Supreme Court of California
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Supreme Court of California
Jorge E. Navarrete, Clerk and Executive Officer of the Court
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IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

	)	No. S267391
	)	
	)	DCA No. B301638
	)	
	)	
IN RE JASMINE JENKINS,	)	Superior Court
	)	(Los Angeles)
On habeas corpus.	)	No. BA467828
_____	)	

REPLY TO ANSWER TO PETITION FOR REVIEW

APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA, LOS ANGELES COUNTY

Honorable Lisa B. Lench, Judge

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INTRODUCTION

Petitioner was charged with murder. Her defense was self-defense. After her conviction for manslaughter she filed a habeas petition in the Court of Appeal alleging that the state had failed to disclose exculpatory information about the criminal history of the victim Brittneeh Williams and her sister, the state's main eyewitness, Sade Williams. After the appellate court denied relief, petitioner sought review, at least in part because the record suggested that the Attorney General's Office -- which represented the state in both in the Williams sisters' case and here in petitioner's case -- knew the Williams sisters had been convicted yet never disclosed this evidence to petitioner, instead litigating this case as if there were some legitimate question as to the Williams sisters' criminal history. Petitioner urged the Court to grant review to address whether the Attorney General had either a legal or ethical obligation to disclose exculpatory evidence in his possession.

This Court ordered the Attorney General to respond. The Court's order was clear and to the point:

> Where a habeas petitioner claims he or she did not receive a fair trial because the District Attorney failed to disclose material evidence in violation of Brady v. Maryland (1963) 373 U.S. 83—and where the Attorney General has knowledge of, or is in actual possession of, such evidence—what duty, if any, does the Attorney General have to disclose that evidence to the petitioner?"

The Office of the Attorney General has now responded. It has made clear the statewide policy it is following, and the policy is nothing less than stunning.

According to the Office of the Attorney General, the state is under *no* legal obligation to disclose exculpatory evidence it has in its possession. Referring to the seminal case of *Brady v. Maryland* (1963) 373 U.S. 83, the state explains that this is so because *"Brady* is a trial right that does not apply postconviction." (Answer 16.) Going all in on this crabbed reading of *Brady*, the state further argues that recently enacted rule 3.8(d) of the Rules of Professional Conduct -- which requires timely disclosure of evidence tending to negate guilt or mitigate the offense -- "like *Brady*, appears to apply to a prosecutor's duties in a pre-conviction trial setting." (Answer 24-25.)

Review is appropriate to assess what the Office of the Attorney General has now conceded is its statewide policy. Crediting the state's position here would allow -- and even encourage -- it to become an accessory after the fact to a prosecutor's suppression of material evidence. The state's Answer -- and the startling position it has taken in this case -- shows that this is an ongoing and statewide problem, and thus is an issue likely to recur. Review is proper.

ARGUMENT

I. REVIEW IS APPROPRIATE TO DETERMINE IF THE OFFICE OF THE ATTORNEY GENERAL CAN LEGALLY AND ETHICALLY SUPPRESS EXCULPATORY EVIDENCE.

A. The State's Approach in the Court of Appeal.

Petitioner Jasmine Jenkins discovered that the prosecutor never disclosed that her office convicted the charged victim, Brittneeh Williams, of three violent felonies. The prosecutor failed to disclose this evidence even after petitioner's trial counsel made clear he was advancing a self-defense claim, which would entail prior acts of violence admissible pursuant to Evidence Code section 1103. (See 2 RT 26-28.)

Similarly, the prosecutor failed to disclose the fact that its key eyewitness -- Brittneeh's sister Sade -- was also convicted of three violent felonies in the same case. Rather, the prosecutor told trial counsel that Sade had been arrested for three violent felonies but never charged. (See Exh. B, Attachment A.)[1] The prosecutor failed to disclose this evidence even though Sade was key to the prosecution's questionable separate-stabbing theory as reflected by the jury's sole request for a readback. (See 1 CT 171.)

Petitioner filed a verified habeas petition on October 22, 2019. She included a copy of the Court of Appeal's opinion in the Williams sisters' case as an exhibit. (Exh. B, Attachment B.) Petitioner served the Attorney General with the petition that

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[1] Unless otherwise indicated, all references to exhibits are to those exhibits attached to the Petition.

same day.

After four requests for extension of time, and two automatic extensions of time following the Covid 19 pandemic, the Attorney General filed an Informal Response on May 18, 2020. In that Informal Response, the Attorney General argued the Petition should be denied "because petitioner has offered no competent evidence that either Williams or the witness suffered the adjudications petitioner cites . . . ." (Informal Response 7.) The Attorney General continued:

> Here, there was no *Brady* violation. Petitioner has offered no competent evidence that either Brittneeh or Sade were the minors in the case cited; Exhibit B, Attachment B is nothing but an apparent printout of an unspecified and unverified Internet source suggesting a direct appeal opinion in which minors "Brit. W." and "Sade W." are listed as defendants, among others. Because Petitioner has not provided sufficient evidence to show Brittneeh or Sade were the minors named, she has already failed to show a prima facie case for relief**.**

(Informal Response 15.)

Petitioner called out the Attorney General's approach in her Informal Reply:

> However, as the chief law enforcement officer of the state, respondent has access to Brittneeh's criminal history. (See Pen. Code, § 11105.) Moreover, respondent's own office handled the appeal in that

> case. (See Exh. B, Attachment B, p. 1.)
>
> Why are we speculating? Why are we playing games? Why is the suppression continuing?

(Informal Reply 6-7.)

After an Order to Show Cause issued, the state did not deviate at all in the formal Return. Instead, in the memorandum accompanying the Return, the state repeated the above-quoted arguments *verbatim*. (See Return 9, 15.) The state never admitted or denied any of petitioner's specific factual allegations, and its formal, unverified Return consisted of two paragraphs: (1) respondent admitted that petitioner was in custody following a conviction, and (2) respondent offered the following conclusory general denial of all petitioner's claims:

> Respondent alleges that petitioner is not entitled to relief because the prosecutor did not violate *Brady v. Maryland* (1963) 373 U.S. 83, by failing to disclose Williams's and a witness's purported prior juvenile adjudications for an incident that occurred in 2006 because she did not suppress such evidence and such evidence was not material; Williams's alleged prior juvenile adjudication does not constitute "new evidence" under Penal Code section 1473, subdivision (b)(3); and there was no cumulative error.

(Return 7.)

In her traverse, petitioner called out the state's failure to

admit or deny her specific allegations under penalty of perjury. (Traverse 11-13.) Petitioner sifted through respondent's memorandum and did her best to identify the facts apparently still in dispute, including: (1) "Whether the prior case involved the Williams sisters or two other sisters with remarkably similar names and characteristics," (2) "Whether the prosecutor disclosed Brittneeh's past case to trial counsel," and (3) "Whether the prosecutor disclosed Sade's prior case to trial counsel". (Traverse 13-17.) Petitioner informed the Court of Appeal that it could order the state to file an amended Return that complied with this Court's prior decisions (Traverse 13), and alternatively requested an evidentiary hearing to the extent one was necessary to resolve the apparently still-disputed facts (Traverse 13-17).

The appellate court did neither. Instead, it simply denied petitioner's *Brady* claims. (See *People v. Jenkins*, B29474/B301638, slip opn., at pp. 11-14.) In doing so, the Court of Appeal acknowledged the state's consistent position that petitioner failed to establish the Williams sisters' identities as the defendants in that prior case. Rather than address the propriety of the state's refusal to examine its own case files to resolve this question, the appellate court noted that the state's position reflected a "fair point":

> The juveniles in *People v. Emerald R.*, *supra*, B196643, are referred to as "Brit. W." and "Sade W.", which Respondent contends fails to establish they were the Williams sisters here. That is a fair point, but for present purposes we will

> assume Brit. W. and Sade W. were Brittneeh and Sade Williams.

(*Id*. at p. 11, fn. 1.)

B. The State's Position Now.

As noted above, this Court asked the state to file an Answer to the petition for review, and to focus in particular on the following issue:

> Where a habeas petitioner claims he or she did not receive a fair trial because the District Attorney failed to disclose material evidence in violation of *Brady v. Maryland* (1963) 373 U.S. 83 — and where the Attorney General has knowledge of, or is in actual possession of, such evidence — what duty, if any, does the Attorney General have to disclose that evidence to the petitioner?

The state has now responded. The Attorney General believes that "*Brady* is a trial right that does not apply postconviction." (Answer 16; see also Answer 17-18.) The Attorney General believes further that new rule 3.8(d) of the California Rules of Professional Conduct, "like *Brady*, appears to apply to a prosecutor's duties in a pre-conviction trial setting." (Answer 24-25 [citing identical ABA Model Rule 3.8(d)].) Respondent "assumes . . . that the Attorney General is ethically required to disclose known exculpatory information relevant to the veracity of a petitioner's factual allegations" (Answer 25), and claims that ethical duty was fulfilled here because petitioner

"clearly knew about Brittneeh's and Sade's purported prior juvenile adjudications here . . . ." (Answer 25-26.) The state claims it only "briefly" argued that petitioner did not establish the Williams sisters' identities in the prior case, and that it in fact litigated the case "under the assumption they were the minors who suffered those prior adjudications." (Answer 23, 26-28.) Finally, respondent argues that this Court should not grant review on this question because it was not fully presented to the Court of Appeal and does not involve an important question of law or a conflict in the law. (Answer 16-21, 28.)

Respondent is wrong on all counts. As set forth below, respondent's understanding of his *Brady* obligations is deeply unsettling and unsupported by any case law. The state's claims that it complied with its "assume[d]" ethical duties here is belied by the record, and belied by the very Answer it filed with this Court. Finally, the state's Answer has confirmed that this is an issue begging for this Court's immediate attention, and its attempts to avoid review here should be rejected. Review is appropriate.

C. *Osborne* Does Not Support Respondent's Position, and in Any Event this Court Should Find the Attorney General's Suppression of Evidence Violates the State Constitution.

The state cites *DA's Office v. Osborne* (2009) 557 U.S. 52 (*Osborne*) for the proposition that "[t]he Supreme Court of the United States has held that an allegation of a prosecutor improperly withholding evidence in postconviction proceedings

cannot be raised as a claim of *Brady* error." (Answer 17.) The Supreme Court did nothing of the sort.

Osborne did not even involve a habeas proceeding. Instead, in *Osborne*, defendant sought access to evidence for DNA testing in a civil lawsuit pursuant to 42 U.S.C. § 1983. (557 U.S. at p. 60.) This evidence had been tested using before trial using antiquated technology, and it suggested -- but did not conclusively prove -- that defendant had committed the charged crime. (*Id*. at pp. 57-58.) When the State of Alaska refused to allow the evidence to be tested using new technology, based in part on the fact that defendant had recently confessed to committing the crime in a parole hearing, defendant filed a § 1983 lawsuit against the state. (See *id*. at pp. 59-60.)

The Supreme Court elected to avoid constitutionalizing DNA testing in order not to "short-circuit what looks to be a prompt and considered legislative response." (*Osborne*, *supra*, 557 U.S. at p. 73.) The Court held there was no "freestanding" due process right to access physical evidence for DNA testing, reasoning that post-conviction DNA testing claims are not "parallel" to a trial right and thus are not analyzed under *Brady*. (*Id*. at p. 69, 73-74.)

Osborne is inapposite. At most the Supreme Court held in that case that a defendant may not sue a state in federal court to obtain access to evidence that is only potentially exculpatory. Moreover, the state in *Osborne* was not actively litigating a *Brady* claim based on the suppression of the same evidence. It is one thing to say that the state does not violate *Brady* by failing to

allow physical evidence to be tested years after conviction. It is quite another to say *Brady* allows the state to defeat an active *Brady* claim in habeas by suppressing the same evidence the prosecutor suppressed, all the while claiming -- quite falsely -- that such evidence does not exist.

Respondent cites no authority upholding the California Attorney General's suppression of exculpatory evidence in any post-conviction proceeding. Quite the opposite: the state acknowledges that the Court of Appeal in *People v. Garcia* (1993) 17 Cal.App.4th 1169 held that the Attorney General is under the same *Brady* obligations post-conviction as the prosecution is at trial. (See Answer 18.) Respondent does not cite any case disapproving of or overruling *Garcia*. (See *ibid*.) Instead, respondent points out -- simply -- that *Garcia* predates *Osborne*. (*Ibid*.)

But it is not just *Garcia*. In *People v. Gonzalez* (1990) 51 Cal.3d 1179, this Court noted the ongoing ethical duties prosecutors have to provide exculpatory evidence after conviction. (See *id*. at pp. 1260-1261.) After doing so, the Court shared the following expectation of the state's prosecutors:

> We expect and assume that if the People's lawyers have such information in this or any other case, they will disclose it promptly and fully.

(*Id*. at p. 1261.) Respondent's approach in this case shows this Court's expectations have not been met.

But review is proper even if *Osborne* could bear the weight

respondent places on it. Indeed, if the state is right about the reach of the Due Process Clause under the federal constitution, review is proper to address whether the Due Process Clause of the state constitution permits the Office of the Attorney General to suppress exculpatory evidence after a defendant has been convicted. (See Cal. Const. Art. I, § 7.) Because it is fundamentally unfair to win a *Brady* claim in post-conviction proceedings -- in whole or in part -- by suppressing evidence, this Court should do just that.

Respondent's trial-centric reading of rule 3.8(d) of the California Rules of Professional Conduct fares no better. Respondent claims that "rule, like *Brady*, appears to apply to a prosecutor's duties in a pre-conviction setting." (Answer 25.) In support of this sweeping statement, respondent cites a comment from an ABA committee discussing a trial prosecutor's duties. (See *ibid*.) Nothing in the language of the rule or the comment, however, limit its application to a "pre-conviction setting." And it makes utterly no sense to deem it unethical for a prosecutor to convict a defendant in a trial by suppressing material evidence, yet ethical for a different prosecutor to defend the same conviction in post-conviction proceedings by suppressing the very same evidence. Review is appropriate to make clear that respondent's different-rules-for-different-stages reading of the ethics rules is unsound.

D. The State's Claim That it "Assumed" These Prior Convictions Involved the Williams Sisters Because it Argued Materiality in the Alternative Is Misleading and Ignores the Nature of the Materiality Inquiry.

Despite its hugely restrictive reading of *Osborne* and rule 3.8(d) of the Rules of Professional Conduct, to his credit respondent "assumes . . . that the Attorney General is ethically required to disclose known exculpatory information relevant to the veracity of a petitioner's factual allegations." (Answer 25.) Respondent tells this Court that ethical duty was fulfilled here because "petitioner clearly knew about Brittneeh's and Sade's purported prior juvenile adjudications . . . ." (*Ibid*.) Respondent also separately explains he "did search for conformation within its limited, readily-available electronic file for the appeal, but it was unable to obtain sufficient information, such as birthdates, to confirm the prior adjudications." (Answer 19, fn. 3.) Respondent chose not to retrieve his physical file "for a few reasons, primarily because verifying that Brittneeh and Sade were the minors from the prior adjudication was unnecessary . . . [and because] the Court of Appeal gave respondent only seven court days to file a return when it issued the order to show cause." (Answer 19-20, fn. 3.)

First, respondent's timing is all wrong. Petitioner served the Attorney General with a copy of the habeas petition and exhibits on October 22, 2019. Respondent filed his Return on December 7, 2020. Respondent thus had far more than "seven court days" to retrieve his file. He had 412 calendar days -- over a

year -- to do so. He apparently did not.

Second, respondent did not need to undergo the arduous task of retrieving his physical file. As petitioner pointed out in her Informal Reply, respondent is the chief law enforcement officer in the state and is responsible for managing the criminal history clearinghouse as codified in Penal Code section 11105. (See Informal Reply 6-7.) Respondent needed only access his own criminal history repository and check Sade's and Brittneeh's criminal histories to confirm they were convicted of three violent felonies. Again, he apparently did not.

Third, respondent's claim that checking his own records to confirm the Williams sisters's convictions was "unnecessary" because he only "briefly" disputed the identity of the Williams sisters (Answer 19, fn. 3, 22-23) is belied by the record. Respondent repeatedly disputed their identity in the Informal Response (see, e.g., Informal Response 7, 15, 21, 24) and again in the Return (see, e.g., Return 7, 9, 15, 22, 25). Indeed, respondent appears to *still* dispute their identities; in his Answer, respondent repeatedly refers to these as "alleged," "allegedly-undisclosed" and "purported" prior convictions. (See, e.g., Answer 10, 14, 15, 19, 25, 28.) Respondent's claim that he fulfilled his "assume[d]" ethical duties to disclose exculpatory evidence in a case where he never disclosed *anything* -- and instead repeatedly and consistently cast doubt on the exculpatory evidence petitioner managed to uncover on her own -- is totally unsupported by the record. (See Answer 25.)

To be sure, in addition to disputing the Williams sisters'

identities, respondent also alternatively argued materiality below. (See, e.g., Informal Response 17-19; Return 18-21.) But respondent fails to appreciate the fact that it is impossible to conduct a materiality analysis when the evidence still has not been disclosed. We know only the bare minimum about this evidence -- that Brittneeh and Sade brutally attacked three women for no reason and were subsequently convicted. Precisely because the Office of the Attorney General now insists it has no obligation to disclose exculpatory evidence after conviction, petitioner does not know if there is more to the story. (See, e.g., *Pham v. Terhune* (9th Cir. 2005) 400 F.3d 740 [ordering state in post-conviction proceedings to disclose exculpatory evidence so that petitioner and courts could assess materiality].)

In this case, for example, the information in the possession of the Attorney General could show probation violations, subsequent arrests for other violent felonies, admissions to the probation officer and so on. Put simply, the limited information petitioner was able to uncover on her own may not contain the whole story, but this is impossible to know because respondent still will not disclose anything about this prior case. Respondent's continued suppression has thus hamstrung the materiality analysis.

Moreover, the fact of the matter is the only evidence of Brittneeh's history of violence the jury heard was from petitioner herself. (See 5 RT 1646-1649.) The prosecutor cross-examined petitioner at length, implying that petitioner had started -- or was at least a willing participant in -- the prior fights with Brittneeh.

(See, e.g., 5 RT 1677-1686, 1707-1709.) And the prosecutor argued at length in closing arguments that the prior fights showed that petitioner faced only the dangers of "having her hair pulled" or "a fistfight." (6 RT 1888, 1903-1904, 1927-1928.) The prosecutor could not have made such arguments with a straight face had jurors heard of Brittneeh's prior violent attack on three women, which left each of them severely injured. (See Exh. B, Attachment B.) The evidence was material.

The same is true as to Sade, but for different reasons. According to defense counsel, Sade testified "with great emotion" that her sister was not violent and was not a bully. (See Exh. B [Blacknell Decl.] at para. 14.) Defense counsel would have "relished" the opportunity to impeach Sade's emotional testimony with the fact that she and Brittneeh had previously attacked three women together. (*Ibid*.) But the prosecutor's suppression of this evidence ensured he never got the chance.

Further, Sade's testimony was key to the prosecutor's thinly supported theory in which Brittneeh was stabbed at two separate points, as reflected by the jury's request for a readback of this testimony. (See 1 CT 171.) While respondent, like the Court of Appeal, points to nine-year-old Abigail's testimony as other evidence for this theory, the fact of the matter is Abigail's testimony made utterly no sense. Indeed, even respondent concedes that Abigail testified petitioner pushed Brittneeh to the bus stop and then stabbed her in the stomach and head. (Answer 14-15.) The video, of course, shows Mitchell pushing Brittneeh to the bus stop, and not even the prosecutor claimed Brittneeh was

stabbed at that point. (See People's Exhibit 4, file 3 at 00:05-00:24; 6 RT 1900-1901.) And no one claimed Brittneeh was ever stabbed in the head. (See, e.g., 6 RT 1900-1901.) Sade's testimony -- and thus her credibility -- were key to the state's case, and the suppressed evidence undermined her credibility as nothing else could. Again, the evidence was material.

E. Because the Attorney General Has a Statewide Policy of Suppressing Evidence Post-conviction -- Even When Litigating *Brady* Claims about That Same Evidence -- this Court Should Reject the State's Attempts to Avoid Review and Announce the Specific Contours of the State's *Brady* Obligations.

Respondent's final argument deals with whether this Court should grant review. Respondent advances two primary reasons for denying review. First, respondent claims that the issue was not fully presented to the Court of Appeal. (Answer 16-21.) Second, respondent claims that determining whether the Attorney General may suppress evidence when defending a *Brady* claim "fails to raise any important question of law or demonstrate any conflict in the law." (Answer 28.)

This issue was fully presented to the Court of Appeal. As noted above, petitioner repeatedly pointed out respondent's failure to produce this evidence in her pleadings. (See, e.g., Informal Reply 6-7, 13-14; Traverse 5-6, 11-17.) She alleged that the state was continuing to suppress this evidence. (See *ibid*.) She repeatedly argued that the state should check its own files to provide the evidence. (*Ibid*.) While the Court of Appeal did not

acknowledge any of this in its opinion -- instead commenting that the state had made a "fair point" that the Williams sisters' identities were never established (see *People v. Jenkins*, B29474/B301638, slip opn., p. 11, fn. 1) -- it was fully presented to that court.

Moreover, even assuming for the moment that this issue was not fully presented below, rule 8.500(c)(1) still permits this Court to grant review. That rule states that "[a]s a policy matter, on petition for review the Supreme Court normally will not consider an issue that the petitioner failed to timely raise in the Court of Appeal." Nothing prevents this Court from departing from the normal course in this case. And given the nature of the issue here, that is precisely what should be done.

Respondent's second basis -- that this issue does not involve an important question of the law or a conflict of the law -- merits only a brief response. As reflected in this Court's request for an answer -- and the amicus letter by the California Attorneys for Criminal Justice -- this is an incredibly important question that requires immediate attention from this Court. The Attorney General has a statewide policy of not disclosing exculpatory evidence even when defending a *Brady* claim based on that same evidence. And it has this policy despite being aware of an appellate court opinion declaring such policies improper. The Attorney General's statewide policy of suppression thus involves both an important question of law and a conflict in the law. Review is appropriate pursuant to rule 8.500(b)(1).

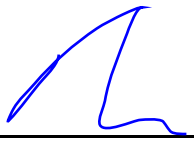
CONCLUSION

For all the reasons set forth above and in the petition for review, review is appropriate.

Dated: April 5, 2021.

Respectfully submitted,

RUDOLPH J. ALEJO



By: Rudolph J. Alejo
Attorney for Petitioner
Jasmine Jenkins

CERTIFICATE OF COMPLIANCE

I certify that the accompanying brief is 1.5-spaced, that a 13-point proportional font was used, and that there are 3,981 words in the brief.

Dated: April 5, 2021.

Rudolph J. Alejo

CERTIFICATE OF SERVICE

I, the undersigned, declare as follows:

I am a citizen of the United States, over the age of 18 years and not a party to the within action. My business address is 8839 N. Cedar Ave #312, Fresno, CA 93720.

On April 5, 2021, I served the within

REPLY TO ANSWER TO PETITION FOR REVIEW

upon the parties named below by depositing a true copy in a United States mailbox in Fresno, California, in a sealed envelope, postage prepaid, and addressed as follows:

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Los Angeles Superior Court
Hon. Lisa Lench
210 West Temple Street
Los Angeles, CA 90012

and upon the parties listed below through the Truefiling system:

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LA County DA	Court of Appeal

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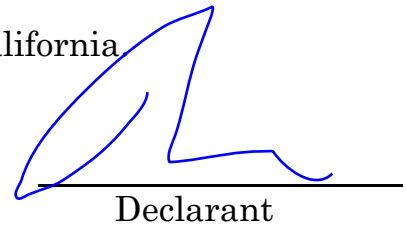

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STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **JENKINS (JASMINE) ON H.C.**
Case Number: **S267391**
Lower Court Case Number: **B301638**

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