SENATE COMMITTEE ON PUBLIC SAFETY

Senator Nancy Skinner, Chair
2017 - 2018 Regular

Bill No:	SB 1437	**Hearing Date:**	April 24, 2018
Author:	Skinner		
Version:	February 16, 2018		
Urgency:	No	**Fiscal:**	Yes
Consultant:	GC		

Subject: ***Accomplice Liability for Felony Murder***

HISTORY

Source: Restore Justice (co-sponsor)
Anti-Recidivism Coalition (co-sponsor)
Californians for Safety and Justice (co-sponsor)
California Coalition for Women Prisoners (co-sponsor)
CARES for Youth (co-sponsor)
Felony Murder Elimination Project (co-sponsor)
Initiate Justice (co-sponsor)
Pacific Juvenile Defender Center (co-sponsor)
University of San Francisco School of Law Criminal and Juvenile Justice Clinic and Racial Justice Clinic (co-sponsor)
USC Gould School of Law Post-Conviction Justice Project (co-sponsor)
Youth Justice Coalition (co-sponsor)

Prior Legislation: SCR 48 (Skinner) – Ch. 175, Stats. 2017
AB 2195 (Bonilla) – 2016, failed passage in Assembly Appropriations
SB 878 (Hayden) – 1999, failed passage on the Senate Floor

Support: The Advocacy Fund; Bend the Arc Jewish Action; Californians United for a Responsible Budget; California Public Defenders Association; Catholic Worker Hospitality House; Center for Juvenile Law and Policy; Center on Juvenile and Criminal Justice; Community Housing Partnership; Community Works West; Courage Campaign; East Side Studios; Ella Baker Center for Human Rights; Fair Chance Project; Friends Committee on Legislation of California Lawyers Committee for Civil Rights of the San Francisco Bay Area; Felony Murder Elimination Project; Full Moon Pickles and Catering; the Lawyers' Committee for Civil Rights of the San Francisco Bay Area; Legal Services for Prisoners with Children; The Modesto/Stanislaus NAACP; Pillars of the Community; the Place4Grace; Prison Activist Resource Center; Prisoner Advocacy Network; Prisoner Hunger Strike Solidarity; Riverside Temple Beth El; Rubicon Programs; Showing Up for Racial Injustice – Long Beach; Sister Inmate; Survived & Punished; Time for Change Foundation; University of San Francisco School of Law's Criminal and Juvenile Justice Clinic and Racial Justice Clinic; United Auto Workers Local 2865; WE ARE HERE TO HELP; Women's Center for Creative Work; 9iWomen's Council of the California Chapter of the National Association of Social Workers; Young Women's Freedom Center; 29 individuals

Opposition: California District Attorneys Association; California Police Chiefs Association; California State Sheriffs' Association; Peace Officers Research Association; Riverside Sheriffs Association

PURPOSE

The purpose of this bill is to revise the felony murder rule to prohibit a participant in the commission or attempted commission of a felony that has been determined as inherently dangerous to human life to be imputed to have acted with implied malice, unless he or she personally committed the homicidal act.

Existing law defines murder as the unlawful killing of a human being, or a fetus, with malice aforethought. (Pen. Code, § 187, subd. (a).)

Existing law defines malice for this purpose as either express or implied and defines those terms. (Pen. Code, § 188.)

- It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature.

- It is implied, when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.

Existing law provides that when it is shown that the killing resulted from an act with express or implied malice, no other mental state need be shown to establish the mental state of malice aforethought. Neither an awareness of the obligation to act within the general body of laws regulating society nor acting despite such awareness is included within the definition of malice. (Pen. Code, § 188.)

This bill would prohibit malice from being imputed to a person based solely on his or her participation in a crime.

This bill would prohibit a participant in the commission or attempted commission of a felony inherently dangerous to human life to be imputed to have acted with implied malice, unless he or she personally committed the homicidal act.

Existing law defines first degree murder, in part, as all murder that is committed in the perpetration of, or attempt to perpetrate, specified felonies. (Pen. Code, § 189.)

Existing law, as enacted by Proposition 7, approved by the voters at the November 7, 1978, statewide general election, prescribes a penalty for that crime of death, imprisonment in the state prison for life without the possibility of parole, or imprisonment in the state prison for a term of 25 years to life. (Pen. Code, § 190.)

Existing law defines 2nd degree murder as all murder that is not in the first degree and imposes a penalty of imprisonment in the state prison for a term of 15 years to life. (Pen. Code, §§ 187 & 190.05.)

This bill would prohibit a participant in the perpetration or attempted perpetration of one of the specified first degree murder felonies in which a death occurs from being liable for murder,

unless the person personally committed the homicidal act, the person acted with premeditated intent to aid and abet an act wherein a death would occur, or the person was a major participant in the underlying felony and acted with reckless indifference to human life.
Existing law, as added by Proposition 8, adopted June 8, 1982, and amended by Proposition 21, adopted March 7, 2000, among other things, defines a serious felony. (Pen. Code, § 667.1.)

Existing law, also added by Proposition 8, adopted June 8, 1982, and amended by Proposition 36, adopted November 6, 2012, commonly known as the Three Strikes Law, requires increased penalties for certain recidivist offenders in addition to any other enhancement or penalty provisions that may apply, including individuals with current and prior convictions of a serious felony, as specified. (Pen. Code, §§ 667.5 & 1192.7.)

This bill would include in the list of serious felonies the commission of a felony inherently dangerous to human life wherein a person was killed.

This bill would provide a means of resentencing a defendant when a complaint, information, or indictment was filed against the defendant that allowed the prosecution to proceed under a theory of first degree felony murder, 2nd degree felony murder, or murder under the natural and probable consequences doctrine, the defendant was sentenced for first degree or 2nd degree murder or accepted a plea offer in lieu of a trial at which the defendant could be convicted for first degree or 2nd degree murder, and the defendant could not be charged with murder after the enactment of this bill.

The bill would provide that the court cannot, through this resentencing process, remove a strike from the petitioner's record. By requiring the participation of district attorneys and public defenders in the resentencing process, this bill would impose a state-mandated local program.

COMMENTS

1. Need for This Bill

According to the author:

> SB 1437 seeks to restore proportional responsibility in the application of California's murder statute reserving the harshest punishments for those who intentionally planned or actually committed the killing.
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> In criminal justice, a person's intent is a critical element to determine punishment for a criminal offense with one glaring exception. Under current California law, prosecutors are able to replace the intent to commit murder with the intent to commit a felony if the felony results in a death. Thus a person can be found guilty of murder if a death occurs while a felony is committed. It does not matter whether the death was intended or whether a person had knowledge that the death had even occurred.
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> The result is that California's felony murder statute has been applied even when a death was accidental, unintentional or unforeseen but occurred during the course of certain crimes.

This application of the statute has caused disproportionately long sentences for people who did not commit murder, and who in some cases had, at best, very peripheral involvement in the crime that resulted in a death.

According to a 2018 survey by the Anti-Recidivism Coalition and Restore Justice, 72% of women currently incarcerated in California with a life sentence did not commit the homicide. Additionally, the average age of those charged and sentenced under this interpretation of the murder statute is 20 years old; indicating that youth who were peripheral to a homicide are often held as responsible as the actual killer.

The California Supreme Court has commented on the necessity to fix this interpretation of California's murder statute. In *People v. Dillon*, the state Supreme Court called the use of the felony murder rule to charge those who did not commit a murder, or had no knowledge or involvement in the planning of the murder, "barbaric".

States such as Arkansas, Massachusetts, Kentucky, Hawaii, Michigan, and Ohio have narrowed the scope of what is known as the felony murder rule and limited the application of their murder statute. Ohio, for example, now requires that a killing that occurs during a felony must be an intentional killing in order to receive a first-degree murder conviction.

SB 1437 clarifies that a person may only be convicted of murder if the individual willingly participated in an act that results in a homicide or that was clearly intended to result in a homicide.

Under this bill, prosecutors would no longer be able to substitute the intent to commit a felony for the intent to commit murder.

SB 1437 would also provide a means for resentencing those who were convicted of murder under the felony murder rule but who did not actually commit the homicide.

2. Murder Generally

Murder is the most egregious form of homicide, which is the taking of the life of another human being. Homicides are killings of another, whether lawful or unlawful. Under California law murder is defined as "the unlawful killing of a human being or a fetus with malice aforethought." (Pen. Code, § 187, subd. (a).) Murder is distinguishable from manslaughter because the element of "malice" is required to be convicted of murder.

Malice

Both first-degree murder and second-degree murder require what is known as "malice." Malice may be expressed or implied. Express malice means that you specifically intend to kill the victim. Implied malice is when: (1) the killing resulted from an intentional act, (2) the natural consequences of the act are dangerous to human life, and (3) the act was committed deliberately with the knowledge that of the danger to human life, and with a conscious disregard for that life.

The most simple way to understand the element of malice is that the act does not require ill will or hatred to a particular person. Merely acting with a wanton disregard for human life and committing an act that involves a high degree of probability that it will result in death, is acting with malice aforethought. (*People v. Summers* (1983) 147 Cal.App. 3d 180, 184.)

First-Degree Murder

There are three methods for convicting a person of first-degree murder in California:

- If the killing was willful, deliberate, and premeditated.
- The murder was committed: through use of a destructive or explosive device, with ammunition designed to penetrate armor, poison, by lying in wait, or by inflicting torture.
- *With the felony-murder rule* (by committing a specifically enumerated felony that turns any death committed during the course of that felony into first-degree murder).

Second-Degree Murder

Second-degree murder is distinguishable from first-degree murder because it is willful, but it is not deliberate and premeditated. In principle, second-degree murder has always been intended to therefore encompass all murder that is not defined as first-degree murder. So for instance, if a defendant initiates a physical altercation with another person without intending to kill that person, nevertheless that person dies as a result of the altercation the defendant initiated, the defendant is likely to have committed second-degree murder (absent a legal defense).

Punishment

First-Degree Murder

In California a conviction for first-degree murder (including felony-murder) can result in one of three sentences:

- Imprisonment in state prison for a term of 25 years to life;
- Life imprisonment in state prison without the possibility of parole; or
- Death

State law requires a sentence of life imprisonment without parole or death for homicides involving special circumstances set by the California Penal Code. For example, the court must consider whether the defendant:

- committed first degree murder while engaging in a felony or
- avoiding a lawful arrest,
- using a bomb or explosive device, or
- intending to kill another person for financial gain.

The court must also confer a sentence of life imprisonment without parole or death if the defendant:

- committed first degree murder of a peace officer,
- federal law enforcement officer,
- firefighter,
- prosecutor, or
- judge.

State laws also allow for the most stringent forms of punishment when the murder was "especially heinous, atrocious, or cruel, manifesting exceptional depravity." This generally refers to murders involving torture.

Second-Degree Murder

California state laws set the term of imprisonment for second degree murder as 15 years to life in state prison. The term increases to 20 years to life if the defendant killed the victim while shooting a firearm from a motor vehicle. In addition, the term may increase to 25 years to life if the victim of the crime was a peace officer.

State laws also allow the court to consider whether the defendant has a prior criminal record. If the defendant has previously served time in prison for murder, the possible sentence for second degree murder may range between 15 years to life in state prison and life imprisonment without the possibility of parole.

3. The Felony Murder Doctrine

The felony murder rule applies to murder in the first degree as well as murder in the second degree. The rule creates liability for murder for actors (and their accomplices) who kill another person during the commission of a felony. The death need not be in furtherance of the felony, in fact the death can be accidental.

The purpose of the rule is to deter those who commit felonies from killing by holding them strictly responsible for any killing committed by a co-felon, whether intentional, negligent, or accidental during the perpetration or attempted perpetration of the felony. (*People v. Cavitt* (2004) 33 Cal. 4th 187, 197.)

First-Degree Felony Murder

First-degree felony murder rule applies when a death occurs during the commission of one of a list of enumerated felonies. These felonies are as follows: arson, robbery, any burglary, carjacking, train wrecking, kidnapping, mayhem, rape, torture, and a list of sexual crimes (including rape, sodomy, oral copulation, forcible penetration, or lewd acts with a minor). (Pen. Code, § 189.)

If someone is standing watch while his friend breaks into a locked vehicle and is discovered by a security guard and they all flee on foot. If the security guard falls to the ground in pursuit of the burglars and dies as a result of the fall, both co-defendants could be convicted of murder.

Second-Degree Felony Murder

Second degree murder occurs when a death occurs during the commission of a felony that has not been enumerated in code as constituting first-degree felony murder, but that courts have defined as "inherently dangerous." (*People v. Ford* (1964) 60 Cal.2d 772.) The standard courts are supposed to use for inherently dangerous is that the felony cannot be committed without creating a substantial risk that someone could be killed. (*People v. Burroughs* (1984) 35 Cal. 3d 824, 833.)

So therefore, a defendant who fires a weapon in the air to deter criminals from burglarizing their property can be convicted of second-degree felony murder if the firing of the weapon kills a human being. That defendant could be convicted of 15-years to life in state prison.

4. Lack of Deterrent Effect on Criminal Behavior

"The Legislature has said the effect that this deterrent purpose outweighs the normal legislative policy of examining the individual state of mind of each person causing an unlawful killing to determine whether the killing was with or without malice, deliberate or accidental, and calibrating treatment of the person accordingly. Once a person perpetrates or attempts to perpetrate one of the enumerated felonies, then in the judgment of the Legislature, he is no longer entitled to such fine judicial calibration, but will be deemed guilty of first-degree murder for any homicide committed in the course thereof." (*People v. Cavitt* (2004) 33 Cal. 4th 187, 197.)

The deterrent effect of the felony-murder doctrine has been debated for decades. Countless legal scholars and law review articles have addressed the issue. Most recent studies have concluded that the felony murder rule does not have a deterrent effect on the commission of dangerous felonies or deaths during the commission of a felony.[1] Proponents have argued that the felony-murder rule encourages criminals to reduce the number of felonies they commit and take greater care to avoid causing death while committing a felony. Opponents argue that criminals are unaware that the felony-murder rule even exists, and that it is impossible to deter criminals from committing unintentional and unforeseeable acts.

A 2002 study of FBI crime date found that nearly 20 percent of all murders annually between the years of 1970-1998 were felony murders. The results of the study suggested that the felony-murder rule has a relatively small effect on criminal behavior, and it does not substantially affect either the overall felony or felony-murder rate. Secondly, the study found that the effects varied by type of felony. While difficult to determine, the rule may have had a positive effect on reducing deaths during theft related offenses, it may have actually increased the rates of death in robbery-homicides. The rule was found to have no effect on rape deaths.[2]

5. Elimination of the Felony Murder Doctrine Worldwide

The United States adopted the felony murder rule as a form of English Common Law. English Common Law is the common legal system and concepts that has been adopted by courts throughout England, the United Kingdom, and their colonies worldwide.

- Abolished in England and Wales via the Homicide Act of 1957.
- Abolished in Northern Ireland via the Criminal Justice Act of Northern Ireland in 1966.
- Held unconstitutional in Canada as breaching the principles of fundamental justice. (*R v Vaillancourt* (1987) 2 SCR 636.)
- Abolished in Australia and replaced with a modified version known as "constructive murder" which requires that the offender commit an offense with a base penalty of 25 years to life in prison and that the death occurred in an attempt, during, or immediately after the base offense. Abolished and modified in the Crimes Act of 1958.

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[1] *The American Felony Murder Rule: Purpose and Effect* by Daniel Ganz, 2012, UC Berkeley; *The Culpability of Felony Murder* by Guyora Binder, 2008 Notre Dame Law Review; *Felony-Murder Rule a Doctrine at Constitutional Crossroads* by Nelson E. Roth and Scott E. Sundby, 1985 Cornell Law Review

[2] *Does the Felony-Murder Rule Deter? Evidence from FBI Crime Data* by Anup Malani, 2002, (clerk to Justice Sandra Day O'Connor, U.S. Supreme Court)

- There was never a felony murder rule in Scotland.

In the United States there are still 46 states that have some form of a felony murder rule. Hawaii, Kentucky, Michigan, and Ohio have completely abolished the felony murder rule. In 24 of those states, including California, the punishment can be death. The felony murder rule has been removed from the American Law Institute's Model Penal Code.

This bill does not eliminate the felony murder rule. The purpose of this legislation is to merely revise the felony murder rule to prohibit a participant in the commission or attempted commission of a felony that has been determined as inherently dangerous to human life to be imputed to have acted with implied malice, unless he or she personally committed the homicidal act.

6. Difficulties in Gathering Data on Felony Murder in California

The problem in collecting data on felony murder is that the abstract of judgement in murder cases only reflect conviction of murder in the first or second degree. It does not reflect the basis for the conviction. Felony murder is not a separate charge which can be easily tracked. A murder defendant is charged with murder in violation of Penal Code § 187 and the degree is determined by the trier of fact at trial, or is admitted by the defendant when entering a plea. There isn't any way to determine from the abstract of judgment if a first or second-degree murder conviction was premeditated, unpremeditated, or felony murder.

The only exception, where the conviction would be broken down, is in murder cases where there is a special circumstance which makes the offense punishable by death or life without parole. In these cases, a felony murder special circumstance (Penal Code §190.2 (a) (17)) would be alleged in the charging document and reflected in the abstract of judgment if found to be true. These death penalty/LWOP cases, where data can be obtained, are only a portion of the overall murder cases.

It would appear that the only way to gather the data on numbers of felony murder convictions in California would be a case file inspection in the court in the jurisdiction where the conviction was obtained.

7. Argument in Support

According to the *Pacific Juvenile Defender Center*:

> The Pacific Juvenile Defender Center (PJDC) provides support to more than 1000 juvenile trial lawyers, appellate counsel, law school clinical programs and non-profit law centers throughout California. We work to improve the quality of legal representation, assure fairness for youth in court proceedings, and promote practices that will produce good outcomes. As a regional affiliate of the Washington, D.C.-based National Juvenile Defender Center, we are also part of national efforts to improve the treatment of youth in the justice system.
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> Under current California law, a person may be held liable for first-degree murder without intending for a killing to occur or aiding the killing in any way. The death may be accidental, unintentional, and unforeseen, but as long as it occurred during the course of certain crimes, all participants – whether or not they performed the

homicidal act, knew a co-participant was armed, or were even at the scene of the killing – may be liable for first-degree murder.

Our members are well aware of the need to reform felony murder rules because juveniles are so often affected by them. Almost universally, young people do things in groups, and when something goes wrong our clients are genuinely surprised and horrified. Even when they have agreed to do some underlying act such as robbery, they never expect that anyone will get hurt. Current California laws allow those youth to be convicted of murder just as would be a person who actually caused or intended the death to occur. While allowing conviction for murder without the requisite action or intent is unfair to adults and juveniles alike, it is especially unfair to young people because they are developmentally incapable of maturely assessing the risks and consequences of their acts.

In a series of cases, the United States Supreme Court has held that juveniles are less culpable than adults, and that traditional justifications for punishment cannot fairly be applied to them. The court has specifically noted that young peoples' actions are characterized by immaturity, impetuosity, failure to appreciate risks and consequences; and peer pressure1 – exactly the kinds of factors that would result in being involved in an unintended situation where a death occurred. As neurological development continues young people change and become more capable of making mature judgments, but the human brain is not fully mature until age 25,2 so the number of juveniles and young adults impacted by the felony murder rule is substantial.

S.B. 1437 would not eliminate felony murder liability, but it would impose significant limitations on it. The bill would amend Penal Code section 188, subdivision (a)(3), to prohibit malice from being imputed to a person based solely on his or her participation in a crime, and would prohibit a participant or conspirator in the commission or attempted commission of a felony inherently dangerous to human life to be imputed to have acted with implied malice, unless he or she personally committed the homicidal act. Pursuant to amendments to Penal Code section 189, subdivision (e), it would prohibit a participant or conspirator in the perpetration or attempted perpetration of specified felonies listed in Penal Code section 189, subd. (a), in which a death occurs from being liable for murder, unless (1) the person personally committed the homicidal act; (2) the person acted with premeditated intent to aid and abet an act wherein a death would occur; or (3) the person was a major participant in the underlying felony and acted with reckless indifference to human life. S.B. 1437 would also add Penal Code section 1425, providing a resentencing mechanism to re-examine cases that were decided without those limitations.

This legislation will not eliminate criminal responsibility for accomplices in criminal activity. Participants in crime will still be held responsible for their involvement in the underlying crime, and those who actually cause a death will still be liable for murder. S.B. 1437 simply reduces the unfairness of the felony murder rule by refocusing attention on the intent and actions of the participants.

It is time for this Legislature to move toward elimination of felony murder liability. Thirty-five years ago, in *People v. Dillon* (1983) 34 Cal.3d. 441, the

California Supreme Court referred to our felony murder rules as "barbaric," but concluded that because our rules are statutorily based, only the Legislature can change them. The rule has already been abolished or limited in a number of countries, and in a growing number of states, including Arkansas, Massachusetts, Kentucky, Hawaii, Michigan, and Ohio.

8. Argument in Opposition

According to the *California District Attorneys Association*:

> This bill eliminates murder liability for those who participate in felonies that are inherently dangerous to human life in which a death occurs if those participants do not personally commit the homicidal act, do not act with premeditated intent to aid and abet an act in which a death would occur, or for those who do not act as a major participant in the underlying felony. While we agree that there is room for some measured reform in this area, the complete elimination of murder liability goes too far and draws no distinction between those who participate in dangerous felonies that result in the death of someone and those which do not.
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> There are a number of concerns raised in this bill:
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> First, the retroactive application of this bill applies to convictions that resulted from both jury and bench trials as well as convictions that resulted from negotiated plea bargains. Under the provisions of this measure, a resentencing hearing will necessarily require a full court record, including transcripts and exhibits, to determine the exact level of participation in the crime in order to determine whether a particular defendant is entitled to relief. In cases that resolved through a negotiated plea, no such record exists and virtually all participants in murders may qualify for relief to which they may not be entitled.
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> Additionally, this bill requires the prosecution to prove beyond a reasonable doubt that the petitioner falls into one of the categories that precludes resentencing. In cases that resolved through a negotiated plea, the absence of a full court record will necessarily prevent the people from establishing beyond a reasonable doubt whether a petitioner is excluded. The result will entitle virtually all petitioners who apply, even those who were major participants in the crime which resulted in death, to be entitled to a resentencing and the elimination of their well-deserved criminal liability.
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> Second, by placing the burden on the prosecution to prove beyond a reasonable doubt that petitioners do not qualify for resentencing, this bill will require the litigation of facts previously not litigated in the original case, particularly in cases that resolved through a plea. It is unclear from this bill whether the determination of those facts will be conducted by the resentencing judge or will necessitate a jury – which has significant procedural and constitutional implications as well as significant costs.
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> Moreover, this bill provides no exception to allow for the trial transcript to be used in a resentencing hearing. The effect of this would be to necessitate the calling of witnesses, other victims, and family members who may have been

involved in the original case. The effects of this to crime victims and survivors would be devastating.

Finally, the requirements placed on a petitioner to seek a resentencing hearing merely require the submission of a request indicating that a petitioner was convicted of murder and that the prosecution theory could have included a theory of first or second degree felony murder. Charging documents, plea forms, jury verdict forms and other documents involved in the prosecution of murder cases do not specify the theory under which someone is charged or even convicted of murder. The only way to determine whether a felony murder theory was advanced in a particular case would be to examine the transcripts at trial. The effect of this provision of the bill would be to allow everyone convicted of murder – actual killers, those acting with premeditated intent, and major participants acting with reckless indifference to human life included – to successfully petition to have a resentencing hearing. Combined with the burden on the prosecution to prove beyond a reasonable doubt the petitioner's ineligibility for a resentencing, this bill will effectively authorize the release of actual killers and those who played major roles in the killing of others during dangerous felonies.

We are committed to working to find a reasonable and measured approach to felony murder reform. Unfortunately this bill falls short and creates some potentially disastrous and costly problems that renders this bill unworkable.

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