

**IN THE SUPREME COURT OF PENNSYLVANIA**

\_\_\_\_\_  
[REDACTED]  
\_\_\_\_\_

IN RE: FORTIETH STATEWIDE INVESTIGATING GRAND JURY

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**PETITIONER [REDACTED] S BRIEF IN SUPPORT OF HIS  
EMERGENCY PETITION  
FOR REVIEW IN THE NATURE OF AN APPEAL**

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[REDACTED]

Date: July 10, 2018

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**INTRODUCTION**

Petitioner [REDACTED]

[REDACTED], comes before this Court seeking its help to maintain his good name and reputation as a [REDACTED]

[REDACTED]

[REDACTED]

The Grand Jury subpoenaed this evidence, and Office of the Attorney General (the “OAG”) had it throughout the investigation and the writing of this report; see

[REDACTED]

Simply put, there is no way, on the basis of the record to date, that any real review of the evidence before the Grand Jury could lead to the Report's conclusion, by a preponderance, that Petitioner [REDACTED] Investigating Grand Jury Act requires. No real due process has been nor will be afforded to Petitioner in his attempts to seek justice and maintain his good name and reputation, as the Commonwealth's case law and Constitution require, without this Court's intervention and requirement that Petitioner be afforded due process through a pre-deprivation hearing to review the Grand Jury's and the Supervising Judge's conclusions below about the record evidence, and to supplement it if necessary. And equally, there is no way that this Court could find the Report to be for a legitimate purpose authorized by the Investigating Grand Jury's enabling legislation; for this reason alone, the Report's naming of names for the twin purposes of [REDACTED]

[REDACTED]

As demonstrated more fully below, the facts and the law compel but one result here: no Report concerning Petitioner should be released without a proper review by the standard mandated by the Investigating Grand Jury Act. Nor should any Report be allowed to be accepted and released without Petitioner being afforded the opportunity for a pre-deprivation review of the evidence against him (including full

notice and a meaningful opportunity to be heard) -- and, if the true facts then found compel it, the redaction of any mention [REDACTED]

**STATEMENT OF JURISDICTION**

This Court has appellate jurisdiction pursuant to 42 Pa. C.S. § 722(5) and Pa.R.A.P. 3331(a)(3), (a)(5), or alternatively as a collateral order, Rule 313(b). The Honorable Norman A. Krumenacker, III, Supervising Judge of the Fortieth Statewide Investigating Grand Jury, has certified his June 14, 2018 Revise Order for immediate appeal pursuant to 42 Pa. C.S. § 702(b) and Pa.R.A.P. 312.

**ORDERS IN QUESTION**

The Orders to be reviewed are, first: the Revised Order entered on June 14, 2018, by the Honorable Norman A. Krumenacker, III, Supervising Judge of the Fortieth Statewide Investigating Grand Jury<sup>1</sup>, which states as follows:

[REDACTED] this 14th day of June, 2018, the Motion by [REDACTED] to Redact Grand Jury Report No. 1 as not sufficient of the Evidence and Motion for Pre-Deprivation Evidentiary Hearing are DENIED. See Order and Opinion of June 5, 2018.

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<sup>1</sup> June 14, 2018 Order attached as Exhibit “B.”

Further, the request to certify this matter for immediate appeal is GRANTED, as the Court is of the opinion that this Order involves a controlling question of law as to which there is substantial ground for difference of opinion, and that an immediate appeal from this Order may materially advance the ultimate termination of the matter.

Finally, the Request to stay all further proceedings before this Court pending such interlocutory appeal is hereby DENIED. Any response to the report [42 Pa§4552 (e)] is due June 22, 2018;

and second, Judge Krumenacker's previous May 22, 2018, Amended Order Accepting Investigating Grand Jury Report No. 1 And Directing Further Action Prior To the Report Being Made Part of the Public Record,

**AND NOW**, this 22<sup>nd</sup> day of May 2018, upon examination of Investigating Grand Jury Report No. 1, and finding that said report, within the scope of the Grand Jury's authority, proposes recommendation for legislative, executive or administrative action in the public interest based upon stated findings, and further finding that said report is based upon facts received in the course of an investigation authorized by the Investigating Grand Jury Act, 42 Pa.C.S. Sec. 4541 *et seq.*, and is supported by the preponderance of the evidence...<sup>2</sup>

#### **STATEMENT OF SCOPE AND STANDARD OF REVIEW**

The Court, in its July 6<sup>th</sup> Scheduling Order, identified three questions for Petitioner to address on appeal (*see* Statement of Questions Involved, immediately below.) Each of the Questions Involved are questions of law. The Supreme Court's standard of review over questions of law is *de novo*, and the scope of review is

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<sup>2</sup> May 22, 2018 Order attached as Exhibit "C."

plenary. In re Thirty-Third Statewide Investigating Grand Jury, 86 A.3d 204, 215 (Pa. 2014) (citing Levy v. Senate of Pennsylvania, 65 A.3d 361, 367 (Pa. 2013); Kopko v. Miller, 892 A.2d 766, 770 (Pa. 2006)).

**STATEMENT OF THE QUESTIONS INVOLVED**

1. Whether the supervising judge ignored the court's clear duty under the Investigating Grand Jury Act to consider the grand jury's evidence and make a determination whether or not the Report's conclusions about Petitioner are supported by the preponderance of the evidence?

*Implied (but not directly addressed) in the negative by the Supervising Judge's Revised Order of June 14, 2018 and the June 5, 2018 Opinion and Order referenced therein.*

2. Whether the grand jury's release of the names and identifying characteristics of those persons of whom it is critical but did not indict for a criminal offense is not for a purpose supported by the Investigating Grand Jury Act?

*Not addressed by the Supervising Judge's Revised Order of June 14, 2018 or the June 5, 2018 Opinion and Order referenced therein.*

3. Whether the supervising judge violated Petitioner's fundamental rights to his good reputation and due process of law under Article I, Sections 1, 9, and 11 of the Pennsylvania Constitution by denying him a pre-deprivation hearing?

*Answered in the negative by the Supervising Judge's Revised Order of June 14, 2018 and the June 5, 2018 Opinion and Order referenced therein.*

**STATEMENT OF THE CASE**

This Court is by now well aware of the extraordinary events leading up to these expedited proceedings. For Petitioner here, [REDACTED]

[REDACTED] when he received one of the following form letters from Senior Deputy Attorney General Daniel J. Dye regarding the 40<sup>th</sup> Statewide Investigating Grand Jury, Report No. 1:

You have been named in a grand jury report. Please find enclosed the portion of the report which I have been authorized to release to you by the Supervising Judge of the 40<sup>th</sup> Statewide Investigating Grand Jury pursuant to 42 Pa.C.S. § 4552(e). You will also find the Court's order providing thirty (30) days to respond from today's date. Please be advised any response may be made public.

Attached to the letter from Mr. Dye was the following Order and Notice entered by the Honorable Norman A. Krumenacker, III, Supervising Judge:

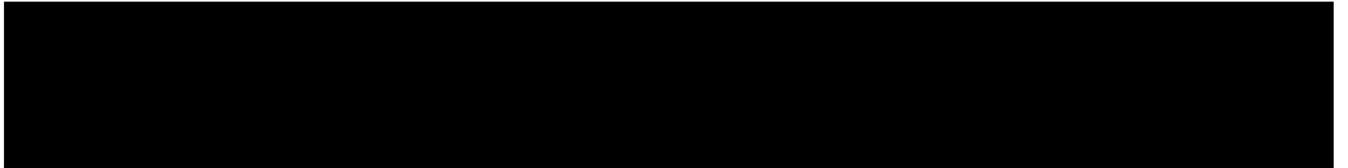
**AND NOW**, this 2<sup>nd</sup> day of May 2018, pursuant to 42 Pa.C.S. § 4552(e), the Court finds that Report 1 of the 40<sup>th</sup> Statewide Investigating Grand Jury is critical of certain individuals. The Court finds [REDACTED]

**IT IS ORDERED** that the Attorney for the Commonwealth shall provide a copy of this order to any living party so named. The provision of this order shall constitute sufficient notice.

**IT IS FURTHER ORDERED** that individuals so named shall have 30 days to file a sealed response with the Court, and provide a copy to the Attorney for the Commonwealth.

*\*\*\*FILED UNDER SEAL\*\*\**

Attached to the Order and Notice were



Through counsel, Petitioner filed a motion for relief<sup>3</sup> before the Supervising Judge of the Grand Jury, Norman Krumenacker, on June 8, 2018. Without hearing or opinion, the court denied [REDACTED]'s motion on June 12<sup>th</sup>. At counsel's request, Judge Krumenacker entered a Revised Order two days later, on June 14<sup>th</sup>, explicitly determining that the case involves a controlling question of law as to which "there is substantial ground for difference of opinion, and that an immediate appeal from this Order may materially advance the ultimate termination of the matter," and referencing his previous, June 5, 2018 Order and Opinion concerning other Petitioners in these Grand Jury proceedings.

[REDACTED] brought his Emergency Petition for Review in the Nature of an Appeal before this Court on June 18<sup>th</sup>, accompanied by an Emergency Application for Stay Pending Appeal. Since then, the media and a self-professed victim and the OAG have filed motions seeking to have the Report unsealed and the Stay lifted

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<sup>3</sup> "Motion For This Court's Determination That The Grand Jury Report As It Concerns Petitioner [REDACTED] Is Not Supported By A Preponderance Of The Evidence, And As A Result, Must Be Stricken Upon This Court's Rejection Thereof; Or, In The Alternative, For A Pre-Deprivation Evidentiary Hearing", June 8, 2018.

before this Court's decision of the merits. On July 6, this Court issued its Order soliciting full merits' briefing on this and several other petitions before it, identifying the specific questions to be addressed.

The Report's Appendix describing Petitioner [REDACTED]

[REDACTED]

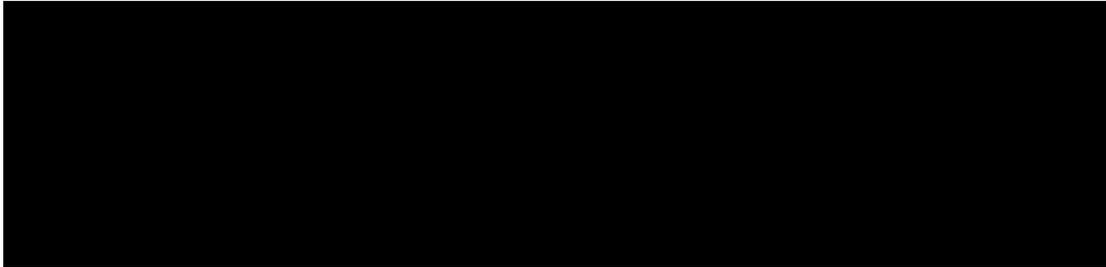
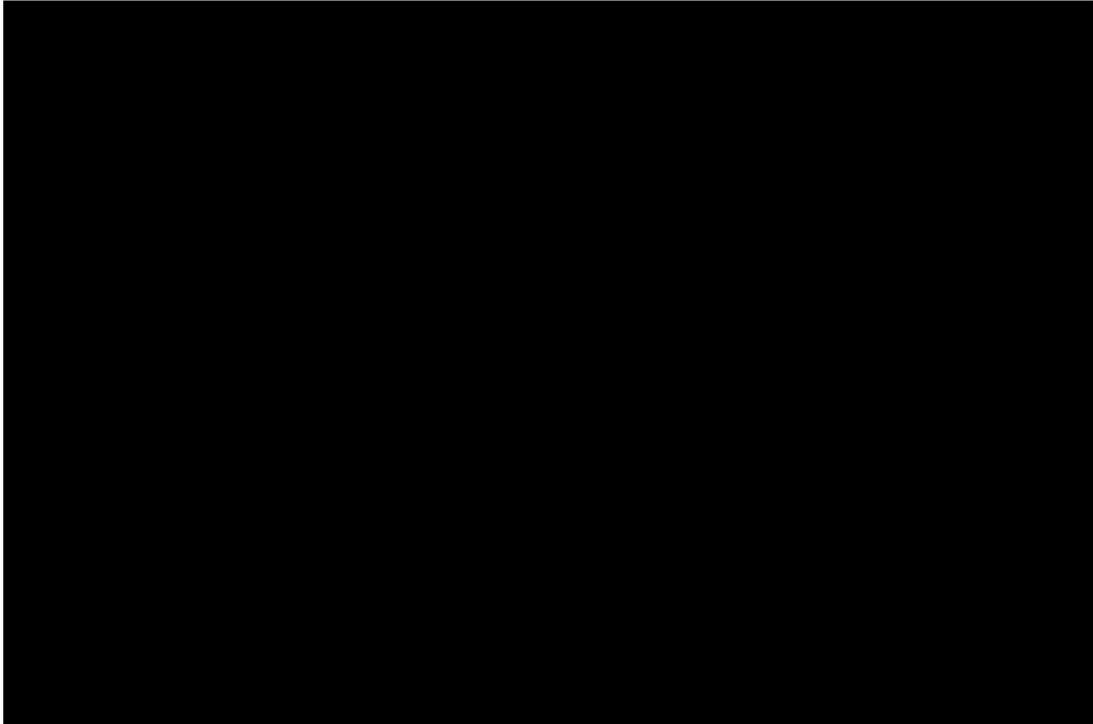
On July 5, 2004, [REDACTED]

[REDACTED]

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<sup>4</sup> Petitioner objects to any use or, especially, release of any materials protected as privileged and confidential under statute and Constitutional protections, issues which the Report does not address, and further adopts the position and arguments raised at [REDACTED] (Pa., Merits Brief filed July 10, 1018).

*\*\*\*FILED UNDER SEAL\*\*\**



[REDACTED]

[REDACTED]

attached hereto as

Exh. C<sup>5</sup>.

[REDACTED]

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<sup>5</sup> There is no doubt that the Grand Jury [REDACTED]

[REDACTED]

**SUMMARY OF THE ARGUMENT**

Petitioner seeks this Court's relief to preserve his reputation from wrongful attack and destruction based on less than the preponderance of the evidence and in an effort wholly outside of due process and other protections afforded him by rights under statute and Constitution. Given notice only now, and told he may provide a

 Petitioner seeks this Court's order: to provide the record of the Grand Jury and the Court demonstrating whether or not they carried out their statutory duty in considering the evidence, and whether they applied the requisite standard, as the statute requires; to provide him with a pre-deprivation hearing to demonstrate through evidentiary presentation and testimony that the Grand Jury's Report as to him is false and defamatory, as due process requires; and further, to redact or excise completely it's section concerning him which are not supported by the preponderance of the evidence, as justice requires. As important, Petitioner seeks this Court's determination of whether the Grand Jury's Report serves a proper purpose under statute; if not, it must be quashed or altered to fit within the narrow confines which the law of the Commonwealth allows.

**ARGUMENT FOR PETITIONER**

**I. There Is No Indication That The Supervising Judge Fulfilled The Court's Clear Duty Under The Investigating Grand Jury Act To Consider The Grand Jury's Evidence And Make A Determination Whether Or Not The Report's Conclusions About Petitioner Are Supported By The Preponderance Of The Evidence**

[Petitioner, pursuant to Pa.R.A.P. 1513(d)(5), 2116(a) and 2137, has joined in and adopts by reference the legal arguments in the Merits Brief Setting Forth Common Legal Arguments of [REDACTED] (“Petitioners’ Common Brief”) submitted on behalf of himself along with the Petitioners at [REDACTED], including that Brief’s Statement of Jurisdiction, Orders in Question, Statement of Scope and Standard of Review, Questions Presented, Statement of the Case, Summary of Argument, and Argument. He also joins in any other Briefs filed by Petitioners that have filed appeals raising similar challenges to Report No. 1, especially the

[REDACTED]

[REDACTED]

the Grand Jury itself, and then the Supervising Court thereafter, must first make a determination that the report “is based upon facts received in the course of an investigation . . . and is supported by the preponderance of the evidence.” 42 Pa.

C.S. Sec. 4552(b) (“Investigating Grand Jury Reports; Examination by the Court.”)

[REDACTED]

[REDACTED]

no indication that any fact has been determined by a preponderance of the available evidence by the Grand Jury much less by the Supervising Judge. No individualized finding about Petitioner can be supported by the Grand Jury’s own evidence as it concerns him by the preponderance of the evidence standard, [REDACTED]

[REDACTED]

Due process, as argued in the briefs submitted to this Court concurrently herewith, requires more: production of the Report and the evidence about Petitioner on which it was based (i.e., notice,) and a pre-deprivation hearing and evidentiary review and supplementation (i.e., a meaningful opportunity to be heard).

[REDACTED] has not been afforded any type of hearing in order to challenge the findings classifying him as [REDACTED]

[REDACTED]

In addition, there is nothing in the Report, or in the orders of the Court below, demonstrating how the legal standards applied to the evidence before the Grand Jury or the Court could lead to him [REDACTED]

[REDACTED]



**II. The Grand Jury’s Release Of The Names And Identifying Characteristics Of Those Persons Of Whom It Is Critical But Did Not Indict For A Criminal Offense Is Not For A Purpose Supported By The Investigating Grand Jury Act**

**A. The Plain Language Of The Act Conveys A Limited Purpose – And Limited Subject Matter Jurisdiction – To Investigate Organized Crime And Public Corruption**

The Investigating Grand Jury Act is codified at 42 Pa. C.S § 4541 *et seq.* As the plain language of the Act makes clear, a statewide or “multicounty” investigating grand jury has “jurisdiction to inquire into *organized crime* or *public corruption* or both under circumstances wherein more than one county is named in the order convening said investigating grand jury.” *Id.* § 4542 (emphasis added); *see also id.* § 4544. “Organized crime” and “public corruption” are both defined in the Act. *Id.* § 4542.<sup>6</sup> Neither definition applies here.

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<sup>6</sup> **“Organized crime.”** The unlawful activity of an association trafficking in illegal goods or services, including but not limited to gambling, prostitution, loan sharking, controlled substances, labor racketeering, or other unlawful activities; or any continuing criminal conspiracy or other unlawful practice which has as its objective:  
(1) large economic gain through fraudulent or coercive practices; or

Given the limited subject matter jurisdiction of multicounty investigating grand juries, the OAG must specifically justify the need for such a grand jury to investigate either organized crime or public corruption. *Id.* § 4544(a) (noting “the Attorney General shall state that, in his judgment, the convening of a multicounty investigating grand jury is necessary *because of organized crime or public corruption or both*”) (emphasis added). The naked facts here here preclude Attorney General Shapiro from honestly being capable of doing so.

**B. The Plain Language Of The Act Conveys A Limited Purpose – And Limited Subject Matter Jurisdiction – For The Grand Jury to Issue an Investigative Report**

Even if there were a proper jurisdictional basis in this matter, the multicounty investigating grand jury may then issue an “investigating grand jury report” only in limited purposes further defined in the Act: to propose recommendations for legislative, executive, or administrative action in the public interest based upon

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(2) improper governmental influence.

**“Public corruption.”** The unlawful activity under color of or in connection with any public office or employment of:

(1) any public official or public employee, or the agent of any public official or public employee under color of or in connection with any public office or employment; or

(2) any candidate for public office or the agent of any candidate for public office. *Id.*

stated findings.” *Id.* § 4542. Of course, the “proposing [of] recommendations for legislative, executive, or administrative action in the public interest ***based upon stated findings***,” § 4542 (emphasis added), must necessarily refer to findings from the investigation into organized crime and public corruption; otherwise, making recommendations beyond the scope defined in the Act would create much broader subject matter jurisdiction than the Act permits, and lead to investigations into issues having nothing to do with “organized crime” or “public corruption” (as defined in the Act.<sup>7</sup>) As has happened here.

Given the limited statutory grant of subject matter jurisdiction to multicounty grand juries (including the one at issue here) and the reports they might author, the OAG *cannot* use the grand jury process in a manner not authorized by statute, for publicity, or as a focus for elected officials’ pet focus. In particular, the Act does *not* authorize any investigating grand jury – whether for organized crime, public

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<sup>7</sup> Legislatures in other states have addressed this. New York law requires that a grand jury report submitted for this particular reason – *i.e.*, for “[p]roposing recommendations for legislative, executive or administrative action in the public interest based upon stated findings” – may not be “*critical of an identified or identifiable person.*” See N.Y. Crim. Proc. Law § 190.85(1)(c), (2)(b) [emphasis added].

corruption, or otherwise – to defame innocent third parties or to publish erroneous, misleading, unreliable, and scandalous rumors. Such conduct violates Petitioners’ fundamental constitutional interest in their good reputations.

The Grand Jury Report does make recommendations to the legislature, as contemplated under Section 4542. For example, the Grand Jury recommends changes to existing criminal and civil statutes of limitations. Exhibit F, Report at 7-9 (“Introduction”). The Grand Jury, however, does not stop with legislative recommendations. The Report makes clear that the Grand Jury, [REDACTED]

[REDACTED]

[REDACTED]

Exhibit F, Report at 2 (“Introduction”) (emphasis added).

These stated purposes stretch well beyond the statutory limits on permissible purposes of an investigating grand jury report under Section 4542. The Grand Jury Act simply does not authorize the grand jury or the Supervising Judge [REDACTED]

[REDACTED]



2. The Supervising Judge's Order of June 14, 2018, denying his Motion For Pre-Deprivation Hearing be reversed;
3. This matter be remanded with instructions to the Supervising Judge to:
  - a. Make a determination that the *specifics* of the Report as to Petitioner,<sup>8</sup> either are, or are not, proved by the preponderance of the evidence;
  - b. Hold a Pre-Deprivation hearing for Petitioner, at which he is given meaningful notice and an opportunity to be heard, in the event that the Court below makes findings about him, and determines they are supported by a preponderance of the evidence; and,
  - c. At the hearing, any information determined to be false, misleading or not supported by a preponderance of the evidence be deleted from the Report.

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<sup>8</sup> And as to each Petitioner, and indeed as to each individual about which [REDACTED]  
[REDACTED]  
[REDACTED] see, May 22, 2018 Amended Order of the Supervising Judge, at Par. 2.

**CONCLUSION**

Accordingly, for the reasons set forth above, Petitioner,   
respectfully requests that the Court grants his Emergency Petition for Review in  
the Nature of an Appeal.

Respectfully submitted this 10<sup>th</sup> day of July 2018.

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**CERTIFICATE OF COMPLIANCE**

I, Efrem M. Grail, Esquire, certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

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Date: July 10, 2018

**CERTIFICATE OF COMPLIANCE**

I, Efrem M. Grail, Esquire, certify that this filing, is less than 30  
Pages and does not exceed 14,000 words.

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Date: July 10, 2018

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**PETITIONER [REDACTED]'S BRIEF IN SUPPORT OF HIS  
EMERGENCY PETITION  
FOR REVIEW IN THE NATURE OF AN APPEAL**

---

**CERTIFICATE OF SERVICE**

I, Efreem M. Grail, hereby certify this 10<sup>th</sup> day of July, 2018, that a copy of the foregoing is hereby served upon the following:

Pittsburgh (Western District) Supreme Court Prothonotary:  
Via PACFile

Via U.S. Mail:  
The Honorable Norman A. Krumenacker, III  
Supervising Judge, 40<sup>th</sup> Statewide Investigating Grand Jury  
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