

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC02-1106

ASKARI ABDULLAH MUHAMMAD,

Petitioner,

vs.

MICHAEL W. MOORE, Secretary,
Department of Corrections, State of Florida,

Respondent.

ON PETITION FOR
WRIT OF HABEAS CORPUS

RESPONSE

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INTRODUCTION

Petitioner will be referred to as Defendant. The prosecution and Respondent will be referred to as the State. The symbols "DAR." will refer to the record on appeal from Defendant's direct appeal. The transcript of the trial proceedings is not consecutively numbered, and the transcripts of the pretrial proceedings are contained in a number of individually paginated transcripts contained in the various supplemental records. As such, the State will refer to the transcript of voir dire as "DAT1." The transcript of the guilt phase will be referred to as "DAT2." The transcript of the evidentiary portion of the sentencing phase will be referred to as "DAT3." The transcript of the pronouncement of sentence will be referred to as "DAT4." The individual transcripts of the pretrial hearing will be referred to by the date on which the hearing was held.

STATEMENT OF THE CASE AND FACTS

In accordance with Fla. R. Crim. P. 3.851(b)(2), this petition is being pursued concurrently with the appeal from the order denying Defendant's motion for post conviction relief. *Allen v. State*, No. SC02-371. The State will therefore rely on its statements of the case and facts contained in its brief in that matter.

ARGUMENT

I. APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO RAISE AN ISSUE REGARDING THE PARTICIPATION OF STANDBY COUNSEL.

Defendant first asserts that his appellate counsel was ineffective for failing to raise an issue regarding an alleged restriction on standby counsel's ability to consult with Defendant. Defendant contends that his decision to proceed pro se was conditioned on his ability to receive legal assistance for counsel and that standby counsel should have been permitted to investigate the case for Defendant and advise Defendant on how to present his case. However, this claim should be denied as the underlying issue is without merit.

Initially, the State would note that Defendant's claim is based largely on an affidavit by standby counsel filed with his post conviction motion. This affidavit is allegedly based on matters that were not made a part of the record at trial. Defendant does not explain how his appellate counsel could have raised an issue regarding matters that were admittedly not a part of the record on appeal. In fact, claims based on matters that are not a part of the record cannot be raised on appeal. *Altchiler v. State, Dept. of Professional Regulation*, 442 So. 2d 349 (Fla. 1st DCA 1983) ("That an appellate court may not consider matter outside of the record is so elemental that there

is no excuse for any attorney to attempt to bring such matters before the court."). As such, appellate counsel cannot be deemed ineffective for failing to raise this issue. *Kokal v. Dugger*, 718 So. 2d 138, 143 (Fla. 1998); *Groover v. Singletary*, 656 So. 2d 424, 425 (Fla. 1995); *Hildwin v. Dugger*, 654 So. 2d 107, 111 (Fla. 1995); *Breedlove v. Singletary*, 595 So. 2d 8, 11 (Fla. 1992). The claim should be denied.

Moreover, the allegations in the affidavit are refuted by the record. On January 12, 1981, the trial court held a hearing on Defendant's prior attorney's motion to withdraw. (1/12/81. at 3) During this hearing, Defendant asserted that his attorney should have no right to speak on Defendant's behalf. (1/12/81. at 5-6) Defendant asserted that before he would allow an attorney to appear for the defense in this matter, the attorney would have to agree not to speak on Defendant's behalf and to act only as the Defendant's assistant in preparing the case for trial. (1/12/81. 6) Defendant asserted that he had a right to such "assistance of counsel" that was distinct for representation by counsel. (1/12/81. at 6-7) At that time, the trial court informed Defendant that he had no right to the type of "assistance of counsel" that he was claiming and that Defendant would have to choose between proceeding pro se or being represented by counsel. (1/12/81. at 10-13) It warned

Defendant of the immense difficulty that he would face representing himself due to his incarceration. (1/12/81. 11-12)

During the *Faretta* inquiry, Defendant again raised his concept of "assistance of counsel" and stated that he planned to move for such "assistance." (6/7/82. at 17-19) The trial court inquired if Defendant would still want to represent himself if it denied such a motion, and Defendant insisted that he would still want to represent himself. (6/7/82. at 19) The trial court also informed Defendant that standby counsel would not actively participate in his preparation of his defense and would only be available to answer questions about legal procedures. (6/7/82. at 19) The trial court inquired if Defendant would still want to represent himself if the trial court denied all of the motions that he had proposed. (6/7/82. at 24-25) Defendant insisted that he still wished to represent himself. (6/7/82. at 25)

After the trial court had allowed Defendant to represent himself, Defendant again moved for the "assistance of counsel" and again insisted that "assistance of counsel" was different than representation by counsel. (7/19/82. at 12-20)

While Defendant asserts that standby counsel was prohibited for assisting him, the record reflects that the trial court affirmatively informed Defendant that he could consult with

standby counsel at the beginning of voir dire:

If you have any questions during the course of the trial, I know that you have not used Mr. Replogle of the Public Defender's Office much in the past, but if you have any questions, Mr. Replogle is present to assist you.

(DAT1. 7) Defendant inquired what the trial court meant by this statement because the trial court had previously refused to allow hybrid representation. (DAT1. 8) The trial court clarified that Defendant was free to ask questions of standby counsel regarding courtroom procedures. (DAT1. 8) Defendant then indicated that he understood standby counsel's role. (DAT1. 8)

After 32 veniremembers had been examined, Defendant objected to the trial court's offer that Defendant could ask standby counsel's advice because the trial court had not allowed hybrid representation. (DAT1. 277) The trial court overruled the objection. (DAT1. 277)

After both sides had rested their cases, the trial court gave Defendant an opportunity to review the jury instructions. (DAT2. 434) At that time, standby counsel indicated on the record that he had offered to assist Defendant in reviewing the instructions. (DAT2. 434) He asked if he and Defendant could be allowed to go somewhere private to do so. (DAT2. 434) The trial court commented that Defendant had "consistently refused the

Court's offer of [standby counsel's] assistance." (DAT2. 434) Defendant then stated that the trial court had previously refused to allow hybrid representation, that he had told standby counsel that it was not necessary for standby counsel to review the jury instructions and that he would allow standby counsel to do so if standby counsel wanted to do so. (DAT2. 434) However, Defendant asserted that he did not want his allowing standby counsel to review the jury instructions to waive his objection to the refusal to allow hybrid representation. (DAT2. 434) The trial court informed standby counsel that he probably should not review the instructions. (DAT2. 435) The trial court then informed Defendant that standby counsel was available and had been available to answer questions for Defendant if he requested to ask such questions. (DAT2. 435) The trial court also indicated that it had informed standby counsel not to provide advice unless asked. (DAT2. 435)

After the guilt phase, the trial court offered to appoint counsel to represent Defendant during the penalty phase. (DAT2. 506) Defendant declined the offer and continued to assist on representing himself. (DAT2. 506)

When the trial court attempted to colloquy Defendant regarding his waiver of counsel and waiver of a jury at sentencing, Defendant again asserted that he had a right to

hybrid representation and again objected to the appointment of standby counsel. (DAT3. 6-8)

As the record reflects that the trial court did not prevent Defendant from consulting with standby counsel and that Defendant continued to insist on representing himself with full knowledge that the trial court would not permit hybrid representation, a claim that the trial court erred in restricting Defendant from consulting with standby counsel or that his waiver of counsel was involuntary because he did not know that he would not be entitled to hybrid representation was meritless. As such, appellate counsel cannot be deemed ineffective for failing to raise this claim. *Kokal*, 718 So. 2d at 143; *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11. The claim should be denied.

To the extent that Defendant is attempting to claim that the trial court erred in refusing to permit hybrid representation or that the trial court should have refused to allow Defendant to represent himself with the active participation of counsel because this was a capital case, these claims are meritless. As such, appellate counsel cannot be deemed ineffective for failing to raise them. *Kokal*, 718 So. 2d at 143; *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11.

With regard to the claim that Defendant was entitled to

hybrid representation, it was meritless. In *McKaskle v. Wiggins*, 465 U.S. 168, 183 (1984), the Court expressly stated that a trial court was "not required . . . to permit 'hybrid' representation." The Court then went on to caution the lower court to limit carefully the unsolicited participation of standby counsel in cases where a defendant was proceeding pro se so that the defendant's right to self representation was not undermined. This Court has also held that there is no right to hybrid representation. *Mora v. State*, 814 So. 2d 322, 328 (Fla. 2002); see also *Brooks v. State*, 703 So. 2d 504, 505 (Fla. 1st DCA 1997). As such, the claim that the trial court erred in not allowing hybrid representation is without merit. Appellate counsel was not ineffective for failing to raise this issue, and the claim should be denied. *Kokal*, 718 So. 2d at 143; *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11.

Defendant's reliance on *Geders v. United States*, 425 U.S. 80 (1976), *Perry v. Leeke*, 488 U.S. 272 (1989) and *Crutchfield v. Wainwright*, 803 F.2d 1103 (11th Cir. 1986), is misplaced. In *Geders*, *Perry* and *Crutchfield*, the defendants were not proceeding pro se, and there was no standby counsel. Instead, the issue confronting the courts was whether a trial court had

violated a represented defendant's Sixth Amendment right by instructing the defendant and his counsel not to speak to one another during a recess because the defendant was in the middle of testifying when the recess occurred. As such, *Geders*, *Perry* and *Crutchfield* are not relevant to the issue of whether a court must permit hybrid representation.

Defendant also asserts that even if the trial court did not have to grant Defendant's request for hybrid representation, it could not prevent standby counsel from actively participating in the case once it appointed standby counsel. However, in *McKaskle*, the Court instructed the lower courts that they had a duty to prevent standby counsel's active participation if such participation was not at the request of the defendant and if such participation interfered with the right of self representation. Here, the record reflects that Defendant did not request the active participation of standby counsel. The trial court expressly informed Defendant that he could consult with standby counsel if he wanted to do so. Defendant expressed a desire that standby counsel not participate. As such, the lower court did not err in failing in the manner in which the record reflects it handled the issue of standby counsel. As such, the claim is meritless, and appellate counsel was not ineffective for failing to raise this issue. *Kokal*, 718 So. 2d

at 143; *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11. The claim should be denied.

Defendant's reliance on *Hicks v. Oklahoma*, 447 U.S. 343 (1980) and *Vitek v. Jones*, 445 U.S. 480 (1980), does not show that appointment of standby counsel entitles standby counsel to participate actively in the case without a request from the defendant. In *Vitek*, the court was addressing whether an inmate had a right to notice and hearing before he was transferred to a mental health facility. In *Hicks*, the Court was concerned with a determination that an error in sentencing a defendant under an unconstitutional law was harmless. As such, they had nothing to do with what actions standby counsel in a criminal case was permitted to take when a defendant was proceeding pro se.

With regard to Defendant's claim that the trial court should have required the active participation of standby counsel because this was a capital case, the claim is meritless. The United States Supreme Court has recognized the right to represent oneself as a fundamental right. *Faretta v. California*, 422 U.S. 806 (1975). The Court has also found that allowing standby counsel to participate actively when a defendant is representing himself is problematic if it interferes with the defendant's right of self representation.

McKaskle v. Wiggins, 465 U.S. 168 (1984)(active participation of standby counsel would violate the constitutional right of self representation if it caused the jury to believe that the defendant was represented by counsel or if standby counsel was allowed to overrule the pro se defendant's decisions about the conduct of the case). Because the Court has determined that all defendant's have these rights, this Court is not free to allow those rights to be infringed because this is a capital case. As such, this claim is meritless, and appellate counsel was not ineffective for failing to raise it. *Kokal*, 718 So. 2d at 143; *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11. The claim should be denied.

II. APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO RAISE AN ISSUE REGARDING DEFENDANT'S ALLEGED ABSENCES.

Defendant next asserts that his appellate counsel was ineffective for failing to raise an issue regarding alleged violations of his right to be present. Defendant contends that he was involuntarily absent when the trial court pronounced sentence, during a sidebar conference in the penalty phase, when the decision was made to excuse two veniremembers for cause and when the manner in which voir dire would be conducted was decided. However, the claim should be denied as the underlying issues are unpreserved and without merit.

The first alleged absence of Defendant occurred after the evidentiary presentation at the penalty phase. Defendant asserts that this alleged absence was error because the trial court did not conduct a waiver colloquy and because it prevented Defendant from presenting evidence of mitigation. However, this issue was not preserved.

In *Carmichael v. State*, 715 So. 2d 247, 249 (Fla. 1998), this Court held that in order to preserve a claim that the defendant was involuntary absent for the proceeding, it was necessary to object to the continuance of proceeding in his absence. Such a holding is in accordance with United States Supreme Court precedent on the issue. *Taylor v. United States*,

414 U.S. 17, 19-20 (1973)(colloquy not necessary); *United States v. Gagnon*, 470 U.S. 522, 528-29 (1985)(defendants' failure to assert right to be present sufficient to waive presence). Here, there was no objection to Defendant's alleged absence. As such, the issue was unpreserved, and counsel cannot be deemed ineffective for failing to raise it. *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11. The claim should be denied.

Moreover, the record does not reflect that Defendant was not present. At the conclusion of the penalty phase closing argument, the trial court noted that Defendant had chosen not to present any evidence or argument in mitigation. (DAT3. 59-60) As such, the trial court ordered a presentence investigation so that it could be sure that mitigation did not exist. (DAT3. 59-60) At the beginning of this statement, the trial court stated, "Take the defendant out first." (DAT3. 59) However, the record does not reflect that Defendant was removed from the courtroom. (DAT3. 59-60) As such, appellate counsel cannot be deemed ineffective for failing to raise this meritless issue. *Kokal*, 718 So. 2d at 143; *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11. The claim should be denied.

Even if the issue had been preserved and Defendant was not

present, he would still not be entitled to any relief. During the penalty phase, the trial court did not restrict Defendant's presentation of evidence. (DAT3. 29) Instead, Defendant chose to rest his case without presenting any evidence. (DAT3. 29) During the penalty phase closing argument, Defendant was not limited in asserting anything he wanted. (DAT3. 45-59) At the time of sentencing, Defendant was again given the opportunity to present anything before sentence was pronounced. (DAT4. 4) Defendant again declined to present any evidence. (DAT4. 4) Moreover, contrary to Defendant's assertion, the trial court was not making a finding regarding the imposition of a death sentence. The trial court merely summarized the evidentiary presentation during the penalty phase and decided to order a presentence investigation. This Court now requires that such reports be ordered whenever a defendant does not present mitigation. *Muhammad v. State*, 782 So. 2d 343 (Fla. 2001). Defendant does not explain what input he could have provided regarding the decision to order a PSI. In *Snyder v. Massachusetts*, 291 U.S. 97, 105-06 (1934), the Court recognized that a defendant had a due process right to be present when "his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge." The Court further opined that "when presence would be useless, or the

benefit but a shadow," the defendant's rights were not violated by his absence. *Id.* at 106-07. This Court has also found any error in denial of the right to be present harmless when the defendant's presence would not have contributed to the proceedings. *Coney v. State*, 653 So. 2d 1009 (Fla. 1995). As the only ruling made during the time that Defendant was allegedly not present was the ordering of a PSI, any error in his not being present would be harmless at worst. As such, appellate counsel was not ineffective for failing to raise this issue. *Strickland v. Washington*, 466 U.S. 668 (1984). The claim should be denied.

The next alleged time that Defendant was allegedly not present was during a sidebar conference during the pronouncement of sentence.¹ In pronouncing sentence, the trial court stated that it had found no statutory mitigation. (DAT4. 5) After sentence had been pronounced, the State requested a sidebar. (DAT4. 6) An unrecorded sidebar conference was then held. (DAT4. 6) After the sidebar, the trial court announced that the

¹ While Defendant asserts that he was precluded from going sidebar because the trial court required that he remain behind a line in the courtroom, the trial court, in fact, stated that both Defendant and the State would be required to ask questions from their tables and neither side would be allowed to approach witnesses or the jury. (DAT1. 7) As a result, the sidebar conference during the pronouncement of sentence was the only sidebar conference conducted.

State had informed the trial court at sidebar that it had to consider nonstatutory mitigation. (DAT4. 6) It announced that it had not found nonstatutory mitigation. (DAT4. 6) Defendant made no objection to the holding of the sidebar, did not request to go sidebar and did not challenge the manner in which the trial court had considered nonstatutory mitigation. (DAT4. 6) As Defendant did not object, this issue was not preserved, and appellate counsel cannot be deemed ineffective for failing to raise this issue. *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11. The claim should be denied.

Moreover, while Defendant claims that he could have directed the trial court to nonstatutory mitigation, Defendant ignores the fact that he had chosen not to do so during the evidentiary portion of the penalty phase, during his penalty phase closing argument or just prior to the announcement of sentence. When the trial court stated that he had not found any nonstatutory mitigation, Defendant did not object to this finding or point to any nonstatutory mitigation. As such, Defendant has not shown what he could have added to a sidebar conference at which the State merely reminded the trial court of its duty to consider nonstatutory mitigation. Again, any error would be harmless. *Snyder; Coney*. As such, appellate counsel was not ineffective

for failing to raise this issue. *Strickland v. Washington*, 466 U.S. 668 (1984). The claim should be denied.²

The final time that Defendant asserts that he was not present was when the manner in which voir dire was conducted was decided and when two veniremembers were excused for cause. While Defendant asserts that he was not present when the manner in which voir dire would be conducted was decided, the record reflects that the issue of manner in which voir dire was to be conducted was decided at a hearing on October 11, 1982. (10/11/82. at 29-36) Defendant was, in fact, present during this hearing and presented argument on this issue before the trial court decided how voir dire would be conducted. *Id.* The record also reflects that Defendant was present throughout voir dire. As such, appellate counsel cannot be deemed ineffective for failing to raise this nonmeritorious issue. *Kokal*, 718 So. 2d at 143; *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11. The claim should be denied.

² In a footnote, Defendant contends that the manner in which the trial court considered nonstatutory mitigation was error and points to documents concerning Defendant's mental state as evidence of nonstatutory mitigation. However, counsel on appeal claimed that the trial court had erred in failing to consider this evidence as mitigation. Initial Brief of Appellant, Case No. 63343, at 37-39. This Court rejected that argument. *Muhammad v. State*, 494 So. 2d 969, 976 (Fla. 1986). As such, this claim should be rejected.

In a footnote, Defendant also asserts that his appellate counsel was ineffective for failing to seek reversal of his conviction because the competency hearing was not transcribed. However, appellate counsel did move this Court to reverse his conviction because the competency hearing was not transcribed. Motion to Reverse the Trial Court's Judgment and Sentence and Remand for a New Trial, dated Aug. 9, 1984, case no. 63343. As such, the claim should be denied.

III. APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO RAISE AN ISSUE REGARDING THE MANNER IN WHICH DEFENDANT WAS PERMITTED TO USE THE LAW LIBRARY.

Defendant next asserts that his appellate counsel was ineffective for failing to raise an issue regarding Defendant's ability to use the prison law library. Defendant asserts that his appellate counsel should have argued that the trial court erred in denying a motion to allow Defendant to go to the law library personally. However, this claim should be denied because the underlying issue is without merit.

At a hearing before the trial court on January 12, 1981, Defendant asked to represent himself but have counsel appointed to assist him. (1/12/81. at 4-10) The trial court informed Defendant that self representation and representation by counsel were mutually exclusive and that some of the draw backs of self representation would be problems investigating the case and doing legal research due to the fact that Defendant was in custody. (1/12/81. at 10-17) The trial court then gave Defendant 48 hours to decide if he wished to be represented by counsel or not. (1/12/81. at 17-19)

At a hearing on June 7, 1982, regarding Defendant's desire to represent himself, the trial court again informed Defendant that he would have difficulty deposing witnesses and doing legal

research if he represented himself. (6/7/82. at 16-24) At the end of the hearing, the trial court permitted Defendant to represent himself.

On July 8, 1982, Defendant moved the trial court for permission to use the law library. (DAR. 392-93) In the motion, Defendant asserted that he had asked the prison official to use the law library and that they had refused to permit him to do so. *Id.*

At the hearing on the motion, Defendant asserted that he had asked the prison warden to allow him to go to the law library between the hours of 1:00 a.m. and 3:00 a.m. to do his own legal research. (7/19/82. at 25-27) He contended that the warden had not responded and that he needed to be able to do legal research. (7/19/82. at 27-29) Defendant admitted that he was able to obtain access to legal authorities by requesting them from the staff of the prison law library. (7/19/82. at 29-30) He asserted that this was inadequate and that he wanted to personally go to the law library. (7/19/82. at 30) He acknowledged that the prison officials had a legitimate security reason to prevent Defendant from going personally to the law library. (7/19/82. at 30) However, he contended that his right to use the law library personally should outweigh that legitimate interest of the prison officials. (7/19/82. at 30-

31) The State responded that case law did not require that Defendant be permitted to personally go to the law library and that Defendant's ability to request materials from the law library was sufficient to satisfy Defendant's rights. (7/19/82. at 31-32)

Defendant claimed that he was not always able to request materials and that his requests were not always fulfilled. (7/19/82. at 32-34) The trial court inquired what requests Defendant had made from the library and how those requests were handled. (7/19/82. at 34) Defendant responded that he had requested information about the policies regarding inmates in his confinement status using the library and a case report. (7/19/82. at 34) The library had responded that it did not have a copy of the Atlantic Reporter. (7/19/82. at 34-35) Defendant complained that the prison officials should be required to obtain the Atlantic Reporter if they did not have it. (7/19/82. at 35-36) The trial court then inquired what other request had been made, and Defendant was unable to specify any other requests. (7/19/82. at 36) The trial court denied the motion. (DAR. 414, 7/19/82. at 53)

Defendant asserts that *Bounds v. Smith*, 430 U.S. 817 (1977), requires that he be personally allowed to go to the law library. However, *Bounds* did not establish such a right. In fact, *Bounds*

did not even require the establishment of prison law libraries. Instead, *Bounds* held that states were required "to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law." *Id.* at 828. The manner in which a particular state chose to fulfill that obligation was left to that state. *Id.* at 830-31. *Bounds* said nothing about whether a state could be forced to permit an inmate to go to the law library personally.

In *Lewis v. Casey*, 518 U.S. 343 (1996), the Court did address the issue of whether the failure to allow an inmate to go to the law library personally violated the Constitution. Like Defendant, the inmates who were not allowed to go to the law library personally were inmates who had been segregated from the general prison population for disciplinary and security reasons. *Id.* at 347. Like Defendant, these inmates were provided with access to the law library by having to submit written requests to the law library and having the requested materials brought to them. *Casey v. Lewis*, 834 F. Supp. 1553, 1556-57 (D. Ariz. 1992). The lower federal court had found that the failure to allow segregated inmates personal visits to the law library violated the Constitution and ordered that such inmates be permitted to do so. 518 U.S. at 347-48. The Court

held that the lower federal court had erred in so holding:

There are further reasons why the order here cannot stand. We held in *Turner v. Safley*, 482 U.S. 78, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987), that a prison regulation impinging on inmates' constitutional rights "is valid if it is reasonably related to legitimate penological interests." *Id.*, at 89, 107 S. Ct., at 2261. Such a deferential standard is necessary, we explained,

"if 'prison administrators ..., and not the courts, [are] to make the difficult judgments concerning institutional operations.' Subjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration." *Ibid.* (citation omitted), quoting *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 128, 97 S. Ct. 2532, 2539, 53 L. Ed. 2d 629 (1977).

These are the same concerns that led us to encourage "local experimentation" in *Bounds*, see *supra*, at 2180, and we think it quite obvious that *Bounds* and *Turner* must be read in pari materia.

The District Court here failed to accord adequate deference to the judgment of the prison authorities in at least three significant respects. First, the court concluded that ADOC's restrictions on lockdown prisoners' access to law libraries were unjustified. *Turner's* principle of deference has special force with regard to that issue, since the inmates in lockdown include "the most dangerous and violent prisoners in the Arizona prison system," and other inmates presenting special disciplinary and security concerns. Brief for Petitioners 5. The District Court made much of the fact that lockdown prisoners routinely experience delays in receiving legal materials or legal assistance, some as long as 16 days, 834 F. Supp., at 1557, and n. 23, but so long as they are the product of prison regulations reasonably related to legitimate penological interests, such delays are not

of constitutional significance, even where they result in actual injury (which, of course, the District Court did not find here).

Id. at 361-62.

Here, Defendant was a death row inmate who had stabbed a prison guard to death. The prison had a clear interest in seeing that Defendant's contact with others was limited. As such, the trial court's denial of Defendant's motion to be permitted to go to the law library personally was proper under *Casey*, and Defendant's claim that the entry of this order was error is nonmeritorious. Since appellate counsel cannot be deemed ineffective for failing to raise a nonmeritorious issue, the claim should be denied. *Kokal*, 718 So. 2d at 143; *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11.

Moreover, the only specific complaint regarding access to the law library that Defendant was able to articulate was that he was informed that the law library did not have a copy of the Atlantic Reporter. However, the Atlantic Reporter does not contain materials on Florida law. In *Lewis*, the Court recognized that a prison law library did not have to include every available legal research tool to be constitutional. *Id.* at 354-55. Instead, the library only had to include legal materials directly relevant to challenges to a conviction,

sentence or condition of confinement. As such, the lower court properly determined that Defendant's claimed inability to access the Atlantic Reporter was properly rejected as a grounds for more access to the law library. Again, the claim that appellate counsel was ineffective for failing to raise this nonmeritorious issue should be denied. *Kokal*, 718 So. 2d at 143; *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11.

Defendant's reliance on *Ex Parte Hull*, 312 U.S. 546 (1941) and *Johnson v. Avery*, 393 U.S. 483 (1969), does not change this analysis. In *Hull*, the Court held that prison officials could not prevent an inmate from filing a petition for writ of habeas corpus by requiring that the proposed petition be examined and approved by a state official before it could be filed. In *Johnson*, the Court held that a regulation preventing prisoners from assisting one another in preparing court documents was unconstitutional. Neither case addressed the manner in which a defendant was to be given access to a law library. As such, they are inapplicable to this matter.

Defendant's reliance on *Wolff v. McDonnell*, 418 U.S. 539 (1974), is misplaced. In the portion of *Wolff* relied upon by Defendant, the Court was addressing whether an inmate had a due process right to notice and hearing before good time credits

could be cancelled for misbehavior. The Court held that the inmate did have the right to written notice and a hearing but that the form of the hearing would depend largely on a balancing of the interests of the prison with the rights of the inmate. As such, *Wolff* does not show that regulation of the manner in which legal research materials are used is unconstitutional. In fact, it supports the balancing of Defendant's need for legal research with the need to safeguard others in the prison from him. Thus, *Wolff* does not show that Defendant is entitled to any relief.

Defendant's reliance on *Burns v. Ohio*, 360 U.S. 252 (1959), *Smith v. Bennett*, 365 U.S. 708 (1961), and *Douglas v. California*, 372 U.S. 353 (1983), is particularly misplaced. Each of these cases concerned the availability of review proceedings, or counsel therefore, to indigent defendants. The Court held in each case that conditioning the filing of a proceeding on the payment of a fee or restricting the appointment of counsel based on a predetermination of the merits deprived indigent defendants of equal protection and due process. Here, Defendant's access to use the law library personally had nothing to do with his status as an indigent. As such, they are inapplicable to this matter. The claim should be denied.

IV. APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO RAISE ISSUES CONCERNING VENUE AND VOIR DIRE.

Defendant next asserts that his appellate counsel was ineffective for failing to raise an issue regarding a change of venue. He also appears to contend that appellate counsel was ineffective for failing to raise an issue regarding the denial of individual voir dire.

With regard to the change of venue, the trial court properly refused to change venue. On February 5, 1981, Defendant filed a motion for change of venue, asserting that residents of the county were prejudiced against him because of pretrial publicity. (DAR. 159-64) The State responded to this motion by filing affidavits of several long time residents of Bradford County who indicated that Defendant could get a fair trial in that county. (DAR. 204-07) It also filed a memorandum of law in opposition, asserting that Defendant had not made a sufficient showing that the publicity regarding this case was inflammatory or that a fair jury could not be selected in Bradford County. (DAR. 209-12) On August 31, 1981, the trial court entered an order reserving ruling on Defendant's motion for change of venue. (DAR. 279) On September 18, 1981, the trial court entered an order denying the motion for change of venue. (DAR. 281)

On November 2, 1981, Defendant served an amended motion for change of venue. (DAR. 285-86) In this motion, Defendant asserted that the trial of another inmate for attacking a different prison guard had been publicized and resulted in hostility toward those individuals who had attacked prison guards, which would deny Defendant a fair trial. *Id.* Defendant attached to this motion 3 newspaper articles regarding the other inmate and his attacks. (DAR. 287-89) These articles recounted the facts surrounding the actions of this other inmate and the court proceedings that resulted from this action but made no mention of Defendant. *Id.* The articles also did not comment about any general problems with inmates attacking others. *Id.* On November 23, 1981, the trial court denied this motion. (DAR. 290)

On October 11, 1982, Defendant again filed a motion for change of venue. (DAR. 431-36) This motion reasserted the grounds that had previously been rejected. *Id.* At the hearing on the motion, the State objected to the late filing of the motion. (10/11/82. at 12) Defendant responded that he had not filed the motion earlier because he had not reviewed the entire record. (10/11/82. at 13-18) The trial court denied this motion. (DAR. 449, 10/11/82. at 23) However, the trial court granted Defendant leave to renew the motion if voir dire

revealed that an impartial jury could not be selected.
(10/11/82. at 23)

The test for determining a change of venue is whether the general state of mind of the inhabitants of a community is so infected by knowledge of the incident and accompanying prejudice, bias, and pre-conceived opinions that jurors could not possibly put these matters out of their minds and try the case solely on the evidence presented in the courtroom.

McCaskill v. State, 344 So. 2d 1276, 1278 (Fla. 1977); see also *Rolling v. State*, 695 So. 2d 278, 284 (Fla. 1997). In applying this test, a trial judge must evaluate two prongs: (1) the extent and nature of the pretrial publicity; and (2) the difficulty encountered in actually selecting a jury. *Rolling*, 695 So. 2d at 285.

Here, there was no difficulty in seating a jury. Of the 38 veniremembers called to serve as jurors, only 9 had heard of any media coverage. (DAT1. 9, 13-14, 110, 160, 193, 206-07, 281, 330, 337, 338, 395) Most of the 9 only recalled vague impressions of stories that they had been exposed to long before trial. (DAT1. 110, 160, 193, 199-201, 206-07, 281-82, 337, 395, 263-64) Only one veniremember indicated that he had formed an opinion regarding Defendant's guilt based on what he had heard outside of the courtroom. (DAT1. 271-73) That veniremember, Mr. Davis, was questioned outside the presence of the other

veniremembers about his knowledge of the case and excused for cause. (DAT1. 271-73) None of the veniremembers who had heard anything about the case served on the jury. (DAT1. 195, 202, 270, 273, 322, 398-99, 400) As there was no difficulty in selecting a jury, the trial court properly denied the motion for change of venue. *Rollings*. As such, appellate counsel cannot be deemed ineffective for failing to raise this issue on appeal. *Kokal*, 718 So. 2d at 143; *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11. The claim should be denied.

In an attempt to bolster his claim that the trial court erred in denying the motion for change of venue, Defendant relies on the fact that some of the veniremembers had been to the prison, had been employed by the Department of Corrections, had family members or friends who had been employed by the Department of Corrections, knew witnesses or knew court personnel. However, these issues have nothing to do with the alleged pretrial publicity that was the basis of the motions to change venue. As such, any issues regarding changing venue on these bases was not preserved for review. *Steinhorst v. State*, 412 So. 2d 332, 338 (Fla. 1982)(objection must be based on same grounds raised on appeal for issue to be preserved). As such, appellate counsel cannot be deemed ineffective for failing to

raise this issue. *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11. The claim should be denied.

Moreover, being a corrections officer, much less knowing, or being a family member of, a corrections officer is not even grounds for a cause challenge.³ See *State v. Williams*, 465 So. 2d 1229 (Fla. 1985); see also *Lusk v. State*, 446 So. 2d 1038, 1041 (Fla. 1984); *Morgan v. State*, 415 So. 2d 6 (Fla. 1982). Even if any of the alleged grounds would have been grounds to excuse any of the veniremembers for cause, Defendant only ever had one cause challenge denied. (DAT1. 269) Defendant subsequently exercised a peremptory challenge to that veniremember. (DAT1. 270) Defendant never requested any additional peremptory challenges and never objected to the jury before it was sworn. As such, any issue regarding these veniremembers was not preserved for review. *Trotter v. State*, 576 So. 2d 691 (Fla. 1990). As such, appellate counsel cannot

³ Defendant asserts that one of the jurors who served had to be cautioned not to discuss the matter with her husband who worked at a different Department of Corrections facility. However, the veniremember in question, Ms. Dobbins, did not serve on the jury. Ms. Dobbins was selected as an alternate. The alternates were discharged before deliberations and did not serve in this case. (DAT2. 502-04, DAT3. 4-13) Moreover, Defendant did not attempt to remove Ms. Dobbins for cause or by a peremptory challenge. (DAT1. 432-37, 448)

be deemed ineffective for failing to raise the issue. *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11. The claim should be denied.

The trial court also properly handle the issue of individual voir dire. Defendant moved for individual voir dire. (DAR. 76-77) Defendant asserted that individual voir dire was necessary to prevent veniremembers from learning of the publicity about the case from one another, to allow counsel to ask questions that might be embarrassing to the veniremembers and to prevent veniremembers for learning what to say to get themselves dismissed. *Id.*

On August 31, 1981, the trial court entered an order reserving ruling on Defendant's motion for individual voir dire. (DAR. 279) On September 18, 1981, the trial court entered an order granting Defendant's motion for individual voir dire. (DAR. 280)

On May 3, 1982, the State moved the trial court to reconsider its order granting individual voir dire. (DAR. 304) At the hearing on the motion, the State noted that the motion had previously been granted and that an initial voir dire had occurred before a mistrial had been granted. (10/11/82. at 29-30) During that voir dire, very few veniremembers indicated that they had any knowledge of Defendant or this crime. (10/11/82.

at 30) Since the reason for the granting of the motion had not occurred during the first voir dire and since the procedure was burdensome, the State asked the trial court to reconsider its prior ruling. (10/11/82. at 30-32) The trial court indicated that it had initially granted the motion out of concern that some veniremembers might know that Defendant had been on death row when this crime was committed and might mention it. (10/11/82. at 33) The State suggested that general questions regarding veniremembers knowledge of Defendant could be asked of the venire as a whole and that those veniremembers who indicated that they had some knowledge could be questioned individually. (10/11/82. at 33) Defendant objected to any alteration of the existing voir dire procedure. (10/11/82. at 33-34) After the State explained how it envisioned its suggested procedure working, the trial court agreed to use the State's suggested procedure. (10/11/82. at 34-36) The trial court granted the State's motion on October 11, 1982. (DAR. 444)

At the beginning of voir dire with each panel, the trial court inquired if anyone on the venire were aware of the facts of the case. (DAT1. 11-13, 109-10, 205-07, 335-36, 340-41) The trial court instructed the veniremembers only to answer yes or no before the entire panel. (DAT1. 12-13, 109-10, 206, 335) Those veniremembers who indicated that they had more than a

vague recollection of having read about the crime when it initially occurred were questioned individually. (DAT1. 199-201, 262-73)

After 32 veniremembers had been examined, Defendant objected to the manner in which voir dire was being conducted and requested individual voir dire. (DAT1. 274-76) He claimed that the veniremembers were not being candid because they were being questioned collectively. (DAT1. 274-76) As an example, Defendant asserted that one veniremember's responses concerning being present at an execution and concerning her religious beliefs were inconsistent. (DAT1. 274-76) The trial court responded that Defendant's account of the veniremember's answers was incorrect and that individual voir dire was not appropriate for the type of complaint that Defendant was raising. (DAT1. 276-77) As such, the trial court overruled Defendant's objection. (DAT1. 276-77)

The decision of whether to grant individual voir dire rests in the discretion of the trial judge. *San Martin v. State*, 705 So. 2d 1337, 1343-44 (Fla. 1997). To show that the trial court abused its discretion, a defendant must show that the manner in which voir dire was conducted resulted in a partial jury. *Id.*; see also *Gorby v. State*, 819 So. 2d 664, 685-86 (Fla. 2002). Here, the trial court's decision to allow general questioning of

the venire and only to question individually those veniremembers who indicated that they had been exposed to pretrial publicity did not abuse that discretion.

In an attempt to show that the jury was biased by the failure to conduct individual voir dire, Defendant relies upon comments made by veniremember Davis. However, these comments were made during individual voir dire of Mr. Davis when the remainder of the venire was not present. (DAT1. 271-73) They resulted in the excusal for cause of Mr. Davis. (DAT1. 273) As such, they do not show that the denial of individual voir dire resulted in a bias jury.

Defendant also relies upon comments by Ms. Dobbins. (DAT1. 432-37) However, these comments were elicited by Defendant, who had not requested to question Ms. Dobbins individually. *Id.* When Defendant continued to address this area, the State requested that Ms. Dobbins be questioned individually, which was done. (DAT1. 435-37) Moreover, these questions were asked in front of a venire for which only alternate jurors were selected. (DAT1. 405-06) The alternates were discharged before jury deliberation. (DAT2. 502-04, DAT3. 4-13) Moreover, Ms. Dobbins' comment regarding why she felt sympathy for the victim's family was not of such an inflammatory nature as to have tended the venire. As such, these comments do not show that the manner in

which the jury was selected resulted in a biased jury. As such, the issue of the denial of individual voir dire was without merit. *San Martin; Gorby*. Appellate counsel was not ineffective for failing to raise it. *Kokal*, 718 So. 2d at 143; *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11. The claim should be denied.

In a footnote, Defendant also appears to complain that appellate counsel was ineffective for failing to raise any issue regarding the alleged presence of 100 corrections officers in the courtroom. He asserts that the presence of these officers intimidated Defendant and caused him to waive a sentencing jury.

When the trial court colloquied Defendant about his waiver of a sentencing jury, Defendant denied that he was threatened or coerced. (DAT3. 8-9) He stated that he had decided to waive a jury because of the length of the recess between the guilt and penalty phases and because of the presence of people from the Department of Corrections. (DAT3. 9) However, there was no indication of the number of Department of Corrections personnel in the courtroom in the record. Further, there is no indication that the corrections personnel who were present were not there for a legitimate purpose, such as securing Defendant. Moreover, Defendant never requested that the trial court remove the corrections personnel. As such, this issue was not preserved.

Castor v. State, 365 So. 2d 701 (Fla. 1978). Appellate counsel cannot be deemed ineffective for failing to raise an unpreserved issue. *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11. The claim should be denied.

V. APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO RAISE ANY ISSUE REGARDING THE QUALIFICATIONS OF THE GRAND JURORS.

Defendant next asserts that his appellate counsel was ineffective for failing to claim that the trial court erred in denying his motions challenging the indictment. He asserts that appellate counsel should have asserted that the indictment was flawed because members of the grand jury either worked for the Department of Corrections or had relatives who worked for the Department. He claims that such connections to the Department resulted in grand jurors who were biased against him. However, this claim should be denied because appellate counsel cannot be deemed ineffective for failing to raise a nonmeritorious issue.

On October 23, 1980, the grand jury returned an indictment against Defendant for the first degree murder of Richard James Burke, which had occurred on October 12, 1980. (DAR. 1-2) On October 29, 1980, Defendant filed a motion to compel the clerk of the court to compile a list of all members of the grand jury and grand jury forepersons for the last ten years. (DAR. 24-25) He also moved to voir dire the grand jurors to determine if he had any reason to challenge any of them. (DAR. 26-28) Additionally, he sought production of a transcript of the grand jury proceedings. (DAR. 29-30)

At the arraignment on October 24, 1980, Defendant stood mute

based on these pending motions. (11/24/80. at 3-4) Defendant requested 60 days to file motions regarding any alleged defects in the indictment. (11/24/80. at 4) The trial court agreed to hear the pending motions at such time as Defendant set them for hearing. (11/24/80. at 4-5) The record does not reflect that these motions were ever heard.

On March 27, 1981, Defendant filed a motion to abate the proceedings. (DAR. 226-28) In this motion, Defendant asserted that 14 of the grand jurors who returned the indictment against him either worked for the Department of Corrections, had previously worked for the Department of Corrections or had relatives who worked or had worked for the Department of Corrections. *Id.* Defendant contended that it was possible that these connections to the Department of Corrections could have caused these grand jurors to be biased and that these grand jurors might have been excusable from grand jury service if they were so prejudiced. *Id.* Again, the record does not reflect that a hearing was ever held on this motion.

On July 7, 1981, the trial court denied Defendant's motion to require the clerk of courts to produce a list of all grand jurors and grand jury forepersons for the 10 years preceding Defendant's indictment. (DAR. 259) It also denied the motion to compel the production of a transcript of the grand jury

proceedings and the motion to voir dire the grand jurors. (DAR. 260-61) The trial court denied the motion to abate the proceedings. (DAR. 271)

Appellate counsel would have not been ineffective for failing to raise this issue because it is meritless. Defendant's claim is based entirely on the present or past employment of certain grand jurors or their relative with the Department of Corrections. Defendant has not asserted that any grand juror was actually prejudiced against him.⁴ This Court has held that the fact that someone is employed by the Department of Corrections is not grounds to exclude that person from a jury, even when the charge relates to an attack on prison personnel by an inmate. See *State v. Williams*, 465 So. 2d 1229 (Fla. 1985); see also *Lusk v. State*, 446 So. 2d 1038, 1041 (Fla. 1984); *Morgan v. State*, 415 So. 2d 6, (Fla. 1982).

Even if any of the grand jurors had, in fact, been excusable, appellate counsel would still not have been ineffective for failing to raise this meritless issue. In *Rogers v. State*, 511 So. 2d 526, 531 (Fla. 1987), this Court

⁴ To the extent that Defendant may contend that he could not assert such individual bias because he was not permitted to voir dire the grand jurors, the State would note that this Court has held that denial of such voir dire is not error. See *Porter v. State*, 400 So. 2d 5, 6-7 (Fla. 1981).

held that any error in the inclusion of a person on a grand jury whom this Court presumed was biased was rendered presumptively harmless by the return of a guilty verdict by the trial jury. Here, Defendant's motion to abate the proceedings was based on an allegation that several of the grand jurors might have been biased because of their employment, their prior employment or their relatives' employment or prior employment. Even assuming that any of these grand jurors might have been biased, the fact that the petit jury found Defendant guilty renders this error harmless under *Rogers*. See also *Porter v. Wainwright*, 805 F.2d 930, 941-42 (11th Cir. 1986).

Moreover, the United States Supreme Court has held that a grand jury indictment may not be dismissed unless it is shown that the alleged error in the grand jury proceedings substantially influenced the grand jury's decision to indict or that there is grave doubt that the grand jury would have indicted absent the alleged error. *Bank of Nova Scotia v. United States*, 487 U.S. 250, 256 (1988). In determining whether to indict, a grand jury must only determine whether there is probable cause to believe that a crime has been committed and that the defendant is the person who committed that crime. See *United States v. DiBernardo*, 775 F.2d 1470, 1476 (11th Cir. 1985). Here, Defendant has acknowledged that there was probable

cause to believe that Defendant killed Off. Burke. Brief of Appellant, Case No. SC01-1415, at 26-27. As such, there was no substantial influence on the decision to indict and no grave doubt that Defendant would have been indicted. As such, any error was harmless and appellate counsel cannot be deemed ineffective for failing to raise this nonmeritorious issue. *Kokal*, 718 So. 2d at 143; *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11. The claim should be denied.

Defendant's reliance on *Costello v. United States*, 350 U.S. 359 (1956), does not show that this issue had merit. In *Costello*, the defendant had moved to dismiss an indictment, claiming that the only evidence presented to the grand jury was hearsay and that such evidence was insufficient to support an indictment. The Court held that an indictment was not subject to challenge on the grounds that the grand jury was not presented with adequate or competent evidence. Such a holding has no bearing on whether an indictment should have been dismissed because certain grand jurors allegedly should have been disqualified from grand jury service. As such, Defendant's reliance on *Costello* is misplaced.

Defendant's reliance on *United States v. DiBernardo*, 552 F. Supp. 1315 (S.D. Fla. 1982), is particularly misplaced, as the

decision was reversed on appeal. *United States v. DiBernardo*, 775 F.2d 1470 (11th Cir. 1985). Moreover, the case is irrelevant to the issue Defendant attempts to raise here. In *DiBernardo*, the government had conducted an undercover investigation into the pornography industry. After the investigation was concluded, one of the undercover officers had difficulty readjusting to his normal life, which resulted in his referral for mental health assistance and his arrest for shoplifting charges. The agent gave contradictory versions of the shoplifting incident. Additionally, the prosecutor did not instruct the grand jury to disregard evidence of possible organized crime involvement in seeking a superceding indictment to which such evidence was not relevant. The district court dismissed the indictment because of the combination of the evidence regarding undercover officer's ability to lie and the prejudicial effect of the irrelevant evidence of organized crime involvement, which the grand jury was not instructed to disregard. 552 F. Supp. at 1324-28.

On appeal, the Eleventh Circuit held that the dismissal of the indictment was erroneous. It reasoned that before a trial judge could dismiss an indictment, the trial judge needed to find intentional abuse of the grand jury process by the government, such as knowing presentation of perjured testimony

or intentional presentation of irrelevant and prejudicial evidence. Here, Defendant's claim that the indictment should have been dismissed was not based on any knowing presentation of perjury or irrelevant, prejudicial evidence. As such, *DiBernardo* is inapplicable to this matter.

CONCLUSION

For the foregoing reasons, the petition for writ of habeas corpus should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was furnished by U.S. mail to Heidi Brewer, Assistant CCR, 1533 S. Monroe Street, Tallahassee, Florida, this 16th day of August, 2002.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief is type in Courier New 12-point font.

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