his early childhood records document the early onset of psychological and substance abuse difficulties, and that Mr. Taylor is a mentally ill person. Even the state expert

conceded that Mr. Taylor lacked the emotional maturity, the failures in his childhood, and the evidence of psychological trauma caused to him during his formative years. All the testimony at trial, including that from the state expert, contradicts the State's characterization of Mr. Taylor's childhood as simply an "unsatisfactory relationship with his stepfather." (State's Answer Brief at 21).

Despite obvious deficits and long-term incarceration, Mr. Taylor was able to form positive relationships as evidenced by the testimony of Idamae Newlin, Jospehine Quattrociocchi, and Robert Railey; further his education by obtaining his GED, and attempt to address his substance abuse issues. Mr. Taylor was able to make a positive contribution to other inmates while incarcerated as evidenced by the testimony of Gary Cross.

The combination of mental health issues and other positive mitigation evidence presented at trial demonstrates that this is not among the "least mitigated" of individuals.

In the final analysis, this Court must conclude that the sentence of death is disproportionate in this case.

ISSUE III

FLORIDA'S CAPITAL SENTENCING PROCESS IS UNCONSTITUTIONAL BECAUSE A JUDGE RATHER THAN JURY DETERMINES SENTENCE

In his Initial Brief, Mr. Taylor urged this Court to reconsider the rejection of Ring v. Arizona, 122 S.Ct. 2428 (2002) to the Florida death penalty process. Mr. Taylor urged this Court to recognize the constitutional violations of due process and jury trial rights which occur when a jury does not make specific findings regarding the existence of each and every aggravating factor rather than the blanket jury recommendation permitted under the current statute and in permitting a judge to determine whether or not a death sentence should be carried out.

Since the filing of the Initial Brief, this Court issued its opinion in State v. Steele, 30 Fla. Law Weekly S677 (Fla. October 12, 2005). As this Court has recognized, Florida is now the only state in the country to permit a death sentence to be imposed where jury may determine by a mere majority vote both whether aggravators exist and whether to recommend the death penalty. Again, Mr. Taylor urges this Court to adopt the dissent of Justice Pariente which would require the use of a special jury

verdict form that would require the jury to indicate what aggravators the jury has found and the jury vote as to each. Particularly applicable in this case is the danger that a death sentence would be affirmed where there is no information despite the unanimous death recommendation that the jury agreed as to any particular aggravator or improperly rejected mitigation in reaching their advisory recommendation. The unanimous recommendation does not suffice as it does not reflect that a majority of the jury found that any individual aggravator had been established. It could very well be that only a minority of the jury felt that any of the three aggravators had been established, but returned a unanimous verdict because they individually felt that one existed, even if that was not the same aggravator as another juror. Absent the special findings of the jury, it is impossible to determine whether the jury unanimously believed that one, two, or three of the aggravators submitted to them was established. The ramifications of this are of serious concern, as it may very well be that the jury may have only be in unanimous agreement as to none, one aggravator or two, which would quite obviously alter the proportionality analysis that is carried out by this Court.

The requirement of special jury recommendation forms will only enhance the reliability of review in death penalty litigation that has become increasingly subjective and almost incapable of meaningful appellate review. Jurors should be required to unanimously conclude and have that conclusion reflected in a special verdict form that at least one aggravating exists before a sentence of death could be imposed.

ISSUE IV

THE EXISTENCE OF THE PRIOR VIOLENT FELONY AGGRAVATING FACTOR SHOULD NOT BAR THE APPLICATION OF RING TO DEATH SENTENCES.

The Appellant will rely upon the arguments advanced in the Initial Brief addressing the implicit overruling of the prior violent felony exception in the death sentencing process under Almendarez-Torres v. United States, 523 U.S. 224 (1988).

The existence of a unanimous death recommendation from the jury does not alter the analysis in the Initial Brief where that recommendation is constitutionally infirm. The lack of specialized verdict forms which record the numerical vote of jury as to each aggravating factor completely undermine reliability in the jury

recommendation, even a unanimous recommendation. The Appellant would adopt the argument of Issue IV as regards the failure to require unanimous jury recommendations as to each individual aggravating factor before a death sentence can be imposed to that portion of the State's argument that the jury vote in this case precludes relief even if the prior violent felony exception were stricken.

ISSUE IV

THE PENALTY PHAWSE JURY INSNTRUCTIONS IMPROPERLY MINIMIZE AND DENIGRATE THE ROLE OF THE JURY IN VIOLATION OF CALDWELL V. MISSISSIPPI.

The state argues that no Caldwell v. Mississippi, 472 U.S. 320 (1985), violation could have occurred in this case because of modifications made to the standard jury instructions. The State asserts that this issue is not preserved because no objection was made to the modified instructions and because the modified instructions cured any Caldwell defect.

Although some modifications were made to the jury instructions, none of the modifications cured the Caldwell defects. The essence of this claim is that the role of the jury is improperly denigrated when, as in this case, the

jury is repeatedly advised that their decision is only advisory and that sentence rests solely with the court. In the opening paragraph of the jury instructions given in this case, the jury was specifically told that the final decision as to what punishment would be imposed was the responsibility of the judge, thus denigrating the importance of what significance the recommendation carried. Throughout the remainder of the instruction, the jury was continually advised that their recommendation was "advisory". The jury's role is further undermined by the instruction to them that their decision does not have to be unanimous. The clear message sent to the jury under the standard instructions and as given to the jury in this case is that the advisory recommendation regarding punishment is of lesser value than the decision as to guilt or innocence. The decision as to guilt or innocence has to be unanimous, obviously a higher standard than a simple majority recommendation.

CONCLUSION

Based upon the issues, citations of law, and argument presented in both the Initial Brief and Reply Brief, Mr. Taylor respectfully requests that this Court reverse the judgment and sentence of death entered in this cause.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief was generate in Courier New, 12 point font, pursuant to Fla. R. App. 9.210.

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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 the Office of the Attorney General, Assistant Attorney General Carol Dittmar, Concourse Center 4, 3507 East Frontage Rd., Suite 200, Tampa, FL 33607, this _____ day of November, 2005.

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