In the Supreme Court of Florida

GROVER REED,

Appellant,

v. CASE NO. SC11-2149

STATE OF FLORIDA,

Appellee.

__________________/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, GROVER REED, the defendant in the trial court, will be referred to as appellant, the defendant, or by his proper name. Appellee, the State of Florida, will be referred to as the State. Pursuant to Rule 9.210(b), Fla. R. App. P. (1997), this brief will refer to a volume according to its respective designation within the Index to the Record on Appeal. A citation to a volume will be followed by the appropriate page number within the volume. The symbol "IB" will refer to appellant's initial brief and will be followed by any appropriate page number. All double underlined emphasis is supplied.

STATEMENT OF THE CASE AND FACTS

This is an appeal of a trial court order denying a successive postconviction motion in a capital case. The facts of the crime are recited in the Florida Supreme Court's direct appeal opinion. *Reed v. State*, 560 So.2d 203, 204 (Fla. 1990). Reed was convicted of the armed robbery, rape and murder of a Lutheran minister's wife who had allowed him to stay in their home as part of Traveler's Aid. Reed strangled, raped, and stabbed her repeatedly in the throat. *Reed*, 560 So.2d at 204. The Florida Supreme Court affirmed the convictions and death sentence. *Reed v. State*, 560 So.2d 203 (Fla. 1990)(striking two aggravators but affirming the death sentence). The procedural history of this case is recited in the Florida Supreme Court's postconviction appeal opinion. *Reed v. State*, 875 So.2d 415, 420 (Fla. 2004).

On November 29, 2010, registry counsel, Martin J. McClain, filed a successive 3.851 motion in this capital case raising a claim that this Court's prejudice analysis in the initial post-conviction motion was flawed based on *Porter v. McCollum*, 558 U.S. -, 130 S.Ct. 447, 175 L.Ed.2d 398 (2009). (R. Vol. I 1-41). The second claim in the successive motion was a claim of newly discovered evidence based on the affidavits of two inmates, James Hazen and Johnny Shane Kormondy, alleging that a third inmate, Dwayne Kirkland, who is now dead told them that he raped and murdered a Jacksonville woman about the same time as the rape and

murder of the minister’s wife in this case. Registry counsel then filed an amended successive motion including a third claim regarding the constitutionality of Florida’s lethal injection protocol. (R. Vol. I 117-164). The State filed an answer to the amended successive motion. (R. Vol. I 165-194). The trial court denied the successive motion. (R. Vol. II 294-298).

On May 7, 2011, registry counsel McClain, filed a motion for discovery for a photograph of a latent fingerprint for comparison with the defendant’s fingerprints. (R. Vol. I 195-198). The trial court denied the motion for discovery. (R. Vol. II 292-293). Reed now appeals the denial of his successive motion and the denial of his discovery motion.

SUMMARY OF ARGUMENT

CLAIM I

Reed argues that the trial court erred in summarily denying his newly discovered evidence claim. First, as the trial court found, Reed was not diligent. The affidavits were signed in 2007 but the claim was not raised until 2010. Moreover, as the trial court ruled, there was "no possibility, much less probability" that the affidavits would result in an acquittal given the "overwhelming evidence of the defendant's guilt." And, as the trial court observed, "convenient confessions" by "dead death row inmates are anything but credible." The trial court properly summarily denied the newly discovered evidence claim in the successive motion.

CLAIM II

Reed argues that the trial court erred in denying his motion for discovery of a latent fingerprint. The trial court did not abuse its vast discretion regarding discovery motions in postconviction proceedings. The motion should have been filed during trial or at the initial postconviction proceedings. Furthermore, a second fingerprint on the check taken during the murder cannot exonerate Reed. Regardless of any other fingerprints on the check, Reed's fingerprints were definitively proven to be on the check both at trial and during the 2002 evidentiary hearing. The trial court properly denied the motion.

CLAIM III

Reed asserts that the trial court's and this Court's prejudice analysis in the initial postconviction proceedings regarding his claims of ineffective assistance of counsel was flawed based on *Porter v. McCollum*, 558 U.S. -, 130 S.Ct. 447, 175 L.Ed.2d 398 (2009). *Walton v. State*, 77 So.3d 639 (Fla. 2011), controls. The trial court properly summarily denied this claim.

CLAIM IV

Reed asserts that Florida's lethal injection protocols are unconstitutional. *Valle v. State*, 70 So.3d 530 (Fla. 2011), controls.

ARGUMENT

ISSUE I: WHETHER THE TRIAL COURT PROPERLY SUMMARILY DENIED THE SUCCESSIVE 3.851 MOTION RAISING A NEWLY DISCOVERED EVIDENCE CLAIM? (RESTATED)

Reed argues that the trial court erred in summarily denying his newly discovered evidence claim. First, as the trial court found, Reed was not diligent. The affidavits were signed in 2007 but the claim was not raised until 2010. Moreover, as the trial court ruled, there was "no possibility, much less probability" that the affidavits would result in an acquittal given the "overwhelming evidence of the defendant's guilt." And, as the trial court observed, "convenient confessions" by "dead death row inmates are anything but credible." The trial court properly summarily denied the newly discovered evidence claim in the successive motion.

The trial court's ruling

The trial court denied the newly discovered evidence claim. (R. Vol. II 296-297). The trial court noted that neither of the affidavits "connects Kirkland to the death of the victim in this case" except "perhaps by innuendo" (R. Vol. II 296). The trial court ruled that the newly discovered evidence claim was untimely. (R. Vol. II 296-297). The trial court noted that the two affidavits were signed on January 30, 2007 but the successive motion raising the newly discovered evidence claim based on these

affidavits was not filed until November, 2010. The trial court also ruled that there was "no possibility, much less probability" that the affidavits would result in an acquittal given the "overwhelming evidence of the defendant's guilt." (R. Vol. II 297). The trial court observed that "convenient confessions" by "dead death row inmates are anything but credible." (R. Vol. II 297).

Standard of review

The standard of review is *de novo*. *Gore v. State*, 2012 WL 1149320, 4 (Fla. 2012)(citing *Walton v. State*, 3 So.3d 1000, 1005 (Fla. 2009)). "A successive rule 3.851 motion may be denied without an evidentiary hearing if the records of the case conclusively show that the movant is entitled to no relief." *Gore v. State*, 2012 WL 1149320, 4 (Fla. 2012)(citing Fla. R.Crim. P. 3.851(f)(5)(B) and affirming the trial court's denial of a successive motion). Additionally, a postconviction motion may be summarily denied as a matter of law. If, for example, there is controlling precedent against a claim raised in a postconviction motion, the trial court may properly summarily deny such a claim.

Merits

Reed asserts a claim of newly discovered evidence of innocence based on a dead inmate's claim that he raped and murdered a Jacksonville woman about the same time as the murder in this case.

Reed has obtained affidavits from two inmates, James Hazen and Johnny Shane Kormondy,[1] claiming that a third inmate, Dwayne Kirkland, who has since died, told them that he raped and murdered a woman in Jacksonville.[2]

I. Newly discovered evidence

A legally sufficient claim of newly discovered evidence must establish two elements: 1) the newly discovered evidence must not have been known by the trial court, the party, or counsel, and it must appear that the defendant or defense counsel could not have known of it by the use of due diligence; and 2) the evidence must be of such nature that it would probably produce an acquittal or yield a less severe sentence on retrial. *Clark v. State*, 35 So.3d

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[1] Hazen, Kormondy, and Buffkin entered the home of a married couple, all three raped the wife and murdered the husband. Kormondy was the triggerman. Hazen's convictions for one count of first-degree felony murder, three counts of armed sexual battery, one count of burglary of a dwelling with an assault and one count of armed robbery were affirmed but his death sentence was reduced to life imprisonment on appeal by the Florida Supreme Court. *Hazen v. State*, 700 So.2d 1207 (Fla.1997). Kormondy's conviction for first-degree murder, three counts of sexual battery with use of a deadly weapon or physical force, burglary of a dwelling with assault and robbery while armed were affirmed and his death sentence was affirmed following a resentencing. *Kormondy v. State*, 703 So.2d 454 (Fla. 1997); *Kormondy v. State*, 845 So.2d 41 (Fla. 2003).

[2] Kirkland's conviction for first degree murder was reduced to second-degree murder and his death sentence was vacated on appeal by the Florida Supreme Court. *Kirkland v. State*, 684 So.2d 732 (Fla. 1996).

880, 891 (Fla. 2010) citing *Jones v. State*, 709 So.2d 512, 521 (Fla. 1998); See also Fla. R.Crim. P. 3.851(d)(2).

A. Diligence

In *Clark v. State*, 35 So.3d 880, 891-893 (Fla. 2010), the Florida Supreme Court denied a claim of newly discovered evidence of innocence based on an inmate's statement that the co-defendant had confessed to the inmate that he, the co-defendant, was the actual shooter, not the defendant as untimely and meritless. The Florida Supreme Court found that the claim was untimely because the defendant failed to raise this claim within one year of discovering it. Clark acknowledged that he became aware of the inmate's statement in 2005 but did not raise the claim until 2007. *Clark*, 35 So.3d at 892. Nor was the evidence, reasoned the Florida Supreme Court, "of such nature that it would probably produce an acquittal for the Defendant on retrial."

Reed, like Clark, was not diligent. This claim is being raised years too late. These affidavits were signed in January of 2007 yet the successive motion raising this claim was not filed until November of 2010 - nearly four years later. This claim is over three years late. As in *Clark*, this claim is untimely.

Registry counsel claims as a basis for "equitably tolling" of the one year time limitation, that prior registry counsel withdrew

as counsel without notice being given to Reed or current registry counsel. Even assuming rule 3.851 is subject to equitable tolling, this explanation is not a valid basis for equity. Current registry counsel had no trouble filing this successive motion years later as he could have done years earlier. Current registry counsel McClain is also federal habeas counsel. By February 5, 2007, when Reed filed an amendment to his federal habeas petition raising this same claim of newly discovered evidence of innocence, current registry counsel was aware of the underlying facts that form the basis of this claim. *Reed v. McNeil*, 3:05-cv-00612 (Fla. M.D.). All that Mr. McClain had to do to discover that former registry counsel Chris Anderson had withdrawn was to make one phone call to Chris Anderson. Surely, reasonable habeas counsel would have contacted state postconviction counsel with these affidavits if for no other reason than to exhaust the federal claim of actual innocence in state court as required by the federal habeas statute. Current registry counsel should have contacted former registry counsel years earlier. Current registry counsel should have asked to be appointed by the state courts years earlier. Equitable tolling is not warranted on such facts.

B. Not likely to produce an acquittal

This evidence is not likely to produce an acquittal at retrial. *Marek v. State*, 14 So.3d 985, 990-994 (Fla. 2009)(rejecting a claim of newly discovered evidence, in a third successive postconviction motion, based on a co-defendant's statements that he was the actual killer because "the probative value of the testimony recounting Wigley's statements is negligible.")

Affidavits from former death row inmates regarding what a third former death row inmate, who is now conveniently dead, told them over fifteen years ago are not reliable. *Herrera v. Collins*, 506 U.S. 390, 423, 113 S.Ct. 853, 872, 122 L.Ed.2d 203 (1993) (O'Connor, J., concurring)(noting that the affidavits "conveniently blame a dead man-someone who will neither contest the allegations nor suffer punishment as a result of them."). Just as in *Herrera*, Kirkland is dead. Reed, like Herrera, is conveniently blaming a dead man. As the trial court observed, "convenient confessions" by "dead death row inmates are anything but credible."

Contrary to registry counsel's assertion, it is very doubtful that Kirkland's statements would satisfy the statement-against-penal-interest hearsay exception. IB at 39 n.44. The rationale underlying the exception is that an unincarcerated person would not make a statement that would result in his incarceration for a crime if such a statement were not true. *People v. Gibian*, 76 A.D.3d 583, 599, 907 N.Y.S.2d 226, 239 (N.Y.A.D. 2 Dept. 2010)(explaining

the rationale for admitting statements against penal interest into evidence is that they are more trustworthy than other forms of hearsay because human experience teaches that people do not ordinarily make statements which will subject them to criminal prosecution unless those statements are true). However, as Justice O'Connor noted, a dead man or a soon to be dead man who is already incarcerated for life will not suffer any punishment as a result of his statements and therefore, the exception should not apply. *Herrera v. Collins*, 506 U.S. 390, 423, 113 S.Ct. 853, 872, 122 L.Ed.2d 203 (1993) (O'Connor, J., concurring)(noting that the affidavits "conveniently blame a dead man - someone who will neither contest the allegations nor suffer punishment as a result of them.").

Moreover, as in *Herrera*, the affidavits contain inconsistencies. Kormondy's affidavit states that Kirkland knew that he was going to die soon and he wanted to "make peace with what he had done." Surely, a person who wanted to make peace with himself and knew he was dying would have informed the warden or the prosecutor that he was the "real killer," not merely another inmate. The two inmates give no details that would connect Kirkland's alleged confession of a rape and murder of an older, white Jacksonville woman in February of 1986 to this particular murder.

Moreover, neither of these inmates explains his long delay in coming forward. *Herrera v. Collins*, 506 U.S. 390, 423-424, 113

S.Ct. 853, 872, 122 L.Ed.2d 203 (1993)(observing, in a capital case, where the affidavits exonerating the defendant were given over eight years after petitioner's trial, that "[n]o satisfactory explanation has been given as to why the affiants waited until the 11th hour--and, indeed, until after the alleged perpetrator of the murders himself was dead--to make their statements.). As Justice O'Connor noted:

> Affidavits like these are not uncommon, especially in capital cases. They are an unfortunate although understandable occurrence. It seems that, when a prisoner's life is at stake, he often can find someone new to vouch for him. Experience has shown, however, that such affidavits are to be treated with a fair degree of skepticism. These affidavits are no exception. They are suspect, produced as they were at the 11th hour with no reasonable explanation for the nearly decade-long delay.

Herrera v. Collins, 506 U.S. 390, 423-424, 113 S.Ct. 853, 872, 122 L.Ed.2d 203 (1993) (O'Connor, J., concurring). She also noted that the defendant had delayed presenting his new evidence until eight years after conviction – without offering a "semblance of a reasonable excuse for the inordinate delay." This Court should do just as the United States Supreme Court suggested it do - it should treat these two affidavits with a fair degree of skepticism. As in *Herrera*, there is no explanation for the delay in reporting the alleged "real" killer's confession. According to both inmates' affidavits, the conversations with Kirkland, where he "confessed"

to the murder, occurred in approximately 1995.[3] The inmates do not explain their ten or twelve year delay in reporting the conversations.

And, as in *Herrera*, the evidence against Reed is overwhelming, including his fingerprints on the victim's checks, found in the victim's backyard, which were taken from the victim's checkbook in her purse taken during the robbery. *Reed v. State*, 875 So.2d 415, 427 (Fla. 2004)(rejecting an ineffectiveness claim and explaining the trial court wrote, "it was obvious to the jury that the fingerprint was fresh as it was found on a check to which the defendant had no access, in a wallet to which the defendant had no access, which had been inside the residence prior to the rape and murder of the victim, and which was found laying in the backyard by investigating officers," quoting the postconviction order at 10). The State has both scientific and physical evidence rebutting Reed's claim that Kirkland committed this rape and murder. The evidence against Reed includes his fingerprints on the victim's stolen check which were reconfirmed to be Reed's fingerprints by a different fingerprint expert at the state postconviction proceedings. Reed ignores this fingerprint evidence in his actual

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[3] Kirkland's conversation with Kormondy, which occurred on death row had to have occurred before 1997 when Kirkland was removed from death row. So, there is at least a ten year delay in Kormondy's reporting of the conversation.

innocence claim. While Reed argues about the "freshness" of his fingerprints, he does not account for the existence of his fingerprint on an item that was obviously taken during the crime. IB at 23. Additionally, Reed's baseball cap was found near the victim's body inside her house. *Reed*, 560 So.2d at 204-205 (summarizing the "most significant evidence of Reed's guilt" to include the witnesses who positively identified the baseball cap as Reed's because of the presence of certain stains and mildew and testifying that they had seen Reed wearing his baseball cap on the day of the murder but not thereafter); *Reed*, 875 So.2d at 422 (noting the positive identification of Reed's cap itself and testimony that it was last seen in his possession on the day of the murder). Reed does not explain his baseball cap at the murder scene either. A viable claim of actual innocence must account for the State's scientific evidence of his guilt. *Escamilla v. Jungwirth*, 426 F.3d 868, 871 (7th Cir. 2005)("Courts do not allow prisoners to start with clean slates after their convictions and argue 'actual innocence' as if the trial had not occurred."). The scientific and physical evidence rebuts Reed's claim of actual innocence. As the trial court noted rejecting this claim there is "overwhelming evidence" of Reed's guilt.

Evidentiary hearings in successive motions

The trial court properly summarily denied this claim without an evidentiary hearing. No evidentiary hearing was required. *Van Poyck v. State*, 961 So.2d 220 (Fla. 2007)(concluding that capital defendant was not entitled to an evidentiary hearing on claim of newly discovered evidence based on co-defendant's alleged confession that he was the actual shooter). This Court should not have the same standard for granting evidentiary hearings for successive motions as it does for initial postconviction motions. While this Court requiring evidentiary hearings in initial motions is both desirable and understandable, requiring evidentiary hearings for successive motions is not. This Court should explicitly adopt a more stringent standard for successive motions in the interest of finality.

Even under the current standard, no evidentiary hearing was required. Registry counsel's reliance on *Mungin v. State*, 79 So.3d 726 (Fla. 2011), is seriously misplaced. In *Mungin*, this Court reversed a summary denial of successive motion and remanded for an evidentiary hearing. However, this Court remanded for an evidentiary hearing on the *Brady* and *Giglio* claims only; it did not remand for evidentiary hearing on the newly discovered evidence claim. *Mungin*, 79 So.3d at 738 (noting the analysis is different, however, in considering Mungin's claim that based on this newly discovered evidence because "the information provided by Brown is

not of such a nature that it would probably produce an acquittal on retrial."). The *Mungin* Court affirmed the trial court's summary denial of the newly discovered evidence claim. Here, as in *Mungin* and for the same reasons, the trial court properly summarily denied the newly discovered evidence claim.

ISSUE II: WHETHER THE TRIAL COURT PROPERLY DENIED THE MOTION FOR DISCOVERY OF A FINGERPRINT CARD?

Reed argues that the trial court erred in denying his motion for discovery of a latent fingerprint. The trial court did not abuse its vast discretion regarding discovery motions in postconviction proceedings. The motion should have been filed during trial or at the initial postconviction proceedings. Furthermore, a second fingerprint on the check taken during the murder cannot exonerate Reed. Regardless of any other fingerprints on the check, Reed's fingerprints were definitively proven to be on the check both at trial and during the 2002 evidentiary hearing. The trial court properly denied the motion.

<u>The trial court's ruling</u>

On May 7, 2011, registry counsel McClain, filed a motion for discovery for a photograph of a latent fingerprint for comparison with the defendant's fingerprints. The trial court denied the motion for discovery. (R. Vol. II 292-293). The trial court noted that he had denied the newly discovered evidence claim, which this motion related to, in a separate order finding the claim to be meritless. (R. Vol. II 292). The trial court noted that the presence of Reed's fingerprints on the check was reconfirmed during the 2002 evidentiary hearing held as part of the initial postconviction proceedings. (R. Vol. II 293).

Standard of review

The standard of review is an abuse of discretion. As this Court has explained, the availability of discovery in a postconviction case is a matter "firmly within the trial court's discretion." *Johnston v. State*, 27 So.3d 11, 24 (Fla. 2010)(quoting *Marshall v. State*, 976 So.2d 1071, 1079 (Fla. 2007)). A trial court's determination with regard to a discovery request is reviewed under an abuse of discretion standard. *Overton v. State*, 976 So.2d 536, 548 (Fla. 2007). A trial court has even more discretion regarding a discovery motion in the context of a successive postconviction motion than the vast discretion that a trial court has in the context of an initial postconviction motion.

Law of the case

This discovery motion is an attempt to relitigate the ineffectiveness of trial counsel claim for not presenting a defense fingerprint expert or the *Brady* claim regarding FDLE fingerprint analyst Bruce Scott. *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). The ineffectiveness claim and the *Brady* claim raised in the initial postconviction proceedings were denied by the trial court following a full evidentiary hearing regarding both claims. And the trial court's denial of both claims was affirmed by both the Florida Supreme Court and a federal district

court. *Reed v. State*, 875 So.2d 415, 430-432 (Fla. 2004); *Reed v. McNeil*, Case No. 3:05-cv-612-J-32, Doc #33 (M.D. Fla. 2008).

Nor does the motion explain why this comparison was not made during the trial or during the post-conviction evidentiary hearing held in 2002. If Reed wanted to compare his fingerprints with this second latent fingerprint, he should have done so at trial or, at the latest, at the 2002 evidentiary hearing. Such a comparison could have, and should have, been introduced to support the ineffectiveness claim. Reed could have gotten the fingerprint card through a public records request during the initial postconviction proceedings. Reed could have compared this other unidentified fingerprint using the fingerprint database, the Automated Fingerprint Identification System (AFIS), and identified it during the initial postconviction proceedings. Kirkland's fingerprints would have been in AFIS because Kirkland was a convicted murderer who was sentenced to death in 1994. This motion should have been filed over a decade ago during the initial post-conviction proceedings.

<u>Merits</u>

There is no unqualified general right to engage in discovery in a capital postconviction proceedings. *Johnston v. State*, 27 So.3d 11, 24 (Fla. 2010). This is because a capital defendant had extensive discovery prior to trial. Indeed, Florida has among the

broadest criminal discovery in the nation. See, e.g., Tamara L. Graham, Comment, Death by Ambush: A Plea for Discovery of Evidence in Aggravation, 17 CAP. DEF. J. 321, 339-42 (2005)(describing Florida as being at the liberal end of the scale in providing discovery for the defense and Virginia at the other, still following the traditional model of quite limited discovery). Florida basically adopted the ABA standards for pre-trial criminal discovery forty years ago. *Cf. Baranko v. State*, 406 So.2d 1271, 1272 (Fla. 1st DCA 1981)(noting rule 3.220(j)(1) "vests broader discretion in the trial judge than ABA Standard 4.7, from which it was patterned."). Reed could have requested this card during pre-trial discovery.

Nor will any comparison of the second latent fingerprint change the fact the first latent fingerprint found on the victim's check was Reed's - a fact that was confirmed by a second fingerprint expert, Ernest Hamm, at the 2002 evidentiary hearing. Regardless of whose fingerprint is also on the check - the victim's fingerprints, her husband's fingerprints, or even some third person's fingerprints such as Kirkland - Reed's fingerprint were found on check taken during the crime. A second fingerprint on that check cannot possibly exonerate Reed. It can, at most, inculpate another person. The trial court properly denied the discovery motion.

ISSUE III: WHETHER THE TRIAL COURT PROPERLY SUMMARILY DENIED THE *PORTER* CLAIM?

Reed asserts that the trial court's and this Court's prejudice analysis in the initial postconviction proceedings regarding his claims of ineffective assistance of counsel was flawed based on *Porter v. McCollum*, 558 U.S. -, 130 S.Ct. 447, 175 L.Ed.2d 398 (2009). *Walton v. State*, 77 So.3d 639 (Fla. 2011), controls. The trial court properly summarily denied this claim.

ISSUE IV: WHETHER THE TRIAL COURT PROPERLY SUMMARILY DENIED THE LETHAL INJECTION CLAIM?

Reed asserts that Florida's lethal injection protocols are unconstitutional. *Valle v. State*, 70 So.3d 530 (Fla. 2011), controls. The trial court properly summarily denied this claim.

CONCLUSION

The State respectfully requests this Honorable Court affirm the trial court's denial of the successive post-conviction motion and the discovery motion.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing ANSWER BRIEF has been furnished by U.S. mail to Martin J. McCLAIN, McClainm & McDermott, 141 N.E. 30th Street, Wilton Manors, FL 33334, this 21st day of June, 2012.

CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated using Courier New 12 point font.

Respectfully submitted,
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