**SUPPRESSION ORDERS EXIST IN RELATION TO ASPECTS OF THIS JUDGMENT: SEE FOOTNOTE 21.**

**IN THE HIGH COURT OF NEW ZEALAND**
**AUCKLAND REGISTRY**

**I TE KŌTI MATUA O AOTEAROA**
**TĀMAKI MAKAURAU ROHE**

**CRI-2022-092-10487**
**[2024] NZHC 2284**

**THE KING**

v

**THOMAS TAHITAHI**

Hearing: 14 August 2024

Appearances: A Devathasan and S Arnerich for Crown
K Holden for Defendant

Judgment: 14 August 2024

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**SENTENCING NOTES OF MOORE J**
**[For publication]**

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Solicitors:
Kayes Fletcher Walker, Auckland

[1] Mr Tahitahi, at the age of 42 you appear for sentence having pleaded guilty to the murder of Daniel Eliu. My task this morning is to decide what sentence you should receive for what you did.

[2] However, before I go any further, I wish to acknowledge Mr Eliu's whānau and friends who are here today and to welcome them to the High Court.

**The offending**

[3] It is first necessary for me to set out the facts of your offending. Obviously, these are well known to you. You have pleaded guilty to murdering Daniel Eliu and you have accepted the summary of facts which sets out what happened that day.[1] However, because sentencing is quintessentially a public function which must be conducted in open Court, it is necessary for me, in this public forum, to lay them out.

[4] The summary of facts records that you are a patched member of the Head Hunters. Mr Eliu was President of the Notorious Chapter of the Mongrel Mob.

[5] On 23 November 2022, you were released on parole from prison. I note from your criminal history this appears to have been for a sentence of more than six years for aggravated robbery using a firearm.

[6] Less than a month later, on the morning of Saturday 17 December 2022, you shot Mr Eliu to death. The background to that killing reflects just how cold blooded it was in fact. Let me explain why.

[7] On that Saturday, the Grace Foundation was holding its regular church service at the Puhinui Seventh Day Adventist Church, on Puhinui Road. It was the last service of the year. Because of this, a Christmas lunch had been arranged for both Grace Foundation members and other churchgoers.

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[1] *R v Tahitahi* HC Auckland CRI-2022-092-10487, 10 April 2024 (Minute of Venning J). In his minute, the Judge refers to "the agreed summary of facts dated 9 April 2024", which are the summary of facts on which Mr Tahitahi appears for sentence.

[8] About 200 people, including children, were present. It was meant to be a day of fun and celebration. Amongst other events, Mr Eliu was to graduate from one of the Grace Foundation's programmes that day.

[9] At 8:46am, you drove from your home in Massey to the Point England area. There you picked up another person. To this day that person's identity is unknown.

[10] A little more than half an hour later, you and this unknown person left Point England and drove to Puhinui Road. You were now the passenger, while your unknown associate was the driver.

[11] For several minutes the car drove up and down Puhinui Road, in front of the driveway to the church. Obviously, you and the driver were scoping out the scene. You were then dropped off along Puhinui Road. You made your way back to the church on foot. Your unknown associate drove to Edorvale Avenue, about 300 metres away, where they parked the car and waited.

[12] At about 9:55am, you walked down the driveway and through the carpark. You were wearing a blue hoodie. I have seen the photograph of you. The hood was pulled up and you were wearing sunglasses. However, your face was clearly visible. Over your shoulder, you carried a black jacket. Hidden within it was a loaded semi-automatic .22 firearm.

[13] You milled around the carpark for a few minutes before strolling over to the front lawn. A number of people had gathered there for the barbecue.

[14] You walked right up to Mr Eliu. He had his back to you. You stood less than a metre behind him. With the gun still partially concealed in your jacket, and with several people nearby, you shot Mr Eliu six times in quick succession: twice in the back of each leg, and then four times into his back.

[15] You say in your pre-sentence report and in your letter of remorse to the Court, that it wasn't your intention to kill Mr Eliu. That is nonsense. The injuries and where they were on Mr Eliu's body put the lie to that. The first two shots went into Mr Eliu's

legs. I accept that these were not intended to be fatal. It seems likely they were fired to incapacitate your victim. But the four shots which followed went into Mr Eliu's back, a fact which plainly conveys what you were intending. One bullet passed through Mr Eliu's right upper back and shoulder. Another went into his left upper back through his left lung; aorta; oesphoagus; and right main bronchus. A third went into his right lower back through his abdomen and stomach finishing up in his liver. And the fourth went into his left lower back terminating near his backbone. The Crown told me this morning that it was just four seconds from the first to the last shot.

[16] The fatal shot was the one which went through his aorta. That, on its own, was enough to kill. But the blood loss caused by Mr Eliu's other wounds also contributed to his death. He was given first aid at the scene but died where he fell shortly after the paramedics arrived.

[17] After the shooting you ran back to the waiting car. A number of those who had been nearby gave chase. They saw you get into the front passenger seat. The car did a U-turn and drove off at speed. You drove back to Point England arriving there at approximately 10:40am.

[18] You were identified as a result of CCTV footage. This showed you twice using the getaway car some days earlier, on 13 and 16 December 2022, at the Westgate Shopping Centre. On both occasions, a distinctive scar could be seen on your shin. You were identified through that scar as well as the shoes you were seen to be wearing when you murdered Mr Eliu. Polling data from your phone provided further support mirroring the movements of the car on the morning of the shooting.

[19] The evidence against you was very strong.

**Victim impact statements**

[20] Three victim impact statements have been presented to the Court. Each has been read in open Court. Those statements were from Litia Eliu, Daniel's sister; Sadaris Faleao Senior, Daniel's younger brother and Chessar Cowan, Mr Eliu's son.

[21] It takes real courage to read such intimate statements in the public setting of a courtroom. They all speak of the disbelief and shock your actions have caused them. They speak fondly of a kind and generous man whose life you cut short for reasons which are, even now, difficult, if not impossible, to understand or reconcile. They speak of the devastation Mr Eliu's death has brought on the whole family. Each is affected in different ways. You have heard what they said. It is neither necessary nor appropriate to repeat what they had to say about their fallen father and brother.

**Approach to sentencing**

[22] I now turn to the approach I must take to sentencing you.

[23] The Sentencing Act 2002 says that everyone who commits murder must be sentenced to life imprisonment unless such a sentence would be manifestly unjust, given the circumstances of the offence and the offender.[2] Both your lawyer, Ms Holden, and the Crown agree that there are no such circumstances in your case. I must and will sentence you to life imprisonment. But that is not the end of this sentencing exercise. I need to explain why.

[24] Both lawyers agree, as do I, that the real issue in your case is the length of the minimum period of imprisonment that I must impose. That is the period of imprisonment you must serve before becoming eligible for parole. I refer to that as the MPI. I emphasise however that the MPI is *not* your sentence. While you will be able to apply to the Parole Board for parole after you have served your MPI, whether you will be granted parole is a matter for the Parole Board alone. And, even if you are granted parole, you will remain subject to your life sentence and can even be recalled at any time during your life back to prison should you go on to further offend.

[25] Section 103 of the Sentencing Act says that if a person is sentenced to life imprisonment for murder, the Court must impose an MPI of not less than 10 years.[3] If, however, the murder involves one or more of a list of aggravating factors set out in

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[2] Sentencing Act 2002, s 102.
[3] Section 103(2).

s 104 of the Sentencing Act, then the Court *must* impose an MPI of at least 17 years unless it would be manifestly unjust to do so.[4]

[26] This means there are three questions I must answer to determine what MPI you must serve:[5]

(a) First, do any of the aggravating factors identified in s 104 of the Sentencing Act apply to the facts?

(b) Secondly, what MPI would be appropriate but for the application of s 104?

(c) And thirdly, if s 104 does apply, would an MPI of 17 years be manifestly unjust?

[27] And so, I now turn to consider each of those three questions.

**Do any of the aggravating factors in s 104 of the Sentencing Act apply?**

[28] The first question I must consider is whether any of the aggravating factors in s 104 apply in your case. The Crown says that two are engaged:

(a) first, that the murder involved calculated or lengthy planning; and

(b) secondly, that the murder was committed with a high degree of brutality, cruelty, depravity or callousness.

[29] Ms Holden submits that none of the s 104 factors apply.

[30] As for the first, while she accepts that the murder was planned, she says that this planning was neither calculated nor lengthy.

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4 Section 104.

5 *Davis v R* [2019] NZCA 40, [2019] 3 NZLR 43 at [25].

[31] Rather, she says the planning was basic, involving neither disguising nor concealment (for example, by obscuring the number plate of the getaway vehicle, or checking to see if CCTV was present). She also says that you were told where Mr Eliu would be, and so didn't have to make inquiries as to the victim's whereabouts.

[32] As for the second, Ms Holden says that although the murder was callous, it was not so callous as to meet the threshold required.

[33] Standing back, I agree with the Crown that the two aggravating factors it says are engaged apply.

[34] First, I consider that the killing was clearly calculated and pre-planned. At the risk of repetition, you enlisted an associate to help you. You scoped out the area before entering the church precincts. You concealed your firearm from view. You then ran to a getaway vehicle which you organised in order to flee.

[35] Those features make this murder plainly more calculated than *R v Rameka*, one of the cases relied on by Ms Holden, where the offending was said not to have been so calculated or lengthy as for s 104 to apply.[6] In that case, the defendant shot his ex-partner at close range in the presence of their son after driving him back to his ex-partner's home. The features of your offending also make this murder more calculated than *R v Vaitohi*, which involved a gratuitous, close-range shooting following rising tensions due to a failed drug-deal the evening before.[7] It was also common ground in that case that s 104 did not apply.[8]

[36] Rather, I agree with the Crown that the features of your case bear similar styles of planning to those in *Winders v R*,[9] and *R v Pukepuke*,[10] two cases where s 104 was engaged because of calculated planning.

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6 *R v Rameka* [2024] NZHC 324 at [21].
7 *R v Vaitohi* [2023] NZHC 2761.
8 At [24].
9 *Winders v R* [2018] NZCA 277, [2019] 2 NZLR 305.
10 *R v Pukepuke* [2023] NZHC 3700.

[37] In *Winders* the defendant shot his victim – a Stop/Go sign operator – at close range in the forehead from his car. He did so believing that a week earlier, the victim's late signalling had caused his father to reverse and collide his vehicle into another.

[38] In *Pukepuke* the defendant killed his victim to exact retribution for the death of a fellow gang member. He was sentenced on the basis that he had decided to kill someone in the victim's household as retribution, and that he discharged his firearm virtually immediately on encountering his victim after entering the dwelling.[11] The sentencing Judge was satisfied that the acquisition of a firearm and the use of a second vehicle meant there was a heightened degree of planning such that s 104 was applicable.[12]

[39] While planning needs to be "calculated" in order for s 104 to apply, it does not need to be competent or sophisticated.[13] The planning in your offending clearly meets that standard. I therefore consider that your murder of Mr Eliu involved calculated planning sufficient to mean s 104 is applicable.

[40] Even so, I consider s 104 to be applicable for a second and even more compelling reason. I find that your murder of Mr Eliu showed a high degree of callousness. While I accept that the use of a firearm at close range is regrettably not uncommon for murders,[14] I consider the context in which you used it to have been highly callous.

[41] Again, the essential facts of your offending bear repeating. You shot Mr Eliu six times from behind in close range. You shot him first in each calf, before delivering further shots, including the fatal shot, to his torso. Plainly the shots into Mr Eliu's legs were designed to incapacitate him and to leave him unable to defend himself against the shots fired into his back. You also chose to shoot him in close proximity and in view of those attending the Christmas festivities and other celebrations planned for that day. You did so at a venue where young children were present with their families. You did so with people nearby. The mortal risks to others were obvious. You did this

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11 At [22].
12 At [30].
13 *Desai v R* [2012] NZCA 534 at [59].
14 *R v Rameka*, above n 6, at [22].

at a time when a community should have been able to come together in celebration, and to feel safe.

[42] To the extent that *Rameka* is, as Ms Holden suggests, authority for the proposition that a close-range shooting observable by others is not highly callous, I disagree. Callousness refers to showing or having an insensitive or cruel disregard for others. That is precisely what you exhibited to a heightened degree when you shot Mr Eliu. As the Crown rightly says, this was a professional, execution-style killing.

**What MPI would be appropriate under s 103?**

[43] The second question I must consider is what MPI would be appropriate if s 104 were not engaged. This is done by considering comparable cases and what MPI was imposed in those. It involves setting a starting point MPI before considering what adjustments need to be made to that starting point to take into account your personal circumstances.

*What is the appropriate starting point MPI?*

[44] The Crown says that your offending should attract a starting point MPI of 17 years. It says – and I agree – that your offending is aggravated by the high degree of brutality and premeditation involved; by the vulnerability of your victim who was attacked from behind without warning and without the means of defending himself; through your use of a weapon; and, most obviously, because Mr Eliu lost his life with devastating consequences for his whānau and friends.

[45] The cases that I have already referred to inform this analysis.

[46] In *Pukepuke* the sentencing Judge held that but for the application of s 104, the offending would have attracted an MPI of 16 years' imprisonment before taking into account any of the defendant's mitigating factors.[15]

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[15] *R v Pukepuke*, above n 10, at [42].

[47] In *Winders*, an MPI of 17 years was adopted, but the Crown submitted that an MPI in the region of 15 to 16 years was appropriate if s 104 was held not to apply.[16]

[48] In *Rameka*, the sentencing Judge held that a starting point MPI of 14 and a half years would have been appropriate, were it not for the defendant's psychiatric illness.[17]

[49] And in *Vaitohi*, a starting point MPI of 14 years' imprisonment was adopted.[18]

[50] As counsel have rightly sought to do, various comparisons and distinctions can be made with these cases. Fundamentally however, each turns on its facts, and the need to satisfy the purposes of accountability, denunciation, deterrence and community protection.

[51] Undertaking that assessment for myself, I consider your offending to have been plainly more serious and calculated than *Vaitohi*. The close-range shooting in that case followed rising tensions that had been brewing earlier that following evening.

[52] I also consider your offending to have been more serious than *Rameka* because it was evidently more calculated. However, I also observe that the initial MPI adopted in that case was very generous.

[53] I agree with the Crown that your offending is most similar to *Winders* and *Pukepuke*. Both were unfeelingly cold-blooded. But I consider your offending to have been more serious than either of those cases for two essential reasons: first your use of an accomplice and secondly the inherent dangerousness of what you did in exposing many others who were also present at the church that day to the risk of serious harm.

[54] Section 103 requires me to set an MPI necessary to satisfy the purposes of holding you accountable for the harm you have caused, to denounce your brazen and callous conduct, to deter you and others from committing similar such offending and to protect the community from you.

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16 *R v Winders* [2016] NZHC 2964 at [20].
17 *R v Rameka,* above n 6, at [36].
18 *R v Vaitohi*, above n 7, at [29].

[55] Bearing those requirements in mind, and in light of the cases I have been referred to, I consider a starting point MPI of 17 years' imprisonment to be warranted under s 103.

*What adjustments should be made to the starting point MPI for personal circumstances?*

[56] I now turn to consider what adjustments should be made to the starting point.

[57] While the seriousness of your offending must be my particular focus in setting your MPI for murder,[19] adjustments may nevertheless be made on account of your personal circumstances. What this means is that your mitigating factors play a lesser role than they would otherwise if I were sentencing you for an offence other than murder.[20]

*(a) Personal aggravating factors*

[58] The Crown says that your MPI should take account of your previous criminal history and the fact that, at the time of your offending, you were on parole.

[59] At the age of 42, you have a lengthy criminal history. Indeed, despite your claim to the pre-sentence report writer that you had no experience with shooting firearms, it is clear from your criminal history that you are well familiar with guns and with using them to support your criminal offending.

[60] For example, as the Crown rightly points out, you have been convicted four times for aggravated robbery with a firearm; once for assault with intent to rob with a firearm; once for assault with a firearm; three times for possessing a firearm; and once for reckless discharge. Adding to all of this, you were on parole when you murdered Mr Eliu. You were on parole following being sentenced for aggravated robbery with a firearm. Against that background your claim of naivety around guns and gun use is all but inconceivable.

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[19] *Webber v R* [2021] NZCA 133 at [33]

[20] At [33].

[61] Ms Holden responsibly agrees with the Crown that an uplift of 12 months' imprisonment is appropriate to reflect your criminal history and offending while subject to parole. I agree.

*(b) Personal mitigating factors*

[62] I next turn to your personal mitigating factors. As you have heard your counsel say this morning, you are entitled to some credit for your guilty plea, and to the extent that your background helps to explain your offending. Ms Holden says you are also entitled to some credit for remorse.

*(i) Guilty plea*

[63] I start first with your guilty plea. You pleaded guilty in April this year, approximately six weeks before your trial was scheduled to commence. Your plea came over two years after your first appearance on the murder charge on 30 December 2022.

[64] In those circumstances, the Crown says that the lateness of your guilty plea ought to be assessed against the strength of the Crown case. I have already assessed the case against you as strong. Were the sentencing to proceed outside the operation of s 104 of the Sentencing Act, the Crown says a reduction of no more than five per cent would be warranted. Ms Holden says a reduction of one year is appropriate.

[65] I agree that you are entitled to some credit for your guilty plea notwithstanding how late it was made. I shall assess the actual credit later in these remarks.

*(ii) Background*

[66] I now come to your background and to what was happening in your life at the time which helps to explain your offending. I have read the two reports which discuss this: the pre-sentence report and a report provided on your behalf under s 27 of the Sentencing Act. Both, usefully, relay the information that you shared with the report writers about your upbringing. I have also read and considered the memorandum filed this morning by Ms Holden and the attached letter from the lawyers who are

representing you in your claim for redress for abuse suffered while you were in State care, especially the time you spent at Weymouth.

[67] In both the pre-sentence report and the s 27 report, you are recorded as saying that you were abused as a child.[21] The reports also say that you had limited schooling, having abandoned education at a young age. The s 27 report details your account of abuse both in the family home at the hands of a close family friend, and, as I have indicated, while in state care. It also speaks to how you came to be involved in the Head Hunters, but also your insistence that your offending was not gang related.

[68] You make various claims in both your pre-sentence and s 27 reports about Mr Eliu. In your pre-sentence report, you say that you disliked Mr Eliu having previously shared a cell with him. In your s 27 report, you claim that he sexually assaulted you when you shared a cell together. You also say that some two decades earlier, Mr Eliu kidnapped and raped your sister over multiple days. The s 27 report says that your sister and mother confirmed this but also noted that no Police complaint was made. You also say that Mr Eliu had threatened another person who was very important to you shortly before you killed him.

[69] These are obviously assertions of fact which, if proven to the required standard, would justify a lesser penalty or other outcome than might otherwise be appropriate for your offending.[22] Section 24 of the Sentencing Act says that such facts – if not wholly implausible or manifestly false – must be negated beyond a reasonable doubt if related to the nature of your offence or part in it.[23] If such a fact is not, however, related to the nature of the offence or your part in it, then it is on you to prove on the balance of probabilities the existence of that disputed mitigating fact.[24]

[70] I accept that your claims of abuse as a child are proved on the balance of probabilities and operate as a mitigating fact for sentencing. There is nothing from the Crown to suggest otherwise and the letter from your lawyers supports your assertion.

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21 I made orders without opposition from the parties and media present (Stuff and TVNZ) that while the media may publish references to abuse, references to the particular kind of abuse suffered while the defendant was a child were not to be published.

22 Sentencing Act 2002, s 24(3).

23 Section 24(2)(c).

24 Section 24(2)(d).

The issue, of course, is whether your claims of sexual assault by Mr Eliu – both against you, and against your sister – are proven to the requisite standard.

[71] Those assertions go to the motivations for your offending, rather than provocation at the time. For that reason, I consider the relevant onus to be on you to prove on the balance of probabilities the existence of those facts. [25]

[72] In response to the claims made in your pre-sentence report, the Crown has provided a statement from the second officer in charge in relation to the investigation into Mr Eliu's death. The officer says Department of Corrections' records confirm that between 2008 and 2009, you and Mr Eliu were incarcerated at the same correctional facility for 145 days, but that these records indicate you never shared a cell. He also says that he found no evidence of any personal conflict or tension between you and Mr Eliu. Instead, he observes that your offending seems to be gang related. Of particular relevance are his references to a form you filled out in November 2022 listing your membership of the Head Hunters as currently active, and to an intercepted phone call you made on 12 January 2023 in which you spoke with an unidentified male. On the topic of the unknown getaway driver, you said that "whoever" that was, "they should give that motherfucker a patch".

[73] Notably, your pre-sentence report does not refer to your allegation that Mr Eliu sexually assaulted you while in custody. If that was really part of your motive to kill him, it is surprising that it does not feature in that report. Given that, and the information provided by the Crown – and in particular the information indicating you never shared a cell together – I do not find this aspect of mitigation proved on the balance of probabilities.

[74] Your assertion that Mr Eliu raped and kidnapped your sister is, as noted in your s 27 report, corroborated by your mother and sister herself. But frankly, their corroborations have not been given in a context which gives the Court any confidence as to their reliability. There are also obvious motives to lie in making these claims. Added to that is my adverse finding on your credibility in relation to your claim that

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25 See Mathew Downs (ed) *Adams on Criminal Law - Sentencing* (online ed, Thomson Reuters) at [SA24.07] and Geoff Hall *Hall's Sentencing* (online ed, LexisNexis) at [SA24.7(b)].

you are unfamiliar with firearms. I am therefore not satisfied to the required standard that this aspect of mitigation is proved.

[75] However, even leaving aside that particular claim, the discretion that is available to me to take account these factors, even if I was satisfied these claims carried weight, is limited given you are being sentenced for murder. This is because a defendant's MPI must accurately reflect the seriousness of the crime, and, particularly in your case, the need to give effect to the legislative policy that Parliament has mandated for particularly calculated and callous murders.[26]

*(iii) Remorse*

[76] Finally, you have written a letter of remorse. In it, you acknowledge Mr Eliu and his whānau. You say you accept responsibility for his death. But you also maintain, however – as you do in your pre-sentence report – that you never intended to kill him.

[77] For the reasons I have already given I simply do not believe you did not intend to kill Mr Eliu. Your insistence on this point reinforces for me that no discount for remorse is warranted.

[78] Stepping back as I must, I appreciate that you are entitled to credit for your guilty plea, which spared the State the cost of a trial and witnesses the stress of giving evidence, notwithstanding that it was made so late. I also accept that a reduction is warranted for your background, particularly your childhood. In these circumstances, I consider an overall combined reduction of 12 months' imprisonment to be warranted to take account of these factors.

*Final MPI under s 103*

[79] From a starting point MPI of 17 years, uplifted by 12 months for your previous convictions and paroled status at the time, and reduced by 12 months for your guilty plea and background factors, I accordingly come to a final MPI under s 103 of 17 years' imprisonment.

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[26] *Hohua v R* [2019] NZCA 533 at [44].

## Would an MPI of 17 years be manifestly unjust?

[80] The last question that I must answer is whether an MPI of 17 years would be manifestly unjust. As you have just heard, I have decided that but for s 104, the appropriate MPI in your case would still be 17 years. It follows that a 17-year MPI would not be manifestly unjust. Indeed, it is the right non-parole period to reflect the seriousness, brazenness, and callousness of your offending.

[81] I record however that even if I had considered your personal circumstances to have justified a more generous discount leading to an MPI of 16 years under s 103, a difference of one year would not, in the circumstances of this case, have rendered an MPI of 17 years manifestly unjust.

## Sentence

[82] Mr Tahitahi, please stand. For the murder of Daniel Eliu, I sentence you to life imprisonment with a minimum period of imprisonment of 17 years.

[83] Stand down.

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Moore J