IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Respondent, vs. SANDI DAWN NIEVES, Appellant.	)	Case No. S092410 Los Angeles Superior Court No. PA030589-01

ON AUTOMATIC APPEAL FROM A JUDGMENT

AND SENTENCE OF DEATH

Los Angeles County Superior Court

Hon. L. Jeffrey Wiatt, Judge Presiding

APPELLANT'S SUPPLEMENTAL REPLY BRIEF

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II. *Claims of Judicial Misconduct and Bias*

A. *Risk of Bias – Rippo and Williams*

The Attorney General contends that the principles and holdings of *Rippo v. Baker* (2017) ___ U.S. ___, 137 S.Ct. 905 and *Williams v. Pennsylvania* (2016) ___U.S.___, 136 S.Ct. 1899, only address disqualification of judicial officers due to an intolerable risk of bias when a potential conflict of interest arises under certain narrow circumstances such as pecuniary issues, campaign contributions, or embroilment in contempt proceedings. Respondent's Supplemental Brief at 10. Although the Attorney General is correct about the holdings in those cases, they are not as narrow as the Attorney General contends.

Rippo and *Williams* plainly hold that the threshold for judicial disqualification is not limited to actual bias. It extends to implied bias, including bias that arises from embroilment with a lawyer in a case. The Attorney General entirely skips over the fact *Williams* characterizes implied bias as a structural one *(Williams* at 1910), a point that is not addressed at all in Respondent's Supplemental Brief. The risk that a capital defendant will not or did not receive a fair trial requires reversal without proof of prejudice. *Id. See Tumey v. Ohio* (1927) 273 U.S. 510, 532.

Rippo and *Williams* address the risk of bias. Setting aside the actual bias in this case for the moment, *Rippo* and *Williams* plainly require reversal due to the failure to disqualify the trial judge who exhibited bias in his embroilment with the defense. Indeed, the Attorney General admits that one basis for disqualification under *Rippo* and *Williams* is when the judge is embroiled in contempt proceedings. Respondent's Brief at 10.

In this case, the trial judge repeatedly threatened defense counsel with contempt and sanctioned him multiple times. See AOB at 77-88. The defense sought writs from the Court of Appeal, challenging the sanctions. The Court of Appeal summarily stayed the sanctions and issued *Palma*[1] notices to the trial court indicating it was contemplating issuance of a peremptory writ to set aside the sanctions. See AOB 78-84, nn. 26, 29, 30, 32, 34, 35, 37.

Here, the defense made multiple disqualification motions. AOB at 76, 85-86; 18 RCT 4638-4639; 27 RT 3550:23-27; 3569:1-3578:10; 34 RT 4681:1-4683:11, 4684:15-4685; 35 RT 4771:8-4773:7 (denying written motion); 38 RT 5264:16-5266:8 (denying oral motion); 40 RT 5631:19-5633:15(denying oral motion); 41 RT 5821:20-5827:19 (oral motion denied); 44 RT

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[1] *Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171.

4465:13-6466:24 (oral motion denied); 44 RT 6574:19-24 (no ruling); 49 RT 7430:12-7532:3 (oral motion denied)[2]. Nonetheless, the judge refused to recuse himself or order a mistrial. Judge Wiatt should have disqualified himself or granted a mistrial following the defendant's numerous attempts at showing he could not be fair.

An additional motion for disqualification was reviewed by another judge who denied it. 21 RCT 5280-5358, 5365-5372, 5457-5462 (order of Hon. Frederick P. Horn, Judge of the Orange County Superior Court, denying disqualification).

The opening and reply briefs in this case demonstrate that failure to disqualify Judge Wiatt reached the point of structural error because Judge Wiatt's conduct exhibited an intolerable risk of bias.

The Attorney General contends only the most "extreme facts" require disqualification based on the federal due process clause, citing *People v. Freeman* (2010) 47 Cal.4th 993. It is true that *Freeman* requires extreme facts and held that the mere appearance of bias was insufficient to violate

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[2] The motions included written motions for disqualification pursuant to Code Civ. Proc. section 170.1(a)(6). See AOB at 87 [miscited as Pen Code section 170.1(a)(6)]; 19 RCT 4663-4668, 4673-4680, 4774-4781, 4801-4809, 4838-4844 [order and answer to statement of disqualification); 20 RCT 5005-5060, 5075-5082, 5164-5168;

a defendant's due process right to a fair trial. *Id*. at 996, 1000.

What constitutes an extreme case contemplated by *Caperton v. A.T. Massey Coal Co., Inc*. (2009) 556 U.S. 868, upon which *Freeman* relies, has been expanded by *Rippo* and *Williams*.[3]

In *Caperton* a civil defendant made a massive $3 million financial contribution to a judge's election campaign. It "was larger than the amount spent by all other contributors and 300 percent greater than that spent by the campaign committee[.]" *Freeman,* 47 Cal.4th at 1004. But such a massive weight on one side of the scale of justice is not necessary to disqualify a judge in a capital case.

In *Rippo*, the trial judge was under investigation for bribery. Rippo later learned that the district attorney's office was involved in that investigation at the time of his criminal trial and death sentence – an involvement far more attenuated than what was seemingly a bribe in *Caperton*. The Court held that the Rippo's trial judge should have been disqualified due to an unconstitutional potential of bias.

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[3] The Supreme Court's opinion in *Rippo* does not include the terms "extreme" or "extraordinary" as conditions for disqualification under the due process clause in capital cases. Likewise, these words do not appear in the majority opinion in *Williams*.

In *Williams* the head district attorney in Philadelphia approved a capital prosecution against the defendant. The district attorney did not prosecute the case himself. Almost thirty years later, after he was elected to the Pennsylvania Supreme Court, he sat on an Williams' appeal of post-conviction proceedings. The former head district attorney, now a Judge of the Pennsylvania Supreme Court refused to disqualify himself. The United States Supreme Court held that his disqualification was required because he had approved the prosecution almost thirty years earlier – presenting an intolerable risk of bias. The attenuated relationship between the district attorney and the passage of time show a far more attenuated basis for the implication of bias than *Caperton*.

As the Attorney General points out, Respondent's Supplemental Brief at 24, *People v. Peoples* (2016) 62 Cal.4th 718, 788, which we cited in the supplemental brief, applies the same standard for disqualification as *Freeman*, dismissing "mere appearance" of bias and requiring "extreme facts" as a prerequisite to a due process violation. But the facts in *Peoples* – three ex parte conversations outside the presence of the jury – are a far cry from the pervasive bias and misconduct in this case.

In any event, the facts of the trial in this case are extreme. Here, the trial judge was constantly enmeshed in

conflict with defense counsel and also demeaned the defendant, threatened defense counsel, and threatened defense witnesses.[4] This is the sort of conduct that presents an intolerable risk of bias and disqualifies the judge.

Objectively, there was an intolerable risk of bias – a structural error – which requires reversal of the guilt verdict and death sentence.

B. *California Judicial Misconduct Cases*

The Attorney General recites the facts of the newer California opinions we cited in the supplemental brief and then repeats the same themes asserted throughout the briefing, singling out specific instances during the trial and claiming forfeiture, while unyieldingly defending all of Judge Wiatt's treatment of defense counsel, defendant, and the defense witnesses.

First, for the reasons given in the opening and reply briefs there was no forfeiture of the misconduct or the bias claims. Defense counsel objected repeatedly to many of the court's substantive rulings and he filed multiple motions for

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[4] Whether the trial judge's conduct occurred in the presence of the jury is not relevant to the analysis of potential bias. Nothing in *Rippo, Williams, Freeman* or *Peoples* requires that all or even most of the judge's conduct take place before a jury. The juries were not prejudicially affected in *Rippo and Williams*. It was the likely potential for bias in the process of decisionmaking that violated the defendant's due process rights.

disqualification and mistrial. But even if these efforts had not been made, *People v. Sturm* (2006) 37 Cal.4th 1218, clearly holds that it is not necessary that a defendant object every single time a trial judge engages in misconduct. "[A] defendant's failure to object does not preclude review 'when an objection and an admonition could not cure the prejudice caused by such misconduct, or when objecting would be futile.'" 37 Cal.4th at 1237. What more could defense counsel have done without seriously risking contempt, jury bias against his client, and further disrupting the proceedings? Here, the misconduct was so pervasive and so intense that even those objections that were made were ultimately futile. Realistically, on this record, there is no chance Judge Wiatt would have pivoted to a fairer trial, if defense counsel had made even more objections and challenges to his conduct.

Second, although the Attorney General repeats the theme that defense counsel Howard Waco was responsible for the vast majority of Judge Wiatt's "actions, comments, and remarks [Respondent's Supplemental Brief at 13]," the Attorney General ignores the many instances where Judge Wiatt unilaterally disparaged witnesses, assisted the prosecution, and made threats against the defense. See, e.g. Appellant's Reply Brief at 6-10.

Briefly, for example, Howard Waco, defendant's counsel, *was* not responsible for –

● Threats to defense experts: Dr. Humphrey (inviting the prosecution to explore perjury charges against her (39RT 5517:6-17)), Dr. Ney (having the Royal Canadian Mounted Police round him up (42RT 6208-6214)), and Dr. Plotkin (having him removed from the superior court expert panel(53RT 8119));

● Threats to defense witness Carl Hall (threatening up to five days in jail and a fine (53RT 8119));

● Forcing the defendant to look at photos of her dead children (35RT 4933:20-4934:2));

● Performing ex parte internet searches about defense witnesses (41RT 5846:1-5848:25; 41RT 5873:13-18; 52RT 8008:13-8009:19));

● Providing practically unlimited court funding for prosecution experts (AOB at 134-135);

● Holding ex parte meetings with the prosecution and prosecution experts, including discussion of potential defense witnesses and suggesting case law to the prosecution (36RT 5017-5026; 39RT 5497-5500);

● Repeatedly calling defense witnesses and counsel "liars" (39RT 5572:3-5 (Dr. Humphrey), 46RT 7004:26-7006:4; 51RT 7738:14-7739:28)(Dr. Ney), 36RT 5012:18-22 (Dr. Kaiser-Boyd), 36RT 5012:18-22 (Terri

Towery, head of Los Angeles County Public Defender, appellate unit), 23 RT 2862:8-10 (Defense counsel);

The overwhelming evidence in the record and in our prior briefing shows that the trial judge committed misconduct and showed bias in the presence of the jury and outside its presence.

III. Exploitation of the *Verdin* Error Repeatedly Implied that Sandi Nieves Withheld Adverse Evidence from the Jury

The Attorney General concedes that the trial judge told the jury that Sandi Nieves was required to submit to a mental examination "without conditions." Respondent's Supplemental Brief at 33. The instruction was wrong and misleading. *Verdin v. Superior Court* (2008) 43 Cal.4th 1096.

And, the Attorney General concedes the prosecutor told the jury in closing argument that the jury could consider Nieves's refusal as an attempt to "suppress or conceal evidence against her." *Id*. at 33, quoting from 56RT 8805-8806.[5] This argument profited off of the the judge's

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[5] The prosecutor argued:

> You can take it into account in determining the weight to be given to the opinions of the defense experts in this case, the credibility of those opinions.

(continued...)

erroneous order that Sandi Nieves submit to a mental examination and his instruction to the jury, telling it that she had failed to do so.

Powerfully, and effectively, the prosecution turned her lawful refusal into a silent admission that Nieves was hiding relevant evidence from the jury – refusing to submit to a mental examination because she had something incriminating to hide. The trial judge and the prosecution gave the defendant a "mark of guilt." *Holbrook v. Flynn* (1986) 475 U.S. 560, 571.

Nevertheless, the Attorney General contends *People v. Krebs* (2019)(2019) 8 Cal.5th 265, 346, supports respondent's position that comments by the prosecution experts, the prosecutor, and the judge, telling the jury that Sandi Nieves refused to submit to a prosecution mental examination, were

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[5](...continued)
You can take it into account in determining how valid the defenses or claims actually are in this case, because if they were so valid, why is she hiding for all of these experts, true experts?

And you can take into account as to the validity of the information the defendant gave to the defense experts.

You can consider this actually as an attempt to suppress or conceal evidence against her – against herself.

56RT 8806:5-18.

not prejudicial. The Attorney General contends the experts did not rely on Nieves's refusal in reaching their conclusions. Respondent's Supplemental Brief at 32.

This is very different from *Krebs*, where the question of prejudice concerned a brief comment by the prosecution expert and then by the prosecutor in closing. The issue of prejudice here is not confined to competing expert opinions. Here, Sandi Nieves's refusal to submit to an unconditional mental examination was addressed by three experts,[6] through prosecution argument, and most potently through the judge's commentary directed to the jurors. Further, the prosecution used the lawful refusal to submit to a mental examination to fit its theme that Sandi Nieves was a faker and a manipulator. See Appellant's Opening Brief at 224-228; Reply Brief at 87-90. That theme was reinforced by the judge who told the jury – point blank – that Sandi Nieves "was not forthcoming in this case." 38RT 5485.

Here, the error permeated both the guilt and penalty phases of the trial inasmuch as Nieves's refusal to submit to

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[6] The Attorney General refers to the experts' statements that Sandi Nieves refused a mental examination as "mere statements of fact." Respondent's Supplemental Brief at 32. But nothing told the jurors they could not draw an inference from the fact of refusal. When, for example, a prosecutor unconstitutionally tells a jury that the defendant refused to testify, it, too, is a "mere statement of fact." But it leads to a powerful, prejudicial inference.

an unlawful mental examination was clearly unfavorable to her and undoubtedly affected the balance of life against death in the eyes of the jurors. And, it had an even more powerful effect on the jury because it complemented the trial court's additional penalty phase instruction, under former CALJIC 2.28, telling the jury that Sandi Nieves was not forthcoming in discovery. See AOB at 327-371, 593-605.

While the *Verdin* violation likely led the jurors to give more weight to the aggravating side of the sentencing balance, it simultaneously diminished her mitigation evidence, by indicating she was not forthcoming in revealing her true self. She could not counter that inference because the trial court had excluded defendants' mental health expert – Dr. Kyle Boone – from testifying on behalf of the defendant at the penalty phase. AOB 485-507. See also, *id.* at 531-534 (exclusion of lay testimony concerning defendant's state of mind at penalty phase).

The Attorney General attempts to cure the prejudice by arguing that the jury was properly instructed it was not to be influenced by bias or prejudice against appellant. Attorney General's Supplemental Brief at 34. This general instruction did not address the evidence in the case, or any attempt to suppress or conceal evidence. It did not negate the "mark of guilt" cast on the defendant. If anything, the Attorney General's reliance on a general admonition not to

be biased or prejudiced belies the weakness of respondent's position.

Finally, the Attorney General states that the evidence of guilt was "staggering" and "aggravating factors weighing in favor of death were numerous." *Id.* at 34. Although the argument is a frequent one, and permissible under this Court's jurisprudence, it presents an invitation to excuse an unauthorized order by the trial court – a plain legal error – and the prosecution's exploitation of that order by repeating the defendants' refusal through testimony of the experts, argument by the prosecutor, and through a pinpointed instruction by the trial judge. Under the Attorney General's logic all trial court errors could be excused under California law if a crime is bad enough – indeed, fair trials would be unnecessary for particularly egregious criminal acts. But even so, the balance was not as weighted in this case as the Attorney General asserts. Sandi Nieves had no criminal record; she did not present a threat of future dangerousness; and she had friends and family who expressed that they gave value to her life.

Requiring the defendant to submit to an unlawful mental examination and reliance on her refusal was not harmless. Further, for penalty phase purposes, there is a reasonable possibility the jury would have rendered a different verdict if the jury had not been invited to draw

adverse inferences against the defendant due to her failure to submit to examination by the prosecution. See *People v. Brown* (1988) 46 Cal.3d 432.

IV. *Victim Impact Evidence*

A. *Bosse v. Oklahoma*

The Attorney General contends that *Bosse v. Oklahoma* (2016) ___U.S.___, 137 S.Ct. 1, did not change the law with regard to what victim impact evidence is impermissible under the Eighth Amendment in a death penalty case. But the Attorney General misses our point that *Bosse* curbed the tendency of lower courts to allow an "anything goes" standard in the years since *Booth v. Maryland* (1987) 482 U.S. 496, was overruled in part, by Payne v. Tennessee (1991) 501 U.S. 808, almost 30 years ago.

First, the Attorney General states that *Bosse* "simply" reiterated the *Payne* standard that victim impact evidence is only prejudicial when it renders a trial "fundamentally unfair." Respondent's Supplemental Brief at 36, quoting from *Payne*, 501 U.S. at 825. However, this "standard" is not reiterated or addressed in the per curiam opinion in *Bosse*. Further, it follows that the admission of multiple instances of impermissible testimony makes a penalty trial fundamentally unfair.

The Attorney General ignores the Supreme Court's discussion of what victim impact evidence is impermissible under the Eighth Amendment – which is the point of *Bosse*. The Eighth Amendment does not permit "characterizations and opinions from a victim's family members about the crime, the defendant, and the appropriate sentence[.] 137 S.Ct. at 1.

Second, the Attorney General fails to adequately address the actual testimony and the words used by the four victim witnesses at the penalty phase of the trial in this case, words that surely conveyed their views "about the crime, the defendant, and the appropriate sentence." The Attorney General concludes by arguing that these witnesses were "never asked what sentence they wanted imposed nor did they testify that they wanted appellant sentenced to death." Respondent's Supplemental Brief at 37. In other words, under the Attorney General's reading of the law, a victim impact witness can say whatever she or he wants about a defendant, the crime, and the penalty so long as the witness is not asked directly for that opinion. That makes no sense because the jury hears and considers the testimony whether it is elicited directly or not.

To take one example of many we cited previously, when David Folden testified Sandi Nieves "wanted to control and manipulate everyone around her," and that she

was "trying to do it now," he was addressing the defendant's character. He was not giving victim impact testimony about the victims or about his own feelings. And when he testified, after only two choices remained – life in prison or death – "This time it stops[,]" 60 RT 9371:13-25, he unambiguously was saying he wanted death.[7] He surely was not saying she should be given life in prison. This was pounded home by the prosecutor in closing, when she said "she wins again if you give her life." 64 RT 10126:9-11.

Bosse constrains the victim impact testimony that is proper. The Attorney General has failed to show it does not apply here.

B. *California Cases*

In the treatment of the newer California victim impact cases decided by this Court, the Attorney General ignores the argument we made in the supplemental brief that the family testimony *as well as* the demonstrative evidence

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[7] In a later portion of the victim impact argument, the Attorney General contends that Folden's comment did not explicitly or implicitly indicate he wanted Sandi Nieves to be sentenced to death, claiming it is "pure speculation to assume the jury understood it to mean Folden desired death." Respondent's Supplemental Brief at 39. But the statement was not ambiguous because there were only two choices for the jury to make at that stage of the trial – life in prison or death. Sandi Nieves had already been convicted and the special circumstances had already been found to be true.

rendered the penalty phase unconstitutional and prejudicial. Compare, Appellant's Supplemental Brief at 26, 28, 29 ["Coupled with the character evidence and testimony given by the family, the victim impact evidence at this trial violated the Eighth Amendment."], with Respondent's Supplemental Brief at 37.

Further, the Attorney General misses the point that the evidence discussed in the newer cases we cited focuses on the victims in those cases and the impact of death on the survivors. Here, some of the testimonial evidence focused on the defendant, her character, and the perceived manner of the deaths. It was not wholly focused on the "victim impact."

The Attorney General focuses and isolates the demonstrative evidence alone, breaking it into bits and pieces, and then contending no bit or piece was prejudicial.[8]

The Attorney General principally recites the facts of the cases we cited in our supplemental brief and then emphasizes there were four victims in this case. Therefore, the Attorney General contends, any existing legal constraints on the scope of victim witness evidence should be

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[8] The Attorney General stresses that the video shown the jury was cut from 35 minutes to 13 minutes. Respondent's Supplemental Brief at 41. This ratio is irrelevant. If the video had been cut from 140 minutes to 52 minutes that would not mean its edited length brought it within constitutional parameters.

expanded by a factor of four to adjust for the four victims. In other words, the impact of whatever victim impact evidence is tendered may permissibly be quadrupled before it reaches a constitutional limit. Respondent's Supplemental Brief at 38-39, 41. But this ignores the common adage that the whole is often greater than the sum of its parts. Whether evidence calls for a "legally impermissible level of emotion" (*People v. Sandoval* (2015) 62 Cal.4th 394, 441) cannot be dependent solely on quantitative measurements, that is, the number of photos or number of minutes of video, divided by the number of victims. *Cf. People v. Hill* (1998) 17 Cal.4th 800, 845 (in the context of prosecutorial misconduct there was a "strong possibility the aggregate prejudicial effect of such errors was greater than the sum of the prejudice of each error standing alone").

A proper and constitutional determination requires an assessment of the quality and import of the evidence under all the circumstances. "[T]he prosecution may 'not introduce irrelevant or inflammatory material' that "' 'diverts the jury's attention from its proper role or invites an irrational, purely subjective response."" *People v. Bell* (2019) 7 Cal.5th 70, 128, citing *People v. Dykes* (2009) 46 Cal.4th 731, 784 and *People v. Edwards* (1991)] 54 Cal.3d 787, 836.

For the reasons demonstrated in appellants' opening brief, her reply brief, and her supplemental brief, the new

California cases do not defeat the challenge to the victim impact evidence in this case.

V. *The Necessity of Unanimous Findings Proved Beyond a Reasonable Doubt*

We will not dwell on our submission that *Hurst v. Florida* (2016) 577 U.S. ___, 136 S.Ct. 616, requires unanimous jury findings in favor of a death sentence and our recognition that this Court had previously rejected this argument.

The Supreme Court, however, recently decided *McKinney v. Arizona* (2020) ___ U.S. ___, 140 S.Ct. 702, holding that an appellate court can reweigh aggravating and mitigating circumstances on direct appeal without violating *Hurst*. Nothing in that opinion undermines our previous argument. However, the majority opinion in *McKinney* strengthens our argument by favorably citing Justice Thomas's point in *Ring v. Arizona* (2002) 536 U.S. 584, 612, that *Ring*, upon which *Hurst* rests, requires a jury to find facts that support an aggravating circumstance. *McKinney*, at 708. We submit those facts must be found unanimously. See Appellant's Supplemental Brief at 29.

VI. *Conclusion*

For the reasons given in the Opening Brief, the Reply Brief, and this Supplemental Brief, the entire judgment—the convictions, the special circumstance findings, the death sentence, and restitution—should be reversed.

June 11, 2020

Respectfully Submitted

By: /s/ Amitai Schwartz
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Sandi Dawn Nieves

Certificate of Counsel

I am the attorney for Appellant Sandi Dawn Nieves in this automatic appeal from a judgment of death. The text of the foregoing brief consists of 4,018 words as counted by the Corel WordPerfect X9 word-processing program used to generate the brief.

June 11, 2020

/s/ Amitai Schwartz
Amitai Schwartz
Attorney for Appellant

Proof of Service

Re: The People of the State of California vs. Sandi Dawn Nieves, California Supreme Court Case No. S092410

Los Angeles County Superior Court, Case No. PA030589-01

I, Amitai Schwartz, declare that I am over 18 years of age, and not a party to the within cause; my business address is 2000 Powell Street, Suite 1286, Emeryville, CA 94608. I served a true copy of the attached

APPELLANT'S SUPPLEMENTAL REPLY BRIEF

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I declare under penalty of perjury that the foregoing is true and correct. Executed on June 11, 2020 at Emeryville, California.

/s/ Amitai Schwartz

STATE OF CALIFORNIA
Supreme Court of California

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