No. _____

In the Supreme Court of the United States

BENJAMIN SMITH,

Petitioner,

Versus

SECRETARY, DEPARTMENT OF CORRECTIONS,
ATTORNEY GENERAL, STATE OF FLORIDA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does a state and/or federal prisoner have a constitutional right to raise a freestanding claim of actual innocence, in a federal habeas corpus proceeding?

PARTIES TO THE PROCEEDING

All the parties to this proceeding are named in the caption.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Benjamin Smith respectfully petitions for a writ of certiorari to review the opinion of the United States Court of Appeals for the Eleventh Circuit entered in this matter on September 26, 2018, denying the Petitioner's Certificate of Appealability and affirming the judgment of the United States District Court for the Middle District of Florida, Orlando Division.

OPINIONS BELOW

The Order Denying the Petitioner's Application for Certificate of Appealability, issued by the United States Court of Appeals for the Eleventh Circuit is unpublished and attached as **Appendix A**. The Order Denying the Petitioner's Motion for Reconsideration is unpublished and attached as **Appendix B**.

The judgment of the United States District Court for the Middle District of Florida, Orlando Division, is unpublished and is attached at **Appendix C**. The district court's findings on this matter, also unpublished, appear in the record attached as **Appendix D.**

JURISDICTION

The court of appeals entered its order on September 26, 2018. Pursuant to Federal Rule of Appellate Procedure 35 and 11th Circuit Rule 35, a timely Motion for Reconsideration of single judge's order was filed on October 17, 2018. Ultimately, the United States Court of Appeals for the Eleventh Circuit denied the motion on November 27, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves Title 28, United States Code, Section 2254:

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that--

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that--

(A) the claim relies on--

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

28 U.S.C.A. § 2254.

STATEMENT OF THE CASE

A. Statement of jurisdiction in the lower courts, in accordance with this Court's Rule 14(1)(g)(ii), and suggestion of justification for consideration, as suggested under Rule 10.

The Petitioner, Benjamin Smith, filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the district court. The district court entered judgment on August 30, 2017. The Petitioner filed a timely notice of appeal on September 27, 2017. The Eleventh Circuit exercised jurisdiction over the Petitioner's appeal under 28 U.S.C. § 1291, which authorizes review of final judgments of the district courts.

This case concerns an important issue surrounding if and when a state prisoner is allowed to challenge his judgment and conviction based solely on the issue of his actual innocence. This issue has never been determined before by this Court, and its failure to reach a decision has caused conflict amongst all Circuit Courts of Appeals.

B. Factual Background.

In 1996, a group of family members and friends attended an event at the Citrus Bowl in Orlando. (Doc. 14-3 at 215). As the group returned to the parking lot Terry Manley saw a Black male acting suspiciously in the area where the group had parked. (Doc. 14-3 at 217). Manley approached and saw someone inside one of the vehicles. (Doc. 14-3 at 220). Manley startled the individual, causing him to flee, but not before the individual brandished a gun. (Doc. 14-3 at 221-22). Manley, along with three other members of the group (Ellis Tapley, Kenneth Dozier and Lee Keith) began to chase the suspect (Doc. 14-3 at 222-23). During the chase, the suspect shot Tapley and Dozier (Doc. 14-3 at 230); Tapley died at the scene. (Doc. 14-3 at 231). Mazie Pauldo witnessed Tapley's shooting from her car, which was parked on an adjacent street. (Doc. 14-4 at 56-59). The shooter ultimately eluded capture by his pursuers.

Law enforcement officers investigating the shooting showed Manley, Pauldo and Keith photo arrays of people in an effort to identify the suspect. Manley and Pauldo identified Smith. (Doc. 14-3 at 232-33 & Doc. 14-4 at 161). Keith could not make a positive identification of the shooter, identifying more than one as possibly being the shooter (including Smith). (Doc. 14-3 at 337, 369-70; Doc. 14-4 at 45-46).

Manley, Pauldo, Keith and tommy Whitmer (the deceased victim's younger brother) later participated in a live lineup that included Smith. Manley also could not make an identification. (Doc. 14-3 at 233-34). But Pauldo and Whitmer identified Smith as the shooter. (Doc. 14-4 at 64-65 & Doc. 14-3 at 381-82). Keith identified Smith too but conceded he was only 98% sure. (Doc. 14-3 at 338-39).

C. State Court Procedural History

Almost twenty years ago, in August of 1998, a grand jury returned an indictment charging the Petitioner with first degree murder, attempted first degree murder and attempted burglary of a vehicle. (Doc. 14-1 at 65-66). In May of 2000, a jury found the Petitioner guilty as charged and the Petitioner was sentenced to life for first degree murder, fifteen years for attempted first degree murder, and three years for attempted burglary. (Doc. 14-2). The Petitioner then appealed the judgment and sentence of the trial court to the Fifth District Court of Appeal. In May 2001, the court affirmed *per curiam*. (Doc. 14-6).

In April of 2003, the Petitioner filed a motion for postconviction relief, pursuant to Florida Rule of Criminal Procedure 3.850. The trial court ultimately denied his motion, and the Petitioner appealed to the Fifth District Court of Appeal. (Doc. 14-7). The appeal was ultimately affirmed in February 2005. (Doc. 14-8). The Petitioner filed a second motion for postconviction relief in March 2006. (Doc 14-8). This motion challenged his conviction on the ground of newly discovered evidence. Specifically, one of the State witnesses, Mazie Pauldo, recanted her earlier identification of him as the shooter. (Doc. 14-9). The trial court ultimately denied the motion in March of

2008, and the Fifth District reversed and remanded the case for an evidentiary hearing thereafter. (Doc. 14-9).

The trial court conducted an evidentiary hearing and ultimately **granted** the Petitioner's motion and ordered a new trial. (Doc. 14-10). The State appealed, and the Fifth District reversed and remanded in January of 2011, instructing the trial court to determine whether there was sufficient evidence to find police or prosecutorial misconduct. (Doc. 14-11). After conducting a subsequent evidentiary hearing in March of 2011, the trial court found that there was insufficient evidence to support findings of misconduct. (Doc. 14-11). The Petitioner appealed and the Fifth District affirmed the order in March 2013. (Doc. 14-11). The Petitioner filed a motion for rehearing, which the Fifth District denied in April of 2013. (Doc. 14-11). The Petitioner also sought a writ of mandamus from the Florida Supreme Court, which was denied in December of 2013, and a similar writ from the Fifth District, which was also denied in September of 2014. (Doc. 14-11).

D. District Court Findings

In October of 2015, the Petitioner filed a Petition under 28 U.S.C. § 2254 in the United States District Court, Middle District of Florida. (Doc. 1). The sole basis for the petition was that his constitutional rights were violated when new evidence established that law enforcement and/or the State Attorney was involved in coercing false identification, resulting in proof sufficient to establish that the Petitioner was actually innocent of the crimes he stood convicted of. (Doc. 1 at 5).

Ultimately, on August 30, 2017, the district court entered an order denying the Petitioner's petition. (Doc. 20). The district court made two overall conclusions: (1) the Petitioner could not establish actual innocence for purposes of avoiding the statute of limitations and (2) the Petitioner could not establish a constitutional violation. (Doc. 20 at 23-30).

E. 11th Circuit Court of Appeal Ruling

The Petitioner appealed from the district court's denial of his petition, and moved for a Certificate of Appealability on January 22, 2018. The Court ultimately denied the petition and found that "[a]lthough Mr. Smith may be able to maintain an actual-innocence claim, a COA is DENIED because reasonable jurists would not debate whether he can show a separate valid claim of the denial of an underlying constitutional right." Pet. App. A at 10.

REASONS FOR GRANTING THE PETITION

I. This Court Has Raised But Never Decided the Question of Whether the Constitution Requires the Ability to Raise Freestanding Actual Evidence Claims.

The appellate court found that although the Petitioner established a claim of actual innocence, that was not sufficient because that "circuit does not recognize stand-alone claims of actual innocence Pet. App. A at 9. Like the lower courts, this Court has repeatedly considered the issue, particularly in the context of capital cases, but has never actually determined whether the Constitution prohibits the punishment of a prisoner who has made a compelling showing of actual innocence.

It has now been more than a quarter century since this Court raised but did not decide the issue in *Herrera v. Collins*, 506 U.S. 390 (1993). *Herrera* found that a state prisoner facing execution was not entitled to habeas relief, noting that "[c]laims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding." *Id.*, at 400. "[F]ederal habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution - not to correct errors of fact," and such courts "'are not forums in which to relitigate state trials.' [Citation.]" *Id.*, at 400-401. Assuming that in a capital case, "a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional," the Court found the petitioner fell "far short" of the threshold showing for such an assumed right, which "would necessarily be extraordinarily high." *Id.*, at 417.

The majority opinion in *Herrera* was only one of five. Two justices would have preferred the Court to decide the issue, arguing there was "no basis in text, tradition, or even in contemporary practice ... for finding in the constitution a right to demand judicial consideration of newly discovered evidence of innocence brought forward after conviction." *Herrera*, 506 U.S. at 427-28 (Scalia, J., concurring).

But most of the justices specifically disagreed with that assessment. In another concurrence, two justices stated that "the execution of a legally and factually innocent person would be a constitutionally intolerable event. Dispositive to this case, however, is an equally fundamental fact: Petitioner is not innocent, in any sense of

the word." *Herrera,* 506 U.S. at 419 (O'Connor, J., concurring). Those justices agreed it was not necessary to determine the precise showing that a petitioner in such a case would have to make. *Id.,* at 420-421. Justice White, who did not join the majority decision, wrote a separate concurrence in which he "assume[d] that a persuasive showing of 'actual innocence' made after trial, ... would render unconstitutional the execution of petitioner in this case," but argued that to obtain relief a petitioner would at least have to show that "'no rational trier of fact could [find] proof of guilt beyond a reasonable doubt.'" *Id.,* at 429 (Kennedy, J., concurring), quoting *Jackson v. Virginia,* 443 U.S. 307, 324.

Three dissenting justices argued that executing "a person who is actually innocent" would violate the Eighth Amendment's prohibition on "cruel and unusual punishments," which extends beyond the valid conviction and sentencing of a defendant, and "is equally offensive to the Due Process Clause of the Fourteenth Amendment." *Herrera,* 506 U.S. at 430-437 (Blackmun, J., dissenting). To obtain relief, they believed a "truly persuasive demonstration" of innocence meant that a petitioner "must show that he is probably innocent." *Id.,* at 442.

Two years later, the Court held that a showing of actual innocence could be used to overcome procedural obstacles in advancing two accompanying constitutional claims, but distinguished *Herrera* as involving a "claim of innocence to support a novel substantive constitutional claim, namely, that the execution of an innocent person would violate the Eighth Amendment." *Schlup v. Delo,* 513 U.S. 298, 314 (1995). The petitioner's "claim of innocence does not by itself provide a basis for relief,"

but was instead a procedural "gateway" though which the petitioner had to pass to establish that in order to have a court consider his constitutional claims by showing that failing to do so would implicate a fundamental miscarriage of justice. *Id.*, at 314-316. The Court held that, in order to establish actual innocence as a gateway to considering constitutional claims, a petitioner had to show that "a constitutional violation has probably resulted in the conviction of one who is actually innocent." *Id.* at 317, quoting *Murray v. Carrier*, 477 U.S. 478, 496.

In *House v. Bell,* 547 U.S. 518 (2006), the Court held that the petitioner had established a gateway claim of innocence under *Schlup,* determining that, "although the issue is close, we conclude that this is the rare case where - had the jury heard all the conflicting testimony - it is more likely than not that no reasonable juror viewing the record as a whole would lack reasonable doubt." *Id.,* at 554. The Court declined to decide whether a freestanding innocence claim was cognizable, reasoning that *"Herrera* requires more convincing proof of innocence than *Schlup.* It follows, given the closeness of the *Schlup* question here, that House's showing falls short of the threshold implied in *Herrera." Id.,* at 555.

In a non-capital case involving a 26 year sentence, the Court acknowledged that the question of whether there was a federal constitutional right to release upon proof of actual innocence "is an open question. We have struggled with it over the years, in some cases assuming, *arguendo,* that it exists while also noting the difficult questions such a right would pose and the high standard any claimant would have to meet." *District Attorney's Office for the Third Judicial District v. Osborne,* 557 U.S.

52, 71 (2009), citing *House* and *Herrera*. Considering a state case involving recantations of key witnesses, implications of the principal witness as the shooter, and the lack of any judicial review of postconviction affidavits, the Court transferred the case to the Southern District of Georgia to "receive testimony and make findings of fact," *In re Davis*, 557 U.S. 952 (2009). Justice Scalia dissented, arguing that the Court was sending the lower court "on a fool's errand," and urging the Court to set the case on its own docket to determine whether actual innocence could be raised at any time in capital cases. *Id.* at 957-958 (Scalia, J., dissenting).

Citing *Herrera*, the Court most recently acknowledged, in a case involving a life sentence, "We have not resolved whether a prisoner may be entitled to habeas relief based on a freestanding claim of actual innocence." *McQuiggin v. Perkins*, 569 U.S. 383, 392 (2013). The Court reaffirmed the viability of relief under the miscarriage of justice gateway, and found that, though the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") had established a higher burden of proof and a diligence requirement on second or successive habeas petition, in "a first petition for federal relief, the miscarriage of justice exception survived AEDPA's passage intact and unrestricted." *Id.* at 397.

II. The Absence of a Ruling from This Court has Resulted in Conflicts and Confusion Among the Courts of Appeals, and Among Legal Scholars, on this Critical Issue

Without clear direction from this Court, the lower courts have inevitably arrived at conflicting decisions as to whether petitioners are "entitled to habeas relief based on a freestanding claim of actual innocence," *McQuiggin v. Perkins*,

569 U.S. at 392, and many have simply misinterpreted Herrera to the severe detriment of defendants facing lengthy prison sentences or even death.

The First Circuit, for example, has stated that the "actual innocence rubric ... has been firmly disallowed by the Supreme Court as an independent ground of habeas relief, save (possibly) in extraordinary circumstances in a capital case." *David v. Hall*, 318 F.3d 347-348 (1st Cir. 2003), *citing Herrera*. The Third Circuit similarly dismissed a claim of innocence based on new evidence as simply not cognizable, also relying on *Herrera*. *Fisher v. Varner*, 379 F.3d 113, 122 (3rd Cir. 2004). While acknowledging that *Herrera* left the question open, the "Fifth Circuit has rejected this possibility and held that claims of actual innocence are not cognizable on federal habeas review." *Graves v. Cockrell*, 351 F.3d 143, 351 (5th Cir. 2003); *see also In re Swearingen*, 556 F.3d 344, 348 (5th Cir. 2009).

The Sixth District concluded that the "Supreme Court has held that newly discovered evidence does not constitute a freestanding ground for federal habeas relief, but rather that the newly discovered evidence can only be reviewed as it relates to an 'independent constitutional violation occurring in the underlying stat criminal proceedings.'" *Zuern v. Tate*, 336 F3d 478, 482, fn. 1 (6th Cir. 2003), *quoting Herrera*, 506 U.S. at 400. In a case where the petitioner had not been sentenced to death, the Seventh District found this Court's precedent "does not allow a federal court to issue a writ of habeas corpus only on the ground that [appellant] is, or might be, innocent of ... murder." *Milone v. Camp*, 22 F.3d 693, 700 (7th Cir. 1994). More recently, the Seventh Circuit limited evidence of factual evidence to gateway claims,

stating "[w]e know from *Herrera* ... that a conviction does not violate the Constitution (or become otherwise subject to collateral attack) just because newly discovered evidence implies that the defendant is innocent." *United States v. Evans*, 224 F.3d 670, 674 (7th Cir. 2000).

Some circuits have produced conflicting outcomes within their own jurisprudence. The Fourth Circuit, for example, has relied on Herrera to deny "the requested habeas relief based simply on [appellant's] assertion of actual evidence due to newly discovered evidence," because the state had an executive clemency process and "[p]recedent prevents us from granting [petitioner's] habeas writ on this basis alone," *Royal v. Taylor*, 188 F.3d 239, 243. (4th Cir. 1999). That court has also characterized *Herrera* as holding "that claims of actual innocence are not ground for habeas relief even in a capital case." *Rouse v. Lee*, 339 F.3d 238, 255 (4th Cir. 2003). But as one of its district courts recently observed, "in later cases the court appears to have assumed, without deciding, that such claims are cognizable." *United States v. MacDonald*, 32 F. Supp.3d 608, 706. As *MacDonald* noted, the Fourth Circuit had since stated in dicta that a "petitioner may also raise a freestanding innocence claim in a federal habeas petition." *Teleguz v. Peaison*, 689 F.3d 322, 328, fn. 2 (4th Cir. 2012). "Like the Supreme Court and the Fourth Circuit, this court will assume, arguendo, that a freestanding actual innocence claim is cognizable." *MacDonald*, 32 F. Supp.3d at 707.

The Eighth Circuit believed a petitioner's claim of actual innocence "has considerable intuitive appeal, for, to some extent, the very purpose of a writ of

habeas corpus is to forestall the unjustified punishment of the innocent," but denied habeas relief based on *Herrera* in *Burton v. Dormire*, 295 F.3d 839, 848 (8th Cir. 2002). That court similarly found it was "without jurisdiction" to treat a factual innocence claim in the absence of an alleged constitutional violation in *Clayton v. Roper*, 515 F3d 784, 793 (8th Cir. 2008), but a different panel later said it was "unsure why the Clayton panel thought it lacked jurisdiction, so we follow the approach of Herrera, 506 U.S. at 417-19, in addressing Dansby's claim." *Dansby v. Norris*, 682 F.3d 711, 716-717.

The Eleventh Circuit has characterized *Herrera* as "holding that no federal habeas relief is available for freestanding non-capital claims of actual innocence." *Rozzelle v. Secretary, Florida Department of Corrections*, 672 F.3d 1000, 1010 (11th Cir. 2012). But in *In re Lambrix*, 624 F.3d 1365 (11th Cir. 2010), the Court actually followed *Herrera*, determining that the petitioner had not made an adequate factual showing "even assuming Lambrix can make a freestanding actual innocence claim." *Id.*, at 1367.

The Ninth Circuit, like this Court, has consistently assumed without deciding that "a freestanding actual innocence claim is cognizable in a federal habeas corpus proceeding ..." *Jones v. Taylor*, 763 F.3d 1242, 1246 (9th Cir. 2014). Like this Court, the Ninth Circuit has not established the precise showing required on such a claim, but following the standard proposed by the dissenters in *Herrera* stated as a minimum that "a habeas petitioner asserting a freestanding innocence claim must go beyond demonstrating doubt about his guilt, and must affirmatively prove that

he is probably innocent." *Carriger*, 132 F.3d at 476, relying on *Herrera*, 506 U.S. at 442 (Blackmun, J., dissenting).

Not only has the issued created conflict amongst the circuits, but the issue has confused and divided scholars. While a number of scholars have advocated for a specific holding acknowledging the cognizability of freestanding actual innocence claims on federal habeas corpus, or even argued that Congress should establish such a right, more than ten "have advanced the erroneous claim that the Supreme Court held in *Herrera* that innocence is not a freestanding constitutional claim." *Kaneb, supra*, at 192.

III. This Court Should Hold that Freestanding Actual Innocence Claims are Legally Cognizable on Federal Habeas Corpus Petitions filed by State and Federal Prisoners Who Can Establish that They are Actually Innocent

Only this Court can resolve the conflicting decisions of the Courts of Appeals and end the confusion among courts and commentators regarding the right to bring freestanding actual innocence claims. When this Court decided *Herrera*, "very few people had been exonerated by DNA evidence. Today, however, at least 316 people have been exonerated by DNA evidence; nearly one thousand have been exonerated without DNA evidence." *Kaneb, supra*, at 202. There have now been more than 2,000 exonerations. Those exonerations have occurred in state courts, where most courts provide a mechanism for establishing actual innocence. However, as this Court has recognized, those state courts have incorrectly applied the standards and made wrong decisions. That precise reason is why this Court should provide another avenue for actually innocent defendants to try and find relief.

The Petitioner's case is the perfect example of when a state court, and a district court, make the wrong finding of fact regardless of the evidence before them. The Eleventh Circuit acknowledged that the Petitioner had established that no reasonable juror would have convicted him absent Ms. Pauldo's testimony. Pet. App. A at 8. Yet, because the Petitioner did not have a sufficient constitutional claim to accompany his actual innocence claim, his entire petition was denied. This is the very definition of a constitutional violation: an admitted innocent man is currently serving a life sentence, with no avenue available for relief.

This Court has recognized that the judicial system is constantly evolving. With that in mind, the Court should be flexible and open to considering a new approach that allows actually innocent defendants a second opportunity to relief. This Court has been provided with countless opportunities to resolve this issue, which continues to be important and recurring. This is the ideal opportunity to resolve said issue.

CONCLUSION

For the reasons stated above, the Petitioner respectfully submits that the petition for a writ of certiorari should be granted.

Respectfully submitted,

Benjamin Smith, Petitioner

Date: February 25, 2019

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