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ENDORSED
FILED
ALAMEDA COUNTY

SEP 11 2009

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9 JOHANNES MEHSERLE

CLERK OF THE SUPERIOR COURT
By Yolanda Phuong, Deputy

10 IN THE SUPERIOR COURT OF CALIFORNIA
11 COUNTY OF ALAMEDA
12 WILEY M. MANUEL COURTHOUSE

13 THE PEOPLE OF THE STATE)
14 OF CALIFORNIA)

15 Plaintiff,)

16 v.)

17 JOHANNES MEHSERLE)

18 Defendant.)

Case Number: 547353-7 161210

MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF MOTION
FOR CHANGE OF VENUE PURSUANT TO
THE 6TH AND 14TH AMENDMENTS TO THE
UNITED STATES CONSTITUTION,
ARTICLE I, §16 OF THE CALIFORNIA
CONSTITUTION, AND PENAL CODE §1033

Date: October 2, 2009

Time: 2:00p.m.

Dept: 11

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1 wholesale violation of Mehserle's federal and state constitutional right to a fair jury trial and
2 any resulting conviction would be constitutionally infirm.

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4 **I. UNDER THE UNITED STATES AND CALIFORNIA CONSTITUTIONS, AS WELL**
5 **AS CALIFORNIA DECISIONAL LAW AND STATUTE, A MOTION FOR**
6 **CHANGE OF VENUE MUST BE GRANTED IF NECESSARY TO SECURE A**
7 **DEFENDANT'S RIGHT TO A FAIR AND IMPARTIAL TRIAL**

8 The Sixth Amendment to the United States Constitution guarantees that the accused in a
9 criminal prosecution shall have the right to a fair trial by an impartial jury. U.S. Const., Amend
10 VI. The right is binding on the states through the due process clause of the Fourteenth
11 Amendment. *See Duncan v. Louisiana* (1968) 391 U.S. 145, 148-154. Similarly, the due
12 process clause of Article I, § 16 of the California Constitution guarantees a criminal defendant
13 the right to a trial by an impartial and unprejudiced jury. *See People v. Wheeler* (1978) 22
14 Cal.3d 258, 265.

15 The United States Supreme Court has articulated the standard to be used in determining
16 whether a change of venue should be granted in a criminal action. *See Sheppard v. Maxwell*
17 (1966) 384 U.S. 333. A trial court *must* change venue if there is any reasonable likelihood that
18 in the absence of such relief, the defendant will be denied a fair trial. *See id.* at 363. The
19 California Supreme Court long ago adopted the *Sheppard* standard. *Maine v. Superior Court*
20 (1968) 68 Cal.2d 375, 383.

21 Thus, in this state, a "defendant is entitled to a [change of venue] not only when a
22 preponderance of the circumstances calls for such a result, but also whenever a defendant has
23 shown *even* a 'reasonable likelihood' that he or she will not receive a fair trial." *Frazier v.*
24 *Superior Court* (1971) 5 Cal.3d 287, 294-295 (emphasis is the California Supreme Court's
25 opinion)(internal quotation marks and citations omitted)

26 Penal Code §1033 codifies the standard for a change of venue as set forth in *Sheppard*
27 and adopted in *Maine*, which, in turn, is "ultimately an implementation of the Sixth and

28 In the event the DA disputes a single fact asserted in this motion or in the accompanying exhibits and
29 declarations, or challenges the admissibility of any part of that evidence for §1033 purposes, the Court is obligated
30 to set the matter for an evidentiary hearing.

1 Fourteenth Amendment safeguards relating to the right of a criminal defendant to receive a fair
2 trial before an impartial trier of fact." *People v. Bonin* (1988) 46 Cal.3d 659, 672. As in the
3 cases, under that section, a trial court must order a venue change "when it appears there is a
4 reasonable likelihood that a fair and impartial trial cannot be had in the county" of original
5 venue.

6 The "reasonable likelihood" standard means something less than "more probable than
7 not" and something more than merely "possible." *Bonin*, 46 Cal.3d at 673; *see also Martinez v.*
8 *Superior Court* (1981) 29 Cal.3d 574, 578 ("The phrase reasonable likelihood denotes a lesser
9 standard of proof than more probable than not.")

10 Critically, the defendant need not make "[a] showing of actual prejudice . . ." *Maine*,
11 68 Cal.2d at 383.

12 Moreover, preference is given to the determination of the question before trial. When a
13 change of venue motion is made before trial, "any doubt as to the necessity of removal to
14 another county should be resolved in favor of a venue change." *Id.* at 578; *see also Fain v.*
15 *Superior Court* (1970) 2 Cal.3d 46, 54 (same); *Corona v. Superior Court* (1972) 24
16 Cal.App.3d 872, 875 (same).

17 The California Supreme Court has established five factors to guide the venue analysis:
18 "the nature and gravity of the offense, the nature and extent of the news coverage, the size of
19 the community, the status of the defendant in the community, and the popularity and
20 prominence of the victim." *Powell*, 232 Cal.App.3d at 794-795. Other factors, such as political
21 considerations, are relevant to the court's analysis as well. *See, e.g., Maine v. Superior Court*
22 (1968) 68 Cal.2d 375, 383. These factors must not be viewed in isolation, but must be
23 considered cumulatively. *People v. Williams* (1989) 48 Cal.3d 1112, 1126.

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1 **II. THE NATURE AND GRAVITY OF THE OFFENSE**

2 California courts have long held that the *nature* and *gravity* of the charged offense is a
3 key factor in the change of venue calculus. See *Martinez*, 29 Cal.3d at 578. In *Martinez* the
4 Supreme Court fleshed out this dual factor:

5
6 The peculiar facts or aspects of a crime which make it
7 sensational, or otherwise bring it to the consciousness of the
8 community define its "nature"; the term "gravity" of a crime
9 refers to its seriousness in the law and to the possible
10 consequences to an accused in the event of a guilty verdict.

11 *Id.* at 582. The *Martinez* court emphasized that is no crime of greater gravity than murder. *Id.*
12 at 583.

13 Taking the second element first, as per *Martinez*, this is a murder prosecution. Except
14 for the rare cases in which the defendant faces the death penalty, there is no more grave
15 charge in terms of seriousness in the law and consequences to the defendant.

16 Far more important here, of course, is the question of "nature"—in other words, are
17 there elements of the case that bring it especially into the consciousness of the community or
18 make it particularly sensational?

19 It is hardly hyperbole to answer that question with this one: Is there a key element of
20 this case that does *not* render it highly sensational and the subject of intense consciousness in
21 the community? The Grant shooting and subsequent first-of-its-kind prosecution of a police
22 officer for murder is among the highest profile, most incendiary, most widely paid-attention-
23 to cases in the history of this county.

24 Or put it in these terms: can the Court think of another murder case in recent history in
25 which pictures of the victim holding his young child, accompanied by calls for "justice"
26 appear on street signs, highway overpasses, tee shirts, bumper stickers, web sites, throughout
27 the relevant geographic area?

28 Can the Court think of another case where the victim's name becomes a household
name, and a manifestation of community outrage regarding the use of excessive force by law

1 enforcers specifically, and the violence wreaking havoc in the black community in general?

2 Alameda County has a long history of conflict between law enforcement and the
3 African American community. The history of the county's largest city is a useful starting
4 place. By the end of World War II, African Americans constituted about 12% of Oakland's
5 population.³ The years following the war saw this percentage rise, along with an increase in
6 racial tensions. Starting in the 1950s, the Oakland Police Department began recruiting
7 officers from the South to deal with the expanding black population and changing racial
8 attitudes; many were openly racist, and repressive police tactics exacerbated racial tensions.⁴
9 In 1950 the California Assembly held first-in-the-nation hearings on police brutality by police
10 in Oakland.⁵

11 The city's population swelled by a third from 1940 to 1945, and a long demographic
12 shift began: black residents to 23 percent of the population in 1960, 34.5 percent in 1970, and
13 more than a third at last count, making Oakland California's African American capital.⁶

14 By 1966, only 16 of the city's 661 police officers were black. Tensions between the
15 poverty-stricken black community and the predominantly white police force were high, and
16 police brutality against blacks was common.⁷

17 In this charged atmosphere, in 1966 the Black Panther Party was founded by Merritt
18 College students Huey Newton and Bobby Seale as a response, in part, to police brutality.⁸

19 Oakland is also the center of the Uhuru Movement and the related African People's

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21 ³ McDonald Heather, Jerry Brown's No-Nonsense New Age for Oakland, available at: http://www.city-journal.org/html/9_4_a2.html

22 ⁴ "Inside the Black Panther Revolution: The Black Freedom Movement and the Black Panther Party in Oakland,
23 California," in *Groundwork: Local Black Freedom Movements in America* (NY: NYU Press, 2005), chap. 13.
Available at: http://www.oah.org/pubs/magazine/bpower/williams.html#_edn10

24 ⁵ *American Babylon: Race and the Struggle for Postwar Oakland*, Robert O. Self (Princeton University Press,
25 2005), p. 78.

26 ⁶ McDonald, *supra*, available at: Heather, http://www.city-journal.org/html/9_4_a2.html

27 ⁷ Ceanne Spencer, Robyn, *Inside the Panther Revolution: The Freedom Movement and the Black Panther Party in*
28 *Oakland, California*, Book Chapter in: *Groundwork: The Local Black Freedom Movement in America* edited by
Komozi Woodard and Jeanne Theoharis.

⁸ McElrath Jessica. *The Black Panthers*.

1 targets in 85 percent of the shootings.

2 As is detailed below, the history of conflict between the black community and police
3 in this county has been a focus of discussion in the press since the Grant shooting. And
4 although there is not a scintilla of evidence in the record that the shooting was racially
5 motivated, or that any conduct by Mehserle on January 1, 2009, was motivated by racial
6 animus, or that Mehserle has ever done anything or said anything that would suggest racial
7 bias, the media has at every turn made this a case about race. See supra, section III C 5.

8 Finally, the Grant shooting occurred during a period in which the homicide and
9 overall crime rates in predominantly black sections of Alameda County have risen through the
10 roof. In 2008, for example, there were 125 people killed in Oakland alone and African-
11 Americans were killed in numbers wildly disproportionate to their percentage of the
12 community. Of the 125 killed, some 99 (79%) were black in a city where African Americans
13 make up roughly a third of the population (Exhibit 10, Homicides in Oakland, Report of the
14 Urban Strategies Council, at 2). Remarkably, the report notes that at the time of its
15 publication, in March 2009, the Oakland Police Department had identified only 35 suspects as
16 to the 125 2008 homicides (Exhibit 10), a statistic that must cause substantial doubts in the
17 black community about law enforcement's commitment to their safety.

18 The 2008 homicide numbers reinforce the disparate experiences of residents in the
19 different neighborhoods of Oakland. Homicides remain disproportionately concentrated: 72
20 percent occurred in three City Council Districts—District 3 (West Oakland), and Districts 6
21 and 7 (East Oakland)—even though these districts combined account for only 44% of the
22 city's population. According to the report, the number of African-Americans murdered in
23 2008 is substantially higher than in previous years. (Exhibit 10)

24 It is hardly surprising, therefore, that the death of an unarmed black man at the hands
25 of a white police officer, in a community with a long and troubled history of racial struggle
26 and violence between police and black citizens, where racial politics and protest have long
27 been a staple, where its members are shot and killed by police officers in disproportionate
28 numbers, and where its members are the victims of homicides (rarely solved) in

1 disproportionate number, should receive unprecedented attention.

2 Moreover, this murder prosecution is the first in California history of a police officer for
3 an on-duty shooting. The shooting and its aftermath have been the subject of what can only be
4 described as an avalanche of media attention, described in detail *infra*. The case has resulted in
5 death threats to the defendant and his family. It has lead to a series of demonstrations—some
6 peaceful, some violent, some devolving into rioting and arson and resulting in hundreds of
7 arrests. It has produced extraordinary political foment, including, if the press is to be believed,
8 the resignation of BART's chief of police. And the prosecution was interrupted at the start of its
9 initial substantive proceeding by the murder of four Oakland police officers, crimes that were
10 associated with the Grant case by television and print media incessantly during the relevant
11 period.

12 There are, of course, criminal cases against police officers of the routine variety that do
13 not garner intense community attention and which therefore can fairly be tried in the county in
14 which the events occurred.

15 This is not such a case.

16 As courts—California and otherwise—have held, when officers are charged with
17 assaults or other acts of violence, the charges occur in communities in which relations between
18 police and minority communities have foundered on the issue of race, and the charged crime is
19 perceived by the community as being related to the race of the victim, venue must be changed.
20 *See Powell, supra; Lozano v. State* (Fla. App. 3 Dist. 1991); *People v. Boss* (N.Y.A.D. 1 Dept.
21 1999) 261 A.D.2d 1, 701 N.Y.S.2d 342; *see also Young v. Superior Court* (1981) 126
22 Cal.App.3d 167 (prosecution of police officer accused of corruption must be moved because of
23 the risk that jurors would attempt to use the case to solve the issue of police corruption).

24 In sum, it is hard to imagine a case in which the gravity and nature of the crime and
25 proceedings weigh more heavily against an in-county trial. Those factors alone prove that an
26 Alameda County trial in this case would amount to a wholesale deprivation of Mehserle's
27 federal and state constitutional right to a fair jury trial.

1 **2. The Repeated Screening of the Shocking and Horrifying Videos of**
2 **Oscar Grant's Shooting Alone Created Sufficient Prejudice to**
3 **Require a Venue Change**

4 As far as defendant's counsel has been able to determine, there is only one other venue
5 case in California history in which police use of force was videotaped and in which the incident
6 was repeatedly screened on local television stations. Certainly there is only one venue case in
7 California history in which such a video, repeatedly screened for the public, captures police
8 employing force that then results in criminal charges. And, of course, in that case, the court
9 found that venue must be changed.

10 The *Powell* court could hardly have been clearer about the extraordinarily and incurably
11 prejudicial effect the video's publication had on the defendants' right to a fair trial:

12 It cannot be disputed that difficulty in obtaining a fair trial in Los
13 Angeles County is exacerbated by the fact the defendants are
14 police officers, sworn to protect citizens, to uphold the law and to
15 maintain peace in the community. Their status is the basis of the
16 intense coverage and repeated showing of the videotape. The fact
17 that the videotape depicts local officers in such conduct threatens
18 the community's ability to rely on its police and has caused a high
19 level of indignation, outrage, and anxiety.

18 *Powell*, 283 Cal.App.3d at 798.

19 The Grant videos are, in some respects, more troubling than the King video. As will
20 appear, elites in the community and use of force experts took one look at the pictures and
21 concluded Mehserle had executed Grant and that there could be no rational defense to a murder
22 charge.

23 The videos here are more troubling because Grant appears, at first glance and without a
24 closer and more exacting examination of the videos, to be on his stomach with his hands behind
25 his back.

26 They are more troubling because the officer used his gun.

27 And they are most troubling, of course, because Grant died.

1 2009; BART shooting case centers on video footage, *San Francisco Chronicle*, May 18, 2009;
2 Exhibit 6 at 318, 325, 347, 356, 361, 362, 379, 380, 381.

3 Polling data suggests that the media's focus on the races of the participants has reached
4 its intended audience. Of those who are aware of the case, nearly 90% are also aware that Grant
5 is black and that Mehserle is white. (Exhibit 1, Attachment D)

6 Stories have routinely compared the Grant shooting to the Rodney King case. *See, e.g.*,
7 BART shooting draws Rodney King case parallels, *San Francisco Chronicle*, January 15, 2009;
8 Exhibit 6 at 248, 253, 256, 338, 339, 354, 1694.

9 Papers regularly mention Oakland's "long and painful history with these kinds of
10 incidents." A step toward justice in BART Shooting, *San Francisco Chronicle*, January 15,
11 2009; *see also* Unrest in Oakland has deep roots in city's history of race relations, *Oakland*
12 *Tribune*, January 8, 2009; Activists still call for DA's ouster, *Oakland Tribune*, January 15,
13 2009; Oakland grapples with grief, a divided community following the officers killing, *Oakland*
14 *Tribune*, March 28, 2009 (mentioning various incidents of racial conflict between the police
15 and local African-Americans, including the infamous *Riders* case).

16 New stories reported that the public has overlooked one of the most troubling aspects
17 of the Mehserle case, which is that Officer Pirone apparently called Grant a "bitch ass nigger"
18 shortly before the shooting. BART 'N-word' bombshell waiting to go off, *San Francisco*
19 *Chronicle*, June 29, 2009. There has been, of course, no allegation that the defendant ever
20 used such language.

21 Papers reported that BART selected a group called the Organization of Black Law
22 Enforcement Executives to conduct a comprehensive review of BART policing practices and
23 to ensure, according to BART board member Carol Ward Allen, that an incident like the
24 Grant shooting never happens again. Black officers group to review BART police, *San*
25 *Francisco Chronicle*, April 24, 2009.

26 Given the coverage, and given the long history of conflict in this county, often violent
27 between African Americans and police, it is impossible that Johannes Mehserle will be seen
28 by any jury as anything other than the white cop who executed a defenseless black man. It is

1 impossible that Mehserle will be judged for his conduct in the early hours of January 1, 2009,
2 and not for the perceived transgressions of white officers over the past hundred years.

3 Although the issue of race fairly has no place in this criminal case, if the prosecution takes
4 place in this county it *will* be about race and in that circumstance would comprise a wholesale
5 violation of Mehserle's federal and state constitutional right to a fair jury trial.

6
7 **6. Live Television Coverage of the Oakland Riots, Along With Other**
8 **Press Coverage of Protests, Civil Disturbances, and Threats of**
9 **Violence to Mehserle and His Family Were Uniquely Prejudicial**

10 Having spent days and weeks watching the videos of Oscar Grant's final moments, the
11 citizens of this county then witnessed extensive, often live, coverage of rioters breaking
12 windows, vandalizing recently-occupied police cars, burning passenger vehicles, and in general
13 wreaking havoc in the name of justice for Oscar Grant. *See Exhibit 7.*

14 Local papers closely followed suit. *See, e.g.,* Hundreds gather on Oakland streets to
15 protest BART shooting, Oakland Tribune, January 7, 2009; Violence stemming from BART
16 shooting was predictable, Oakland Tribune, January 8, 2009; Protests over BART shooting turn
17 violent, San Francisco Chronicle, January 8, 2009; Officer in BART shooting abruptly resigns,
18 San Francisco Chronicle, January 8, 2009; Protest organizer watched in horror, San Francisco
19 Chronicle, January 9, 2009; BART police shooter skips interview, Oakland Tribune, January 8,
20 2009; Oakland pledges help to damaged businesses, Oakland Tribune, January 9, 2009; District
21 Attorney files charges against 3 protesters in Oakland, Oakland Tribune, January 9, 2009;
22 Charges filed against 3 protesters, San Francisco Chronicle January 10, 2009; Brown appoints
23 prosecutor to oversee BART probe, Oakland Tribune, January 10, 2009; BART shooting, riots
24 do more damage to Oakland's reputation as a lawless town, Oakland Tribune, January 10, 2009;
25 BART calls meeting on killing, gets flak, San Francisco Chronicle, January 11, 2009; Many
26 see race as central to BART killing, San Francisco Chronicle, January 11, 2009; Activists plan
27 more BART shooting protests, Oakland Tribune, January 12, 2009; BART completes shooting
28 investigation, Oakland Tribune, January 12, 2009; Protest against BART police expected to
draw 1,000, Oakland Tribune, January 13, 2009; Oakland braces for another BART shooting

1 shooting, San Francisco Chronicle, August 18, 2009; Report Critical of BART in shooting,
2 cbs5.com, August 18, 2009; BART police badly botched call that led to Grant killing, report
3 finds, Oakland Tribune, August 18, 2009; Chip Johnson: Report knocks cops in Grant
4 shooting, San Francisco Chronicle, August 25, 2009.

5 The hiring of the law firm itself had been an issue that engendered protests at BART
6 meetings and extensive press coverage. A city council person criticized BART for hiring the
7 firm without public comment or input. Later the decision was criticized when the cost of the
8 report soared from less than \$100,000 to more than \$250,000. See Vote to showcase uproar,
9 Oakland Tribune, March 25, 2009.

10 And the report itself was made widely available by news organization for download.
11 The news stories about the report once again posted links to the shooting videos. And on the
12 morning of August 19, 2009, the *Chronicle* posted a banner headline on its morning edition,
13 quoting the report: "No one appeared to be in charge."

14 Any argument that passions regarding the Grant shooting have died down was put
15 during an August 22, 2009, BART town hall meeting at which various speakers, including
16 religious and community leaders, referred to the Grant shooting as a murder and called for
17 Mehserle's conviction. See www.indybay.org/newsitems/2009/08/25/18619422.php.

18 Days before the filing of this motion, during the weekend shutdown of the Bay Bridge
19 (and the concomitant increase in BART ridership), a local group committed to seeking
20 Mehserle's conviction and prosecution of other officers involved in the January 1st events took
21 the BART system to remind the public about the case. The group posted fliers throughout the
22 BART system picturing the BART police logo, with the words, "Police Murder. BART lies.
23 We die." (Exhibit 14) The flier also pictures an officer shooting a man who is clearly restrained
24 by the police. Members of the group spoke on BART trains throughout the system, making
25 various (and often patently false) factual claims about the evidence in the case. Videos of the
26 speeches, as well as an article describing the groups efforts to publicize the case, were posted
27 on the hybrid news/advocacy website indybay.org. See [www.indybay.org/newsitems/2009/](http://www.indybay.org/newsitems/2009/09/06/18621071.php)
28 09/06/18621071.php

1 as well. The suspect was initially reported as a young 'negro male'; his picture appeared in the
2 local press. The victim was a young, white local woman.”)

3 Here, the tables are turned. The prosecution occurs in a county with a large minority
4 population, which has a history of violent conflict between the police and the black community,
5 and in which African Americans are the subjects of police shootings and homicides far in
6 excess of their proportion of the population. The victim is a black man with strong ties to the
7 black community—nearly a thousand people attended his funeral. The white defendant on the
8 other hand, grew up and attended college outside the area. Thus, as in *Williams*, potential jurors
9 are likely to view Mehserle as the outsider and Grant as the local. More importantly, of course,
10 they will judge the incident in the historical context of racial conflict and excessive force by
11 white officers against black men—a context that has been drilled into the consciousness of the
12 community by the media.

13 Second, before the events of January 1, 2009, Oscar Grant was no celebrity or
14 particularly prominent member of the community. Likewise, Johannes Mehserle was an obscure
15 third year BART police officer.

16 Now Grant's name and his face—and in particular the image of Grant, smiling, holding
17 his young daughter—is familiar to every adult in this county. Posthumously, he is a celebrity.
18 His picture—accompanied by calls for justice—is plastered on street signs, highway
19 overpasses, telephone poles, tee shirts, bumper stickers and Internet sites. The phrase, “We are
20 Oscar Grant” has been heard across the county for months.

21 Similarly, Mehserle has been turned into a poster boy for police brutality. He has been
22 pictured in newspapers and television stories in handcuffs. He has been called an executioner
23 and murderer by politicians, reverends, and community leaders alike. Judges have called him a
24 liar and told the world that his accident defense is bogus.

25 As the state Supreme Court noted in *Odle v. Superior Court* (1982) 32 Cal.3d 932, 940-
26 41, often by virtue of events and media coverage *after* the charged incident, the victim and/or
27 defendant become prominent, and their prominence exacerbates prejudicial media coverage.

28

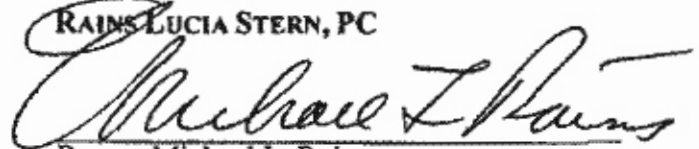
CONCLUSION

1
2 There is one way and only one way to ensure that a jury of Mehserle's peers
3 representing a cross-section of the community tries this precedent-setting case fairly and
4 impartially. There is only one way to proceed that preserves Mehserle's Sixth Amendment right
5 to a fair jury trial: The trial must be moved out of Alameda County.

6 Respectfully submitted,

7
8 Dated: September 10, 2009

RAINS LUCIA STERN, PC



By: Michael L. Rains
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