Electronically Filed 11/08/2013 02:45:00 PM ET

IN THE CIRCUIT COURT OF THE
EIGHTEENTH JUDICIAL CIRCUIT
IN AND FOR BREVARD COUNTY,
FLORIDA

CASE NO. 2012-CF-35337-A

STATE OF FLORIDA,

Plaintiff,

vs.

BRANDON LEE BRADLEY

Defendant.
_______________________________/

MOTION FOR NOTICE OF AGGRAVATING FACTORS

The Defendant, BRANDON LEE BRADLEY, moves for this Court to direct the State to identify which statutory aggravating circumstances contained in Section 921.141(5), Florida Statutes, upon which it will rely in seeking imposition of capital punishment in this case, based on the following:

1. The State has charged this Defendant with one count of first-degree premeditated murder and filed notice under Fla.R.Crim.P. 3.202 that it intends to seek imposition of the death penalty in this case.

2. The Florida Supreme Court has expressly recognized that trial courts have the discretion to order the State to disclose what statutory aggravating circumstances it will seek to prove in prosecuting a capital case, and that requiring that disclosure is NOT a departure from the essential requirements of law even though the Second District Court of Appeal perceived it as such. *See* ***State v. Steele***, 921 So.2d 538, 541 (2005). (We hold that under current law, a trial judge presiding over a case in which the death penalty is

possible does not depart from the essential requirements of law by requiring the State to provide pretrial notice of the aggravators it intends to prove in the penalty phase.)

3. Defendants are entitled to notice of the elements of charged crimes as a basic component of Due Process guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. Adequate notice of the charged offense is also required to enable defense counsel to prepare a meaningful defense and to provide effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution. Adequate notice makes enforceable the protection against double jeopardy guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution. Heightened standards of Due Process attend imposition of capital punishment, as clearly held by case law applying the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and article I, §§ 2, 9, 16, 17 and 22 of the Florida Constitution, and that requirement of heightened due process compels that adequate notice of the elements of charged capital crimes be provided.

4. The Defendant, without waiving objection to the failure of the indictment to specify all of the statutory aggravating factors that the State will seek to use as required by article I, section 15(a) of the Florida Constitution, expressly requests notice as to the identity of all statutory aggravating factors listed in §921.141(5), Florida Statutes, upon which the State will rely in seeking imposition of capital punishment in this case because:

A. The statutory aggravating factors set forth in §921.141(5), Florida Statutes, are recognized in Florida as elements of the offense of capital murder. *See* ***State v. Hootman***, 705 So.2d 1357, 1360 (Fla. 1998) ("The aggravating

circumstances . . . actually define those crimes . . . to which the death penalty is applicable.") (quoting ***State v. Dixon***, 283 So.2d 1, 9 (Fla. 1973)).

B. Defense counsel has the affirmative duty to investigate and litigate all potential issues in order to provide effective assistance of counsel under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and article I, section 2, 9 and 16 of the Florida Constitution. The failure to do so is a denial of the effective assistance of counsel guaranteed criminal defendants by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. Undersigned counsel will be embarrassed in the effort to investigate and prepare a defense to the crime of capital first-degree murder in the absence of notice as to which statutory factors the State will rely in seeking imposition of capital punishment.

C. Forcing the defense to unnecessarily investigate and defend against the entire death penalty statute and all statutory aggravating circumstances listed therein is a huge waste of finite public and judicial resources. Requiring the State to identify the relevant factors will properly focus the litigation and result in the prudent and expedient expenditure of time, labor and funds.

D. In the absence of notice, undersigned counsel necessarily and unfairly has to defend against the entire death penalty statute. This unfair and undue burden constitutes a denial of Due Process and fair notice under the Fifth and Fourteenth Amendments to the United States Constitution, and it contravenes the heightened procedural due process in capital cases that is required by the Eighth and Fourteenth Amendments to the United States Constitution.

MEMORANDUM OF LAW

The state and federal courts recognize that "death is different." *See* ***Amendments to Fla.R.Crim.P. & Fla.R.App.P.***, 875 So.2d 563, 568 (Fla. 2004) (Cantero, J., concurring) ("As we have repeatedly recognized, 'death is different.'"); ***Chamberlain v. State***, 881 So.2d 1087, 1108 (Fla. 2004) ("On this issue as on many others, death is different.").

> "[D]eath is a different kind of punishment from any other which may be imposed in this country. . . . From the point of view of the defendant, it is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." (Citation omitted).

Gardner v. Florida, 430 U.S. 349, 357 (1977). Heightened standards of due process are undoubtedly required by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution whenever a state government seeks to impose capital punishment. Heightened standards of due process apply due to the severity and finality of the death penalty in order to insure reliable imposition of an irrevocable penalty:

> . . . *Because the death penalty is unique "in both its severity and its finality,"* [Gardner v. Florida, 430 U.S. 349] at 357, 97 S.Ct., at 1204, *we have recognized an acute need for reliability in capital sentencing proceedings.* See Lockett v. Ohio, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978) (opinion of Burger, C.J.) (stating that the "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed"); see also Strickland v. Washington, 466 U.S. 668, 704, 104 S.Ct. 2052, 2073, 80 L.Ed.2d 674 (1984) (Brennan, J., concurring in part and dissenting in part) ("[W]e have consistently required that capital proceedings be

> policed at all stages by an especially vigilant concern for procedural fairness and for the accuracy of factfinding").

Monge v. California, 524 U.S. 721, 118 S.Ct. 2246, 2252 (1998) (emphasis added). The Florida Supreme Court agrees. *See* ***Arvelaez v. Butterworth***, 738 So.2d 326, 326-27 (Fla.1999) ("We acknowledge we have a constitutional responsibility to ensure the death penalty is administered in a fair, consistent *and reliable manner* . . . ") (emphasis added). The enhanced due process requirements apply to the proceedings that initially determine the question of guilt as well as to the proceedings that determine whether the death penalty should be imposed:

> To insure that the death penalty is indeed imposed on the basis of "reason rather than caprice or emotion," we have invalidated procedural rules that tended to diminish the reliability of the sentencing determination. The same reasoning must apply to rules that diminish the reliability of the guilt determination. Thus, if the unavailability of a lesser included offense instruction enhances the risk of an unwarranted conviction, Alabama is constitutionally prohibited from withdrawing that option from the jury in a capital case.

Beck v. Alabama, 447 U.S. 625, 637-638, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980).

The United States Constitution and the Florida Constitution expressly guarantee that due process will be provided to citizens charged all crimes. Specifically, the Fifth Amendment to the United States Constitution states:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article I, section 9 of the Florida Constitution provides that "No person shall be deprived of life, liberty or property without due process of law, or be twice put in jeopardy for the same offense, or be compelled in any criminal matter to be a witness against oneself." Article I, section 15(a), Florida Constitution, provides that "No person shall be tried for a capital crime without presentment or indictment by a grand jury, or for other felony without such presentment or indictment or an information under oath filed by the prosecuting officer of the court, except persons on active duty in the militia when tried by courts martial." Article I, section 16(a) of the Florida Constitution states:

> In all criminal prosecutions the accused shall, upon demand, be informed of the nature and cause of the accusation, and shall be furnished a copy of the charges, and shall have the right to have compulsory process for witnesses, to confront at trial adverse witnesses, to be heard in person, by counsel or both, and to have a speedy and public trial by an impartial jury nit he county were the crime was committed. If the county is not known, the indictment or information may charge venue in two or more counties conjunctively and proof that the crime was committed in that area shall be sufficient; but before pleading the accused may elect in which of those counties the trial will take place. Venue for prosecution of crimes committed beyond the boundaries of the state shall be fixed by law.

Article I, section 2, Florida Constitution (1976).

The foregoing are basic constitutional guarantees of due process for criminal defendants. Fundamental fairness and the increased need for reliability in the fact finding process driven by the Eighth and Fourteenth Amendments to the United States Constitution requires that other fundamental constitutional rights be provided as a component of Due Process in the context of imposition of capital punishment, such as the Sixth Amendment right to effective assistance of counsel. *See* ***Gideon v. Wainwright***, 372 U.S. 335, 341-345 (1963) (Right to counsel required by due process); *see also* ***Rompilla v. Beard***, 545 U.S. ___, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005); ***Wiggins v. Smith***, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003).

"Due process" is not a static concept. Rather, it "is flexible and calls for such procedural protections as the particular situation demands." ***Morrissey v. Brewer***, 408 U.S. 471, 481 (1972). The need for heightened reliability in the context of capital punishment has therefore driven the evolution of proceedings and procedures that have become necessary to satisfy Due Process. For example, in capital cases, states are constitutionally required to provide the jury with an option to convict a defendant of a lesser crime unless that procedure is knowingly, voluntarily and intentionally waived by the defendant. ***Beck v. Alabama***, 447 U.S. 625, 638 (1980). That procedure is not employed in non-capital cases. *See* ***Jones v. State***, 484 So.2d 577, 579 (Fla. 1986) ("While we acknowledged in *Harris* [*v. State*, 438 So.2d 787 (Fla. 1985)] the fundamentality of the right to such instructions to due process in the capital context, we here decline to apply that case's requirement of an express personal waiver outside of the context in which it was found necessary. As petitioner himself suggests, due process is not a technical conception of fixed content unrelated to time, place and circumstances.").

Unlike mandatory minimums, state legislatures cannot pass laws requiring the "automatic" imposition of capital punishment. ***Sumner v. Shuman***, 483 U.S. 66 (1987); ***Woodson v. North Carolina***, 428 U.S. 280 (1976). Defendants must be given notice and the opportunity to address all evidence upon which imposition of capital punishment is based. ***Gardner v. Florida***, 430 U.S. 349 (1977). The sentencing body cannot be precluded from considering relevant mitigation. *See* **Smith v. Texas**, 543 U.S 37 125 S. Ct. 400, 160 L.Ed.2d 303 (2004) (procedure unconstitutional where jury asked to answer "yes" or "no" to two questions in a manner where valid mitigating evidence was not considered); ***Skipper v. South Carolina***, 476 U.S. 1 (1976) (sentencing body cannot be precluded from considering defendant's potential for rehabilitation); ***Penry v. Lynaugh***, 492 U.S.302 (1989) (sentencing body cannot be precluded from considering defendant's mental retardation as mitigating circumstance).

The evolution of heightened Due Process and what constitutes fundamental fairness under the Fifth and Fourteenth Amendments to the United States Constitution and article I, Sections 2 and 9 of the Florida Constitution is inextricably tied to the heightened reliability demanded by the Eighth Amendment to the United States Constitution. *See* ***Caldwell v. Mississippi***, 472 U.S. 320, 329, 105 S. Ct. 2633, 2639 (1985) ("This Court has repeatedly said that under the Eighth Amendment 'the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination.'") (Citation omitted) (Emphasis added).

Aside from heightened requirements of reliability required as a component of Due Process, the Eighth Amendment proscription against cruel and unusual punishments precludes capital punishment where imposition of the death penalty is contrary to

contemporary standards of decency. *See* ***Roper v. Simmons***, 543 U.S. 551 (2005) (death penalty for person less than 18 years old unconstitutional); ***Atkins v. Virginia***, 536 U.S. 304, 122 S.Ct. 2242, 2246-2247 (2002) (death penalty impermissible for mentally retarded); ***Stanford v. Kentucky***, 492 U.S. 361 (1989) (death penalty unconstitutional for person under seventeen years of age); ***Tison v. Arizona***, 481 U.S. 137 (1987)(death penalty unconstitutional for person who lacks sufficient moral culpability).

In summary, the law of capital punishment necessarily evolves, and the procedures necessary to provide due process of law must evolve also. In that regard, a court's "duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case." ***Burger v. Kemp***, 483 U.S. 776, 785 (1987). Arbitrary and capricious imposition of capital punishment is forbidden. ***Furman v. Georgia***, 408 U.S. 349 (1977). "Where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." ***Gregg v. Georgia***, 428 U.S. 153, 189 (1976) (plurality opinion).

> If the state wishes to authorize capital punishment it has a constitutional responsibility to *tailor* and *apply* its law in a manner that avoids the arbitrary and capricious infliction of the death penalty. Part of a state's responsibility in this regard is to define the crimes for which death may be the sentence in a way that obviates "standardless [sentencing] discretion." (citations omitted). It must channel the sentencer's discretion by "clear and objective" standards and then "make rationally reviewable the process for imposing a sentence of death."

Godfrey v. Georgia, 446 U.S. 420, 428 (1980) (Emphasis added).

The foregoing considerations render unconstitutional Florida's refusal to provide notice of the aggravating circumstances the State will attempt to use to achieve imposition

of the death penalty. Specifically, the Florida Constitution mandates that capital crimes can only be charged by grand jury indictment. "No person shall be tried for capital crime without presentment or indictment by a grand jury[.]" Article I, section 15(a), Florida Constitution. The Florida Supreme Court has held that a crime that is not punishable by the death penalty is NOT a capital crime, even if the Florida Legislature expressly labels it as such by statute. *See* ***State v. Hogan***, 451 So.22d 844, 845-846 (Fla. 1984) ("Sexual battery of a child, therefore, while still defined as a "capital" crime by the legislature, is not capital in the sense that a defendant might be put to death. Because the death penalty is no longer possible for crimes charged under subsection 794.011(2), a twelve-person jury is not required when a person is tried under that statute.").

In Florida, a defendant convicted of first-degree murder cannot receive the death penalty in the absence of "sufficient" aggravating circumstances. *See*, section 921.141(2) & (3), Florida Statutes. As squarely held by the Florida Supreme Court, this necessarily requires the existence of at least one statutory aggravating circumstance. The omission in the charging document of the existence of any aggravating circumstances fails to specify that a capital crime has been committed because the definition of a "capital crime" in Florida entails the presence of statutory aggravating factors. *See* ***State v. Hootman***, 705 So.2d 1357, 1360 (Fla. 1998) ("The aggravating circumstances . . . actually define those crimes . . . to which the death penalty is applicable.") (quoting ***State v. Dixon***, 283 So.2d 1, 9 (Fla. 1973)).

As a basic component of Due Process under the Fifth and Fourteenth Amendments to the United States Constitution, defendants are fundamentally entitled to notice of the elements of the criminal charges upon which they are to be tried. ***In re Oliver***, 333 U.S. 257,

273-278 (1948). *See* **De Jonge v. Oregon**, 299 U.S. 353, 362, 57 S.Ct. 255, 81 L.Ed. 278 (1937) ("Conviction on a charge not made is a sheer denial of due process."); ***Gray v. State***, 435 So.2d 816, 818 (Fla. 1983) ("However, a conviction on a charge not made by the indictment or information is a denial of due process of law.") (Citing ***Thornhill v. Alabama***, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093 (1940)).

> No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal. (Citation omitted) and cases there cited.... It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made. (Citations omitted).

Cole v. Arkansas, 333 U.S. 196, 201, 68 S.Ct. 513, 92 L.Ed.2d 644 (1948).

Likewise, the Florida Constitution is a separate basis requiring that the charging document provide notice of the elements of the charged offense:

> The constitution (Declaration of Rights, § 11), guarantees to every accused person ... the right to know "the nature and cause of the accusation against him," and it necessarily follows that the accused cannot be indicted for one offense and convicted and sentenced for another, even though the offenses are closely related and of the same general nature or character and punishable by the same grade of punishment.

Penny v. State, 140 Fla. 155, 162, 191 So. 190, 193 (1939). *Accord*, ***Ray v. State***, 403 So.2d 956 (Fla. 1981). The revision to Florida's constitution in 1976 moved, but did not diminish the right, "In all criminal prosecutions the accused shall, upon demand, be informed of the nature and cause of the accusation, and shall be furnished a copy of the charges [.]" Article I, section 16(a), Florida Constitution (1976). The failure of Florida to

honor and enforce the clear language of its own constitution denies due process of law and constitutes a violation of Section 1 of the Fourteenth Amendment to the United States Constitution.

The protections afforded by having the charging document clearly specify the elements of the charge upon which the defendant is being tried extend beyond mere notice to the Accused, for the charge set forth in the information or Indictment provides the basis to assert the right against double jeopardy violations under the Fifth and Fourteenth Amendment to the United States Constitution. In light of recent holdings by the United States Supreme Court, it is clear that the statutory aggravating circumstances that authorize imposition of capital punishment are entitled to the protections of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. *See* ***Shepard v. United States***, 544 U.S. 13 (2005); ***United States v. Booker***, 543 U.S. 220 (2005), ***Ring v. Arizona***, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), ***Apprendi v. New Jersey***, 530 U.S. 466 (2001), and ***Jones v. United States***, 526 U.S. 227 (1999). *But see,* ***Winkles v. State***, 894 So.2d 842 (Fla. 2005); ***Bottoson v. Moore***, 833 So.2d 693, 732-733 (Fla. 2002).

In the absence of notice, defense counsel will unfairly have to defend against Florida's entire death penalty statute because an affirmative duty is placed on defense counsel to thoroughly investigate *all* potential issues:

> [S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations

> unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

Smith v. Wiggins, 539 U.S. 510, 521-522, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003), quoting ***Strickland v. Washington***, 466 U.S. 668, 690-691, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1989). These issues include not only the possible mitigation that may exist, but also an affirmative duty exists for defense counsel to investigate and be prepared to address all potential aggravating circumstances that the State can use to seek imposition of a death sentence. *See* ***Rompilla v. Beard***, 545 U.S. 374, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005). Before counsel can make informed decisions about how to strategically deal with the potential aggravating circumstance, it must be investigated. Anything less denies effective assistance of counsel under the Sixth and Fourteenth Amendments to the United States Constitution. In this regard, section 921.141(5), Florida Statutes, contains 14[1]

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[1] **(5) Aggravating circumstances.**--Aggravating circumstances shall be limited to the following:
(a) The capital felony was committed by a person previously convicted of a felony and under sentence of imprisonment or placed on community control or on felony probation.
(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.
(c) The defendant knowingly created a great risk of death to many persons.
(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any: robbery; sexual battery; aggravated child abuse; abuse of an elderly person or disabled adult resulting in great bodily harm, permanent disability, or permanent disfigurement; arson; burglary; kidnapping; aircraft piracy; or unlawful throwing, placing, or discharging of a destructive device or bomb.
(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.
(f) The capital felony was committed for pecuniary gain.
(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.
(h) The capital felony was especially heinous, atrocious, or cruel.
(i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.
(j) The victim of the capital felony was a law enforcement officer engaged in the performance of his or her official duties.
(k) The victim of the capital felony was an elected or appointed public official engaged in the performance of his or her official duties if the motive for the capital felony was related, in whole or in part, to the victim's official capacity.

factors that may authorize imposition of capital punishment in Florida. Without notice as to which factor(s) the State will seek to use, defense counsel must investigate, litigate, and be prepared to defend against them all.

"No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal." ***Cole v. Arkansas***, 333 U.S. 196, 201, 68 S.Ct. 514, 517, 92 L.Ed. 644 (1948). The heightened due process considerations previously addressed compel that, at a minimum, the State of Florida be compelled here upon timely request to provide notice as to what, if any, statutory aggravating circumstances contained in Section 921.141(5), Florida Statutes, the State will attempt to prove in obtaining a death sentence in this case. As explained by Justice Cantero, "Although it is clear that no statute, rule of procedure, or decision of this Court or the United States Supreme Court compels a trail court to require advance notice of aggravating factors, it is equally clear that none prohibits it, either. Moreover, the justification for it is stronger now than when we decided *Hitchcock* and *Sireci*." ***Steele***, supra at p.8.

WHEREFORE the Accused moves for this Court to exercise its discretion and to direct the State to identify in writing every statutory aggravating circumstance that the

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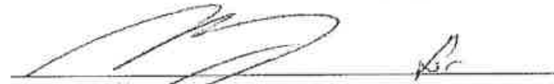
(l) The victim of the capital felony was a person less than 12 years of age.
(m) The victim of the capital felony was particularly vulnerable due to advanced age or disability, or because the defendant stood in a position of familial or custodial authority over the victim.
(n) The capital felony was committed by a criminal street gang member, as defined in section 874.03.
(o) The capital felony was committed by a person designated as a sexual predator pursuant to s. 775.21 or a person previously designated as a sexual predator who had the sexual predator designation removed.

State will seek to use as a basis for imposition of the death penalty in this case.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by e-service to the Office of the State Attorney, Brevard County, Florida, this 8 day of November, 2013.

FBN: 081241



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