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**IN THE ARIZONA SUPREME COURT**
IN AND FOR THE COUNTY OF MARICOPA

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| In the Matter of,<br><br>PETITION TO AMEND RULES 31.2, 31.4, 31.13, 32.4, AND 32.9 ARIZONA RULES OF CRIMINAL PROCEDURE | ARIZONA SUPREME COURT<br>No. R-14-0010<br><br>COMMENTS TO AMENDED PETITION TO AMEND RULES |

The Arizona Attorney General's Office ("Petitioner") proposes several amendments to Arizona Rules of Criminal Procedure 31 and 32. Following an initial comment period, Petitioner now offers revisions to the proposed amendments. The revised proposed amendments do not address the majority of the concerns raised during the initial comment period and will add confusion and uncertainty to a long-settled and carefully-worked system of review.

**Introduction**

The Amended Petition argues for substantial changes to the system of appellate and post-conviction review in capital cases. As with Petitioner's original proposed amendments, the revised proposed amendments would reorder the post-conviction and direct appeal proceedings in capital cases, requiring that post-conviction proceedings occur before the direct appeal. Following resolution of the post-conviction proceedings in superior court, this Court would conduct a consolidated review of appellate and post-conviction issues ("unitary review"), but, apparently, "retain the power to decline review" of post-conviction issues. (Am. Pet. at 13.)

While Petitioner's substantive revisions purport to address the concerns identified during the initial comment period, Petitioner has in fact done little to clarify the system of review contemplated by the proposed amendments and has not addressed the concerns raised in the initial comments. Briefly, Petitioner's

revisions: 1) provide a post-conviction petitioner with more time to review the record before filing a petition than proposed in Petitioner's initial amendments by extending the time limit for filing the petition and providing that the time limit will not begin to run until the record is complete, and 2) heighten the standard for extensions of time in which to file the post-conviction petition. (Am. Pet. at 1.) As a result, the majority of the concerns identified in the initial comments of the Federal Public Defender and the State Bar of Arizona remain unaddressed, and the undersigned agencies urge the Court to consider the concerns identified in the initial comments.

For the reasons described herein, along with the reasons explained in the initial comments, Arizona should not invite confusion and uncertainty into a carefully-worked system of review, but should continue to improve the system of appellate and post-conviction review it has developed through years of experience.

## I. The Proposed Amendments Require Adoption of an Unworkable System of Review and Do Not Significantly Reduce the Time Needed for Review of Capital Cases.

Petitioner asks this Court to adopt significant, sweeping changes to a carefully-constructed system of review in capital cases. As discussed in the initial comments of the Federal Public Defender and the State Bar of Arizona, the proposed amendments would result in a return to a system of unitary review that this Court previously found unworkable. In addition, Petitioner's arguments in

support of the amendments rely largely on the assertion that the amendments would significantly reduce "delay" in the review of capital cases. However, as discussed below and in the Federal Public Defender's initial comment, Petitioner's recounting of the time needed for review of capital cases is misleading.

### A. This Court Has Already Found Unitary Review Unworkable.

As detailed in the Federal Public Defender's initial comment, this Court has already found a unitary review system that was almost identical to the system contemplated by the proposed amendments "unworkable." (FPD Initial Cmt. at 4); *see also State v. Spreitz*, 202 Ariz. 1, 2, 39 P.3d 525, 526 (2002); *Krone v. Hotham*, 181 Ariz. 364, 366, 890 P.2d 1149, 1151 (1995); *State v. Valdez*, 160 Ariz. 9, 15, 770 P.2d 313, 319 (1989). While not disputing that the proposed amendments would reintroduce a system similar to the one this Court previously rejected, Petitioner argues that the system under the revised proposed amendments "addresses the problems that made the prior practice unworkable" by focusing only on capital cases and including time limits for post-conviction proceedings. (Am. Pet. at 9-10.)[1] The differences Petitioner identifies between the prior unitary review system and the system under the proposed amendments are not meaningful.

[1] Petitioner, citing both *Spreitz* and *Krone*, also appears to argue that the proposed amendments will not face the risk of preclusion discussed under the previous system of unitary review. (Am. Pet. at 9.) While the Court discussed preclusion in

Petitioner asserts, without explanation, that the proposed amendments avoid the problems with the prior unitary review system because the changes contemplated by the amendments are limited to capital cases. (Am. Pet. at 10.) Petitioner does not explain how the focus on capital cases alleviates any of the concerns that led this Court to abandon unitary review. Indeed, it appears that the proposed amendments simply single out capital cases for proceedings in an "unworkable" system.

Petitioner also argues that new time limits address the reasons this Court found the prior system unworkable by assuring that "cases are not lost in the system as under the prior unitary regime." (*Id.* at 10.) Petitioner asserts that time limits on the filing of the petition for post-conviction relief and on judicial decisions in post-conviction make the proposed system of review more workable. (*Id.*) However, delay in filing post-conviction petitions does not appear to have been a problem under the prior system of unitary review, which only resulted in a stay of direct appeal proceedings after the initiation of post-conviction proceedings. *See Valdez*, 160 Ariz. at 15, 770 P.2d at 319. Similarly, delay specific to judicial decision making was not identified by any court as a problem with the

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both cases, it did not rely on it as the basis for its conclusion that unitary review was unworkable. *See Spreitz*, 202 Ariz. at 2, 39 P.3d at 526; *Krone*, 181 Ariz. at 366, 890 P.2d at 1151.

prior system. *See Spreitz*, 202 Ariz. at 2, 39 P.3d at 526; *Krone*, 181 Ariz. at 366, 890 P.2d at 1151.

Further, while acknowledging that the delay in direct appeals prompted this Court to find the prior unitary review system unworkable, Petitioner fails to acknowledge that the types of delay addressed by the proposed time limits do not have a significant impact on delay in resolution of direct appeal proceedings under either the prior or proposed systems of unitary review. In fact, as pointed out in the initial comment and addressed below, Petitioner's inaccurate statements with respect to the time involved in resolving post-conviction cases in Arizona obscures the issues of delay and results in an incorrect assessment of the impact of the proposed amendments. (*See* FPD Initial Cmt. at 4-5 & App. A; *infra* Section I.B.)

### B. The Revised Proposed Amendments Will Not Significantly Reduce "Delay."

Petitioner's arguments in support of the proposed amendments rely largely on the assertion that the proposed amendments will significantly reduce "delay" in the review of capital cases. However, Petitioner's recounting of the time needed for review of capital cases, along with Petitioner's assertion that the revised proposed amendments will reduce this time, is misleading.

Petitioner repeatedly asserts that the revised proposed amendments will result in resolution of capital cases in less than three or four years and that this time is "significantly shorter than the current practice." (Am. Pet. at 2; *see also id.* at 14,

19.) However, as discussed in the Federal Public Defender's initial comment, Petitioner's sweeping estimate of the time involved in resolving capital cases is largely the result of Petitioner's failure to acknowledge systemic issues, unaddressed by the proposed amendments, which contribute to the time involved in reviewing capital cases. (*See* FPD Initial Cmt. at 5 & App. A.) Petitioner concedes that the revised proposed amendments "will not eliminate all sources of unnecessary delay." (Am. Pet. at 10.) While making this concession, however, Petitioner persists in failing to account for the unaddressed sources of delay in calculating the time necessary for review of capital cases under the proposed amendments.[2]

In addition, much of the time necessary for the development, presentation, and review of post-conviction cases involves the time spent investigating the bases

[2] Petitioner also argues that the revised proposed amendments will reduce delay in filing the direct appeal Opening Brief because under the proposed amendments "there would be little reason for an extension of time, as appellate counsel will receive the record on appeal and transcripts while the PCR is pending." (Am. Pet. at 10.) However, under the revised proposed amendments it appears that direct appeal counsel will be responsible for raising issues not raised during post-conviction. (*See id.* at 6 (stating direct appeal counsel must review post-conviction proceedings and raise "any additional record-based post-conviction issues").) Such a requirement significantly adds to direct appeal counsel's responsibilities, and the often voluminous record produced during post-conviction proceedings poses a serious risk that direct appeal counsel will need additional time to review the post-conviction record and related files and to prepare the consolidated appeal. Considering these increased responsibilities, it appears the proposed amendments could, in fact, lengthen the time and increase the resources necessary for direct appeal without significantly decreasing the time needed for post-conviction review.

for potential post-conviction claims. While Petitioner initially insisted its proposal would eliminate the need to investigate cases, (Pet. at 2), Petitioner now acknowledges that post-conviction counsel has an obligation to review and investigate the underlying case as to both guilt and penalty. (Am. Pet. at 3; *see also* FPD Initial Cmt. at 5-6 (explaining post-conviction counsel's obligation to investigate).) Despite Petitioner's concession that investigation is a necessary part of post-conviction, Petitioner's calculation of the time needed for review of capital cases still fails to account for the additional time needed for a thorough and adequate investigation.

Further, although the revisions to the proposed amendments now include a higher standard for extensions of time in post-conviction proceedings, (Am. Pet. at 1, 10; App. to Am. Pet. at 7 (proposed amendment to Rule 32.4(c) requiring a showing of extraordinary circumstances)), the Arizona courts already supervise the development and progression of post-conviction proceedings. Nothing indicates that the current good cause standard for extensions of time is inadequate or subject to abuse or that the proposed standard will reduce the time needed for completion of post-conviction proceedings. The purported need for a "trade off" between the length of time to file petitions and the standard for extensions is a false one.

Thus, Petitioner's failure to accurately account for the time involved in review of capital cases, under both the current and proposed rules, misstates the

impact of the proposed amendments. The proposed amendments would result in a return to an unworkable system of unitary review, significantly delaying resolution of review on direct appeal and increasing the time and resources necessary to complete direct appeal review. In addition, Petitioner has not demonstrated that the proposed amendments will result in any significant reduction in the time necessary for post-conviction review.

## II. The Revised Proposed Amendments Create Confusion, Uncertainty, and the Potential for Increased Litigation.

### A. The Creation of Confusion and Uncertainty.

The revised proposed amendments will introduce uncertainty and confusion into Arizona's system of appellate and post-conviction review of capital cases. Despite the opportunity to clarify or correct any inconsistencies or uncertainties in the application of the proposed amendments with an Amended Petition, significant problems remain regarding the application of the proposed amendments and the manner in which the proposed unitary review system will operate.

#### i. Appellate Counsel's Role and Obligations.

As an initial matter, the role and obligations of direct appeal counsel under the revised proposed amendments remains unclear. While Petitioner asserts that its revised proposal clarifies that post-conviction counsel will be responsible for filing the petition for review, this clarification is not apparent from the text of the revised proposed amendments and Petitioner still asserts that direct appeal counsel will be

responsible for handling the consolidated appeal. (*See* Am. Pet. at 1, 6.) As a result, it appears that direct appeal counsel will be responsible for reviewing the entirety of the post-conviction proceedings in order to effectively litigate the appeal of all post-conviction issues.

Petitioner has removed language from the proposed rule amendment requiring direct appeal counsel to raise all colorable claims of ineffective assistance of counsel regardless of whether those claims were raised during post-conviction or in the petition for review. (*See* App. to Am. Pet. at 5 (proposed changes to Rule 31.13(f)(3)).) However, Petitioner continues to assert that direct appeal counsel will be responsible for raising issues that post-conviction counsel failed to raise during the post-conviction proceedings and in the petition for review. (Am. Pet. at 6 (stating that direct appeal counsel must review the post-conviction proceedings and raise "any additional record-based post-conviction issues").) In such a system, direct appeal counsel's responsibilities are unclear and amorphous. It would appear that the proposed amendments hold direct appeal counsel responsible for knowing the full range of evidence and issues developed during the post-conviction proceedings; such knowledge would be essential to raising previously unraised post-conviction issues.

In addition, Petitioner proposes that direct appeal counsel must complete these changed obligations in an unreasonable amount of time. Under the current

Rules, in capital cases, "the appellant's opening brief shall be filed within 90 days after the court issues a notice that the record is complete." Ariz. R. Crim. P. 31.13(f)(1). Petitioner's proposal, however, allows 30 days from the denial of post-conviction relief in which to file the petition for review, and just 60 days from the filing of the petition for review in which to file an appellate opening brief. (App. to Am. Pet. at 5, 9.) Thus, in addition to a morass of confusion regarding counsel's obligations, Petitioner has not allowed any additional time in which to fulfill these obligations.

Thus, Petitioner's proposal would, at best, inject a lack of certainty into a system in which the roles and obligations of counsel were previously well delineated, and, at worst, significantly increase costs and delays for the reasons described in the comments. (*See, e.g.*, *supra* n.2; *infra* Section II.A.i; Section IV.)

**ii. Appellate Counsel's Qualifications.**

Direct appeal counsel's revised obligations also implicate the need for revised qualifications of direct appeal counsel. In its initial comment, the Federal Public Defender explained that direct appeal counsel's increased responsibilities and obligations under the proposed amendments, including appeal of post-conviction issues and the duty to raise post-conviction claims that were not raised during post-conviction, implicate direct appeal counsel's qualifications. (*See* FPD Initial Cmt. at 7-9.) Because the proposed amendments require appellate counsel to

effectuate post-conviction rights, the concerns that led the Court to adopt the qualifications for post-conviction counsel found in Rule 6.8(c) would also dictate that appellate counsel meet these same heightened qualifications. (*See id.* at 8.)

Petitioner's only response to this issue is to argue that while the Rules require direct appeal and post-conviction counsel to meet different qualifications, the qualification requirements for post-conviction and direct appeal counsel have not always been different. (Am. Pet. at 13.) This response disregards this Court's conclusion that the effective litigation of post-conviction issues requires counsel with specialized qualifications. *See* Ariz. R. Crim. P. 6.8(c). Petitioner also ignores the fact that direct appeal counsel would be responsible for effectively litigating the appeal of post-conviction issues, requiring a thorough knowledge and understanding of the post-conviction proceedings, while also raising any post-conviction issues not raised during post-conviction. (*See id.* (asserting "appellate counsel simply would provide the same type of legal analysis any appellate attorney performs based on the record before the appellate court"); *see also id.* at 6 (stating that direct appeal counsel must review the post-conviction proceedings and raise "any additional record-based post-conviction issues").)

### iii. Creation of a Sixth and Fourteenth Amendment Right to Post-Conviction Counsel.

In addition, Petitioner's proposed changes to Arizona's review system may create a right to the effective assistance of post-conviction counsel. (*See* FPD

Initial Cmt. at 9-10.) As explained in the Federal Public Defender's initial comment, courts have relied on the need for finality to conclude that there is no right to the effective assistance of post-conviction counsel, and the proposed rule amendments will require post-conviction proceedings to occur before a conviction and sentence are final. (*See id.*) Because the proposed amendments would create a process by which post-conviction counsel is responsible for challenging non-final convictions and sentences, this Court would be responsible for ensuring the constitutionally effective assistance of post-conviction counsel. (*See id.*) Petitioner fails to acknowledge or address this point. (*See* Am. Pet. at 12-13 (noting only that under the current system of review this Court has not recognized a right to the effective assistance of post-conviction counsel).)

### B. The Proposed Amendments Will Create Unnecessary Conflicts Resulting in Increased Delay and Expense.

Petitioner's proposal would also create an unnecessary entanglement of conflicts that would lead to further costs and delays. Petitioner has now "clarifie[d] that while the PCR counsel files the petition for review, it is consolidated with the appeal and the appellate attorney is responsible for the combined appeal." (Am. Pet. at 1.) As explained in the initial comment, this arrangement "draws the two sets of Sixth Amendment attorneys retained . . . into irresolvable conflicts, and 'pits' them against each other." *See Owens v. Ofc. of the Dist. Atty. for the Eighteenth Judicial Dist.*, 896 F. Supp. 2d 1003, 1007 (D. Colo. 2012); (*see also*

FPD Initial Cmt. at 13-16). For one example, post-conviction counsel has the unique burden of raising all ineffective assistance of trial counsel claims. *Spreitz*, 202 Ariz. at 3, 39 P.3d at 527 ("[I]neffective assistance of counsel claims are to be brought in Rule 32 proceedings."). Raising these claims, however, effectively waives the protective attorney-client privilege. *State v. Cuffle*, 171 Ariz. 49, 51-52, 828 P.2d 773, 775-76 (1992) (internal citations omitted). Appellate counsel, on the other hand, remains responsible for claims that may depend on the inviolability of the same information that post-conviction counsel's claims have opened to disclosure. *See Owens*, 896 F. Supp. 2d at 1007. These types of conflicts have led to extensive litigation as a result of Colorado's unitary review system. *Id.* Petitioner offers no distinction between its proposal and Colorado's system that would resolve this issue.

Petitioner's only response to this problem is that the "heart of any problem is with the administration of the system that permits unnecessary delay due to attorneys raising specious issues." (Am. Pet. at 16-17.) This is no answer to the real problem of the conflicts created by unitary review. Petitioner, even in its revised proposal, does not propose any solution to the myriad problems arising from this or other conflicts inherent in a system of unitary review. *See generally* Joan M. Fisher, *Expedited Review of Capital Post-Conviction Claims: Idaho's Flawed Process*, 2 J. App. Prac. & Process 85, 87 (2000); Justin F. Marceau &

Hollis A. Whitson, *The Cost of Colorado's Death Penalty*, 3 U. Denver Crim. L. Rev. 145, 154 n.38 (2013); (*see also* FPD Initial Cmt. at 13-16).

As the Deputy Director of Colorado's Office of the Alternate Defense Counsel (responsible for, among other things, Colorado capital post-conviction cases) has explained, "based on how the cases have gone already, the cases are clearly more expensive, are far beyond the time limits stated in the statute, and many more issues have been injected into the cases *because* of [unitary review] than have been solved." (Attach. A (emphasis in original).) In the face of concrete examples of the problems created in the few other jurisdictions that employ unitary review, it is simply not enough to baldly assert that the problems of those systems "are not so drastic" and are merely a function of "how well its rules and structures are enforced." (*See* Am. Pet. at 15-16.) This Court should look closely at the examples set by other unitary review jurisdictions. Those examples demonstrate that unitary review is not the clean, effective solution Petitioner proposes it to be.

## III. Petitioner's Proposed Amendments Eliminate Protections Extended to the Constitutional Rights of Capital Defendants.

The purpose of review in capital cases is to ensure justice and that criminal proceedings do not violate defendants' constitutional rights. *See State v. Bible*, 175 Ariz. 549, 609, 858 P.2d 1152, 1212 (1993); *see also Zant v. Stephens*, 462 U.S. 862, 884-85 (1983). The proposed amendments, even as revised, infringe on the protections extended to the constitutional rights of capital defendants.

### A. The Proposed Amendments Eliminate the State Constitutional Right to the Effective Assistance of Appellate Counsel.

The proposed amendments eliminate a defendant's ability to raise a claim of ineffective assistance of appellate counsel before this Court. (*See* Am. Pet. at 7 (acknowledging that "under the proposed reform there is no mechanism for raising appellate IAC claims in state court since such claims are raisable only in the first PCR proceeding, which would occur before the direct appeal" (citing Ariz. R. Crim. P. 32.1, 32.2).) The State Bar of Arizona's initial comment correctly pointed out that the proposed amendments eliminate the right to the effective assistance of appellate counsel for purposes of state court litigation by eliminating the procedural mechanism necessary to effectuate that right. (State Bar Initial Cmt. at 1-3.) Petitioner's revisions do nothing to cure this constitutional defect.

Arizona courts have effectuated defendants' rights to the effective assistance of appellate counsel by permitting defendants to raise such claims in post-conviction proceedings. *See State v. Bennett*, 213 Ariz. 562, 146 P.3d 63; *State v. Herrera*, 183 Ariz. 642, 905 P.2d 1377 (Ct. App. 1995). The proposed amendments would prevent this Court from considering and vindicating defendants' rights to effective appellate counsel. Similarly, because the proposed amendments eliminate the means by which defendants can assert their state constitutional right to the effective assistance of appellate counsel, Petitioner asks

this Court to nullify the state constitutional right through amendment of the Arizona Rules of Criminal Procedure.

What is more, while insisting it is of little import that a defendant may never raise an ineffective assistance of appellate counsel claim in state court, Petitioner simultaneously insists that, under its proposal, there would remain no right to the effective assistance of post-conviction counsel. (Am. Pet. at 8-9, 12-14.) Thus, in essence, Petitioner promotes a system in which there is no way to ensure the effective assistance of any review counsel in state court. The proposed amendments would improperly eliminate both the state courts' ability to consider and vindicate important constitutional rights of capital defendants and defendants' state constitutional right to the effective assistance of appellate counsel.

### B. The Proposed Amendments Further Attempt to Limit Protection Extended to the Constitutional Rights of Capital Defendants.

As explained in the initial comment, Petitioner's proposal is an attempt to limit the constitutional protections extended to defendants facing the death penalty. (FPD Initial Cmt. at 16-18.) In the context of Arizona's current post-conviction review system, the United States Supreme Court has recognized an equitable remedy for federal habeas corpus petitioners who do not receive effective assistance from their state post-conviction counsel. *Martinez v. Ryan*, 132 S. Ct. 1309 (2012).

Petitioner initially proposed its changes to Arizona's post-conviction process as a way to solve the perceived problem that "[n]early all of the 46 Arizona capital defendants currently on habeas appeal have filed motions requesting remands in light of *Martinez* on claims that were never raised in state court." (Pet. at 10.) Petitioner explained that its proposal would eliminate the protections of *Martinez* by eliminating "the procedural framework which provided context for the equitable rule announced in *Martinez*." (*Id.*) Although Petitioner's Amended Petition is silent on this argument, Petitioner has not renounced the purpose it initially explained to this Court—eliminating the protections of *Martinez.* (*See* Pet. at 10.) Again, at heart, rather than resolving the issues Petitioner identifies, the proposed amendments are an attempt to avoid the application of *Martinez* and its protections.[3] (*See* Pet. at 10-11.) This is not an appropriate reason to upend Arizona's appellate and post-conviction system.

## IV. The Proposed Amendments Will Increase the Costs of Review of Capital Cases in Arizona.

The proposed amendments will increase the costs of review in capital cases by moving the more time and resource intensive post-conviction proceedings before direct appeal and by increasing the resources necessary for direct appeal.

[3] As described in the initial comment, the "solution" to *Martinez*—assuming for the sake of argument that an equitable protection is somehow troublesome—is not as simple as changing the order of post-conviction proceedings. (FPD Initial Cmt. at 16-18.) Petitioner's Amended Petition does not address this point.

Petitioner now argues generally that "[t]he longer litigation takes, the greater the costs." (Am. Pet. at 19.) While this principle may prove true in litigation as a general matter, it is ill-fitted for considering the costs involved in review of capital cases. Because the post-conviction review process requires extensive investigation, involving significant expenses of both time and money, the costs of post-conviction review are inherently higher than the costs incurred during direct appeal. As explained in the initial comment, premature post-conviction review may result in the expenditure of unnecessary resources that could be avoided through direct appeal.[4] (*See* FPD Initial Cmt. at 13-16.) In addition, the resources required for direct appeal will also be increased under the proposed amendments, because direct appeal counsel will be responsible for raising issues not raised during post-conviction proceedings. (*See* Am. Pet. at 6.) As a result, direct appeal counsel will need to spend significant time and effort reviewing the often voluminous post-conviction record and related files.

[4] Petitioner also asserts that earlier post-conviction review would be more efficient because, as this Court recognized in *Krone*, "an early [post-conviction] proceeding 'could make consideration of the direct appeal moot and could hasten the start of a new trial or other resolution of the case.'" (Am. Pet. at 9-10 (*quoting Krone*, 890 P.2d at 1151).) While *Krone* acknowledges a procedural possibility, it does not stand for the proposition that Arizona's process for post-conviction review would be more efficient if reordered. Petitioner does not cite anything suggesting that it is not at least equally likely that an early direct appeal would obviate the need for the more time and resource intensive post-conviction proceedings.

## Conclusion

In sum, Petitioner's revision has done little to address the serious conflicts and concerns raised by its initial proposal to this Court. Indeed, Petitioner's proposal and revisions create more questions than they have answered. For all of the reasons in the initial comments, and for the additional reasons stated above, this Court should decline to accept Petitioner's proposals and allow Arizona's capital review system to continue improving along its current course.

Respectfully submitted this 13th day of June, 2014.


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## Certificate of Service

I hereby certify that on June 13, 2014, I electronically filed the foregoing with the Arizona Supreme Court by using the Court Rules Forum website. I certify that Petitioner will be served with a copy of the comment via email as allowed by Arizona Supreme Court Rule 28(D)(2).

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