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TEMPORARY FREEDOM: AN ANALYSIS OF THE CRIMINAL PROCEDURE CODE WITH THE ENTRY INTO FORCE OF LAWS NUMBER: 12.403/11 AND NUMBER: 13.964/19

Hélder Vitorino de Souza
IESB – ``Instituto de Ensino Superior de Brasília`` / Law Department, Brasília – DF
http://lattes.cnpq.br/5881113130010701

Anthony Henrique Ferreira Viana
IESB – ``Instituto de Ensino Superior de Brasília`` / Law Department, Brasília – DF
http://lattes.cnpq.br/8015320867586898

Denesmar Gomes Pimenta
IESB – ``Instituto de Ensino Superior de Brasília`` / Law Department, Brasília – DF
http://lattes.cnpq.br/4023074484638065

Rita Girão Guimarães
IESB – ``Instituto de Ensino Superior de Brasília`` / Law Department, Brasília – DF
http://lattes.cnpq.br/7030486648333180

Cristina dos Santos Almeida
IESB – ``Instituto de Ensino Superior de Brasília`` / Law Department, Brasília – DF
http://lattes.cnpq.br/8381652797567327

Gustavo Nascimento Almeida
IESB – ``Instituto de Ensino Superior de Brasília`` / Law Department, Brasília – DF
http://lattes.cnpq.br/3406967222635919

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Abstract: This article addresses the issue of temporary freedom, Title IX of Decree-Law number: 3,689, of October 3, 1941, in the context of Brazilian criminal legislation, highlighting the modifications introduced by Law number: 12,403, of May 4, 2011, and number: 13,964, dated December 24, 2019. The analysis considers the relationship between temporary release and the principles of due process and the presumption of innocence, guaranteed by the 1988 Constitution. Temporary release is a right conditioned on the custody situation of the individual, being subject to legal requirements and careful judicial analysis. The study highlights the different types of prison that exist in the Brazilian legal system and highlights the types of temporary freedom, such as mandatory, permitted and prohibited. Finally, the impact of legislative changes on temporary freedom promoted by Laws number: 12,403/11 and number: 13,964/19 is discussed, recognizing advances and challenges in implementing this institute in the Brazilian criminal system.
Keywords: Freedom; Temporary; Prison; Law number: 12,403/11; Law number: 13,964/19.

INTRODUCTION

The present study aims to analyze the provisions on temporary release established in the Code of Criminal Procedure, established by Decree-Law number: 3,689, of October 3, 1941, in light of the changes introduced by Law number: 12,403, of May 4 of 2011, and number: 13,964, of December 24, 2019.

Law number: 13,964/19, known as the Anti-Crime Package, promoted changes to seventeen current pieces of legislation, including the Penal Code, the Criminal Procedure Code and the Criminal Executions Law (CNMP, 2024). It is noteworthy that the reformulations in the Penal and Criminal Procedure codes are directly related to preventive detention, bail, temporary release and other precautionary measures, in addition to establishing other measures (BRAZIL, 2019).

However, for the purposes of objectivity, we will restrict the scope of this study to the topic of temporary freedom, possibly addressing related issues when necessary to understand the central theme of this article.

When we talk about temporary freedom, it is essential to consider punitive regimes that restrict freedom, that is, prison. Temporary freedom, although it is an objective right for everyone, can only be requested by those who are deprived of their freedom by legal determination. Therefore, it is a subjective right, restricted to those in custody.

To understand the importance of this topic, we will present the data available in Infopen - National Survey of Penitentiary Information from the Ministry of Justice, updated until June 2019 (MJ, 2024). The data reveals that of a total of 752,277 inmates, 248,929 were temporarily arrested at the time of the survey, which represents approximately 33.12% of the Brazilian prison population (MJ, 2024).

It is important to highlight that pre-trial detainees are individuals accused of crimes who are awaiting the outcome of legal proceedings, and may be declared guilty or innocent at the end of the trial.

The decree of preventive detention does not occur without criteria, as it is necessary to fulfill requirements that justify the measure. These requirements are related to the risk of the accused harming the progress of the investigation or trial, as well as posing an obvious threat to society.

This study does not intend to discuss the relevance of preventive detention or temporary release, but rather to present, in theory, the applicability of temporary release in light of the changes promoted by Law 12,403/11 and the Anti-Crime Package.

Contrary to common sense, the Penal Code

seeks not only to punish, but also to guarantee reintegration into society, protecting it against possible recurrences (LIMA, 2024). In this context, we agree with Prof. Jair Krewer; professor of Criminal Law at IESB – that it is necessary to interpret the Penal Code as a protagonist, not just as a spectator, to truly understand the legislator's intentions.

This study is based on a brief bibliographical research carried out on legal doctrine, jurisprudence and current Brazilian legislation.

FREEDOM AS A CONSTITUTIONAL PRECEPT

The Brazilian Federal Constitution, due to its structural characteristics, is classified as codified and analytical. This classification involves bringing together all constitutional provisions in a single document, detailing many of them in their application. This characteristic allows several relevant constitutional principles to be highlighted, being pertinent to the object of this study and essential for understanding the application of the Penal Code and the Code of Legal Procedure.

The constituent demonstrated a concern in defining that freedom is the standard to be followed, reserving measures restricting freedom only as an exception, until the final and unappealable sentence of the conviction.

In this sense, within the fundamental rights and guarantees enshrined in the Constitution of 88, its article 5 includes section LXVI, which establishes "no one shall be taken to jail or held therein, when the law allows for temporary release, with or without bail" (BRAZIL, 1988).

It is worth noting that the broad coverage of fundamental rights and guarantees is an innovation in the democratic Constitution of 88, conceived after two decades of military dictatorship. These are protective rights, which guarantee the minimum for an individual to exist in a dignified manner within a society administered by a State, in accordance with the principle of human dignity.

However, the constituent included the fundamental rights and guarantees among the essential clauses, included in item IV of paragraph 4 of article 60. In other words, these are points that cannot be abolished even by constitutional amendment.

Next, we highlight the two constitutional principles most relevant to the central theme of this article, enshrined in the guarantees and fundamental rights of the CF of 88:

PRESUMPTION OF INNOCENCE

The principle of presumption of innocence, enshrined in the Declaration of the Rights of Man and of the Citizen of 1789, specifically in its article 9 establishes that every accused is considered innocent until declared guilty.

This presumption implies that the accused can only be arrested when deemed essential (CAMPIDELLI, 2024).

The International Covenant on Civil and Political Rights, approved in Brazil with the promulgation of Decree number: 592, of July 6, 1992, also reinforces this principle in its article 14, item 2, guaranteeing that "every person accused of a crime will have the right to be presumed innocent until their guilt is legally proven".

The Brazilian Constitution of 1988, in turn, in section LVII of article 5th, declares unequivocally that "no one will be considered guilty until the criminal sentence has become final" (BRAZIL, 1988). This legal provision aims to guarantee the limitation of state punitive power, ensuring the defendant the right to be treated as innocent throughout the process, reinforcing the prevalence of the right to freedom (REBELO; ROSA, 2020).

It is essential to understand that the presumption of innocence, like any other

fundamental right or guarantee, is not absolute (REBELO; ROSA, 2020).

In this sense, ruling 1397533 (TJDFT 1, 2024), citing the judgment of Declaratory Constitutionality Actions number: 43, 44 and 54 by the Plenary of the Federal Supreme Court, which recognized the constitutionality of article 283 of the CPP (Criminal Procedure Code), granted the appeal to "suspend the execution of the custodial sentence until the criminal action becomes final".

THE DUE LAWSUIT

The principle of due legal process originates in 13th century English law as part of the protection of life, liberty and property, limiting the exercise of Royal power (TELES, 2021).

In Brazil, this principle is provided for in Section LIV of article 5th of the 1988 Federal Constitution, which determines that "no one will be deprived of their freedom or their property without due legal process" (BRAZIL, 1988).

This principle guarantees the individual that their freedom can only be deprived or their rights restricted through a legal process, which must be conducted by the Judiciary by a Natural Judge, ensuring contradictory and broad defense (CNMP, 2020). Initially created to limit royal power, due legal process has consolidated itself as protection of society's primordial values (TELES, 2021).

According to Capez (2023), due legal process implies the State's obligation to guarantee the defendant the right not to be deprived of their liberty or their property without a process carried out in accordance with the law.

The same author argues that this right is divided into several guarantees, such as the right to be heard, to be informed of all procedural acts, to have access to technical defense, to speak out after the accusation, to publicity and motivation for decisions, among others.

Therefore, both the presumption of innocence and due legal process are fundamental pillars of the Brazilian legal system, guaranteeing individual rights and limiting the punitive power of the State.

PRISON MODALITIES

Temporary prison is procedural and precautionary in nature. It can only be decreed during criminal prosecution (MORAES, 2024).

According to Capez (2023), after the promulgation of Law number: 12.403/11, Brazilian Criminal Law began to prioritize the non-temporary detention of the indicted or accused person, except when absolutely necessary. This law promoted several changes to title IX of the Criminal Procedure Code: "Prison, precautionary measures and temporary release", an understanding expanded and consolidated with the advent of Law 13,964/19.

Capez (2023) also highlights that temporary prison cannot only be necessary; it must only be enacted when essential to guarantee the effectiveness of the process.

FLAGRANT PRISON

According to Capez (2023), the term "flagrante" derives from the Latin: ``flagrare``, which means "to burn". In the legal context, it refers to a crime that is occurring, has just occurred, or is in progress. This is a precautionary and procedural measure that can be carried out without a written order from the competent Judge. It is applied to those who are caught committing or have just committed a crime or misdemeanor.

After prison in the act, the prisoner must be presented to the competent judge within 24 hours for a custody hearing. At this hearing, the Judge decides whether the prisoner will

remain detained or be released based on the procedural facts and the guarantee that the accused will attend hearings and other procedural acts, if necessary, in addition to complying with the sentence (CAPEZ, 2023).

PREVENTIVE PRISON

According to Capez (2023), preventive detention is a precautionary measure of an exceptional nature, designed to guarantee the effectiveness of future judicial provision. It must only be adopted when its unequivocal need is demonstrated after verifying that there is no other less invasive measure applicable to the case.

Therefore, the author explains that, for its decree to occur, the following prerequisites must be met: proof of the existence of the crime, sufficient evidence of authorship and danger generated by the accused's state of freedom.

Article 312 of the Code of Criminal Procedure lists the requirements for the ordering of preventive detention, which can also be ordered in case of non-compliance with other precautionary measures. The decision that decrees preventive detention must be motivated and substantiated, based on the fear of danger and concrete facts that justify its application (CAPEZ, 2023).

These forms of prison provided for in Brazilian legislation aim to guarantee the right to individual freedom, respecting the principles of the Rule of Law and the presumption of innocence (CAPEZ, 2023).

HOUSE PRISON

House prison, governed by articles 317 to 318-B of the CPP (Criminal Procedure Code), conditions the indictment or accused's confinement to their residence, from where they can only be absent with judicial authorization.

This modality may replace preventive detention in some situations, when the offender is over 80 years old, extremely weak due to a serious illness, pregnant, among others.

TEMPORARY PRISON

Temporary detention, governed by Law number: 7,960, of December 21, 1989, is procedural in nature and aims to enable investigations related to serious crimes, and can only be applied during the police investigation. It must be decreed by the judicial authority upon representation from the police authority or request from the Public Prosecutor's Office. It is necessary that at least one of the situations provided for by law be met, such as the indispensability of the measure for the progress of the police investigation.

This type of prison has a maximum period of 5 days, which can be extended for an equal period in case of extreme and proven need.

OTHER PRECAUTIONARY MEASURES

The CPP (Criminal Procedure Code) also lists other precautionary measures to be established against the accused or indicted agent. However, these precautionary measures do not affect the individual's freedom in an unrestricted manner, dealing only with limitations, with the exception of cases of crime committed with violence or serious threat, with the agent being unattributable or semi-imputable, following an expert conclusion.

TEMPORARY FREEDOM

According to Prado (2007), the origin of temporary freedom dates back to the Roman Empire, where the magistrate discretionally allowed the release of the accused upon the promise of his appearance at trial.

As already mentioned, in Brazil, temporary

freedom is a fundamental right guaranteed by the Federal Constitution of 1988, which guarantees the individual the right to await the outcome of the process in freedom, except in duly substantiated exceptional cases. According to the Code of Criminal Procedure (CPP), there are three main types of temporary release: mandatory, permitted and prohibited (CAPEZ, 2023).

- **Mandatory Temporary Release:** It is recognized as an unconditional right of the accused and cannot be denied, as the grounds for ordering preventive detention are absent.
- **Permitted Temporary Release:** In situations where there are no grounds for preventive detention, the judge must grant temporary release and may impose precautionary measures provided for by law.
- **Temporary Freedom Prohibited**: According to the author, this possibility does not exist. Therefore, any legislation that prohibits the granting of temporary release, when the reasons authorizing preventive detention are absent, is considered unconstitutional. However, with the advent of the anti-crime package, article 310 § 2 of the Code of Criminal Procedure began to provide for this possibility, thus paving the way for the prohibition of temporary release in specific circumstances.

This understanding is based on jurisprudence, as the STF (Federal Court of Justice); (2012) in HC 104.339, reported by the eminent minister Gilmar Mendes and maintained by the full court, declared that due to the general prohibition ex lege is incompatible with the constitutional principle of the presumption of innocence and of due legal process. Prolating the following decision:

> The Panel decided to refer the judgment of this writ to the STF (Federal Court of Justice) Plenary. Unanimous decision. Justifiably absent from this trial were Ministers Celso de Mello and Joaquim Barbosa. 2nd Panel, 02/22/2011. Decision: The Court, by majority and in accordance with the Rapporteur's vote, declared, incidentally, the unconstitutionality of the expression "**and temporary freedom**", contained in the caput of article 44 of Law number: 11.343/2006, Ministers Luiz Fux defeated, Joaquim Barbosa and Marco Aurélio. Subsequently, the Court, by majority, partially granted the order for the requirements set out in article 312 of the Code of Criminal Procedure to be assessed in order to, if applicable, maintain the precautionary segregation of the patient, with the defeat of Ministers Luiz Fux, who denied the order; Joaquim Barbosa, who granted the order due to his poor understanding of the motivation for maintaining the patient's prison, and Marco Aurélio, who granted the order due to an excess of time. The Court decided to authorize the Ministers to decide monocratically on habeas corpus when the only basis for the petition is article 44 of the aforementioned law, with the defeat of Minister Marco Aurélio. The President, Minister Ayres Britto, voted. Speaking for the Federal Public Ministry, Dr. Roberto Monteiro Gurgel Santos, Attorney General of the Republic. Justifiably absent was Minister Cármen Lúcia. Plenary, 10.05.2012.

However, the full decision was in diffuse control of constitutionality, therefore, it was valid only for the specific case contained in the habeas corpus in question.

However, subsequently, the STF (Federal Court of Justice); (2017), now provoked by the extraordinary appeal RE 1,038,925 RG, also reported by the eminent minister Gilmar Mendes on 8/18/2017, made it possible to expand this understanding by proposing the establishment of the following thesis:

> *The expression "and temporary freedom", contained in the caput of article 44 of law 11,343/2002, is unconstitutional.*

In view of this, summary 697 of the STF (Federal Court of Justice) was generated, which reads as follows:

> *"The prohibition of temporary release in cases for heinous crimes does not prohibit the relaxation of procedural detention due to an excessive period of time."*

With the advent of this new decision, the understanding regarding the prohibition of temporary freedom was pacified in a binding manner, thus partially declaring the device unconstitutional.

Therefore, the procedural institute of temporary freedom guarantees that the accused can wait in freedom for the process to progress until the final judgment, and the use of this institute may or may not be linked to guarantees to be given by the accused. Its revocation may be decreed at any time, in cases where the imposed conditions are not complied with. (CAPEZ, 2023).

> "Temporary release may be granted, with or without bail, in the case of prison in the act, in which the procedure does not involve any violation of the rules provided for by law, in accordance with article 310, item III of the Code of Criminal Procedure. Although the prison is legal, the magistrate may understand that it is no longer necessary for criminal proceedings and, therefore, order temporary release." (TJDFT 2, 2024)

The 1988 Federal Constitution, in its article 5, section LXVI, establishes that "no one will be taken to jail or held there when the law allows temporary release, with or without bail". This constitutional provision highlights the importance of the principle of presumption of innocence and the need to guarantee the freedom of the individual as long as there is no final conviction (BRAZIL, 1988).

Temporary freedom can be granted both in cases of prison in the act and in situations of preventive detention, as long as the requirements established by Brazilian legislation are met (BRAZIL, 2019).

According to article 310 of the Code of Criminal Procedure, the judge may grant temporary release with or without bail, observing the criteria of necessity and adequacy of the measure. Furthermore, the magistrate's decision must consider the seriousness of the crime, the defendant's antecedents, the existence of evidence of the materiality of the crime and sufficient evidence of authorship, among other elements relevant to the analysis of the specific case (BRAZIL, 2019).

However, in cases of heinous crimes, domestic and family violence against women, and recurrence of intentional crimes, the granting of this benefit is more restricted, requiring more robust reasoning from the magistrate (BRAZIL, 2019).

Furthermore, temporary freedom can be revoked at any time if the accused fails to comply with the conditions imposed by the judge or if new elements emerge that justify the need for his precautionary prison (BRAZIL, 2019), however, its granting is conditional on compliance with legal requirements and the judge's careful analysis, aiming to ensure the effectiveness of criminal prosecution, without violating constitutional principles and the fundamental rights of the individual (BRAZIL, 2019).

For a better understanding of the institute of temporary freedom, it is necessary to understand its functioning in terms of its operational aspect, discussed below.

SECURITY WITH GUARANTEE OF PROCEDURAL OBLIGATIONS

As recommended by Capez (2023), bail is a guarantee materialized through a deposit of a real nature, intended to fulfill the procedural obligations of the defendant or accused, such as attendance at all procedural acts, not changing residence or even if absent from the residence for more than 8 days without judicial authorization.

It may be arbitrated by the police authority in cases where the custodial sentence for the crime for which he is being accused does not exceed 4 years. Once this limit is exceeded, it can only be granted by court order (Article 322, Sole Paragraph, CPP).

Its value is defined by analyzing the nature of the infraction, the personal economic conditions of the agent, his previous life as well as the circumstances indicative of his dangerousness (Article 326, CPP). It may also be waived, reduced by up to two thirds or increased by up to a thousand times, if the agent's economic situation so allows (Article 325, § 1, CPP).

Failure to comply with the bail conditions may lead to its breach (Article 341, CPP) which will result in the loss of half of it (Article 343, CPP). The judge may decide to impose an additional precautionary measure, order preventive detention as well as prohibit new bail in the same case (CAPEZ, 2023).

At the end of the process, it can be used to pay court costs, compensation for damage, monetary benefits or a fine, if the defendant is convicted (Article 336, caput, CPP).

In cases where the defendant has his acquittal final or has his punishment terminated, the agent will have returned the full amount of his bail (Article 337, caput, CPP).

Even non-bailable crimes (heinous, racism, drug trafficking) are subject to temporary release. In principle, when the law declares a crime to be non-bailable, it implies that the accused must not be released on bail, as the law considers the accused to be dangerous. Therefore, preventive detention is considered necessary to guarantee public or economic order, or to guarantee adequate criminal instruction, or to guarantee the application of criminal law.

However, in order to make the general rule of freedom of the individual compatible until the criminal conviction becomes final, it can be concluded that it is not possible to completely and absolutely prohibit temporary freedom, under penalty of establishing a hypothesis of mandatory precautionary prison.

Therefore, the judge, when faced with a non-bailable crime, must carry out an analysis of the circumstances of the specific case, observing whether the legal prerequisites are present and then decide, with motivation, on the exceptional nature of maintaining precautionary detention or on the freedom of the agent.

In accordance with this understanding, the Federal Supreme Court established in HC 80.719/SP:

> The criminal accusation for a heinous crime does not justify, in itself, the precautionary deprivation of liberty of the accused or the defendant. Even if the person is accused of the alleged commission of a heinous crime, and until an unappealable criminal sentence is issued, it is not possible - due to the insurmountable constitutional prohibition (CF, article 5, LVII) - to presume his guilt. No one can be treated as guilty, whatever the nature of the criminal offense attributed to them, without there being, in this regard, a final and unappealable judicial decision. The constitutional principle of non-culpability, in our legal system, enshrines a rule of treatment that prevents the Public Power from acting and behaving, in relation to the suspect, the accused, the accused or the defendant, as if they had already been definitively condemned by sentence of the Judiciary.

In these cases, the possibility of arbitrating bail, whether by the police or judicial authority, is prohibited.

This peculiarity is the result of Law number: 6,416, of May 24, 1977, which allows those accused or defendants of notably more serious crimes to benefit (CAPEZ, 2023).

LEGISLATIVE CHANGES AND IMPACTS ON TEMPORARY FREEDOM

Laws number: 12,403/11 and number: 13,964/19 promoted significant changes in the Brazilian criminal system, directly impacting the institution of temporary freedom. Law number: 12.403/11, for example, brought a concern to avoid the temporary incarceration of the indicted or accused when there is no clear need for prison (BRAZIL, 2011; BRAZIL, 2019).

Although Law number: 12,403/11 emphasizes the freedom of the agent, it also considers the application of other precautionary measures that aim to restrict some rights in order to avoid possible obstructions to the progress of the police investigation.

It also specifies crimes where it is not possible to set bail, since the previous version of the CPP (Criminal Procedure Code) had a more generic characterization of this prohibition. Other approaches introduced by Law number: 12,403/11 concern adjustments in the limits of bail amounts and the situations and consequences of breaching bail.

It was in the wake of the popular outcry for greater repression against criminals that Congress approved Law 13,964/2019, known as the Anti-Crime Package or Law. The package amended provisions of 17 criminal laws, such as the Penal Code (CP), the Criminal Procedure Code (CPP) and the Penal Execution Law (LEP).

According to the evolution of society, in relation to greater protection for women, the elderly, children and adolescents, and people with disabilities or illnesses, it becomes permissible to order preventive detention to guarantee the execution of urgent protective measures.

Among the new features, the Anti-Crime Law expanded the cases in which pre-trial detention can be ordered, increased the maximum period of prison from 30 to 40 years, expanded the list of crimes considered heinous – crimes such as genocide, restricted robbery was included. of freedom of the victim and robbery with the use of explosives – and limited the chances of progression of regime and conditional release. Although some changes are seen as advances in criminal legislation, there are concerns about the increase in incarceration and the restriction of temporary freedom (BRAZIL, 2019).

Nevertheless, the new rules on preventive detention are the most frequent topic in the STJ's jurisprudence surrounding the Anti-Crime Law, which have been consolidating the understanding that Law 13,964/2019 – in accordance with the wording given to article 315 of the CPP (Criminal Procedure Code) – expressly requires that the imposition of a preventive or any other precautionary measure must be based on concrete motivation related to new or contemporary facts and on the demonstration of the indispensability of the restrictive measure.

Furthermore, it is no longer possible to convert a flagrant prison into preventive prison without provocation from the Public Prosecutor's Office, the police authority, the assistant or the plaintiff, even in situations where a custody hearing is not held.

FINAL CONSIDERATIONS

The analysis of the provisions on temporary release in light of the Criminal Procedure Code, and the modifications introduced by Laws number: 12.403/11 and number: 13.964/19, reveals the complexity and importance of this institute in the context of the Brazilian criminal system. Temporary freedom emerges as a fundamental right enshrined in the 1988 Federal Constitution, guaranteeing the individual the right to await the outcome of the process in freedom, except

in duly substantiated exceptional cases. The presumption of innocence and due legal process are basic principles that support this right, limiting the punitive power of the State and guaranteeing human dignity.

Jurisprudence and legislation reflect the evolution of this institute, recognizing the need to reconcile the preservation of public order with the guarantee of individual rights. The granting of temporary release may be accompanied by precautionary measures, such as bail, which aim to ensure the accused's attendance at procedural acts and the effectiveness of criminal prosecution. However, the restriction of this right, especially in cases of heinous crimes and domestic violence, requires robust reasoning on the part of the judge, in order to guarantee the proportionality and reasonableness of the measure.

The legislative changes promoted by Laws, number: 12,403/11 and number: 13,964/19 reflect the search for a more efficient and fairer criminal system, balancing the need to repress crime with the protection of individual rights. These changes, although they seek to avoid unnecessary temporary incarceration, also recognize the importance of precautionary measures to guarantee the effectiveness of criminal justice. In short, the analysis of temporary freedom highlights the constant search for a balance between the protection of society and respect for the fundamental rights of the individual in the context of the Brazilian criminal process.

Only this way, it will it be possible to guarantee a fair, efficient and respectful criminal system with human dignity.

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