PRELIMINARY STATEMENT

_____Gary Bennett, Jr., was the defendant and the State was the prosecution in the Criminal Division of the Circuit Court of the Eighteenth Judicial Circuit, in and for Brevard County, Florida. In the brief, the parties will be referred to as Bennett, Defendant or Appellant and State, respectively.

The record in this case consists of the following:

R. 1 to 786 Trial Transcripts
R. 787 to 790 Judgment
R. 791 to 800 1988 Order on Motion for Post Conviction Relief
R. 801 to 803 Indictment
R. 804 to 810 Notice of Appeal of Denial of Motion for Post Conviction Relief
R. 811 to 1236 Transcripts of 1987 Hearing on Defendant's Motion for Post Conviction Relief
R. 1237 to End Various pleadings and documents contained in the Record on Appeal
The Exhibits attached to the defendants motion for post conviction relief are referred to as "D-" for defendant, D-A through D-L

STATEMENT OF THE CASE

On October 15, 1983 the defendant was arrested on a warrant based on the return of Grand Jury Indictment 83-2375-CF-A charging him with First Degree Murder from a Premeditated Design, contrary to § 782.04(1)(a), Florida Statutes, a capital case.[R. at 802-803; 1448-1450] On the same date the Office of the Public Defender for the Eighteenth Judicial Circuit was appointed to represent the defendant, and Marlene M. Alva and Norman R. Wolfinger, Assistant Public Defenders, were assigned as his attorneys. [R. at 1447] On November 10,1983 an Order was issued relieving the Office of Public Defender as the defendant's attorney of record because of a conflict of interest, the Office of the Public Defender also represented two State's witnesses who alleged that the defendant made inculpatory "jailhouse" admissions to them following his arrest on October 15, 1983.[1] The Order appointed the Conflicts Division of Brevard County to represent the defendant. [R. at 1423; 1425-1426] On or about November 15, 1983 Lawrence M. Litus, Esq. entered an appearance as attorney of record for the defendant. [R. at 1422]

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[1] Around the same time the trial judge Thomas Waddell by letter dated November 15, 1983 to the State Attorney Douglas Cheshire felt compelled to remind him that DR7-104(A)(1) prohibited his office from engaging in the practice of speaking without the Public Defender's permission to prisoners represented by the Office of the Public Defender and offering them lighter sentences in exchange for testimony against other inmates. [Exhibit D-L]

On January 3, 1984 the defendant's trial began before The Honorable Thomas Waddell and a jury. On January 5, 1984 the court charged the jury, instructing it to consider First Degree Murder from a Premeditated Design and alternatively First Degree Felony Murder Perpetrated or Attempting to Perpetrate Sexual Battery. In addition, the lesser included offenses of Second Degree Murder, Third Degree Murder and Manslaughter were charged. [R. at 704-709; 717-718] On the same day the jury returned a verdict finding the defendant guilty of First Degree Murder and on January 6, 1984 a majority of the jury recommended that the defendant's life be spared and he be sentenced to life imprisonment. [R. at 782-783] The trial judge accepted the jury's recommendation and sentenced the defendant to life imprisonment without the benefit of parole for 25 years. [R. at 784-785; 787-790] On direct appeal the defendant's conviction was affirmed. Bennett v State, 466 So.2d 231 (Fla. 5th DCA, 1985)

On May 3, 1985 a motion for post conviction relief, pursuant to Fla. R. Crim. P. 3.850, was filed by trial counsel on the defendant's behalf alleging State's witness John Preston, a dog handler, who testified his dog identified the defendant's scent on the murder weapons during a "scent lineup" had been found by several state and federal authorities to be highly unreliable and suspect, attaching a 57 page investigative report of the Special Investigations Division, United States Postal Service, and citing

tests ordered subsequent to the defendant's trial by Judge Gilbert Goshorn in State v Burch, Kimborough, Taylor and Gibbs, 84-709 CFA, B, C and D. The defendant also alleged that the trial court restricted his right of cross-examination. By Order dated October 1, 1985 the motion of the defendant was denied, the court ruling that the claims were raised at trial and on appeal, therefore procedurally barred.

In December, 1986 the defendant filed a second motion for post conviction relief, pursuant to Fla. R. Crim. P. 3.850, alleging multiple grounds of ineffective assistance of trial counsel, including the failure to submit a pretrial challenge to either the "dog scent" lineup evidence or present witnesses challenging the reliability of the dog handler John Preston, and the failure to conduct an investigation to rebut the State's evidence that the defendant made incriminating jailhouse statements. An evidentiary hearing on the defendant's motion was held on May 7, May 26, July 2 and July 29, 1987 before The Honorable John Antoon, II, Circuit Judge during which the State was represented by Norman R. Wolfinger, State Attorneys Office for the Eighteenth Judicial District by Christopher White, Assistant State Attorney.[2] On May

[2] No issue was raised either during the pendency of the defendant's post conviction relief motion filed in 1986 or on appeal of its denial that it was a conflict of interest for the office of the defendant's former attorney on the case, Norman Wolfinger, State Attorney, to represent the State in opposition to the motion for post conviction relief.

23, 1988 an Order was issued denying the defendant's motion for post conviction relief. [R. at 791-799] On appeal the denial of the motion for post conviction relief was affirmed. Bennett v State, 544 So.2d 212 (Fla. 5th DCA, 1989)

On March 20, 1995 Norman R. Wolfinger, State Attorney, by Christopher White, authorized the Palm Bay Police Department to destroy the evidence in the defendant's case in their possession. Amongst the items of evidence destroyed were seven slides created from the evidence gathered during the autopsy and cuttings created by the laboratory during forensic testing of the evidence from the crime scene. [Exhibit D-K]

On June 19, 2009, pursuant to the request of State Attorney Wolfinger for executive assignment, Governor Charles Crist appointed Lamar Lawson, State Attorney, Ninth Judicial Circuit, to represent the State in the defendant's case.

On October 23, 2009 the defendant filed, pursuant to Fla. R. Crim. P. 3.853, a motion for post conviction DNA testing on the remaining evidence existing in the case and on January 5, 2010 the court entered an Order, with the consent of the State, granting the motion permitting the defendant to test the oral, vaginal and anal swabs created during the decedent's autopsy, as well as the swabbing of suspected blood from the refrigerator at the murder scene. The testing of the oral and vaginal swabs was conducted, at the defendant's expense, and it was determined that no DNA could be

found on the already partially consumed samples. The envelope allegedly containing the swabbing from the refrigerator contained no swabbing.

On September 15, 2010 the defendant filed, pursuant to Fla. R. Crim. P. 3.850, a motion for post conviction relief alleging the suppression of exculpatory evidence and newly discovered evidence. The exculpatory evidence was alleged to be a note in the State Attorney's file discovered in January 2010 which clearly established that a dog scent discrimination lineup conducted on September 9, 1983 that was used to secure the indictment of the defendant on capital murder charges was an obvious sham known to the State and suppressed. The newly discovered evidence was alleged to be the November 14, 2008 DNA evidence in the case of State v William Michael Dillon, Case No. 05-1981-CF-001746-A establishing to a scientific certainty that Dillon's DNA was not on the shirt worn by the killer which the defendant maintained established that the dog handler John Preston's trial testimony that his dog picked up Dillon's scent on the shirt was false, and that in combination with the earlier case of State v Wilton Dedge, Case No. 05-1982-CF-000135-A, Brevard County in which John Preston testified his dog picked up the scent of the accused on a bed sheet where a rape occurred only to discover in 2006 that DNA evidence on a vaginal swab established the defendant's innocence, that Preston was nothing more than a serial perjurer as established by the

scientific evidence.

At the same time the defendant filed his motion for post conviction relief he filed a motion to disqualify all judges of the Eighteenth Judicial Circuit, or in the alternative, for a change of venue. This motion was based on the fact that the trial prosecutor in the defendant's case, John Dean Moxley, currently a Circuit Judge in the Eighteenth Judicial Circuit, was actively participating behind the scenes in the defendant's case, urging the State's representative in a five-page, single-spaced letter, to oppose the defendant's motion for DNA testing while at the same time requesting copies of the defendant's pleadings.

By Order dated December 13, 2010, Judge David Dugan denied the defendant's motion to disqualify the judges of the Eighteenth Judicial Circuit

On April 8, 2011 Judge Dugan entered an Order noticing the parties of the court's intent to take judicial notice of the substantive and procedural facts of the Dillon and Dedge cases and giving the parties 30 days to respond regarding the propriety of the court taking judicial notice of the Dillon and Dedge cases. The State did not respond to the Order and the defendant submitted opposition stating that the substantive and procedural facts in the Dillon and Dedge cases were matters of proof at an evidentiary hearing, especially considering that at the time the court had not even ordered the State to respond to the defendant's motion for

post conviction relief.

On May 18, 2011 the State was ordered to answer the defendant's motion for post conviction relief and to address the issue of judicial notice.

On or about September 27, 2011 the State submitted an answer and on or about October 29, 2011 the defendant submitted a reply to the State's answer.

On November 14, 2011 the court entered an Order denying the defendant's motion for post conviction relief, and on December 14, 2011, the defendant filed a Notice of Appeal.

STATEMENT OF FACTS

At an undetermined time on July 12-13, 1983 Helen Nardi was viciously murdered in her trailer and around dinner time on July 13, 1983 her daughter Mary Parkins entered her trailer and allegedly discovered her body. Ms. Nardi was found lying on her back, with a sheet covering her naked body, on the bedroom floor between the bed and the wall. [R. at 317] A minimum of four weapons were used against her by her killer or killers. [R. at 164-165] The blade of a pair of scissors was left protruding from her chest and during the autopsy it was determined the blade passed through a vein. [R. at 151] Embedded in her back, but not visible, was an ice pick blade, with no handle, which passed through the thoracic aorta, the main artery in the body. This wound was also lethal. [R. at 153-154] In all, 26 separate entry wounds were inflicted on her, nine to the chest, three of which were lethal, five to her neck, including one in the center of the neck which penetrated trachea. [R. at 149-150; 159] All the wounds were premortem, meaning they were inflicted while she was alive. [R. at 152; 164] According to the medical examiner two of the wounds were consistent with being caused by the ice pick, and five of the wounds were consistent with being inflicted with a scissors, three, all lethal, to the chest, one to the left side of the neck, and the fifth on the back of the neck. Other entry wounds were consistent with being caused by "a single edged instrument...a knife with one

edge," and there was "a possibility" there was a fourth weapon. [R. at 155-157; 164] A steak type knife blade with blood on it and no handle, and a screwdriver with blood on it were found in the bed next to the body. [R. at 297-298; 318] In addition, there was evidence of blunt force trauma injury beneath her scalp which could have been inflicted with the broken bottle of Coca Cola found scattered on the floor. [R. at 158-159; 213; 219] Blood splatter on the wall and blood on a quilt that was next to the bed were also observed. [R. at 148]

Based on the fact that all the wounds were inflicted while the decedent was alive, the wounds were on both the front and back of the decedent's body and caused by a minimum of four weapons, three of which were identified by the wounds inflicted and "one wound... different from the rest," the medical examiner could not say whether "one person, two persons three persons or four" assaulted the decedent. [R. at 164-165]

In the kitchen sink, immersed in a cup of water, was a plastic handle, [State's Exhibit 47], which the State contended was the handle from the knife blade found in the bed, and a wooden handle, [State's Exhibit 48], which the State maintained was the handle to the ice pick blade recovered from the decedent's back. [R. at 318-319; 346; Dunning Deposition, at 170]

Seventeen latent fingerprints were recovered at the scene. A closet door in the "bedroom" contained three latent prints and

other latent prints were recovered on the other walls in the bedroom and in the bathroom. [R. at 256-258]

One of the prints, on the closet door and the adjacent molding, was a palm and fingerprint matching the defendant's left ring finger and left palm. The print "extended 21 inches inside the bedroom." [R. at 248-251; 274-275; 225-226] In the words of Detective Dunning there were "other prints around in the bathroom area on the mirror that were identified as being Mary Parkins, the daughter, and Kermit Parkins, the son-in-law and there was a palm print found over by the door...it was mine." [Dunning Deposition, at 42]

With the discovery of the fingerprint and palm print allegedly belonging to the defendant he became the sole suspect/target of the investigation and over the next three months he was repeatedly questioned and subjected to rape kit testing, a polygraph examination, and the seizure of the clothing he wore on the evening of July 12 and the morning of July 13, 1983. The testing of the samples of the defendant's saliva, blood, head hairs, pubic hairs and genital swabbings in comparison to the evidence recovered from the scene found nothing of evidentiary significance. Similarly, the testing of the defendant's clothing revealed no evidence and the defendant passed the polygraph test. [R. at 345; 350-351; 356; 365-366; 1457; William Deposition, at 97-101; 143; Peterson Deposition, at 20-28; Jernigan Deposition, at 3-6] During his interrogations,

which the police admitted were initially very heated and illegal, the defendant denied having anything to with the murder, and denied being in the area of the trailer where his finger and palm print were found. He told the police he had been in the victim's trailer one time, on the Sunday before the murder when he helped her carry a grocery bag to her trailer during which time he used the bathroom, which was right next to the bedroom and the area where his prints were found.

The defendant's suspect status remained constant despite the existence of other obvious suspects with a motive to kill the decedent and whose fingerprints were also found in the trailer, i.e., Kermit Parkins, the decedent's son-in-law who was regularly sexually assaulting the decedent, and Mary Parkins, Kermit's wife, who experienced a childhood of sexual abuse at the hands of the decedent. Kermit and Mary Parkins were also the beneficiaries of the decedent's life insurance policy.

When the police arrived at the murder scene Mary Parkins, who discovered the body, blurted out, before being asked any questions, that her husband "Kermit didn't do it." She maintained she said that because "I know he was with me all day." [R. at 528-529] Several days later, without prompting, she once again felt it necessary to repeatedly say to the police her husband "didn't do it" when the investigators came to their home to speak to him. [Exhibit D-G, Police Handwritten Notes]

Unbeknownst to the defendant's jury there was reason for Mary Parkins to feel it necessary to defend Kermit Parkins, the reason being he regularly engaged in sexual intercourse with his mother-in-law, the decedent. Also unknown to both the defendant and his jury was that Mary Parkins was sexually abused by the decedent as a child by "prostituting her" as a means of paying her bills. In a note in the State Attorney's file it was stated that the "problem" in the case was that "Helen's [the victim's] been making it with D's [daughter's] husband and D [daughter] Mary was prostituted by Helen and Husband as a child." [Exhibit D-F]

Kermit Parkins admitted to Detective Leroy "Roy" Dunning of the Palm Bay Police Department, the lead investigator on the case, he had sex with his mother-in-law two to three weeks before her death. Kermit Parkins also told Detective Dunning that his sex with the decedent was "natural" and that the decedent was "good" at sex. [R. at 1049-1051; Dunning Deposition, at 96; 107-108] Incredibly Detective Dunning never memorialized in writing Parkins's admission or obtained any details as to dates, places and frequency of his perverted sex with his mother-in-law. [Dunning Deposition, at 189-191] At trial when defense counsel asked Kermit Parkins, "have you ever had sex with Helen Nardi?" the prosecutor objected on relevancy grounds and the trial court sustained the objection over defense counsel's argument that it was relevant as to motive, holding it lacked a "predicate." [R. at 556] Trial

counsel then attempted to establish the "predicate" and then asked "Do you remember ever telling Detective Dunning that you had sex with Helen Nardi?" Again the prosecutor objected on relevancy grounds and again the trial judge sustained the objection saying he didn't see the relevancy of the question "without some further predicate." [R. at 558-560]

Detective Dunning learned within a day or two of the murder from Charles Slack, a friend of the decedent and the last known person to see her alive, that the decedent complained to him that Kermit Parkins forced her to have sex with him, and from the defendant's father, Gary Bennett, Sr., and stepmother, Mary Lou Bennett, in written statements dated July 18, 1983, that the decedent, crying with "bruises all on her arms," came to them saying that Kermit Parkins assaulted her to force her to engage in oral sex with him. The defendant's father stated in his written statement of July 18, 1983, the following: "... Helen Nardi came to us about four years ago crying and she had bruises on her arms and told how Kermit her son-in-law could not get his wife Mary (Helen's daughter) to suck him off good enough and had beaten her and made her suck him off. He made Mary and Helen both suck him off." [Dunning Deposition, at 190-191; Exhibit D-G, Statement of Gary Bennett, Sr., dated July 18, 1983, at 3; Exhibit D-H, Statement of Mary Lou Bennett, dated July 18, 1983, at 3]

Dunning, who rented a trailer to Kermit and Mary Parkins for

three years beginning "in 1972,'73," when he owned the Old Fort Trailer Park in Palm Bay, and knew the decedent "from her visiting with" Kermit and Mary Parkins, apparently already knew that the relationship between the decedent and her daughter and son-in-law was unusual to say the least. [R. at 170] He testified at his deposition, but not before the defendant's jury, that in 1971 or so the then 53 year old Kermit Parkins was permitted by the State to marry the 16 year old Mary Nardi Parkins as an alternative to her being placed in foster care after the decedent and her husband were found by the Department of Youth Services to have sold Mary's sister, Margaret, the middle girl, for sexual favors in exchange for rent. [Dunning Deposition, at 98-99] In a report written by Detective Dunning's partner Detective Augustus Williams he reported that Kermit Parkins told him the decedent "loaned Mary to the landlord for sex favors in exchange for rental consideration." [Exhibit D-I, p.4]

Incredibly Detective Dunning made no effort to obtain any biological samples from Kermit Parkins despite the existence of the following: (1) evidence establishing that all wounds suffered by the decedent were premortem; (2) the use of a minimum of four weapons; (3) statements establishing that Kermit Parkins assaulted the decedent in the past to force her to engage in fellatio with him; (4) Mary Parkins's unsolicited statements to the police that "Kermit didn't do it;"(5) Mary Parkins's search for her mother

beginning at 10:00 A.M. even though she did not expect to see her until noon at the earliest; (6) a medical finding that the decedent suffered abrasions on both her knees, which Mary Parkins said looked like she had been dragged; (7) an admission by Kermit Parkins that he had sex with the decedent two or three weeks before her murder; (8) a statement by Kermit Parkins that the decedent was "good" at sex; (9) a finding that Kermit Parkins's fingerprints were on the bathroom mirror; and (10) a prosecution theory that the presence of the acid phosphatase in the decedent's mouth established there was sexual activity between the assailant and the decedent which was "the motive" for the murder. [R. at 152; 164-165; 317-318; 345-346; 519; 522; 528-529; 532-533; 684-685; 1049-1051; Dunning Deposition, at 2; 96; 107-108; 188-192; Exhibits D-E, D-F, D-G, and D-H]

The Assistant State Attorney in charge of the investigation was John Dean Moxley, now Judge Moxley of the Eighteenth Judicial Circuit in Brevard County. Clearly, the defendant's fingerprint in the trailer, just as the presence of the fingerprints of others, was insufficient to justify an arrest and other inculpatory evidence was needed in order to charge him with the Nardi murder. Assistant State Attorney Moxley, in essence, then went to his go-to guy in such situations, dog handler John Preston, who professed that his dogs could detect human scent on objects months after they had allegedly been handled by an individual. He enlisted John

Preston because he knew he could be relied on to supply the prosecution with so-called evidence which he then could use to justify the defendant's indictment, arrest, and conviction. During the early 1980's Preston was routinely used by Assistant State Attorney Moxley to buttress weak or nonexistent cases and obtain convictions, State v Dedge, Case No. 05-1982-CF-000135-A and State v Dillon, Case No. 05-1981-CF-001746-A

On September 9, 1983 the Assistant State Attorney put together an alleged dog-scent discrimination lineup in which Mr. Preston stated his dog Harass II detected the scent of the defendant on the scissors found embedded in the decedent's chest. In a report by the lead detective on the case, dated October 4, 1983, Detective Leroy Dunning stated, "According to Attorney Moxley this [the September 9, 1983 scent lineup] is enough probable cause to go to the grand jury." [Exhibit D-D, p.2] However, a note discovered in the State Attorney's file on January 21, 2010 revealed that Mr. Moxley knew the dog-scent lineup was a sham and suppressed that evidence which he then used before the Grand Jury to obtain the defendant's indictment on capital murder charges and the defendant's arrest. The note stated the following:

> We will not use this lineup because:
>
> 1) The control item may not have been legally seized.
>
> 2) A substantial predicate would have to be developed to avoid dual contamination.

> 3) The lineup is not attractive cosmetically, because the questioned scissors stand out and the alert by HII [Harass II] was passive.
>
> [Exhibit D-B, emphasis added]

Knowing that the dog-scent lineup produced unreliable results and was tainted, Assistant State Attorney Moxley, in an affidavit dated October 14, 1983, swore that the lineup in combination with the defendant's palm and fingerprint established probable cause for issuance of an arrest warrant for the defendant. He stated in the affidavit, in pertinent parts, the following:

> 3. In one of the twenty-six (26) stab wounds were found scissors embedded in the neck [sic] of Helen Nardi.
>
> 4. On September 9, 1983, John Preston furnished the known scent of the Defendant to a previously qualified scent discrimination dog named Harrass [sic] II. Thereafter, Harrass [sic] II alerted on and indicated that the Defendant's scent was on scissors that were removed from the body of Helen Nardi. On October 3, 1983, the Defendant indicated he had not touched any scissors in Helen Nardi's trailer.
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> [Exhibit D-C]

The trial court held that the defendant's claim that the note admitting the September 9, 1983 dog-scent lineup was entirely unreliable was newly discovered evidence and dismissed it holding the evidence could have been discovered by the defendant's prior attorneys. The trial court made the finding in the absence of any evidence in the record that the note could have been discovered by prior counsel. [Opinion, pp. 9-10.]

At trial Mr. Moxley did not use the September 9, 1983 scent lineup allegedly because the dog Harass II before smelling the scissors urinated on washcloths he was supposed to smell to determine if the defendant's scent was on an evidence washcloth. [R. at 388-393; 468-469; 481] Unbeknownst to the defense, because the State suppressed the evidence at trial, the true reason the State did not use the scissors lineup of September 9, 1983 was because the dog did not actually alert on the evidence scissors and the evidence scissors were clearly distinguishable from the comparison scissors so it could easily be identified by Preston as being the scissors he was to say the dog detected the defendant's scent on.

Having decided he could not present the lineup of September 9, 1983 because the dog's alert was "passive" and the evidence scissors stood out, on November 16, 1983 Mr. Moxley commissioned Preston to conduct a second dog-scent lineup, this time with Preston using a different dog named Bar. According to Preston, Bar detected the scent of the defendant on the knife handle [State's Exhibit 47] and ice pick handle [State's Exhibit 48].[3] This

[3] Incredibly, neither the defendant's jury nor the judge who heard the defendant's post conviction relief motion in 1987 knew, because the evidence was never introduced, that it was impossible for the scent of the murderer to be on any of the evidence items to be picked up by Preston's dog because of what happened to these items of evidence after their seizure.

In a deposition Terrell W. Kingery, the State's fingerprint expert, was asked and explained the process he employed in

evidence, Assistant State Attorney Moxley likened to a "fingerprint," while simultaneously arguing that the defendant's denial that his scent was on the murder weapons was part of "his pattern of deception which he continues to do as he testified before you today." [R. at 677] Clearly, this evidence was critical in a case built on a finger/palm print found within 21 inches of the trailer bathroom used by the defendant several days before the murder only to be supplemented by the testimony of jailhouse snitches who claimed that they overheard the defendant following his arrest on October 15, 1983 say in a jailhouse telephone conversation that he got rid of all the fingerprints despite overwhelming evidence that the defendant knew a fingerprint was the

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examining these items and others, 13 in all, for prints. He stated "I take the item and place it in an air tight container, glass container...like an aquarium and it has a glass top over it." Sodium hydroxide pads are placed in the center of the container and then "the Super Glue was poured onto [the sodium hydroxide] pad." The top is placed over the container, and a chemical reaction occurs from the interaction between the Super Glue and the sodium hydroxide causing fumes to be emitted throughout the airtight container. The fumes surround the item in the cabinet adhering to any residue that has been placed on the item. The fumes have an odor which "is irritating. If it gets up your nose, it is irritating. If it gets in your eyes it is irritating." It is a "chemical type" smell which would certainly be noticeable to any person walking into the room. The item is left in the container "for one day," taken out, and examined for any visible ridge detail. Next the item is brushed with powder and viewed at various angles of light to see if there is any ridge detail. In brushing the powder on the item it is impossible not to touch the item. [Kingery Deposition, at 11-14] No usable prints were recovered from the scissors, plastic knife handle, ice pick handle or the other 10 items examined using Super Glue. [id. at 16-20]

foundation of the State's case based on his multiple interrogations on July 15, 18, 20 and October 3, 1983 during which he was repeatedly asked about the presence of his finger/palm print in the trailer. [See Motion for Post Conviction Relief, III E and F.]

Unbeknownst to the defendant's jury because the evidence was simply unavailable until November 2008, the defendant's case was the last in a series of three cases the State used dog handler John Preston to secure the wrongful conviction of an accused in the early 1980's. In each case Preston maintained that his dog picked up the scent of the accused on clothing worn by the perpetrator, State v Dillon, Case No. 05-1981-CF-001746-A; on items at the crime scene, State v Dedge, Case No. 05-1982-CF-000135-A; the murder weapons found at the scene of the crime, Bennett.

Since at least 1982 when the first of the two Dedge trials occurred there were challenges to John Preston's claims that his dogs had the ability to pick up the scent of suspects on items associated with the crime under investigation. This was based, in part, on Preston's bald assertion, without any scientific support, that his dogs could pick up the scent of an individual weeks and months after an incident. In 1986 the Florida Supreme Court held that Preston's testimony alone was insufficient to establish the reliability of dog-scent discrimination lineups as a method of proof, State v Ramos, 496 So.2d 121, 123 (1986) ending Preston's career as an expert witness in the State of Florida. There was,

however, no known evidence conclusively establishing that Preston's claim that his dog identified the scent of the particular accused was false until November 2008 when DNA evidence in the Dillon case proved to a scientific certainty that Preston had to have been testifying falsely that his dog identified the scent of the accused on a particular item of evidence..

In August 2004 in State v Wilton Dedge, Case No. 05-1982-CF-000135-A it was demonstrated that Preston's testimony in Dedge's original 1982 trial and his 1984 retrial was, at a minimum wrong and at a maximum false, when the results of mitochondrial DNA testing of pubic hairs found at the scene of a sexual assault and Y-STR DNA testing of semen on anal swab from the rape kit established that neither the pubic hairs nor semen was Mr. Dedge's. The prosecution maintained the pubic hairs, based on microscopic hair comparison examinations, were Dedge's. This evidence was buttressed by Preston's testimony that his dog Harass II had identified Dedge's scent on the bedding of the rape victim providing the necessary corroboration to a weak identification and the basis to arrest Dedge on charges of burglary with assault, sexual battery with a weapon, and aggravated battery. State v Dedge, 442 So.2d 429, 430 (Fla. 5th DCA, 2003) The mitochondrial DNA evidence and Y-STR DNA evidence, however, did not conclusively establish that Preston in saying his dog detected the scent of Dedge on the bedding was falsely testifying because the conviction

in State v Dillon remained firm.

In November 2008 the proof establishing that Preston's testimony was false in the Dedge, Dillon and the defendant's cases was finally uncovered. William Michael Dillon was convicted in early 1982 of first degree felony murder and sentenced to life imprisonment. Mr. Dillon, just like the defendant Bennett, maintained his innocence through 27 years of imprisonment. Preston testified at Dillon's trial that his dog Harass II identified the scent of Dillon in the neck area of a bloody yellow T-shirt worn by the perpetrator during the murder of the victim. DNA testing of the T-shirt, which was covered in blood that the prosecution argued in summation was the victim's, established that Mr. Dillon's DNA was not on the shirt but what was on the shirt was the DNA of someone else, therefore it was impossible for Dillon's scent to have been on the shirt to be identified by Preston's dog Harass II. On November 14, 2008 the State moved to grant Mr. Dillon a new trial based on the DNA results and on the same date The Honorable David Dugan, Circuit Judge, entered an Order granting Mr. Dillon a new trial. The vacation of Mr. Dillon's conviction and the subsequent dismissal of all charges based on the DNA results established John Preston was not truthful in testifying his dog identified Dillon's scent on the yellow t-shirt and scientifically proved that Preston was a serial perjurer for the State. [Exhibit D-A]

In the court below the State did not contest that the

defendant's conviction was based on the false testimony of John Preston, a dog handler, instead, the State argued that the defendant should have brought his action within two years of the 2004 revelation of the DNA evidence in State v Dedge, Case No. 05-1982-CF-000135-A, which the State maintained "irrefutably disapproved the testimony of dog handler John Preston." [State's Brief, p. 13]

In reply the defendant noted that the State's argument that the defendant's newly discovered evidence claim was time barred, because it was filed more than two years after the Dedge DNA evidence was discovered, completely ignored the fact that the conviction in State v Dillon, Case No. 05-1981-CF-001746-A, remained inviolate after Dedge and that any argument that Dedge proved that Preston was a serial perjurer and shill for the prosecution simply did not match the facts so long as Preston's testimony in Dillon remained scientifically unimpeached.

The trial court in denying the defendant's motion for post conviction relief without an evidentiary hearing stated, in pertinent parts, as follows:

> ...In Dedge, it was conclusively demonstrated by the DNA testing of the semen sample taken from the victim's rectum that Dedge was actually innocent. In contrast, actual innocence was not proven in Dillon. Instead, the Court's Order granting the postconviction motion in Dillon was narrowly tailored to meet the standard required by Strickland v Washington, 466 U.S. 668 (1984); there was a reasonable probability that the outcome of

Dillon's trial would have been different if the jury had had the benefit of the DNA evidence on the armpit of the t-shirt. The fact that actual innocence was not conclusively proven in Dillon was demonstrated by the State's attempt to pursue retrial after Dillon's conviction was vacated due to the DNA results. But most significant to the resolution of the issue pending before the Court in the motion in the case at bar, in neither Dillon *nor* Dedge did the postconviction Court make a factual finding that Investigator John Preston had committed perjury during either trial.

...

In neither Dillon nor Dedge did the newly-discovered DNA evidence established [sic] to a scientific certainty that Investigator John Preston had lied at either of the trials in those cases. Even after the discovery of the DNA evidence in both cases, the possibility remained that Preston and/or his dog had simply been mistaken. The defendant has failed to distinguish the outcome of the postconviction proceedings in Dillon from the outcome of the postconviction proceedings in Dedge insofar as the testimony of Investigator Preston is concerned. Therefore the Court finds that the outcome of the postconviction proceeding in Dillon does not qualify as newly discovered evidence.

[Opinion, pp. 21-22]

SUMMARY OF ARGUMENT

The trial court in denying the defendant's newly discovered evidence claim based on DNA evidence in State v Dedge, Case No. 05-1982-CF-000135-A, and State v Dillon, Case No. 05-1981-CF-001746-A, which the defendant alleged scientifically proved the falsity of the testimony of dog handler John Preston, testimony that was likened to a fingerprint by the trial prosecutor in the defendant's case, imposed a standard of what constitutes newly discovered evidence found nowhere in law under which the defendant was required to have a judicial finding that Preston committed perjury in Dedge and Dillon and that Dillon was actually innocent. In order to impose the requirements it did for the DNA evidence to be newly discovered, the trial court improperly employed judicial notice, in the absence of an evidentiary hearing, to go outside the record in the defendant's case to consider select pleadings in the Dedge and Dillon cases without affording the defendant the opportunity to contest the unspecified alleged facts it chose to consider and interpret in denying the claims.

The trial court then compounded its error on the defendant's newly discovered evidence claims by analyzing the defendant's Brady v Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L.Ed 2d 215 (1963) suppression of evidence claim as presenting a newly discovered evidence claim. The defendant alleged that a note in the State Attorney's file uncovered on January 21, 2010 contained the

suppressed admission of the prosecution that the scent discrimination lineup used to obtain the defendant's indictment on capital murder charges and his arrest was a sham and completely unreliable. Having improperly classified the defendant's Brady claim as a newly discovered evidence claim the trial court went on to reject the claim on the basis that the note could have been discovered by trial counsel and/or first post conviction relief counsel in the absence of any evidence in the record that the note could have been discovered by either attorney.

Lastly, the trial court in denying the defendant's motion to disqualify all judges in the Eighteenth Judicial Circuit, and failing to rule on the defendant's alternative motion for a change of venue, based on Circuit Judge John Dean Moxley's behind-the-scenes advocacy to the Assistant State Attorney handling the case, was error. Judge Moxley when he was an Assistant State Attorney handled the prosecution of the defendant. The trial court based its decision on the technical requirements for disqualifying a judge sitting on the case under Florida Rule of Judicial Administration 2.330 which was error given when the motion was filed no particular judge was assigned the case and the defendant's objectively reasonable well founded fear that he could not receive a fair hearing in the Eighteenth Judicial Circuit based on Judge Moxley's continued advocacy in the case.

ARGUMENT

POINT ONE

THE TRIAL COURT IN DENYING THE DEFENDANT'S NEWLY DISCOVERED EVIDENCE CLAIM APPLIED AN INCORRECT STANDARD IN DETERMINING THE EVIDENCE WAS NOT NEWLY DISCOVERED AND TIME BARRED

On appeal of the summary denial of a Rule 3.850 motion for post conviction relief in order for an appellate court to uphold the denial "the claims must be either facially invalid or conclusively refuted by the record. Further, where no evidentiary hearing is held below, [the appellate court] must accept the defendant's allegations to the extent they are not refuted by the record." Florida Rule of Appellate Procedure 9.141(b)(2)(D); McLin v State, 827 So. 2d 948, 954 (Fla. 2002)

The DNA evidence in the Dedge and Dillon cases was unknown at the time of the defendant's trial and could not have been discovered by the exercise of due diligence, and it establishes, at a minimum, that Preston's testimony in those cases was completely wrong, and at a maximum, that he was exactly what the defendant maintained, a serial perjurer. Whether it was the former or the latter the evidence was newly discovered and was of such nature that it would probably produce an acquittal or retrial. McLin v State, 827 So.2d at 956; Jones v State, 591 So.2d 911, 915 (Fla. 1991)

The court below, however, in viewing the evidence did not apply the accepted standard for analyzing whether evidence was

newly discovered but instead applied a completely incorrect standard in holding the Dillon DNA evidence did not qualify as newly discovered evidence. According to the trial court because there was no official finding by the courts in Dedge and Dillon that Preston committed perjury in testifying at their trials, and the DNA evidence in Dillon did not establish Dillon's actual innocence because the State never conceded Dillon's actual innocence in consenting to his motion for post conviction relief and in filing a *nolle prosequi* of his charges, the DNA was not newly discovered evidence.[4] [Opinion pp. 21-22]

Instead of reviewing the defendant's motion to determine if it was facially valid or conclusively refuted by the record in the case, the trial court went outside the record in the case to create a legal standard under which the defendant was required before he could bring his newly discovered evidence claim to have in hand a finding in both the Dedge and Dillon cases that Preston committed perjury and a concession from the State that Dillon was actually innocent.

Whether the courts concluded Preston committed perjury in the

[4] The Court also noted that the State, following its *nolle prosequi* of the charges against Dillon, continue to pursue DNA evidence in the case. Left unsaid is what occurred as a result of that testing which would all be the subject of an evidentiary hearing. Suffice it to say, no evidence implicating Mr. Dillon in the murder has been uncovered and the appellant understands that the Brevard County Sheriff's Office believes individuals other than Mr. Dillon were responsible for the murder.

Dedge and Dillon cases or the State conceded Dillon's actual innocence is irrelevant to the evidentiary meaning of the DNA evidence recovered to the defendant's newly discovered evidence claim. DNA evidence in Dedge and Dillon proves Preston's testimony was incorrect and/or false in those cases. The issue is whether a jury having this evidence would probably acquit the defendant on retrial either because Preston is falsely testifying and/or is wrong. Similarly, whether the State conceded that Dillon was actually innocent is irrelevant to the defendant's newly discovered evidence claim, the fact is that DNA evidence proves that Dillon's DNA is not on the shirt worn by the murderer but some other third party's DNA is on the shirt, and John Preston testified that his dog Harass II detected Dillon's scent on the shirt. The issue is would this evidence, which could not have been discovered at the time of the defendant's trial, most probably result in an acquittal of the defendant on retrial. The fact that the State did not concede Dillon's actual innocence in consenting to his motion for post conviction relief and *in nollo prosequi* the charges against Dillon has nothing to do with what the evidence speaks to vis-a-vis the defendant's case. The Dillon DNA evidence proves to a virtual scientific certainty that Dillon's scent could not possibly have been on the shirt worn by the murderer, which is the issue and not whether the State conceded Dillon's actual innocence which it is not required to do in consenting to the granting of a new trial or

in moving to dismiss all charges, just as the courts in Dedge and Dillon are not required to declare Preston a perjurer in vacating and dismissing all the respective charges.

The validity of the Dillon verdict remained the last barrier to proving that Preston's evidence against the defendant was wrong and/or false. This was so because so long as the Dillon conviction remained inviolate the proof of the incorrectness and/or falsity of Preston's testimony at the defendant's trial remained unprovable because it could hardly be argued Preston's testimony was wrong or false so long as his testimony in Dillon stood as valid. With the DNA discovery in Dillon that his scent could not possibly have been on the shirt combined with the DNA evidence in Dedge, any pretense that Preston's testimony in any of the cases was valid evaporated and a jury hearing this evidence on retrial would probably acquit the defendant.

The defendant's claims were facially valid and the trial court was required to accept the allegations as true because they were not refuted anywhere in the record. It was only through the creation of an incorrect standard, by going outside the record in the case, that the trial court was able to deny the motion. An Order should issue reversing the denial of the motion and remanding the case for an evidentiary hearing.

POINT TWO

IN DENYING THE DEFENDANT'S SUPPRESSION OF EVIDENCE CLAIM THE TRIAL COURT MISTAKENLY SAID THE CLAIM WAS FOR NEWLY DISCOVERED EVIDENCE AND HELD THE EVIDENCE COULD HAVE BEEN DISCOVERED BY PRIOR COUNSEL IN THE ABSENCE OF EVIDENCE ESTABLISHING THE EVIDENCE COULD HAVE BEEN DISCOVERED

A Brady v Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L.Ed 2d 215 (1963) suppression of evidence claim presents a mixed question of law and fact. Rogers v State, 782 So. 2d 373, 376-377 (Fla. 2001). Accordingly, the standard of review of the disposition of a Brady claim is mixed. A reviewing court must defer to the factual findings of the trial court to the extent they are supported by competent substantial evidence, but the application of those facts to the law are reviewed *de novo*. Johnson v State, 921 So. 2d 490, 507 (Fla. 2005)

In his motion the defendant produced a note found in the State Attorney's file on January 21, 2010 [Exhibit D-B] establishing that the dog-scent discrimination lineup of September 9, 1983 involving the scissors was obviously unreliable and a sham and that the State Attorney failed to disclose that evidence to the grand jury, the trial court and the defendant at trial. The false results of that lineup were then used to obtain the defendant's indictment on capital murder charges and his arrest. The fact that the dog handler John Preston obviously knew which scissors was the evidence scissors was kept from the defendant and his jury even though it

was obviously Brady material which could have been used to destroy the entirety of the dog-scent evidence that the trial prosecutor likened to a fingerprint and proof of the defendant's alleged pattern of deception. [R. at 677] The court below, however, did not apply a suppressed evidence analysis to the note, but instead viewed it as "newly discovered evidence" and held, in the absence of any proof, that trial counsel and/or 1988 post conviction counsel could have discovered the note with the exercise of due diligence. [Opinion, pp. 9-10]

In Brady v Maryland, supra, the Court held that a prosecutor's suppression of evidence favorable to a defendant violates due process if the evidence is material to either guilt or punishment. There are three elements of a Brady violation: (1) the evidence must be favorable to the defendant because it is either exculpatory or impeaching; (2) the evidence was suppressed by the State; and (3) the suppression prejudiced the defendant, meaning that the defendant must demonstrate "a reasonable probability that had the suppressed evidence been disclosed, the jury would have reached a different verdict. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Bryd v State, 14 So. 3d 921, 925 (Fla. 2009).

In the defendant's case the suppressed evidence clearly had the capacity to prove that Preston's dog was not scenting the defendant on the evidence scissors but that Preston was identifying

the evidence scissors and falsely asserting the dog was picking up the defendant's scent on them. Once having the proof that Preston as opposed to his dog was identifying the evidence items, the like a "fingerprint" evidence the Assistant State Attorney asserted Preston provided, which the defendant had no explanation for, disappeared making the defendant's lack of an explanation for the presence of his finger and palm print in the victim's trailer plausible and "undermining confidence in the verdict." [id.]

Clearly, the defendant established the elements of a Brady claim and the record in the case fail to establish that the defendant is not entitled to relief. Accordingly, pursuant to Rule 9.141(b)(2)(D) an Order should issue reversing the denial of the defendant's claim and remanding the case for an evidentiary hearing.

POINT THREE

THE TRIAL COURT, IN THE ABSENCE OF AN EVIDENTIARY HEARING ERRED IN TAKING JUDICIAL NOTICE OF RECORDS IN THE DEDGE AND DILLON CASES

The standard of review for the admissibility of evidence is abuse of discretion. Fike v State, 4 So.2d 734, 737 (Fla. 5th DCA, 2009); LaMarca v State, 785 So.2d 1209, 1212 (Fla. 2001) A trial court's discretion in considering a Florida Rule of Criminal Procedure 3.850 motion in the absence of an evidentiary hearing is limited to determining whether the motion is on its face legally sufficient and whether it is refuted by "the files and records in the case." Anderson v State, 627 So.2d 1170, 1171 (Fla. 1993); Lemon v State, 498 So.2d 934 (Fla. 1986); State v Crews, 477 So.2d 984, 985 (Fla. 1985). In addition, a trial court's discretion in the admission is limited by the rules and statutes governing the admission of evidence. Nardone v State, 798 So.2d 870 (Fla. 4th DCA, 2001)

The trial court went outside the record in the absence of an evidentiary hearing over the objection of the defendant that those records were matters of proof at an evidentiary hearing and considered records in the Dillon and Dedge cases of which the defendant had no specific knowledge, other than knowing that the Court expressed an intent to look at substantive and procedural facts in the Dillon and Dedge cases. The trial court then used those records to create an incorrect standard in determining the

defendant's newly discovered evidence claim.

In cases where there has been no evidentiary hearing the court must accept as true the factual allegations made by the defendant to the extent that they are not refuted by the record and files in the case, but the trial court did not do so in this case. Tompkins v State, 994 So.2d 1072, 1081 (Fla. 2008); Peede v State, 748 So.2d 253 (Fla. 1999); Valle v State, 705 So.2d 1331 (Fla. 1997) Judicial notice is an evidentiary rule and it comes into play during trials and evidentiary hearings. Section 90.103.Fla.Stat. It is at the trial or evidentiary hearing that the issue of judicial notice becomes ripe for determination with both parties having full knowledge of exactly what substantive and procedural facts in the Dedge and Dillon cases are in issue.

In Bergeron Land Development, Inc. v Knight, 307 So.2d 240 (Fla. 4th DCA 1975) the plaintiff filed a complaint to impress a constructive trust on some real property. The defendant answered the complaint asserting a defense of *res judicata* and then moved for judgment on the pleadings. The court granted the motion and dismissed the complaint holding that the issues between the parties had been previously litigated in another case in the same circuit. In reversing the judgment in favor of the defendant the court stated, at p. 241, the following:

> No evidence was offered (nor could it properly be) at the hearing on the motion for judgment...Two well known rules control ...When one party moves for a judgment on the

> pleadings, the court (for purpose of the motion) must accept as true all well pleaded allegations (affirmative and negative) of the nonmoving party...(citations omitted). The second rule is that 'the trial court is not authorized to take judicial notice of the records in a different case pending or disposed of in the same court but outside the record in the case before him.' Kostecos v Johnson, Fla. 1956, 85 So.2d 594; Novack v Novack, Fla. App. 1967, 196 So.2d 499; DuPont v Rubin, Fla. App. 1970, 237 So.2d 795. In order to prove some matter contained in the record of a case other than the one being litigated, a party must offer the other court file or certified copies of portions thereof into evidence in the case then being litigated.

See also Carson v Gibson, 595 So.2d 175 (Fla. 2nd DCA, 1992); Kelley v Kelley, 75 So.2d 191 (Fla. 1954).

The court's function at the time it denied the defendant's motion was to determine whether the motion was facially valid or conclusively refuted by the record in the defendant's case, and not to independently determine the "merits" of the asserted claims by going outside the record in the case to consider unspecified records in the Dillon and Dedge cases absent an adversarial hearing. See, Vencil v State, 715 So.2d 334, 335 (Fla. 1st DCA 1998) ("A trial court cannot deny a 3.850 motion without an evidentiary hearing on the basis of information which is obtained by the court after a petitioner files a 3.850 motion and from sources outside the record.")

Here the trial court relied on briefs submitted by the

parties in Dedge, none of which the defendant had access to,[5] and briefs and arguments of the parties in Dillon from which it drew conclusions all without the defendant having an opportunity to refute, contest, distinguish, or argue their applicability to his case.

In taking judicial notice of unspecified procedural and substantive facts in the Dedge and Dillon court records in absence of an evidentiary hearing, the trial court erred. An Order should issue reversing the trial court's denial of the defendant's motion for post conviction relief.

[5] Counsel for the defense sought to review the court file in Dedge and was told by the Brevard County Clerk's Office that the file had been destroyed and did not exist.

POINT FOUR

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION TO DISQUALIFY THE JUDGES OF THE EIGHTEENTH JUDICIAL CIRCUIT AND/OR HIS MOTION FOR A CHANGE OF VENUE

The standard of review of a trial judge's determination on a motion to disqualify is *de novo*, and whether a motion to disqualify is legally sufficient is a question of law. Parker v State, 3 So.3d 974, 981-982 (Fla. 2009)

On January 21, 2010 defense counsel during an inspection of the State Attorney's file discovered a five-page single-spaced letter in the file from John Dean Moxley, Circuit Judge, Eighteenth Judicial Circuit, to the Assistant State Attorney handling the case on behalf of the State, dated July 14, 2009, urging the State to oppose the defendant's Fla. R. Crim. P. 3.853 motion for DNA testing. At the time the defendant discovered the letter the State had consented and the court had entered an Order permitting the requested testing which unfortunately failed to reveal the existence of any evidence, in the sealed envelopes contained in the court file, to test. Based on the letter and Judge Moxley's obvious interest and advocacy in the case the defendant moved, at the time he filed his 3.850 motion for post conviction relief, to disqualify all of Judge Moxley's fellow judges sitting in the Eighteenth Judicial Circuit and/or for a change of venue.

In denying the defendant's motions the trial court held the motion to disqualify pursuant to Florida Rule of Judicial

Administration 2.330(e) was insufficient because it was filed more than ten days after the discovery of facts constituting the grounds for the motion; a copy was not served on the judge, Florida Rule of Judicial Administration 2.330(c)(4); and the motion failed to be sworn by the party and to have counsel's certification that it was submitted in good faith. Florida Rule of Judicial Administration 2.330(c).

While the motion admittedly was filed more than ten days after discovery of the facts because there was no pending matter, and was neither sworn to by the defendant nor certified to by counsel, it is submitted that Florida Rule of Judicial Administration 2.330 was not applicable because the motion was not directed against the judge sitting on the case. There was no specific judge assigned to the case that was being filed at the same time the motion to disqualify was being filed, and the defendant never feared Judge Moxley would be assigned to hear a case he prosecuted. Instead the motion was directed against all judges of the judicial circuit based on Judge Moxley's interest in the case which created an obvious appearance of a conflict in that the decisions of one of Judge Moxley's colleagues would be effecting Judge Moxley's interests and as a result the defendant feared he could not receive a fair hearing in the Eighteenth Judicial Circuit, an objectively reasonable fear. State v Shaw, 643 So.2d 1163, 1164 (Fla. 4th DCA, 1994).

Clearly Judge Moxley's interest in the case created a legitimate fear that the defendant could not receive a fair hearing in the Eighteenth Judicial Circuit and it was error to deny the motion to disqualify all judges of the Eighteenth Judicial Circuit as it was error to fail to rule on the defendant's alternative motion for a change of venue. As a result an Order should issue reversing the denial of the defendant's motion for post conviction relief and remanding the case for an evidentiary hearing with instructions to the Clerk of the Court to transfer the case to another judicial circuit in accord with the administrative rules providing for such transfers.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the instant brief has been prepared with Courier New 12-point font in compliance with the requirements of Florida Rule of Appellate Procedure 9.210(a).

_____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the Initial Brief has been furnished to the following by Federal Express this 28th day of December, 2011.

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