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State ex rel. Simmons v. Roper 112 S.W.3d 397 (Mo. 2003)

State *ex rel.* Simmons v. Roper
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I. Facts

Christopher Simmons ("Simmons") at the age of seventeen was sentenced to death for murder.[1] Due to the United States Supreme Court's opinion in *Stanford v. Kentucky*,[2] Simmons did not argue that his age constituted a bar to the imposition of the death penalty.[3] The Supreme Court ruled in *Stanford* that no national consensus existed that required a ban on the execution of those who were sixteen or seventeen years old at the time of their crimes.[4] The Supreme Court of Missouri affirmed Simmons's conviction and sentence of death and denied him postconviction relief.[5] On petition for a writ of habeas corpus, Simmons argued that a new national consensus had developed since *Stanford*.[6] Simmons argued that to execute him for a crime he committed while under the age of eighteen would constitute cruel and unusual punishment.[7]

II. Holding

The Supreme Court of Missouri held that waiver rules did not apply to preclude the petitioner's claim.[8] The court set aside Simmons's death sentence and "resentence[d] him to life imprisonment without eligibility for probation, parole, or release except by act of the Governor."[9] Further, the court held that the Eighth Amendment prohibits the execution of those defendants under the age of eighteen at the time their capital crimes were committed.[10]

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1. State *ex rel.* Simmons v. Roper, 112 S.W.3d 397, 399 (Mo. 2003) (en banc); *see* State v. Simmons, 944 S.W.2d 165, 170 (Mo. 1997) (stating that at trial the jury returned a verdict of guilty and a recommendation for a death sentence, which the judge imposed).
2. 492 U.S. 361 (1989).
3. *Simmons*, 112 S.W.3d at 399; *see* Stanford v. Kentucky, 492 U.S. 361, 380 (1989) (holding that the "imposition of capital punishment" on a defendant who murdered at sixteen or seventeen "does not offend the Eighth Amendment's prohibition against cruel and unusual punishment").
4. *Simmons*, 112 S.W.3d at 399 (citing *Stanford*, 492 U.S. at 380).
5. *Simmons*, 944 S.W.2d at 169.
6. *Simmons*, 112 S.W.3d at 399.
7. *Id.*
8. *Id.* at 400.
9. *Id.*
10. *Id.* at 399–400.

III. Analysis

A. Retroactive Application of the Death Penalty

Because Simmons did not argue an Eighth Amendment violation at the time of his trial, the State contended that the Supreme Court of Missouri should not address the substantive issue of whether the execution of those under the age of eighteen at the time they committed their crimes is prohibited by the Eighth and Fourteenth Amendments of the Constitution.[11] The court relied on the first exception to the rule of nonretroactivity expressed in *Teague v. Lane*[12] and rejected this argument.[13] The first exception applies to rules that place "certain kinds of primary, private individual conduct beyond the power of the criminal law-making power to proscribe."[14] Nine years after *Teague*, the United States Supreme Court in *Penry v. Lynaugh*[15] expanded the first exception of *Teague* to cover new rules that prohibit a certain class of punishment for a group of defendants because of their status or offense.[16] The Supreme Court of Missouri concluded that if the Eighth Amendment prohibits the execution of persons under eighteen at the time of their offense "regardless of the procedures followed . . . such a rule would . . . fall under the first exception to nonretroactivity under *Teague* because it would deprive the state of the power to impose the punishment of death on such a person."[17] The court concluded that such a rule would be applicable to defendants in Simmons's position— those whose cases are on collateral review— and that the usual waiver rules would not be applicable.[18]

B. National Consensus Against the Execution of Juveniles and the Mentally Retarded

The Supreme Court of Missouri began its analysis of whether a national consensus had formed in opposition to the juvenile death penalty by examining

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11. *Id.* at 400.

12. 489 U.S. 288 (1989).

13. *Simmons*, 112 S.W.3d at 400–01; *see* Teague v. Lane, 489 U.S. 288, 311 (1989) (holding that new criminal procedural rules, which are not based on prior precedent, do not apply to defendants who have received final judgments unless the rule falls within two narrow exceptions).

14. *Teague*, 489 U.S. at 311 (quoting Mackey v. United States, 401 U.S. 667, 692 (1971) (Harlan, J., concurring in part, dissenting in part)).

15. 492 U.S. 302 (1998).

16. Penry v. Lynaugh, 492 U.S. 302, 330 (1998).

17. *Simmons*, 112 S.W.3d at 400–01.

18. *Id.* at 400. The court also noted that the mentally retarded petitioner in Atkins v. Virginia, 536 U.S. 304, 321 (2002), triggered retroactive protection under the first substantive *Teague* exception. *Id.* The first substantive *Teague* exception applied to Atkins because the Constitution " 'places a substantive restriction on the State's power to take the life' of a mentally retarded offender." *Id.* (quoting *Atkins*, 536 U.S. at 321).

Supreme Court "cases addressing the execution of juveniles and of the mentally retarded."[19]

1. *Death Penalty and Juveniles*

a. Thompson v. Oklahoma

The Supreme Court in *Thompson v. Oklahoma*[20] held that the Eighth and the Fourteenth Amendments prohibit the execution of defendants who were fifteen years old or younger "at the time of the offense."[21] Writing the principal opinion, Justice Stevens explained that judges should determine what constitutes cruel and unusual punishment while being " 'guided by the evolving standards of decency that mark the progress of a maturing society.' "[22] To determine what the current standards of decency are, *Thompson* explored the following factors: (1) relevant legislative actions; (2) evidence of how juries viewed the imposition of the death penalty; (3) views of national and international organizations; and (4) the Court's independent analysis of the "propriety of such executions."[23]

Exploring these factors more fully, the *Thompson* Court recognized that no legislature had adopted a statute that clearly permitted the execution of those under the age of sixteen.[24] The Court found that juries rarely imposed the death penalty on those under the age of sixteen, and in the five times between 1982 and 1986 when juries did impose death sentences on defendants under the age of fifteen, those offenders received sentences that were " 'cruel and unusual in the same way that being struck by lightning is cruel and unusual.' "[25] As part of the Court's discussion of legislation, the Court examined the views of other nations, national religious groups, and social and professional groups and found that there existed a consensus against such executions.[26] Under the Court's independent analysis, the Justices considered juvenile culpability and the purposes of the death penalty— deterrence and retribution.[27] The Court concluded that because so few juveniles fifteen years old or younger were executed, applying a prohibition on

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19. *Id.*

20. 487 U.S. 815 (1988).

21. Thompson v. Oklahoma, 487 U.S. 815, 838 (1988).

22. *Simmons*, 112 S.W.3d at 401 (quoting *Thompson*, 487 U.S. at 821) (internal quotation marks omitted).

23. *Id.* The Supreme Court of Missouri erroneously listed a factor *Thompson* relied on to determine a standard of decency as "evidence of how juries viewed the propriety of execution of the mentally retarded." *Id.* Nowhere in *Thompson* does the court discuss the execution of the mentally retarded. The court likely meant that standards of evolving decency should take into account evidence of how juries view the execution of those under sixteen years of age.

24. *Id.* at 401–02 (citing *Thompson*, 487 U.S. at 829).

25. *Id.* at 402 (quoting *Thompson*, 487 U.S. at 832–33).

26. *Id.*

27. *Id.* at 402.

the execution of those under sixteen would not jeopardize the death penalty's deterrent value.[28] Taking these factors and evidence into consideration, the Court concluded that the Eighth and Fourteenth Amendments prohibited the execution of defendants under the age of sixteen at the time their crimes were committed and that the execution of that class of defendants constituted cruel and unusual punishment because a national consensus had emerged to this effect.[29]

b. Stanford v. Kentucky

The Court decided *Stanford v Kentucky* the year after it decided *Thompson*.[30] In *Stanford*, Justice Scalia wrote the principal opinion and held that the Eighth Amendment did not prohibit the execution of those who committed crimes while they were sixteen or seventeen years old.[31] Agreeing "that what constitutes cruel and unusual punishment must be determined" by current standards, Justice Scalia determined that "current standards are almost entirely to be determined by reference to 'statutes passed by society's elected representatives,' and specifically by state legislatures."[32] Scalia noted that of those states that permitted the death penalty, the majority of those states allowed execution of sixteen- or seventeen-year-olds.[33]

"Although *Stanford* recognized that juries sentence substantially fewer juveniles than adults to death," the Court held that this did not provide a reason entirely to prohibit death sentences of those under eighteen.[34] Additionally, although only one year earlier in *Thompson* the Court examined views of social, religious and professional groups, as well as the opinions of other nations, *Stanford* stated that the views of national organizations rested on " 'uncertain foundations' " and that international opinions were irrelevant in determining whether a national consensus existed.[35] Having so limited the factors to consider, the Court found that there had not yet developed a national consensus against the execution of defendants who were sixteen or seventeen years old at the time they committed their offenses.[36]

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28. *Thompson*, 487 U.S. at 837.
29. *Simmons*, 112 S.W.3d at 402.
30. *Id.*; *see Stanford*, 492 U.S. at 361 (stating the case was decided in 1989).
31. *Simmons*, 112 S.W.3d at 402 (citing *Stanford*, 492 U.S. at 370–77).
32. *Id.* at 402–03 (quoting *Stanford*, 492 U.S. at 370).
33. *Id.* at 403 (citing *Stanford*, 492 U.S. at 370).
34. *Id.* (citing *Stanford*, 492 U.S. at 370).
35. *Id.* (quoting *Stanford*, 492 U.S. at 369 n.1, 377).
36. *Id.* (citing *Stanford*, 492 U.S. at 370–72).

2. *Death Penalty and the Mentally Retarded*

a. Penry v. Lynaugh

The same day that *Stanford* was decided, the Court in *Penry* similarly declared that there was no national consensus against the "imposition of the death penalty on the mentally retarded."[37] The Court again stated that the concept of "what constitutes cruel and unusual punishment is not a 'static' concept."[38] As in *Stanford*, the Court looked at state statutes and determined that they were the best measure of how society views a particular issue.[39] Additionally, the Court looked at data with respect to sentencing juries.[40]

b. Atkins v. Virginia

In 2002, the Court in *Atkins v. Virginia*[41] re-examined the issue of executing a mentally retarded defendant.[42] The Court once again stated the need to examine the issue as a fluid process of evolving determinations "of what constitutes cruel and unusual punishment."[43] The Supreme Court of Missouri found that the Court's analysis in *Atkins* more closely resembled *Thompson* than *Stanford*.[44] Following the relevant factors from *Atkins*, as the Supreme Court of Missouri understood them, the court examined the following: (1) "the objective evidence of legislative intent;" (2) "the frequency with which the death penalty was applied" to mentally retarded defendants; (3) the opinions of religious, professional and social organizations as well as the opinions of other nations; and (4) the evolving standards of decency.[45] The Court stated that since *Penry* had been decided thirteen years earlier, fourteen additional states adopted legislation barring the death penalty for the mentally retarded.[46] The Court noted that in the

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37. *Simmons*, 112 S.W.3d at 403; *see Penry*, 492 U.S. at 340 (holding that the Eighth Amendment does not preclude execution of a "mentally retarded person simply by virtue of his or her mental retardation alone").

38. *Simmons*, 112 S.W.3d at 403 (citing *Penry*, 492 U.S. at 330).

39. *Id.* The Court in *Penry* noted that only two states and the federal government prohibited the execution of the mentally retarded. *Id.* When those two states were added to the fourteen States that completely prohibited the imposition of the death penalty, the Court concluded there was still insufficient evidence to declare that a national consensus had been formed. *Id.* at 403–04.

40. *Id.* at 403–04. The Court noted that Penry was not able to "provide evidence that juries chose not to sentence mentally retarded defendants to death." *Id.* at 404. Additionally, the Court noted that it was unable to conclude that all mentally retarded defendants were not capable of acting "with the level of culpability associated with the death penalty." *Id.*

41. 536 U.S. 304 (2002).

42. Atkins v. Virginia, 536 U.S. 304, 306–07 (2002).

43. *Simmons*, 112 S.W.3d at 404 (citing *Atkins*, 536 U.S. at 312).

44. *Id.*

45. *Id.* (citing *Atkins*, 536 U.S. at 313–16).

46. *Id.* In addition, the Court noted that one state had passed such a resolution only to have

states that still allowed the execution of the mentally retarded, only five such people had been executed since *Penry*.[47] The Court noted that several mental health organizations, the nation's religious communities, and the world community were largely against "the execution of the mentally retarded."[48] The Court, in its independent analysis, found that neither retribution nor the need for deterrence was furthered by allowing the execution of the mentally retarded.[49] Rejecting the assertion that the effect of mental retardation should only be considered as mitigating evidence, the Court stated that the fact that these defendants are mentally retarded makes them less able to assist effectively their counsel in the preparation of their defenses.[50] The Court concluded that " 'death is not a suitable punishment for a mentally retarded criminal.' "[51]

C. *Application of Precedents to the Execution of Juveniles Today*

The Supreme Court of Missouri concluded that because *Atkins* reaffirmed that the standard of decency should be governed by present-day principles, it had the authority and the obligation to determine Simmons's case in light of current standards of decency.[52] The dissent agreed with the State's argument that the court was bound by the United States Supreme Court's decision in *Stanford* until the Supreme Court revisits the issue.[53] The Supreme Court of Missouri utilized the *Atkins* approach to determine if a new national consensus had "developed against the application of the juvenile death penalty since *Stanford*."[54]

The court examined the developments that led to a national consensus against the execution of the mentally retarded in the years between *Penry* and *Atkins*.[55] Noting that the Supreme Court in *Atkins* relied heavily on the fact that

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it be rejected by the Governor, while in two other states, barring the execution of the mentally retarded had been considered by at least one house of the legislature. *Id.*

47. *Id.* at 405. The Court related that "[t]he practice . . . has become truly unusual, and it is fair to say that a national consensus has developed against it." *Id.* (quoting *Atkins*, 536 U.S. at 316).

48. *Id.* The Court cited polling data to support its assertion that the consensus in the United States was against the practice of executing the mentally retarded. *Id.*

49. *Simmons*, 112 S.W.3d at 406 (citing *Atkins*, 536 U.S. at 319).

50. *Id.* (citing *Atkins*, 536 U.S. at 320–21).

51. *Id.* (quoting *Atkins*, 536 U.S. at 321).

52. *Id.* The court argued that the Court's decision in *Stanford* does not bind it because the "fundamental premises" on which all precedent lies is that the courts have an interest in protecting the Eighth Amendment in a "flexible and dynamic manner." *Id.* at 406–07 (citing *Stanford*, 492 U.S. at 369).

53. *Id.* at 406. The dissent noted that *Stanford* is direct and controlling Supreme Court precedent. *Id.* at 419 (Price, J., dissenting). The dissent stated that the Missouri court is bound by the *Stanford* decision and concluded that the court lacked the authority to adjudicate such issues when there is such direct precedent. *Id.* The dissent did not address the *Teague* issue.

54. *Id.* at 407.

55. *Simmons*, 112 S.W.3d at 408.

in the years between *Penry* and *Atkins* sixteen states had instituted bans on the execution of the mentally retarded and that the consistency of the trend continued in that direction, the Supreme Court of Missouri examined evidence and concluded that there was the same consistency of change in opposition to the juvenile death penalty.[56] The court noted that at the time of *Stanford* eleven states barred the death penalty for juveniles under eighteen at the time of their offense, but currently, a total of sixteen states, federal civilian courts, and military courts require the minimum age of eighteen before imposition of death.[57] The court stated that, since *Stanford*, no state has lowered the age for execution below the age of eighteen, even though *Stanford* does not preclude such a practice and many states have considered legislation to raise the minimum age of execution.[58]

The court noted that, of the states that permit the imposition of the death penalty on juvenile offenders, only six have executed a juvenile offender since *Stanford* was decided.[59] Of the six states that executed a juvenile, only three did so in the last ten years.[60] The court stated that only twenty-two of the 366 recorded executions of juveniles in this country occurred between 1973 and 2003.[61] When juries have imposed the death penalty on juveniles since the reinstatement of the death penalty in 1976, the court stated that those sentences have routinely been reversed for a variety of reasons.[62] Finally, the court noted that because of the small number of executions of juveniles, the legislatures in states with a juvenile death penalty may not have had a reason to bar it.[63]

When examining the national and international consensuses against the imposition of the juvenile death penalty, the court noted that, since *Stanford*, additional professional and religious groups have voiced their opposition to such punishment.[64] Although *Stanford* did not rely on opposition from social, political and religious groups, the Court's more recent decision in *Atkins* shifted back to relying on such evidence to determine if a national consensus existed to prohibit

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56. *Id.*; *see Atkins*, 536 U.S. at 315–16 (recognizing the importance of the consistency of the direction of the change with respect to how the death penalty as it relates to the mentally retarded is viewed).

57. *Simmons*, 112 S.W.3d at 408. The court noted that sixteen is "only two fewer than the eighteen states" that prohibited the execution of a mentally retarded defendant in *Atkins*. *Id.*

58. *Id.* at 408–09.

59. *Id.* at 409.

60. *Id.*

61. *Id.* The court related that of those twenty-two executions of juvenile defendants, 81% occurred in Texas, Oklahoma, and Virginia. *Id.* The court stated that since the death penalty was reinstated, more mentally retarded people have been executed than juveniles. *Id.* at 410.

62. *Id.* at 409.

63. *Simmons*, 112 S.W.3d at 410.

64. *Id.* The court provided an extended list of those organizations with anti-juvenile death penalty views. *Id.* at 410–11.

the execution of the mentally retarded.[65] The Supreme Court of Missouri found strong opposition to the juvenile death penalty within both the United States and the international communities.[66]

Upon conclusion of its own independent examination, the court found that "neither retribution nor deterrence provides an effective rationale for the imposition of the juvenile death penalty, and the risk of wrongful execution of juveniles is enhanced for reasons similar to that set out in *Atkins* in regard to the mentally retarded."[67] The court acknowledged the scientific and psychological studies that the defense presented to assert that maturity is not fully reached until continued growth stops, but failed to address these studies concluding that the Supreme Court already recognized the "lesser culpability and developing nature of the adolescent mind in its 1988 decision in *Thompson*."[68] The Supreme Court of Missouri concluded that a seventeen-year-old and a fifteen-year-old are both adolescents and, therefore, the *Thompson* rationale should apply.[69] Similarly, because the juvenile death penalty is applied so infrequently, the court concluded that the deterrence function of the death penalty has little impact on juveniles.[70]

Finally, the court noted that the risk of wrongful execution is greater "with younger offenders, who have had less time to develop ties to the community, less time to perform mitigating good works, and less time to develop a stable work history, than is true of adult offenders, and who are far more likely than adults to waive their rights and to give false confessions."[71] The court noted that, in Missouri, a juvenile defendant can use age as a mitigating circumstance; however, as was the case with Simmons, age can also be used by the prosecution.[72] In Simmons's case, to give the jury more incentive to impose the death penalty, the prosecution used age to suggest younger offenders feel greater immorality and pose an added future danger to society.[73]

The concurrence in *Simmons* stated that although it agreed with the majority's result, "the use of chronological age in making" judgments for Eighth

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65. *Id.* at 411; *see Atkins*, 536 U.S. at 316 n.21 (citing evidence from social, political and religious groups of a national consensus against execution of the mentally retarded).

66. *Simmons*, 112 S.W.3d at 411. The court noted that other international organizations and treaties such as the United Nations Convention on the Rights of the Child strictly oppose the execution of juveniles. *Id.*

67. *Id.*

68. *Id.* The court in *Thompson* stated that "[i]nexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult." *Id.* (quoting *Thompson*, 487 U.S. at 835).

69. *Id.*

70. *Id.* at 413.

71. *Id.*

72. *Simmons*, 112 S.W.3d at 413.

73. *Id.*

Amendment purposes "invites the drawing of a bright line as to the age at which a murder defendant may be subject to the death penalty."[74] The concurrence stated that a better test to utilize would involve presumptions.[75] A sixteen- or seventeen-year-old would be "presumed not to have the capacity to be fully responsible and therefore" ineligible for the death penalty.[76] The State, according to the concurrence, should shoulder the burden of overcoming that presumption, which would leave to the jury, rather than the courts, the determination of the eligibility of the defendant for the death penalty.[77]

IV. Application in Virginia

In Virginia juvenile cases, counsel should count Missouri as an additional state that has judicially abolished the juvenile death penalty. Informing the court of other states that have abolished the juvenile death penalty adds to the credibility of the defendant's Eighth Amendment argument that sentencing a juvenile to death is cruel and unusual punishment. In addition, *Simmons* adds to the mounting evidence of a changing national consensus.

In order for a defense team to take advantage of a new Supreme Court case, it must fall within one of the two *Teague* exceptions. If *Atkins* is an exception to *Teague* because it " 'places a substantive restriction on the state's power to take the life' of a mentally retarded offender," then it is analytically similar to the *Enmund v. Florida*[78] and *Tison v. Arizona*[79] factors or pre-sixteen juvenality because mental retardation would act as a gateway to the imposition of the death penalty.[80] The State has the burden of proving these gateway elements before the defendant is death eligible. If *Simmons* survives the Supreme Court, the same will

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74. *Id.* at 415 (Wolff, J., concurring).

75. *Id.* at 416–17 (Wolff, J., concurring).

76. *Id.*

77. *Id.* at 417 (Wolff, J., concurring). The concurrence stated that "[i]ndividualized treatment . . . in juvenile death penalty cases would preserve the capital sentencing option while eliminating or diminishing the comparative injustice problem associated with line-drawing governed solely according to a defendant's age." *Id.* at 418 (Wolff, J., concurring).

78. 458 U.S. 782 (1982).

79. 481 U.S. 137 (1987).

80. *Simmons*, 112 S.W.3d at 400 (quoting *Atkins*, 536 U.S. at 321); *see* Enmund v. Florida, 458 U.S. 782, 801 (1982) (holding that a sentence of death was excessive and in violation of the Eighth Amendment when imposed on an accomplice to murder); Tison v. Arizona, 481 U.S. 137, 156–58 (1987) (holding that if the individualized inquiry into the defendant's culpability reveals major participation in the felony and reckless indifference to human life, the culpability requirement of *Enmund* is sufficient to warrant imposition of the death penalty). The *Enmund* and *Tison* factors act as a gateway in the federal system in order to reach jury consideration of a death sentence. *See* 18 U.S.C. § 3591(a) (2000) (requiring the defendant to have acted intentionally in order to be death eligible); 21 U.S.C. § 848(n) (2000) (listing the aggravating factors that make a defendant death eligible). *See generally* Kristen F. Grunewald, Case Note, 15 CAP. DEF. J. 117 (2002) (analyzing Atkins v. Virginia, 122 S. Ct. 2242 (2002)).

be true of pre-eighteen juvenality. In Virginia, the Commonwealth would be forced to prove that the defendant committed a death-eligible crime while over the age of eighteen. If the Commonwealth failed to establish this fact, then the defendant could not be sentenced to death.

V. Conclusion

The Supreme Court of Missouri found that the national consensus had shifted since the Supreme Court considered *Stanford*, and that the imposition of the death penalty on defendants who were under the age of eighteen when they committed their crimes is unconstitutional.[81] Thus, according to the Supreme Court of Missouri, the Eighth Amendment's prohibition against cruel and unusual punishment prohibits the juvenile death penalty.[82] Despite the controlling Supreme Court precedent, the court concluded that because cruel and unusual punishment is measured by evolving standards of decency, the shift in the national consensus justifies the court's ruling.[83]

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81. *Simmons*, 112 S.W.3d at 399.
82. *Id.* at 400.
83. *Id.* at 399.

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