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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Diane S. Goodstein, Circuit Court Judge

Appellate Case No.
Tiffany Ann Sanders……………………………………………………………Petitioner,

v.

State of South Carolina,………………………………………………………Respondent.

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the trial court erred by denying Sanders' motion for a new trial based on after-discovered evidence pursuant to South Carolina Rules of Criminal Procedure, Rule 29(b) because Sean Kammerer's testimony-- that Sanders was not aware of, nor did she participate in the murder of the victim-- was not available until the proceeding in which it was raised, and could not have been obtained at any earlier point?

II. Whether the trial court should have found that Sean Kammerer's affidavit constituted after-discovered evidence, and granted Petitioner a new trial?

STATEMENT OF THE CASE

Tiffany Sanders was tried before the Honorable Diane S. Goodstein and a jury between August 3-5, 2010 in Dorchester County, South Carolina. She was represented by Michael O'Neal, Esquire. The State was represented by Harrison Bell and Mandy Kimmons. She was convicted of murder and sentenced to 30 years in prison. She did not initially appeal her conviction and sentence. She then filed an application for post-conviction relief on August 3, 2011 and an Amended application on August 24, 2011. After an evidentiary hearing on May 24, 2012 at the Orangeburg County courthouse, the Honorable Deandrea G. Benjamin granted her a belated appeal pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974), but dismissed her other claims. That order was filed on August 3, 2012. Sanders was represented by Dale T. Cobb and Thomas R. Goldstein for the hearing and subsequent appeal.

Petitioner then filed a petition for writ of certiorari from the denial of her PCR. On December 17, 2014, the South Carolina Supreme Court issued its memorandum opinion in *Tiffany Sanders v. State*, Op. No. 2014-MO-049. Petitioner then filed a petition for rehearing that was then denied on January 22, 2015.

Petitioner then filed a Motion for a New Trial Based on After-Discovered Evidence on March 21, 2017. After a hearing on May 30, 2017 during which Judge Goodstein did not hear any testimony, she denied the motion on February 5, 2018.

Petitioner filed a timely notice of appeal on February 9, 2018. The South Carolina Court of Appeals affirmed Petitioner's conviction and sentence. *State v. Tiffany Ann Sanders*, Unpublished Op. No. 2020-UP-237 (*filed* August 12, 2020). The

South Carolina Court of Appeals then denied Petitioner's timely filed petition for rehearing on September 22, 2020.

This petition for writ of certiorari timely follows.

ARGUMENTS

I. **The trial court erred by denying Petitioner's motion for a new trial based on after-discovered evidence pursuant to South Carolina Rules of Criminal Procedure, Rule 29(b) because Sean Kammerer's testimony-- that Petitioner was not aware of, nor did she participate in the murder of the victim-- was not available until this proceeding, and could not have been obtained at any earlier point.**

The critical issue in this petition for a writ of certiorari is whether Sean Kammerer, an exonerating witness, was available to testify at any earlier point prior to Petitioner's motion for a new trial filed in March of 2017. The Court of Appeals found that since Petitioner could have discovered Kammerer's potential testimony by exercising due diligence prior to trial, that she is not entitled to relief. *State v. Sanders*, Op. No. 2020-UP-237 (filed August 12, 2020). Kammerer's testimony is the sole piece of evidence upon which Petitioner relies in her motion for a new trial based on newly-discovered evidence. Judge Goodstein found, in her order, that he was. She found, in pertinent part:

> Mr. Kammerer's testimony is not necessary to decide this issue because it does not fit within the definition of newly-discovered evidence. Kammerer was known to the Defendant at least since their arrest in 2007. While the Defendant may be correct in her assertion that Kammerer would not have wanted to testify at her PCR hearing while he was pursuing his own legal remedies through the PCR process, that fact does not mean that Kammerer was unavailable at the time. The Defendant had the means to subpoena Mr. Kammerer's testimony pursuant to Rule 45 of the SC Rules of Civil Procedure.

ROA 61-62.

This ruling is inaccurate, and this Court should grant certiorari.

According to Rule 71.1(a), Post-Conviction Relief Actions, the procedure for post-conviction relief is provided by the Uniform Post-Conviction Procedure Act (Act), *S.C. Code Ann.* §§ 17-27-10 to -120 (1985). The South Carolina Rules of Civil Procedure shall apply to the extent that they are not inconsistent with the Act.

South Carolina Code Ann. §17-27-150, Discovery in post-conviction relief proceeding, provides: (a) A party in a noncapital post-conviction relief proceeding shall be entitled to invoke the processes of discovery available under the South Carolina Rules of Civil Procedure if, and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise.

The trial court was inaccurate when it found that PCR counsel could have subpoenaed a co-defendant to testify at a PCR hearing without a judge's express permission to do so because the rules do not allow it. It would have been improper for PCR counsel to subpoena Kammerer without the court's permission. But also, it is highly unlikely that a judge would have given permission to do so since Sean Kammerer, at the time of Sanders' PCR hearing, was pursuing his own statutory legal remedies and thus could not have been forced to testify at his co-defendant's PCR hearing by way of a subpoena. The South Carolina Court of Appeals erred when it dismissively found that "Sanders could have discovered Kammerer's potential testimony by exercising due diligence prior to her trial." Additionally, the Court of Appeals opinion states that trial counsel made a "strategic" decision not to call Mr.

Kammerer at trial. This assertion is belied by the record. Here is the testimony from the PCR hearing:

> Q: And what did you do to investigate the charges and any defenses?
>
> A: Well, I went and looked at all the discovery materials. I looked at all the statements. I spoke with my client. **What I did not do, which I should have done, was I should have gone up and talked to Sean Kaminer (sp) in prison.**
>
> Q: And why did you not do that?
>
> A: The trial came up. I figured the government, the state was going to bring him to trial. I kind of was counting on that. I told my client that. We showed up for the trial, he wasn't there, **and I can just tell you right now that after the trial was over I realized that I should have gone to see him in jail. I should have found out what he was going to say and I should have brought him down there.**

App. 93-94 (emphasis added).

> Q: What reason—why did you not speak to him in advance of trial?
>
> A: Like I said, I assumed, which is always a mistake, that the state was going to bring him to trial, and I would get a chance some way to talk to him prior to trial, and if he's be helpful in my case, I'd put him up as a witness. **In retrospect, I should have gone to speak to him. I should have gone to the jail to talk to him. I should have put him up in my case.**

App. 95-96 (emphasis added).

Trial counsel clearly did not offer a "strategic" reason for not calling Kammerer to testify at trial.

Relevant Dates

The following are dates relevant to consideration of this issue.

- Sean Kammerer pleaded guilty to murder on March 24, 2008 and was sentenced to 34 years in prison.

- Kammerer filed a post-conviction relief application on January 26, 2009.
- Petitioner was tried before Judge Goodstein and a jury between August 3-5, 2010 in Dorchester County, South Carolina.
- Petitioner's PCR hearing was held on May 24, 2012 (she was granted a belated appeal pursuant to *White v. State*)
- Kammerer's PCR application was dismissed on June 14, 2013. He did not appeal.
- The South Carolina Supreme Court issues an unpublished opinion in *Tiffany Sanders v. State of South Carolina*, Opinion No. 2014-MO-049 on December 17, 2014 denying relief.
- Kammerer executes declaration on January 7, 2017.

The trial court's order finds that PCR counsel could have properly subpoenaed Kammerer to Petitioner's PCR hearing and forced him to testify on Petitioner's behalf while he was pursuing his statutory right to challenge his own conviction. The court did not address the fact that contacting a witness who is represented by counsel would have been improper. *See* Rule 4.2 of the Rules of Professional Conduct, Communication with Person Represented by Counsel. *And see Smith v. State*, 404 S.C. 493, 745 S.E.2d 378 (Ct. App. 2012) (acknowledging that Rule 4.2 imposed an impediment on trial counsel contacting a witness represented by counsel).

But also, the court found that, since Kammerer pleaded guilty, he could have been compelled to testify at Petitioner's trial, even though he had already filed a PCR application and was represented by counsel:

> As is the case for all guilty pleas, Mr. Kammerer was advised that he was surrendering his right to remain silent and his right against self-incrimination. Thus, he no longer enjoyed the privilege of refusing to testify upon the Court's acceptance of his plea. Therefore, <u>at the time of her trial</u>, Kammerer was available for Defendant to subpoena and

> attempt to interview… Due to Defendant's knowledge of Mr. Kammerer and the available legal means for obtaining his testimony at the time of trial, the testimony cannot be newly discovered evidence under the relevant definition.

ROA 62 (emphasis in original).

If the court's reasoning is allowed to stand, and the Court of Appeals' opinion approving of it, it will mean that criminal defendants, who plead guilty, effectively waive their rights to avail themselves of post-conviction relief remedies because they can be compelled (by virtue of their guilty pleas) to testify at a co-defendant's PCR hearing. Kammerer exercised his legal statutory rights to collaterally challenge his conviction. Given that he was pursuing these remedies, there is no reason to think he would have willingly implicated himself in the murder that he was challenging and seeking to overturn. It would have been improper to then subpoena him at the trial, or the PCR hearing, to have him invoke his Fifth Amendment right not to incriminate himself. *See State v. Hughes*, 328 S.C. 146, 153, S.E.2d 821, 824 (1997) (witness may not be called solely for the sake of having witness invoke privilege against self-incrimination, for the purpose of permitting the jury to infer wrongdoing from that assertion). The trial court's ruling would effectively gut post-conviction relief for defendants who plead guilty, an action that would not be proper unless undertaken by the legislative branch.

II. The trial court should have found that Sean Kammerer's affidavit constitutes after-discovered evidence, and granted Petitioner a new trial.

Relevant Facts

The essential facts of this case are not complex. Tiffany Sanders encountered Jesse Ham (the decedent), Brandon Frye, David Hughey, and Kevin King on June 8, 2007 in a neighborhood near where she lived as she was out driving with her disabled sister. While she was with these young men, she spoke to Sean Kammerer, a friend of hers, on the phone. Shortly afterwards, she drove Jesse Ham to a shopping center area near a Tire Kingdom in North Charleston, SC. After they arrived, Sean Kammerer shot and killed the victim.

The State's theory of the case, as Solicitor Bell outlined in his opening argument, was that Tiffany lured the victim, J.H., to the area so that Sean Kemmerer could kill him. The State prosecuted the case under the theory of "the hand of one is the hand of all." ROA 329. As the State argued to the jury:

> The difference between accessory before the fact of murder and murder is that you have to determine whether she was present or not. She was in her car when the murder happened outside the car. At some point she left the scene. It's up to you to decide if she was present or not.
>
> If she was not present at the scene, you can find her guilty of accessory before the fact. If she was present at the scene, you can't find her guilty of accessory before the fact, but you can find her guilty of murder, because she aided and abetted and helped and joined in with this crime.

ROA 329-30.

At the conclusion of the opening argument, the State asked the jury to find her guilty "of either murder or accessory before the fact of murder." ROA 330.

But what the jury did not hear because it was only revealed when Kammerer signed his declaration, is that Tiffany Sanders had absolutely no knowledge that Sean Kammerer had a gun that night, or that he intended to shoot and kill Jesse Ham. Indeed, Sean Kammerer's affidavit is wholly consistent the version of events that Tiffany gave to law enforcement when this happened as discussed below.

At trial, the State elicited the following testimony from its witnesses:

David Watson, a special investigator with the Ninth Circuit Solicitor's Office, testified. At the time J.H. was killed, he was a detective with the North Charleston Police Department. He was dispatched to an area near a Tire Kingdom in North Charleston at approximately 11:15- 11:20pm on June 8, 2008. This area was on the corner of Ashley Phosphate and Dorchester Road. There is an "infamous" Rock-n-Roll McDonald's restaurant on the corner. When he arrived, he saw the victim on the ground. ROA 345. This witness identified a number of photographs that were admitted into evidence.

Kevin King also testified for the State. He was a friend of J.H.'s from the neighborhood. ROA 350. They lived in Forest Hills neighborhood off Dorchester Road. ROA 351. On the night of the shooting J.H. came by King's house with another friend, and they decided to hang out. ROA 352. J.H.'s friend was "Brandon." ROA 353. They went back to a house right behind the Rock-n-Roll McDonald's. They hung out and "had a beer or two." ROA 353. Present were J.H., King, and another male.

Bored, they decided to walk around the neighborhood. ROA 353. While they were walking, a female drove into the neighborhood. The young men waved her down

and she pulled up to them. They asked her what she was doing, and she said "Nothing with ya'll" and drove away. ROA 354. They walked back to the house. King testified this happened around 7:30 or 8:00pm. Back at the house, they sat in the backyard. They heard a loud horn. Brandon and the "other guy" went to the front of the house. King and J.H. stayed in the backyard. ROA 355. Brandon then came to the back yard and said "Hey, this girl wants to talk to you" referring to J.H. ROA 355. According to King, the girl asked them their names and they lied to her about them. ROA 355. He said they stood there talking for at least 30 to 45 minutes. ROA 355. King testified that she said she had a friend from the neighborhood who knew J.H. and wanted to meet him at the Rock-n-Roll McDonald's. While they were talking, she spoke on the cell phone. King testified he put his ear to the phone and heard a guy's voice. ROA 356.

King testified that J.H. was hesitant to go, but that eventually he went. King got into the backseat. He said he got into the car because J.H. was "his friend." ROA 357. She drove to the McDonald's, drove around it one time, and then pulled into a Publix parking lot. There was a delivery truck between the buildings, so she drove up to the wood line and backed in. ROA 357. There were four of them in the car—Tiffany, J.H. in the passenger seat, King, and then Tiffany's older, disabled sister next to King. ROA 358.

King testified that something did not seem right to him, and he wanted to get out of the car. As he was doing so, Sean came running up to the car with a gun and

put it into King's stomach. King pushed him down and then ran. ROA 359. He ran between the buildings where the delivery truck was parked.

King testified that he knew Sean; that they grew up together and attended school together. ROA 360. As King ran, he continued to hear shots. ROA 360. He then took off through the woods behind the Publix because he knew the area. He called his dad to come and pick him up. ROA 361.

Later that morning, detectives got in touch with King and they told him that he needed to speak to them. ROA 362.

King described that Sean and J.H. used to be friends but that they had a fight over shoes. ROA 363. This argument happened two or three years before the shooting, but apparently they held grudges. The two of them "fought a lot." ROA 364. J.H. got tired of it and hit Sean with a bat. ROA 364. King's testimony was conflicting as to the seriousness of their problems. He testified that Sean had screamed, in connection with the bat incident, that he would kill J.H. But then he stated there were other incidents, but they were not "too serious." ROA 364.

King admitted that he did not run into Publix to seek help for his friend. He testified, implausibly, that he tried to call 911 on his phone while he was in the woods, but that because he had a long distance phone, it would not call 911.

David Hughey also testified for the state. At the time of his testimony, he was employed by the U.S. Army. He lived down the street from Brandon and was friends with J.H. That night they were hanging out at Brandon's house. They were drinking and talking. ROA 377. While they were hanging out, Tiffany pulled up in her car.

Hughey knew her before that night because they attended middle school together. ROA 378. They asked her what she was doing, and she said "nothing." Then she pulled off. ROA 379. After that, they returned to Brandon's house, and drank some more. According to Hughey, Tiffany then returned to the house. Hughey said that she was "trying to find out who Jessie was." ROA 381. She talked on her cell phone. Hughey testified that he thought she already knew who J.H. and Kevin were. ROA 382. Hughey testified that she said that a girl wanted to meet J.H. ROA 383. J.H., King and Tiffany, along with her sister, drove away. ROA 383. After they left, Hughey stayed at the house with Brandon for another 10 or 15 minutes, and then left. ROA 384.

Later that night, Brandon called Hughey and told him they needed to go to McDonald's to look for J.H. They rode their bikes there. There were police on the scene, so they went back home. Brandon spoke to the police. ROA 385.

Hughey admitted on cross-examination that he knew "a little bit" about the history between Sean and J.H. ROA 387. He never saw them fight. ROA 388. When he and Brandon went back up to the Publix area, Hughey took his gun. ROA 389. After encountering the police and not being searched for weapon, he rode his bike and then threw the gun into a ditch to get rid of it. ROA 390.

Brandon also testified for the State. ROA 391. He lived in the area behind the Rock-n-Roll McDonald's. Generally, Brandon corroborated King and Hughey's accounts. He stated that Kevin and J.H. were "hollering" at Tiffany and that she drove off. ROA 393. They asked her if she wanted to hang out with them, and she

said no. ROA 395. After she, her sister, King and J.H. went to Publix, Tiffany returned about 15 minutes and said that "something happened." They drove back up there together. They did not see anything. They drove to the McDonald's and Publix parking lots. ROA 397. Brandon testified that she was acting like she was scared but that "you could tell it was an act." ROA 398. Brandon testified that Tiffany brought him back to his house and then left. He then called Hughey and they biked up there to check on J.H. ROA 399. They saw the police there. Brandon tried to leave, but he was chased down by a police officer who found marijuana on him. ROA 399-400. The next day he found out that J.H. had been killed. ROA 400.

Brandon had prior convictions of assault and battery of a high and aggravated nature. He also suffers from an anoxic brain injury that causes memory loss and makes him "slower." ROA 401.

Brandon testified he knew both Sean and J.H. and knew that they did not like one another. He never saw them fight in public. He testified that he heard Sean talk about killing J.H. ROA 403.

Jessica Hans, another State's witness, worked for Publix Supermarkets. She testified that as she and another co-worker were standing outside, they heard several loud pops. She looked over to the Papa John's/ Tire Kingdom area and saw a person firing a gun. After the shot was fired, the person with the gun ran to the other side of Tire Kingdom and then disappeared behind a building. She estimated that about 30 seconds later, she saw a Jeep Cherokee speed off in another direction. ROA 416. She

and her co-worker then drove over to that area and found the victim on the ground. They called 911.

DeJuan Jenkins then testified for the State. He lived in Forest Oak, a neighborhood off Dorchester Road in Dorchester County. He testified that he had been with Sean Kammerer since 3 o'clock or 4 o'clock on the day that J.H. was killed. They had been at the mall; Jenkins had driven Sean's mother's car. Around 9 o'clock that evening, they returned back to Sean's house. He testified that around 10 o'clock, he and Sean went to the McDonald's. They parked in the Tire Kingdom parking lot. According to Jenkins, they were going to meet Sean's "girlfriend" there. Jenkins testified that once the "girlfriend" arrived, he observed Sean walk over to the car and open up the passenger door. As he did so, someone exited the car. Sean then pulled out a gun. The victim then exited the car and tried running away. Sean started shooting at him. After he shot him, Sean got back into the car and told Jenkins to take him to his brother's house. Instead, he took him home.

Jenkins testified that he did not see Sean with a gun prior to being in the Tire Kingdom parking lot. Kammerer disputes this, and claims that Jenkins gave him the gun that night. At trial, Jenkins denied he gave the gun to Kammerer. Jenkins acknowledged that he did not call the police. Later, he pleaded guilty to accessory after the fact of murder and received a youthful offender sentence. Jenkins testified that Tiffany Sanders had not been present at the scene when the murder occurred—"She been left since—since he first started shooting and she leave." Jenkins testified that he did not know of any problems between Sean and J.H. ROA 426.

Detective James Sturkie was employed with the City of North Charleston Police Department. He spoke to Tiffany Sanders at the police station, and he recounted their interview during the trial. Her statement was admitted into evidence without objection. ROA 443. Her statement said, which Kammerer's affidavit corroborates:

> Riding around with my sister, my parents called and said they was almost home. Rode to my neighborhood. Was riding through; seen Brandon, David, Jessie, and Kevin. I knew David and Brandon before.
>
> Sean calls and asks who I'm with, then asked me to bring Jessie up to Publix. Kevin, Jessie, my sister and I ride to Publix.
>
> Kevin and Jessie wanted to get out of the car, and as soon as they did Sean ran up to Kevin, pushed him and Jessie screamed "drive." And I took off and went to Brandon's house.
>
> Went to Brandon's house, got Brandon, went back up there to see if any—if they ducked in the woods. I had no knowledge of a gun until I heard the shot.
>
> After me and Brandon didn't see anyone, Brandon said, "All right you can take me home. "I dropped Brandon off and went home. Tried to call Sean, no answer.
>
> I had no knowledge of a gun being present to take a life. The only knowledge that I had was Sean wanting to fight Jessie because of Jessie beating Sean in the head with a baseball bat. I had—if I had known guns would have been involved, I would have kept Jessie and Kevin at Brandon's house.

ROA 443-44.

The newly discovered information presented in Sean Kammerer's affidavit is so critical to this case because the State conceded how weak its case was during the trial. The State clearly indicated they did not have any proof that Petitioner possessed any malice on the night this happened.

> MR. BELL: Well, Your Honor, I think that malice exists from the fact that the principle in this case has admitted and pled guilty to murder. So, malice does exist. She is here as a person that aided, abetted under the "hand of one, the hand of all." I don't know that we have to assume that she had malice, but that malice existed in the commission of the crime…It's up to the jury to decide whether that the murder was the probable or natural consequence of this fight that she—that she gave in her, you know, self-serving statement….
>
> And her part is either she was present or not present, thus accessory before the fact of murder or murder. The malice is certainly there. It's not necessarily her malice, but all it says is "malice." It doesn't say it has to be that person's malice, but that malice existed before somebody was killed.

The information contained in Sean Kammerer's affidavit is newly discovered evidence that proves that Petitioner is not guilty of murder.

In *Clark v. State*, 315 S.C. 385, 434 S.E.2d 266 (1993), this Court held that to obtain a new trial based on after discovered evidence, the party must show that the evidence:

(1) would probably change the result if a new trial is had;

(2) has been discovered since the trial;

(3) could not have been discovered before trial;

(4) is material to the issue of guilt or innocence; and

(5) is not merely cumulative or impeaching.

See also McCoy v. State, 401 S.C. 363, 737 S.E.2d 623 (2013); *Clark v. State*, 315 S.C. 385, 434 S.E.2d 266 (1993).

Additionally, the PCR Act provides that "[a]ny person who has been convicted of, or sentenced for, a crime and who claims . . . that there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or

sentence in the interest of justice" is entitled to seek post-conviction relief. *S.C. Code Ann.* § 17-27-20(A)(4) (2014).

The information contained in Kammerer's affidavit is after-discovered evidence that entitles Petitioner to a new trial. This information—that Tiffany Sanders was unaware of the existence of a gun, or that Kammerer had any intention of killing Jesse Ham prior to his actually doing so—would have changed the outcome of the trial since the State's entire theory of the case was that she did know about Kammerer's plans that night. But as Kammerer admits, not only was Petitioner unaware of his plans, but the gun was not even present at the scene until after Kammerer and Petitioner spoke that night. DeJuan Jenkins pulled out the gun and handed it to Kammerer once they arrived at the scene of the shooting. This information was discovered after trial, and could not have been discovered before trial by counsel because Sean Kammerer was pursuing his own legal remedies. This information is material to the issue of guilt or innocence because Petitioner's knowledge of the existence of the gun constitutes an element of the offense. And also, this information is not merely cumulative or impeaching since it is information that has not been revealed, in any manner, until now. Judge Goodstein erred when she found that this evidence did not constitute newly-discovered evidence, and she should have granted Petitioner a new trial. The South Carolina Court of Appeals' opinion upholding the trial court decision denying Petitioner a new trial is erroneous (and at least partially based on an inaccurate review of the lower court record). This Court should grant Petitioner's petition for a writ of certiorari.

CONCLUSION

This Court should grant the writ.

Respectfully submitted,

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October 19, 2020.

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CERTIFICATE OF SERVICE

Undersigned counsel hereby certifies that she has served a copy of this cert petition on Ben Limbaugh of the South Carolina Attorney General's Office by sending a copy via email and also by sending a copy by US Mail, 1st class, postage pre-paid, on this date, October 19, 2020 to:

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/s/ Elizabeth Franklin-Best

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