

ADNAN SYED,  
Petitioner,

v.

STATE OF MARYLAND,  
Respondent.

RECEIVED  
2016 DEC 28 PM 2:05  
CIRCUIT COURT  
FOR BALTIMORE CITY  
CRIMINAL DIVISION  
BALTIMORE CITY  
CASE NOs.: 199103042-046  
PETITION NO.: 10432

\* \* \* \* \*

**MEMORANDUM OPINION MOTION FOR RELEASE PENDING APPEAL**

ADNAN SYED, Petitioner, by and through his counsel, filed a Motion for Release Pending Appeal [hereinafter "Petitioner's Motion"] on October 24, 2016, pursuant to Maryland's Uniform Post-Conviction Procedure Act, codified as Md. Code. Ann. (2001, 2008 Repl.), § 7-109(b)(2) of the Criminal Procedure Article [hereinafter "Crim. Proc."], and requested a hearing. The State filed State's Response to Motion for Release [hereinafter "State's Response"] on November 7, 2016. Petitioner filed Syed's Reply in Support of Motion for Pretrial Release on November 18, 2016.

**PROCEDURAL HISTORY**

On February 25, 2000, Petitioner was found guilty in a jury trial of first-degree murder, robbery, kidnapping, and false imprisonment. Petitioner was sentenced to imprisonment for life plus thirty years. On May 28, 2010, Petitioner filed a Petition for Post-Conviction Relief, which was denied on January 6, 2014. On January 27, 2014, Petitioner filed an Application for Leave to Appeal. Petitioner's Application for Leave to Appeal was granted on February 6, 2015, but later stayed and remanded to the circuit court on May 18, 2015, for further proceedings. The Maryland Court of Special Appeals instructed:

The purpose of the stay and the remand is to provide Syed with the opportunity to file with the circuit court a request . . . to reopen the previously concluded post-conviction proceeding in light of Ms. [Asia] McClain's January 13, 2015 affidavit, which has not heretofore been reviewed or considered by the circuit court. Moreover, because the affidavit was not presented to the circuit court during Syed's post-conviction proceedings, as it did not then exist, it is not a part of the record and, therefore, this Court may not properly consider it in addressing the merits of this appeal. This remand, among other things, will afford the parties the opportunity to supplement the record with relevant documents and even testimony pertinent to the issues raised by this appeal.

Order 4–5, May 18, 2015 [hereinafter "Remand"].

The Maryland Court of Special Appeals also ordered that "after taking any action it deems appropriate, the circuit court shall forthwith re-transmit the record to this Court for further proceedings." *Id.* at 5. Pursuant to the instructions of the Remand, on June 30, 2015, Petitioner filed a Motion to Reopen Post-Conviction Proceedings, which was granted on November 6, 2015. A five day hearing began on February 3, 2016. The circuit court granted post-conviction relief on June 30, 2016, vacating Petitioner's conviction and granting a new trial. On July 21, 2016, the State filed a Notice of Intent to File Application for Leave to Appeal and Request to Stay Order Granting Post-Conviction Relief. On August 1, 2016, the State filed an Application for Leave to Appeal with the Court of Special Appeals. Petitioner filed no opposition to the State's Request to Stay Order Granting Post-Conviction Relief. On August 3, 2016, the circuit court, pursuant to Crim. Proc. § 7-109(b)(2), granted the State's Request to Stay Order Granting Post-Conviction Relief by issuing an Order to Stay Post-Conviction Relief. On August 11, 2016, Petitioner filed Respondent Adnan Syed's Conditional Application for Leave to Cross Appeal.

## DISCUSSION

Section 7-109 of the Criminal Procedure Article governs the appeal of final orders issued under the Uniform Post-Conviction Procedure Act. Crim. Proc. § 7-109(b)(2) grants this court the discretion to both stay an order granting post-conviction relief *and* set bail for the Petitioner.<sup>1</sup> The plain meaning of the statute and the use of the conjunctive “and” instead of “or” indicates that this court *may* set bail even after a stay has been issued. *See Comptroller of Treasury v. Fairchild Industries*, 303 Md. 280, 284 (1985).

Petitioner’s Motion includes a request for a hearing. The State contends no hearing is required or appropriate. Both parties have been afforded ample opportunity to brief their respective positions on Petitioner’s Motion. The court finds that a hearing in this matter is not necessary.

This matter was remanded by the Maryland Court of Special Appeals to the circuit court, “without affirmance or reversal,” and with explicit instructions to supplement the record with Asia McClain’s January 13, 2015 affidavit and any pertinent testimony. Remand 4–5. The Maryland Court of Special Appeals further directed that “after taking any action it deems appropriate, the circuit court shall forthwith re-transmit the record to this Court for further proceedings.” *Id.* at 5. The Maryland Court of Special Appeals noted that it could not properly consider Asia McClain’s January 13, 2015 affidavit in addressing the merits of the appeal, until the affidavit was presented to the circuit court and made part of the record.

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<sup>1</sup>Md. Code Ann. Crim. Proc. §7-109(b)(2) refers to “bail,” while Md. Rule 4-216 and Md. Rule 4-349(b) refer to “release.” Setting a *bail* pursuant to Crim. Proc. §7-109(b)(2) is directly related to and in furtherance of *release*, as set forth under Md. Rule 4-216 and Md. Rule 4-349(b).



Had Petitioner made a request for his release prior to the Remand, the circuit court would have considered that request without the instructions and directives which indicated future action by the Maryland Court of Special Appeals.

The circuit court must now view Petitioner's Motion in light of the instructions and directives set forth in the Remand. Pursuant to those directives, the circuit court re-opened the post-conviction and conducted further proceedings. The Maryland Court of Special Appeals indicated that, were the court to "conduct any further proceedings it deems appropriate . . . the parties will be given, if and when this matter returns to this court, an opportunity to supplement their briefs and the record." *Id.* at 4. The Remand lastly ordered, that "after taking any action it deems appropriate, the circuit court shall forthwith re-transmit the record to this Court for further proceedings." *Id.* at 5. The circuit court's June 30, 2016 order granting post-conviction relief, not only vacated Petitioner's convictions and granted Petitioner's request for a new trial, it also followed the directive of the Remand and re-transmitted the record with Asia McClain's affidavit and pertinent testimony. The circuit court, as a result of and in furtherance of the Remand, did not: (1) set the matter for arraignment; and/or (2) schedule a date for a new trial. The circuit court would have given these additional commands to the clerk of the circuit court had it granted post-conviction relief without regard to the Remand.

Though Crim. Proc. § 7-109(b)(2) allows the circuit court the discretion to both stay the order granting post-conviction relief and set a bail as it relates to Petitioner's Motion, the circuit court finds that releasing Petitioner by setting a bail, or other form of release, would not be appropriate based upon: (1) the instructions and directives of the Remand (to re-transmit the record with Asia McClain's affidavit and pertinent testimony); (2) the State's pending appellate issue (expert testimony concerning cell phone tower location reliability [appeal from June 30, 2016

order]); and (3) Petitioner's pending appellate issues (whether trial counsel rendered ineffective assistance by failing to contacts a potential alibi witness [conditional cross-appeal from June 30, 2016 order] and whether trial counsel was ineffective for failing to pursue a plea offer<sup>2</sup> [appeal from January 6, 2014 order]). In addition, the evidence likely to be presented at a new trial does not warrant releasing Petitioner by setting a bail or other form of release. Most importantly, however, is the clear language of the Remand indicating further action by the Maryland Court of Special Appeals. Consequently, the circuit court, in the exercise of its discretion, shall deny Petitioner's Motion.

### ALTERNATIVE ANALYSIS

In an overabundance of caution, based upon the strong advocacy demonstrated by Petitioner and the State in these proceedings, and to negate the need for additional evidentiary findings (arising from an interlocutory appeal), the circuit court shall, in the alternative, rule upon Petitioner's Motion by considering release through the application of the Maryland Rules. Petitioner prefaces his Motion upon his position that the circuit court should apply Md. Rule 4-216 in determining his release pending appeal, which governs the "authority of a judicial officer" to order "*pretrial* release." Md. Rule 4-216 (emphasis added); *see also*, Pet'r's Mot. 7-8. The State opposes Petitioner's Motion on the grounds that the circuit court should apply Md. Rule 4-349 in determining Petitioner's release pending appeal, which governs "release *after conviction*." Md. Rule 4-349 (emphasis added); *see also*, State's Resp. 4-5.

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<sup>2</sup> Petitioner has not abandoned the issue of "[w]hether trial counsel was ineffective for telling her client that she had fulfilled his wish and approached the State about a plea offer, when in fact trial counsel never spoke to the State about a potential plea deal." Appl. for Leave to Appeal the Den. of Post-Conviction Relief 1, January 27, 2014.

In staying the June 30, 2016 order which vacated Petitioner's conviction, the circuit court recognized the outstanding appellate issues, two of which arose from the circuit court's decision to grant Petitioner's post-conviction relief. A third appellate issue regarding trial counsel's failure to solicit a plea offer (which arose from the circuit court's initial denial of Petitioner's post-conviction relief) has not been abandoned by Petitioner. The circuit court finds that the numerous pending appellate issues place Petitioner in a post-trial status, rather than a pretrial status.

Therefore, were the circuit court to consider releasing Petitioner pending appeal, it would apply the factors set forth in Md. Rule 4-349(b)<sup>3</sup> and Maryland case law regarding release after conviction, as set forth in *Bigley v. Warden, Md. Corr. Inst. for Women*, 16 Md.App. 1 (1972).

### **Factors**

Md. Rule 4-349(b), states that the court, in making its decision to release a defendant after conviction, may consider the nine (9) factors from Md. Rule 4-216, listed *infra*, and whether any appellate review sought appears to be frivolous or taken for delay.<sup>4</sup> Under Md. Rule 4-349(b), Petitioner carries the burden to show that he (1) "will not flee;" and (2) "will not pose a danger to any other person or to the community." *Id.*

The nine (9) factors a judicial officer may consider in their decision to release a defendant pending release after conviction are:

- the nature and circumstances of the offense charged, the nature of the evidence against the defendant, and the potential sentence upon conviction;

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<sup>3</sup> The factors appear in Md. Rule 4-216 (e), as cross-referenced in Md. Rule 4-349(b).

<sup>4</sup> Md. Rule 4-349(b) cross-references "factors set forth in Md. Rule 4-216(f)." However, Md. 4-216(f) provides conditions of release, and not factors. The factors appear to be set forth in Md. Rule 4-216(e)(1)(A)-(I). As a result of a recent inquiry to the Maryland Rules Committee by the circuit court, it was ascertained that this mistake will be corrected within the 192<sup>nd</sup> Report to be issued on January 5, 2017.



- the defendant's prior record of appearance at court proceedings or flight to avoid prosecution or failure to appear at court proceedings;
- the defendant's family ties, employment status and history, financial resources, reputation, character and mental condition, length of residence in the community, and length of residence in this State;
- any recommendation of an agency that conducts pretrial release investigations;
- any recommendation of the State's Attorney;
- any information presented by the defendant or defendant's attorney;
- the danger of the defendant to the alleged victim, another person, or the community;
- the danger of the defendant to himself or herself; and
- any other factor bearing on the risk of a willful failure to appear and the safety of the alleged victim, another person, or the community, including all prior convictions and any prior adjudications of delinquency that occurred within three years of the date the defendant is charged as an adult.

Md. Rule 4-216(e)(1)(A)-(I); Md. Rule 4-349(b).

*Factor One:*

*The nature and circumstances of the offense charged, the nature of the evidence against the defendant, and the potential sentence upon conviction*

In relation to the first factor, Petitioner raises several key points. “Absent at [Petitioner’s] trial were many significant pieces of evidence that one would expect to see in a case like this.” Pet’r’s Mot. 14. Specifically, no witness saw Defendant and the victim leave a busy high school together on the day of the murder; no witness saw Defendant transfer the victim’s body from the front seat of the car to the trunk in the Best Buy parking lot during daylight hours; and there was no trace evidence linking Defendant to the victims wooded burial site. *Id.* at 14–15. Petitioner further argues that the evidence that was presented at trial consisted of “faulty, unreliable” cell phone records and “highly questionable testimony of Jay Wilds,” who has a long list of run-ins with police including an allegation of strangling a girlfriend to “prevent her from screaming.” *Id.* at 15, 21–23.

However, the State characterizes the evidence against Petitioner as “stronger than what is routinely presented against criminal defendants who are tried and rightly convicted and whose convictions are affirmed all the time.” State’s Resp. 5. Specifically, the State points out that the evidence in Petitioner’s case includes testimony of Jay Wilds, who helped bury the victim; witnesses testimony of Petitioner’s “possessive behavior toward the victim;” “toll records and data corresponding to Syed’s cell phone, which corroborated the testimony of Wilds and other witnesses;” a map page to Leakin Park ripped from a book with Petitioner’s palm print on the back cover, both found in the victim’s car; and an incriminating letter found in Petitioner’s bedroom. *Id.*

Petitioner argues that the State’s timeline for the murder is implausible based on the victim’s fixed lividity and the testimony of alibi witness, Asia McClain, who testified “she had been with Syed in a library at the same time the State theorized the murder took place.” Pet’r’s Mot. 6, 24–26. Regarding Asia McClain’s testimony, the State argues that Petitioner “instruct[ed] a classmate he barely knew to type a letter for him as part of a false alibi.” State’s Resp. 3.

Upon conviction, Petitioner points out that he will be eligible for parole and work release in 2024, and is unlikely to engage in any behavior that would jeopardize this eligibility.” Pet’r’s Mot. 14–15. The State contends that Petitioner is an “exquisitely unsuitable candidate for parole,” and the mere possibility of parole some years away is not enough to support Petitioner’s argument that he would not flee to avoid incarceration. State’s Resp. 7.

The circuit court finds that the nature and circumstances of the offenses are the most serious in nature and there still is compelling evidence against Petitioner.<sup>5</sup> The circuit court also finds that

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<sup>5</sup> Although the State characterizes the cell phone tower evidence against Petitioner as strong, the circuit court notes that this evidence was the basis of the circuit court’s grant of post-conviction relief, and likely would be offered and attacked differently at a new trial.



the nature of the evidence against Petitioner creates a greater risk of flight. The circuit court further finds that upon conviction, Petitioner still faces the potential sentence of life imprisonment plus thirty years.

*Factor Two:*

*The defendant's prior record of appearance  
at court proceedings or flight to avoid prosecution or failure to appear at court proceedings*

Petitioner notes that, prior to his arrest, he had no prior interactions with police or the criminal justice system that would be indicative of his potential to avoid prosecution or failure to appear at court proceedings. Pet'r's Mot. 9.

The circuit court finds that the record indicates that Petitioner has no history of flight or failure to appear.

*Factor Three:*

*The defendant's family ties, employment  
status and history, financial resources, reputation, character and mental  
condition, length of residence in the community, and length of residence in this State*

In relation to the third factor, Petitioner discusses the close relationships he has maintained with friends and family in Maryland, and that individuals in this local support network are willing to provide financial support. *Id.* at 11–12. Petitioner notes that absconding would be particularly difficult considering his family and friends are local, the outside world is foreign to him after 17 years of incarceration, he does not have a passport, and, because of the publicity garnered by his case, he is virtually recognized by the entire world. *Id.* Petitioner points out that he is well liked by prison staff and other inmates, has a reputation of being respectful, has not had any violent infractions while incarcerated, and has taken advantage of limited opportunities to better himself while incarcerated. *Id.* at 10. Recognizing the difficulties “for long term inmates to adjust to life outside of prison,” Petitioner has retained a social worker to help aid the transition into the community upon his release. *Id.* at 26.

However, the State points out that the trial court viewed Petitioner as having a “charismatic ability” to manipulate the victim, classmates, and loved ones. State’s Resp. 3. The State also asserts that Petitioner’s “notoriety and access to the financial capital of others can be as much an asset as an obstacle to flight,” and that Petitioner should not be treated differently just because his case has attracted media attention. *Id.* at 6.

The circuit court finds that Petitioner has strong family ties, and his length of residence in the community and this State is consistent with his tender years at the time of his arrest and conviction.

*Factor Four:*

*Any recommendation of an agency that conducts pretrial release investigations*

The State argues there is no reason Petitioner’s bail status should be different than when he was previously awaiting trial, and Pretrial Services advised the court that Petitioner “be held without bail as is consistent with the normal outcome of a defendant charged with first degree murder and kidnapping.” State’s Resp. 3.

The circuit court sought, *sua sponte*, a report Pretrial Services, but one was not provided.

*Factor Five:*

*Any recommendation of the State's Attorney*

The State argues that Petitioner “has been charged, convicted and sentenced to life in prison for premeditated murder and kidnapping, [and] there remains a risk of flight and a risk to public safety” which warrants a denial of his request for release.” *Id.* at 7.

The circuit court concludes that the State opposes any release based upon its response to Petitioner’s Motion.

*Factor Six:*  
*Any information presented by the defendant or defendant's attorney*

Petitioner argues that the original bail hearing was fundamentally flawed by the State's highly-charged misrepresentation that Petitioner was a flight risk based upon his Pakistani roots and an unfounded claim regarding a trend of scorned, Pakistani men attacking ex-lovers and fleeing the country to escape punishment. Pet'r's Mot. 2-4.

The circuit court has considered all the information presented by Petition's counsel in support of Petitioner's Motion.<sup>6</sup>

*Factor Seven:*  
*The danger of the defendant to the alleged victim, another person, or the community*

In relation to the seventh factor, Petitioner points out that he has not incurred a single citation for a violent act in his 17 years of incarceration, and he is unlikely would to harm or intimidate a witness given "the whole world is watching him." *Id.* at 9-10. With the financial support of friends and family, Petitioner argues he is unlikely to resort to criminal activity as a means of financial gain. *Id.* at 10. Furthermore, members of Petitioner's family and community have offered to pledge real property as part of Petitioner's bail, and have incentive to monitor Petitioner and report any infractions. *Id.* at 12. The State argues Petitioner is a danger to the community due to the seriousness of the crimes for which he is charged. State's Resp. 5-6. The State contends that the fact that Petitioner's intended victim has already lost her life, does not mean Petitioner is any less of a danger to others in the community. *Id.*

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<sup>6</sup> The circuit court finds that Petitioner's March 31, 1999 bail hearing was fundamentally flawed by the State's argument which was xenophobic and a gendered, cultural stereotype of Pakistani men. That such an argument was made without any basis in fact, and potentially considered by the judicial officer in determining flight risk, is so egregious that it negates the circuit court giving that bail decision any weight in this matter, though there may have been other compelling evidence as to risk of flight.



The circuit court finds that Petitioner has met his burden in establishing that he poses no danger to the victim, since the victim is deceased, and believes that Petitioner poses no danger to any another person or the community.

*Factor Eight:  
The danger of the defendant to himself or herself*

The circuit finds there was no evidence indicating whether Petitioner poses a danger to himself.

*Factor Nine:  
Any other factor  
bearing on the risk of a willful failure to appear  
and the safety of the alleged victim, another person, or the  
community, including all prior convictions and any prior adjudications of  
delinquency that occurred within three years of the date the defendant is charged as an adult*

In relation to the ninth factor, Petitioner points out that, at the time of his arrest, Petitioner was an honor roll student, played varsity sports, was well liked by his peers, had been accepted at UMBC, and had no history of violence and no prior contact with police. Pet'r's Mot. 9. Petitioner argues that he is not at risk to willfully fail to appear because he has been waiting 17 years to prove his innocence in this case, and flight would undermine that goal. *Id.* at 11.

However, the State asserts that Petitioner's claim of "waiting to prove his innocence" is undercut by Petitioner's argument that he is entitled to post-conviction relief based on trial counsel's failure to honor and solicit a plea agreement. State's Resp. 6. The State also argues that the potential to return to life in prison indicates an increased likelihood that Petitioner will abscond. *Id.*

The circuit court finds that Petitioner poses a risk of failing to appear at a new trial based upon the potential of being convicted a second time and the likelihood of a life sentence being re-imposed.

### **Bigley Consideration**

In addition to the nine factors, discussed herein, Maryland case law provides guidance regarding the circuit court's discretion in releasing a defendant *after conviction*:

The grant or denial of bail pending appeal will turn on the circumstances of each particular case where the matter is one of discretion of the court. . . . *However, since the probability of ultimate punishment is so enhanced after conviction that the accused is much more likely to attempt to escape if liberated on bail than he was before conviction, and since a defendant who has been adjudged guilty no longer has the benefit of the presumption of innocence, the courts should proceed with caution and grant bail pending appeal only where the peculiar circumstances of the case render it proper.*

*Bigley*, 16 Md. App. at 12 (quoting 8 Am. Jur. 2d, Bail and Recognizance § 44, pp. 809–911) (emphasis added).

Although *Bigley* notes that the court is afforded discretion to release a defendant after conviction, the message is clear: proceed with caution. After review of applicable Maryland Rules and case law, “the peculiar circumstances” of the instant case, and proceeding with caution, the circuit court, in its discretion, shall not set bail pending resolution of the three appellate issues raised by the parties. *Id.* Therefore, even in an alternative analysis, pursuant to the factors set forth in Md. Rule 4-349(b) and the *Bigley* decision, the circuit court shall not set a bail or otherwise release Petitioner pending appeal.

### **Whether Appellate Review Is Frivolous or Taken for Delay**

Md. Rule 4-349(b) also requires the circuit court to determine whether any appellate review sought by Petitioner seems to be frivolous or taken for delay. The circuit court finds that Petitioner's Motion, as have all his actions in this protracted litigation, does not appear to be frivolous or taken for purposes of delay.

### **Risk of Flight and/or Danger**

The circuit court finds that Petitioner has not met his burden to prove he will not flee and has met his burden to prove he does not pose a danger to the victim or any member of the community.

### **ALTERNATIVE FINDING**

Having considered the nine (9) factors set forth in Md. Rule 4-349(b), the cautionary language in *Bigley*, and whether any appellate review sought appears to be frivolous or taken for delay, as well as, whether Petitioner will not flee or pose a danger, the circuit court, in the exercise of its discretion, shall not release Petitioner after conviction, pending appeal.<sup>7</sup>

### **CONCLUSION**

In light of the circuit court's Order to Stay Post-Conviction Relief, which was issued in recognition of and in accordance with the limitations and directives of the Remand, the outstanding appellate issues before the Maryland Court of Special Appeals (an issue appealed by the State, an issue conditionally cross-appealed by Petitioner, and an issue appealed and not abandoned by Petitioner), and the evidence likely to be presented at a new trial, the circuit court, within its discretion, shall deny Petitioner's Motion for Release Pending Appeal.

In the alternative, because Petitioner's Motion is a request for release *after conviction*, in applying Md. Rule 4-349(b) and applicable case law, the circuit court shall deny Petitioner's Motion for Release Pending Appeal.

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<sup>7</sup> In applying the factors set forth in Md. Rule 4-349(b) the court need not consider imposing the least onerous condition or combination of conditions of release as set forth in Md. Rule 4-216(e)(3) and (4), such as releasing Petitioner on personal recognizance or setting a bail.



Therefore, it is on this 28<sup>th</sup> day of December, 2016, that Petitioner's Motion for Release Pending Appeal is hereby **DENIED**.

**Judge Martin P. Welch, Part 97**  
Signature Appears on Original Document

~~MARTIN P. WELCH~~, Judge  
Circuit Court for Baltimore City

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TEST  
*Marilyn Bentley*  
Marilyn Bentley, Clerk



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\* \* \* \* \*

**ORDER**

Upon consideration of Petitioner's Motion for Release Pending Appeal, the State's Response to Motion for Release, and Syed's Reply in Support of Motion for Pretrial Release thereto; and for the reasons set forth in the Memorandum Opinion for the above captioned case, it is this 28<sup>th</sup> day of December 2016,

**ORDERED** that Petitioner's Motion for Release Pending Appeal is hereby **DENIED**.

**Judge Martin P. Welch, Part 97**  
Signature Appears on Original Document

**MARTIN P. WELCH, Judge**  
**Circuit Court for Baltimore City**

**TRUE COPY**  
TEST

*Marilyn Bentley*  
Marilyn Bentley, Clerk



cc: Adnan Syed, Petitioner

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