

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Plaintiff-Appellee,

v.

BRANDON MOORE,

Defendant-Appellant.

CASE NO. 2014-0120

ON DISCRETIONARY APPEAL
FROM THE MAHONING
COUNTY COURT OF APPEAL,
SEVENTH APPELLATE
DISTRICT, CASE NO. 08MA20

**BRIEF OF AMICI CURIAE JAMES M. PETRO, NANCY HARDIN ROGERS, AND
EVELYN LUNDBERG STRATTON IN SUPPORT OF APPELLANT BRANDON
MOORE**

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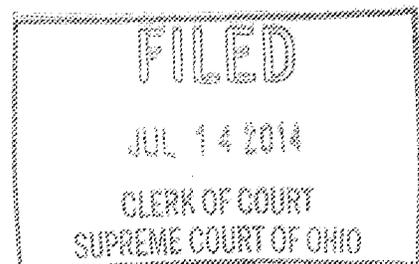


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INTEREST OF AMICI CURIAE

Amici are former public officials in the State of Ohio. As a former judge, prosecutor, and/or law enforcement official, they are leaders in the community and have extensive personal experience with the criminal justice system in Ohio.

James M. Petro was the Attorney General of Ohio from 2003 to 2007. Despite his tough-on-crime reputation, Mr. Petro was the first attorney general in the country to work with the Innocence Project to help free a wrongly convicted man. Mr. Petro advocated on behalf of an innocent man who had been wrongly convicted of murder and sentenced to life imprisonment. Mr. Petro is the co-author of "False Justice: Eight Myths that Convict the Innocent." More recently, Mr. Petro served as the Chancellor of the Board of Regents of the University System of Ohio.

Nancy Hardin Rogers was the Attorney General of Ohio from 2008 to 2009. Ms. Rogers also served on the Board of Directors of the Legal Services Corporation. She was the President of the Association of American Law Schools and a representative in the ABA House of Delegates. Ms. Rogers is a former dean of the Moritz College of Law at the Ohio State University. She is currently the Emeritus Michael E. Moritz Chair in Alternative Dispute Resolution at the Moritz College of Law.

Evelyn Lundberg Stratton is a former Justice on the Supreme Court of Ohio. Throughout her career, Ms. Stratton has advocated for criminal justice reform, especially in the treatment of juveniles, veterans, and those suffering from mental illness. As a Justice, Ms. Stratton chaired the Court's Advisory Committee on Mental Illness and the Courts. She currently co-chairs the Attorney General's Task Force on Criminal Justice and Mental Illness. Ms. Stratton is a member of the Franklin University Criminal Justice Advisory Board. She is a member of the Board of Trustees of the Ohio

Justice Alliance for Community Corrections. Ms. Stratton is also the co-chair of the Ohio Department of Youth Services' Ohio Communities 4 Kids program, which supports community-based and school-based diversion programs to help keep juveniles out of the criminal justice system.

Amici's experiences in the Ohio justice system provide them with a unique perspective on the administration of justice in criminal cases involving juvenile offenders. In particular, amici have been able to witness firsthand how abstract sentencing principles—principles designed and implemented primarily for adult offenders—fail when applied to the complex facts and real-life circumstances of juvenile offenders. Amici unite in this brief in a shared commitment to the universal belief that juveniles are different than adults and should receive sentences that reflect and appreciate those differences.

Amici's core argument—that juveniles are different and should be treated accordingly when sentenced for offenses—is supported by a broad spectrum of society, including opinion leaders outside of the legal context. Indeed, to find otherwise and to suggest that juveniles are equal to adults undermines the social constructs at the very core of American society.

INTRODUCTION

It is a universally recognized and uncontroversial fact that juveniles are different from adults. Because of the biological, psychological, and emotional differences, juveniles are less culpable for delinquent conduct and—at the same time—more amenable to reformation and rehabilitation. Sentencing juveniles, like Brandon Moore, to life in prison without the possibility of parole, deprives them of the opportunity to reform as they develop and mature into adults. Amici respectfully urge this Court to

reject Brandon's sentence. Juveniles sentenced to prison terms that will likely exceed the length of their natural lives must be afforded a meaningful review of their sentences and an opportunity to obtain release.

STATEMENT OF THE CASE

In 2002, Brandon Moore was convicted of non-homicide offenses that he committed when he was fifteen years old. *State v. Moore*, 161 Ohio App.3d 778, 2005-Ohio-3311, 832 N.E.2d 85, ¶¶ 12-13 (7th Dist.). He was initially sentenced to 141 years in prison. *Id.* at ¶ 15. After successfully challenging one count of his conviction and the calculation of his sentence, Brandon was resentenced to 112 years in prison. *Id.* at ¶ 115. Brandon's sentence was subsequently vacated, but he was again resentenced to 112 years in prison in early 2008. *State v. Moore*, 7th Dist. Mahoning No. 08 MA 20, 2009-Ohio-1505, ¶ 3.

At Brandon's request, the trial court issued a nunc pro tunc judgment on April 20, 2010. See *State v. Moore*, Mahoning C.P. No. 02 CR 525 (Apr. 20, 2010). Less than one month later, on May 17, 2010, the United States Supreme Court held that sentencing a juvenile to a prison term without "any chance to later demonstrate that he is fit to rejoin society based solely on a nonhomicide crime that he committed while he was a child in the eyes of the law" violates the Eighth Amendment. *Graham v. Florida*, 560 U.S. 48, 79, 130 S. Ct. 2011, 176 L.Ed.2d 825 (2010). On that same day, Brandon challenged his sentence as a violation of his Eighth Amendment rights. That appeal was denied on procedural grounds, and Brandon subsequently moved for delayed reconsideration, arguing that *Graham* merited reconsideration under Appellate Rules 26(A) and 14(B). The Seventh Appellate District denied his motion in a split decision. Brandon then sought the jurisdiction of this court on January 23, 2014.

ARGUMENT

Proposition of Law: The Eighth Amendment prohibits sentencing a juvenile to a term-of-years sentence that precludes any possibility of release during the juvenile's life expectancy.

It is a basic tenet of the human condition that juveniles are different than adults.

See, e.g., Kim Taylor-Thompson, *States of Mind/States of Development*, 14.1 Stan. L. & Pol'y Rev. 143, 153 (2003) (“[A]dolescents are not simply miniature adults.”). Indeed, this Court stated, eight years ago, that “juveniles are not adults.” *In re D.S.*, 111 Ohio St. 3d 361, 2006-Ohio-5851, 856 N.E.2d 921, ¶ 8. Juveniles are universally recognized as lacking maturity, having an underdeveloped sense of responsibility, and being more susceptible to external influences. By the same token, one of the wonders of youth is that it is, in fact, fleeting, and juveniles ultimately develop into mature, productive, and adult members of a functioning society. See David E. Arredondo, M.D., *Child Development, Children's Mental Health and the Juvenile Justice System: Principles for Effective Decision-Making*, 14.1 Stan. L. & Pol'y Rev. 13, 14 (2003) (“Other than infancy, no stage in human development results in such rapid or dramatic change as adolescence.”). However, while they are still in that developmental stage—and before the metaphorical caterpillar morphs into a butterfly—they must be recognized as vulnerable, malleable members of society and, more importantly, treated accordingly.

This respect for the unique nature of adolescence must extend to juveniles who are sentenced to de facto life sentences: prison terms longer than the natural human life and without the possibility of parole. Juveniles, like Brandon Moore, who receive such sentences must be afforded a meaningful and realistic opportunity to obtain release. The alternative—subjecting individuals to harsh punishment for decades as a

result of acts committed during a period of rapid growth, maturation, and development—undermines society’s faith in the criminal justice system.

A. JUVENILES HAVE HISTORICALLY, UNIVERSALLY, AND SCIENTIFICALLY BEEN RECOGNIZED AS DISTINCT FROM ADULTS.

Dating as far back as ancient Greece, the youthful characteristics of juveniles have been recognized and, at times, celebrated:

Young men have strong passions, and tend to gratify them indiscriminately They are hot-tempered, and quick-tempered, and apt to give way to their anger; bad temper often gets the better of them, for owing to their love of honour they cannot bear being slighted, and are indignant if they imagine themselves unfairly treated. . . . They trust others readily, because they have not yet often been cheated. . . . All their mistakes are in the direction of doing things excessively and vehemently. . . .

Aristotle, *Rhetoric*, Book II, Part 12, ¶ 2. Indeed, parents and society at large instinctively recognize the special characteristics associated with youth. See *Roper v. Simmons*, 543 U.S. 551, 569, 125 S. Ct. 1183, 161 L.Ed.2d (2005); see also *In re C.P.*, 131 Ohio St. 3d 513, 2012-Ohio-1446, 967 N.E.2d 729, ¶ 39 (“Ohio has developed a system for juveniles that assumes that children are not as culpable for their acts as adults. The court’s decision in *Graham* supports this self-evident principle.”).

In the Supreme Court’s landmark *Roper* decision, Justice Kennedy, writing for the majority, laid out “[t]hree general differences between juveniles under 18 and adults [that] demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders.” *Roper* at 569. These differences are grounded not only in implicit societal understanding and parental instincts, but in biological and social science as well.

1. Lack of maturity and underdeveloped sense of responsibility

The first difference noted by Justice Kennedy was that juveniles often lack maturity and have an underdeveloped sense of responsibility. *Id.* “There is widespread agreement among developmental psychologists that the period between twelve and eighteen years of age is a time of very significant physical, cognitive, and emotional development.” David O. Bring, *Immaturity, Normative Competence, and Juvenile Transfer: How (Not) to Punish Minors for Major Crimes*, Essay, 82 Tex. L. Rev. 1556, 1571 (2004). And although some juveniles, particularly older adolescents, may have cognitive abilities comparable to adults, “they typically lack familiar forms of emotional and social maturity and control—they are less able to represent the future adequately, with the result that they are more impulsive and less risk averse.” *Id.* The areas of the brain governing “impulse control, planning, and foresight of consequences mature slowly over the course of adolescence and into early adulthood.” Elizabeth S. Scott,¹ “*Children are Different*”: *Constitutional Values and Justice Policy*, 11 Ohio St. J. Crim. L. 71, 87 (2013); see also *Graham v. Florida*, 560 U.S. 48, 68, 130 S. Ct. 2011, 176 L.Ed.2d 825 (2010) (citing American Medical Association brief). Likewise, the abilities to process information and to think abstractly “continue to develop throughout adolescence.” Taylor-Thompson, *States of Mind*, *supra*, 14.1 Stan. L. & Pol’y Rev. at 150.

¹ Elizabeth S. Scott is currently the Harold R. Medina Professor of Law at Columbia Law School. She previously taught at the University of Virginia, where she founded the Center for Children, Families and the Law. As a member of the John D. and Catherine T. MacArthur Foundation Research Network on Adolescent Development and Juvenile Justice from 1995 through 2006, Professor Scott researched adolescents in the juvenile justice system.

2. More susceptible to negative influences and peer pressure

The second difference between juveniles and adults noted in the *Roper* decision was that juveniles are more susceptible to negative influences and peer pressure than their adult counterparts. *Roper*, 543 U.S. at 569, 125 S. Ct. 1183, 161 L.Ed.2d 1. Anyone who has ever spent time in a middle school recognizes and understands the significant influence peers have on juveniles. See Elizabeth S. Scott & Laurence Steinberg, *Blaming Youth*, Essay, 81 Tex. L. Rev. 799, 820 (2003) (noting that adolescence is a time in which youth separate themselves from their parents and focus more on their peers). Indeed, “peer conformity is a powerful influence on adolescent behavior, and may lead teens to become involved in criminal activity to avoid social rejection.” Elizabeth S. Scott, *The Legal Construction of Adolescence*, 29 Hofstra L. Rev. 547, 591 (2000).

3. Character still in development

Finally, Justice Kennedy recognized that youth is, in fact, fleeting, and that juveniles’ personality traits are more transitory, malleable, and subject to change. *Roper* at 570; see also *C.P.*, 131 Ohio St. 3d 513, 2012-Ohio-1446, 967 N.E.2d 729, at ¶ 40 (“Not only are juveniles less culpable than adults, their bad acts are less likely to reveal an unredeemable corruptness.”). “Between the ages of twelve and seventeen, adolescents undergo a critical period of transition during which they experience rapid transformations in emotional, intellectual, physical, and social capacities.” Taylor-Thompson, *States of Mind*, *supra*, 14.1 Stan. L. & Pol’y Rev. at 152-53; see also Arredondo, *Child Development*, *supra*, 14.1 Stan. L. & Pol’y Rev. at 18 (“[M]odern psychology and psychiatry specifically dispute that a child or adolescent *has* a fully formed character.”). Furthermore, the “age-crime trajectory”—which demonstrates that

the aggregate level of criminal involvement begins at age 13 and increases until age 17, at which point there is sharp decline—bolsters *Roper's* assertion that juveniles are more likely to reform. Scott, “*Children are Different*”, *supra*, 11 Ohio St. J. Crim. L. at 87.

Indeed, “most juveniles are likely to desist from offending as they mature into adulthood—unless the justice system pushes them in the direction of a criminal career.”

Id. at 101; see also Brief of Council of Juvenile Correctional Administrators et al. as Amici Curiae in Support of Petitioners at 31, *Graham v. Florida*, 560 U.S. 48 (2003) (No. 09-7412) (noting that most juveniles “age-out” of reckless behavior).

4. Less capable of assessing risk

In addition to the three differences described by Justice Kennedy in *Roper*, it is well understood that juveniles are less risk-averse and give greater weight to benefits than to risks when making decisions. Scott & Steinberg, *Blaming Youth*, *supra*, 81 Tex. L. Rev. at 815. Indeed, indicators of risk-taking—including, *inter alia*, reckless driving, delinquent behavior, and substance abuse—“follow an inverted-U shaped pattern over development, with risky behavior generally higher in middle or late adolescence than in preadolescence or adulthood.” Laurence Steinberg et al., *Age Differences in Sensation Seeking and Impulsivity as Indexed by Behavior and Self-Report: Evidence for a Dual Systems Model*, 44 *Developmental Psychology* 1764, 1776 (2008). Impulsivity and sensation-seeking follow a similar trajectory as juveniles develop and mature. See Scott & Steinberg, *Blaming Youth*, *supra*, 81 Tex. L. Rev. at 815; see also Barry C. Feld, *The Youth Discount: Old Enough to Do the Crime, Too Young to Do the Time*, 11 Ohio St. J. Crim. L. 107, 117 (2013).

5. More difficulty foreseeing consequences of actions

Juveniles also have difficulty understanding the consequences of their actions, particularly long-term consequences, and are unable to anticipate harm that may be an unintended result of their conduct. Taylor-Thompson, *States of Mind, supra*, 14.1 Stan. L. & Pol’y Rev. at 144; *see also* Scott, “*Children are Different,*” *supra*, 11 Ohio St. J. Crim. L. at 87 (noting that youth are more inclined to focus on the immediate consequences of their conduct). Juveniles are also predisposed to more dramatic, extreme, and unpredictable emotional states than their adult counterparts. Taylor-Thompson, *States of Mind, supra*, 14.1 Stan. L. & Pol’y Rev. at 155. This predisposition to intense emotions and impulsivity is due, in part, to the fact that juveniles process emotionally charged decisions in the limbic system, the section of the brain that controls instinctive reactions. Arredondo, *Child Development, supra*, 14.1 Stan. L. & Pol’y Rev. at 15. Over time, juveniles’ self-management skills, long-term planning, judgment, decision-making skills, regulation of emotion, and evaluation of risk and reward mature. *See* Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 Am. Psychologist 1009, 1011-12 (2003).

Given these vast psychological, emotional, and social differences between juveniles and fully-developed adults—and, in particular, juveniles’ ability to develop and mature over time—it is evident that juveniles must be treated differently than adults when it comes to criminal sentencing. *See* Scott, “*Children are Different,*” *supra*, 11 Ohio St. J. Crim. L. at 78 (stating that juveniles “are a class of offenders who are entitled to protections when they face a sentence of [life without parole] that adults receive only when facing a death sentence”).

B. GIVEN JUVENILES' DISTINCT CHARACTERISTICS, IT WOULD BE AGAINST SOCIETAL STANDARDS TO SENTENCE THEM TO LIFE IMPRISONMENT WITHOUT A MEANINGFUL OPPORTUNITY TO OBTAIN RELEASE.

Juveniles who are sentenced to prison terms that will likely exceed the length of their natural lives must be afforded a meaningful opportunity for parole or release. This review must be provided, regardless of whether the terms of the sentence are mandatory or discretionary, or whether the sentence is defined as “life without parole” or is simply a long enough term that the youth will likely die in prison before he or she is released. To hold otherwise—and to effectively force juveniles to spend their entire lives behind prison walls—defies the universally recognized differences between juveniles and adults discussed in Section A.

1. No support on public protection grounds

Because juveniles continually evolve, develop, and mature, sentencing them to de facto life sentences without the opportunity for a meaningful review “cannot be justified on public protection grounds.” Scott, *“Children are Different,” supra*, 11 Ohio St. J. Crim. L. at 86. Indeed, as Justice Kennedy recognized in *Graham*:

To justify life without parole on the assumption that the juvenile offender forever will be a danger to society requires the sentencer to make a judgment that the juvenile is incorrigible. The characteristics of juveniles make that judgment questionable.

Graham, 560 U.S. at 72-73, 130 S. Ct. 2011, 176 L.Ed.2d 825. Given the universal recognition that juveniles are less mature, more prone to rash decisions, and—perhaps most importantly for these purposes—more likely to reform and rehabilitate, it is inappropriate to sentence them to indefinite, life-long prison terms. This is especially true given the fact that a juvenile’s sentence of life without parole will, on average, be longer and constitute a greater percentage of his or her life than an adult who receives

the same sentence. *Id.* at 70; see also Brief of Council of Juvenile Correctional Administrators et al. as Amici Curiae in Support of Petitioners at 29, *Graham v. Florida*, 560 U.S. 48 (2003) (No. 09-7412) (“For juveniles, a lifetime in prison has a greater and harsher significance than for adults.”). In other words, a juvenile’s sentence will be objectively and subjectively more severe, even though we as a society recognize and understand juveniles’ lack of maturity and increased proclivity to impulsivity. Such a sentence further undercuts the recognition that juveniles are malleable and subject to change. A life sentence implicitly tells the juvenile that he or she is not capable of growing into a productive member of society and may ultimately hinder his or her development. See Arredondo, *Child Development*, *supra*, 14.1 Stan. L. & Pol’y Rev. at 13; see also The Campaign for the Fair Sentencing of Youth, *Statement of Principles*, <http://fairsentencingofyouth.org/about/statement-of-principles/> (accessed July 14, 2014) (“Sentencing minors to life terms sends an unequivocal message to young people that they are beyond redemption.”).

2. Society’s duty to rehabilitate minors

We, as a society, have a duty to encourage juveniles to rehabilitate and reform their behavior. As part of that duty, our criminal justice system must provide youth sentenced to life terms in prison a meaningful opportunity to obtain release. See *Graham* at 73 (“A life without parole sentence improperly denies the juvenile offender a chance to demonstrate growth and maturity.”) This will not guarantee a juvenile’s release from prison; there may well be instances in which it is determined that a youth should in fact receive a life sentence. The key, however, is that such a determination is made following a careful review that considers the characteristics of the youth and the extent to which he or she has matured, developed, and reformed.

Providing juvenile defendants with a meaningful and realistic opportunity to obtain release is consistent with the other protections we provide minors. Youth of Brandon's age cannot drive a vehicle, vote, buy tickets to particular films, ingest alcohol or tobacco, serve in the armed forces, or make their own medical decisions, because they "are assumed to be unable to exercise the rights and privileges that adults enjoy." Scott, *The Legal Construction of Adolescence*, *supra*, 29 Hofstra L. Rev. at 547. Relatedly, juveniles are subject to curfew ordinances and a much more limited right of free speech because "it is assumed that they may be vulnerable to harmful effects." *Id.* at 552-53; *see also Ginsberg v. State of N.Y.*, 390 U.S. 629, 637, 88 S. Ct. 1274, 20 L.Ed.2d 195 (1968) (upholding state statute prohibiting sales of magazines containing nude photographs to youth because the law did not "invade[] the area of freedom of expression constitutionally secured to minors"). A review of life sentences to determine if release should be granted, therefore, is simply an extension of the other protections we already recognize that juveniles need.

3. Society's obligation to provide opportunity for release

A broad cross-section of society agrees that it is illogical to subject juveniles to life sentences without parole without a meaningful opportunity to obtain release. The Campaign for the Fair Sentencing of Youth is an organization that "coordinates, develops and supports efforts to implement fair and age-appropriate sentences for youth." The Campaign for the Fair Sentencing of Youth, *Vision and Mission*, <http://fairsentencingofyouth.org/our-vision/> (accessed July 14, 2014). The Campaign believes "that a just alternative to life in prison without parole is to provide careful reviews to determine whether, years later, individuals convicted of crimes as youth continue to pose a threat to the community." The Campaign for the Fair Sentencing of

Youth, *Statement of Principles, supra*. Supporters of this Campaign span the political and social spectrum, from the American Correctional Association and the American Probation and Parole Association to the Boy Scouts of America and the National PTA to the Campaign for Youth Justice, Central Juvenile Defender Center, and Juvenile Justice Coalition of Ohio.² See The Campaign for the Fair Sentencing of Youth, *Official Supporters*, <http://fairsentencingofyouth.org/about/who-we-are/> (accessed July 14, 2014) Columnist and author George Will has written that “[d]enying juveniles even a chance for parole defeats the penal objective of rehabilitation.” Will, *Cruel and Unusual — a test case*, Wash. Post, (Apr. 20, 2012). The U.S. Conference of Catholic Bishops has likewise stated that sentencing juveniles to life sentences without parole eliminates opportunities for rehabilitation and incorrectly treats juveniles as akin to adults. News Release, *Bishops’ Committee Joins Call to End Life Sentences Without Parole for Children* (Jan. 30, 2013), available at <http://fairsentencingofyouth.org/wp-content/uploads/2013/03/Sign-on-Press-Release.png> (accessed July 14, 2014). President and Mrs. Carter similarly have supported providing juveniles adjudged delinquent “the opportunity . . . to seek rehabilitation and to mature beyond their teenage years.” Letter from Jimmy & Rosalyn Carter to Jerry Brown (Sept. 24, 2012), available at <http://fairsentencingofyouth.org/wp-content/uploads/2013/02/PC-letter-to-Gov-Brown.pdf> (accessed July 14, 2014).

Considering the universally recognized differences between juveniles and adults, the societal protections afforded youth in other contexts, and the broad opposition to

² The Central Juvenile Defender Center is one of the Regional Centers of the National Juvenile Defender Center and focuses on juvenile issues in a handful of states, including Ohio.

sentencing juveniles to life in prison without parole, it is evident that juveniles, like Brandon Moore, who are sentenced to de facto life sentences must be afforded a meaningful and realistic opportunity to obtain release.

CONCLUSION

The sentiment expressed by this Court ten years ago—that “juveniles are not adults”—still rings true today. *D.S.*, 111 Ohio St. 3d 361, 2006-Ohio-5851, 856 N.E.2d 921, at ¶ 8. As the Supreme Court has explained in *Roper* and *Graham*, and social and scientific research has confirmed, juveniles are less mature, more susceptible to negative influences, and more open to rehabilitation as adults. As a result, the balance of reasons that may be used to support sentencing adults to terms of life in prison without parole swings in the other direction when the offenders are juveniles. See *Graham*, 560 U.S. at 71, 130 S. Ct. 2011, 176 L.Ed.2d 825 (“With respect to life without parole for juvenile nonhomicide offenders, none of the goals of the penal sanctions that have been recognized as legitimate—retribution, deterrence, incapacitation, and rehabilitation—provides an adequate justification.” (internal citation omitted)). Because juveniles are not as culpable for their conduct and are more apt to reform their behavior and personality traits over time, they cannot be sentenced to prison sentences that exceed their natural lives without an opportunity for review. Whether that review determines that a particular youth should remain in prison without parole is irrelevant—what is necessary, for these purposes, is that the juvenile be afforded a careful review of his or her sentence and a meaningful and realistic opportunity to obtain release.

Amici therefore respectfully urge this Court to recognize that the distinct and universally recognized characteristics of juveniles precludes their being sentenced to prison terms exceeding their natural lives without an opportunity for review.



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