[Cite as *State v. Marler*, 2009-Ohio-2423.]

IN THE COURT OF APPEALS FOR CLARK COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 2007 CA 8
v.	:	T.C. NO. 06 CR 155
JOSEPH E. MARLER	:	(Criminal appeal from Common Pleas Court)
Defendant-Appellant	:	
	:	

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O P I N I O N

Rendered on the 22nd day of May, 2009.

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DONOVAN, P.J.

{¶1} Defendant-appellant Joseph E. Marler appeals his conviction and sentence for one count of endangering children, in violation of R.C. § 2919.22(B)(6), a felony of the third degree, and 100 counts of pandering obscenity involving a minor, in violation of R.C. § 2907.321(A)(5), all felonies of the fourth degree.

{¶2} On February 6, 2006, Marler was indicted for one count of endangering children,

in violation of R.C. § 2919.22(B)(6), a felony of the third degree, and 100 counts of pandering obscenity involving a minor, in violation of R.C. § 2907.321(A)(1), all felonies of the first degree. At his arraignment on February 9, 2006, Marler pled not guilty to the charges in the indictment.

{¶3} Marler filed a motion to suppress on February 15, 2006. On March 22, 2006, a hearing was held on said motion before the trial court. In a written decision filed on April 28, 2006, the trial court overruled Marler's motion to suppress.

{¶4} On August 7, 2006, Marler filed a motion to dismiss for fair trial violation. Marler filed a motion in limine on August 28, 2006, regarding the authentication of the State's evidence through alleged hearsay statements. One day later on August 29, 2006, Marler filed another motion to dismiss in which he alleged that his indictment violated the ex post facto clauses of the United States and Ohio constitutions. The trial court held a hearing on all of Marler's remaining motions on September 11, 2006. The court subsequently overruled each of Marler's pre-trial motions in two separate entries filed on September 20, 2006.

{¶5} On November 1, 2006, after negotiations with the State, Marler pled no contest to 100 counts of the reduced charge of pandering obscenity involving a minor, in violation of R.C. § 2907.321(A)(5), all felonies of the fourth degree. Additionally, Marler pled guilty to one count of endangering children, in violation of R.C. § 2919.22(B)(6). The trial court accepted Marler's pleas and found him guilty on all counts. On January 5, 2007, the trial court sentenced Marler to 5 years of community control, fined him $5,000.00, classified him as a sexually oriented offender, and ordered him to complete a six month program at the Residential River City Correctional Facility.

{¶6} Marler filed a timely notice of appeal with this Court on February 1, 2007.

I

{¶7} On June 27, 2005, Special Agent Jeff Coburn from the Federal Bureau of Investigations' Cincinnati office contacted Detective Bryan White of the Clark County Sheriff's Office regarding his investigation of a child pornography ring in Tampa, Florida. Specifically, Agent Coburn stated that an individual named Donald Baker had been arrested for trading images over the internet which depicted children engaged in sex acts. Agent Coburn informed Detective White that he had received information from the Innocent Images Task Force based in Tampa, Florida, that Baker had received numerous images of child pornography from a suspect who resided in New Carlisle, Clark County, Ohio.

{¶8} Philippe Dubord, an agent for Innocent Images Task Force, reviewed the evidence taken from Baker's computer. Agent Dubord found that Baker, who used the online screen name "teenboy 18 2003" had received and sent numerous e-mails and images using his computer from November 2003 through February 2004. At least five of the offending images were found by Agent Dubord to have been sent to Baker by an individual using the online screen name "whattayougonnado." After further investigation, Agent Dubord discovered that the screen name "whattayougonnado" was registered to the appellant Joseph A. Marler, residing at 534 Bowser Drive in New Carlisle, Clark County, Ohio.

{¶9} The results of Agent Dubord's investigation were forwarded to Agent Coburn, who then passed on the evidence to Detective White. Detective White used the information to obtain a warrant to search Marler's residence on July 11, 2005. Pursuant to the warrant, Detective White seized Marler's home computer which was found to contain images of child

pornography.

{¶10} After filing numerous pre-trial motions, all of which were overruled, Marler pled no contest to 100 counts of pandering obscenity involving a minor. Marler also pled guilty to one of endangering children. The trial court found Marler guilty on all counts and sentenced him accordingly.

{¶11} It is from this judgment that Marler now appeals.

II

{¶12} Marler's first assignment of error is as follows:

{¶13} "THE TRIAL COURT ERRED DENYING MARLER'S MOTION TO DISMISS FOR FAIR TRIAL VIOLATION."

{¶14} In his first assignment, Marler contends that the trial court erred when it denied his motion to dismiss for fair trial violation since his defense counsel and defense expert faced the potential threat of federal prosecution for merely possessing, viewing, and analyzing the evidence to be used against him at trial. Thus, Marler argues that the limitation on his ability to present a defense made it impossible for him to obtain a fair trial.

{¶15} In support of his argument, Marler relies heavily on an opinion issued by the Eleventh District Court of Appeals of Ohio in *State v. Brady*, Ashtabula App. No. 2005-A-0085, 2007-Ohio-1779 (hereinafter *Brady I*), wherein the court analyzed the issue of whether the federal pornography statutes deprived a defendant of the right to expert assistance in a trial involving charges for pandering obscenity and sexually oriented material involving minors. In *Brady*, the Eleventh District affirmed the decision of the trial court which dismissed all counts brought against the defendant under R.C. § 2907.321. The Eleventh District found that he was

denied the assistance of an expert witness since the expert would be subject to federal prosecution for viewing or analyzing the State's evidence, which would, in turn, make it impossible for the defendant to receive a fair trial.

{¶16} The Supreme Court of Ohio, however, reversed the decision of the Eleventh District and found that the federal statutes provided for the ability of the defendant's expert to examine the State'e evidence at the prosecutor's office or other government facility. *State v. Brady*, 119 Ohio St.3d 375, 2008-Ohio-4493 (hereinafter *Brady II*). Thus, the Supreme Court held that the lack of an exception for expert witnesses in the federal pornography statutes did not deprive a defendant of the assistance of an expert, nor did it deprive a defendant of the right to fair trial. *Id*.

{¶17} Marler was charged and ultimately convicted under R.C. § 2907.321, which was one of the statutes directly at issue in *Brady II*. Additionally, Marler specifically argues that he was denied the right to a fair trial since his defense counsel and expert witness were deprived the opportunity to examine and analyze the State's evidence based on the threat of federal prosecution. In light of the Supreme Court's holding in *Brady II*, Marler's counsel and expert witness could have thoroughly examined the evidence at the prosecutor's office in order to prepare for trial and mount a defense. Thus, Marler was not deprived of the right to a fair trial, and the trial court did not err when it overruled his motion to dismiss.

{¶18} Marler's first assignment of error is overruled.

III

{¶19} Marler's second assignment of error is as follows:

{¶20} "THE TRIAL COURT ERRED DENYING MARLER'S MOTION TO

SUPPRESS."

{¶21} In his second assignment, Marler asserts that the trial court erred when it denied his motion to suppress the evidence that was discovered after a search conducted pursuant to a search warrant. Essentially, Marler argues that the search warrant was deficient and, therefore, lacked probable cause.

{¶22} Initially, we must note that "appellate courts give great deference to the factual findings of the trier of facts. At a suppression hearing, the trial court serves as the trier of fact, and must judge the credibility of witnesses and the weight of the evidence. The trial court is in the best position to resolve questions of fact and evaluate witness credibility. In reviewing a trial court's decision on a motion to suppress, an appellate court accepts the trial court's factual findings, relies on the trial court's ability to assess the credibility of witnesses, and independently determines whether the trial court applied the proper legal standard to the facts as found. An appellate court is bound to accept the trial court's factual findings as long as they are supported by competent, credible evidence. (Internal citations omitted)." *State v. Purser*, Greene App. No. 2006 CA 14, 2007-Ohio-192.

{¶23} "The Fourth Amendment to the United States Constitution and Section 14, article 1 of the Ohio Constitution requires [sic] that a warrant only be issued if probable cause for the warrant is demonstrated through an oath or affidavit." *State v. Robinson*, Montgomery App. No. 20458, 2004-Ohio-5281.

{¶24} "In determining the sufficiency of probable cause in an affidavit submitted in support of a search warrant, '[t]he task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before

him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.' (*Illinois v. Gates* [1983], 462 U.S. 213, 238-239, 103 S.Ct. 2317, 76 L.Ed.2d 527 followed.)

{¶25} "In reviewing the sufficiency of probable cause in an affidavit submitted in support of a search warrant issued by a magistrate, neither a trial court nor an appellate court should substitute its judgment for that of the magistrate by conducting a *de novo* determination as to whether the affidavit contains sufficient probable cause upon which that court would issue the search warrant. Rather, the duty of a reviewing court is simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed. In conducting any after-the-fact scrutiny of an affidavit submitted in support of a search warrant, trial and appellate courts should accord great deference to the magistrate's determination of probable cause, and doubtful or marginal cases in this area should be resolved in favor of upholding the warrant. (*Illinois v. Gates* [1983], 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 followed.)

{¶26} "'[I]t is clear that 'only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause.'" *State v. George* (1989), 45 Ohio St.3d 325. "To establish probable cause to search a home, the facts must be sufficient to justify a conclusion that the property that is the subject of the search is probably on the premises to search. (Internal citation omitted). The nexus between the items sought and the place to be searched depends upon all of the circumstances of each individual case, including the type of crime and the nature of the evidence." *State v. Freeman*, Highland App. No. 06CA3, 2006-Ohio-5020.

{¶27} In the instant case, Marler directs us to the affidavit submitted to the trial court by Detective White, which states in pertinent part:

{¶28} "[The Hillsborough County Sheriff's Office] seized a computer from the residence [of Donald Baker] and had it examined for child pornography. Donald Baker cooperated with the investigation, and admitted that he was involved in a child pornography trading ring involving AOL users on the internet. Task Force Agent Philippe Dubord reviewed the evidence received from Donald Baker's computer, and found hundreds of images with the screen name 'teenboy 18 2003,' which was the name Donald Baker was using on-line. The recovered e-mails and images were received and sent between November 2003, and February 2004. Five of the images sent to Donald Baker were sent by the screen name 'whattayougonnado.' Agent Dubord then subpoenaed the subscriber information from the screen name 'whattayougonnado.' That AOL screen name was registered to a Joseph Marler, residing at 534 Bowser Drive in New Carlisle, Clark County Ohio. That AOL account was terminated by AOL on December 27, 2004. The account showed that Joseph Marler used a credit card to pay for the account. The address listed on the account matches that of Joseph Marler, 534 Bowser Drive, New Carlisle Ohio."

{¶29} Marler challenges the sufficiency of the search warrant on the following grounds: 1) a description of the five images sent from Marler's AOL account to Baker was not provided in Detective White's affidavit; 2) the judge issuing the search warrant did not have the ability to conclude whether the pornographic images he reviewed depicted "actual" children rather than "virtual" children; and 3) the facts contained in the affidavit were "stale" such that the issuing judge could not have reasonably found probable cause to conclude that evidence of criminal

activity would still be present at Marler's residence on July 11, 2005.

{¶30} Initially, the fact that there was no description of the five images sent by Marler to Baker in the affidavit does not undermine the search warrant. Once he was in custody, Baker admitted that he was involved in a child pornography trading ring with other AOL users on the internet. Moreover, the affidavit clearly states that five of the images that were retrieved from Baker's computer were discovered to have been sent from an e-mail address paid for by Marler. Those five images, while not described in any detail, were attached to Detective White's affidavit which was brought before the judge who ultimately signed the warrant. Since the images were attached to the affidavit for the judge to review, it was unnecessary for the affidavit to contain a description of each of the five images.

{¶31} Marler next argues that the judge issuing the search warrant did not have the ability to conclude whether the pornographic images he reviewed depicted "actual" children, rather than "virtual" children or pictures that have been created on a computer of what appears to child pornography. This is an important distinction because, as Marler points out, it is not illegal to possess virtual child pornography, or pornography that does not depict real children. Virtual child pornography "depicts children, but through images that are either entirely computer-generated or that are created using only adults." *State v. Tooley*, 114 Ohio St.3d 366, 2007-Ohio-3698. Virtual child pornography falls into a protected category of free speech under the First Amendment. *Ashcroft v. Free Speech Coalition* (2002), 535 U.S. 234, 122 S.Ct. 1389, 152 L.Ed.2d 403.

{¶32} Marler concludes that if the reviewing judge could not differentiate between real and computer-generated images depicting child pornography, Marler could not be found guilty

of knowingly possessing images of child pornography containing actual minors. Marler ignores the fact that R.C. 2907.321(B)(3) provides in pertinent part:

{¶33} "(3) In a prosecution under this section, the trier of fact may infer that a person in the material or performance involved is a minor if the material or performance, through its title, text, visual representation, or otherwise, represents or depicts the person as a minor."

{¶34} We agree with the trial court that if a trier of fact is permitted to infer that a criminal offense has occurred based on its review of the images in question, then it follows that a neutral magistrate can make a finding of probable cause to support the issuance of a search warrant based on his or her review of the images.

{¶35} More importantly, "only the probability, and not a prima facie showing, of criminal activity [was] the standard of probable cause" that the reviewing judge had to follow when he issued the search warrant based on the information and images provided in Detective White's affidavit. The images attached to the affidavit appeared to show actual minor children engaged in sex acts with adults. We agree with the State that an individual who secretly possesses and trades images that appear to be actual child pornography may indeed possess actual child pornography. Such suspicious behavior warrants further scrutiny, and "a judicial officer may find probable cause only upon the existence of circumstances that warrant suspicion." *State v. Underwood*, Scioto App. No. 03CA2930, 2005-Ohio-2309. For the purposes involved in the issuance of a search warrant, the five images attached to the affidavit spoke for themselves. It was unnecessary for Detective White to provide undeniable proof that the five images did, in fact, contain actual minors, and the reviewing judge did not err by issuing the search warrant based on the probable cause established by the five images that Marler was in

possession of illegal child pornography.

{¶36} Lastly, Marler contends that the facts contained in the affidavit were stale because approximately 7 months passed between the closing of Marler's e-mail account from which the five images were sent, and the issuance of the warrant to search Marler's residence. Marler further notes that approximately 18 months passed between the actual transmission of the images from his computer to Baker's computer and the issuance of the search warrant.

{¶37} An affidavit in support of a search warrant must present timely information and include facts so closely related to the time of issuing the warrant as to justify a finding of probable cause at that time. *State v. Jones* (1992), 72 Ohio App.3d 522, 526. No arbitrary time limit dictates when information becomes "stale." *Id.* The test is whether the alleged facts justify the conclusion that certain contraband remains on the premises to be searched. *State v. Floyd*, Darke App. No. 1389. If a substantial period of time has elapsed between the commission of the crime and the search, the affidavit must contain facts that would lead the judge to believe that the evidence or contraband are still on the premises before the judge may issue a warrant. *State v. Yanowitz* (1980), 67 Ohio App.2d 141, 144.

{¶38} "Ohio courts have identified a number of factors to consider in determining whether the information contained in an affidavit is stale, including the character of the crime, the criminal, the thing to be seized, as in whether it is perishable, the place to be searched, and whether the affidavit relates to a single isolated incident. *** In child pornography cases, these factors are so closely intertwined that consideration of one necessarily involves consideration of the others. (Internal citations omitted)." *State v. Ingold*, Franklin App. No. 07AP-648, 2008-Ohio-2303.

{¶39} Marler asserts that the initial transmission of the five images to Baker was a seemingly isolated incident and there was no evidence that he engaged in protracted or on-going illegal activity. However, based on the evidence in question, namely images of child pornography sent over the internet as part of an interstate trading ring, we find that the information in Detective White's affidavit is not so stale as to render the warrant defective.

{¶40} "The observation that images of child pornography are likely to be hoarded by persons interested in those materials in the privacy of their homes is supported by common sense and the cases. Since the materials are illegal to distribute and possess, initial collection is difficult. Having succeeded in obtaining images, collectors are unlikely to quickly destroy them. Because of their illegality and the imprimatur of severe social stigma such images carry, collectors will want to secret them in secure places, like a private residence. This proposition is not novel in either state or federal court; pedophiles, preferential child molesters, and child pornography collectors maintain their materials for significant periods of time." *Id*., citing *United States v. Riccardi* (C.A.10, 2005), 405 F.3d 852, 861, quoting *United States v. Lamb* (N.D.N.Y.1996), 945 F.Supp. 441, 460.

{¶41} Simply put, the very nature of the offending images coupled with the medium by which the images were sent support the trial court's holding that there was a "fair probability" that evidence of criminal activity was present on Marler's computer when the warrant was issued on July 11, 2005. The enduring quality of child pornography is demonstrated by the fact that such images can be stored indefinitely in the hard drive of an individual's computer. Thus, the issuing judge could reasonably assume that Marler retained computer-based images of child pornography in the same computer at the same residence he lived in when the initial five images

were sent to Baker. Given the information set forth in the affidavit, including the veracity of Detective White, we hold that the trial court had a substantial basis upon which to conclude that there was sufficient probable cause to issue the warrant.

{¶42} Marler's second assignment of error is overruled.

IV

{¶43} Marler's third assignment of error is as follows:

{¶44} "THE TRIAL COURT ERRED DENYING MARLER'S MOTION TO DISMISS FOR LACK OF CAPACITY TO KNOW WHEN HE IS VIOLATING THE LAW VERSUS EXERCISING HIS CONSTITUTIONAL RIGHTS UNDER THE *FREE SPEECH COALITION* DECISION."

{¶45} In his third assignment, Marler contends that the trial court erred when it overruled his motion to dismiss for lack of capacity to know when he is violating the law under R.C. § 2907.321 based on the U.S. Supreme Court's decision in *Ashcroft v. Free Speech Coalition* (2002), 535 U.S. 234, 122 S.Ct. 1389, 152 L.Ed.2d 403, which protects an individual's First Amendment right to possess virtual child pornography. Marler argues that the U.S. Supreme Court's holding in *Ashcroft* renders R.C. § 2907.321 overbroad insofar as the statute serves to chill speech that is protected by the First Amendment. Specifically, Marler asserts that an individual cannot visibly distinguish between actual child pornography and virtual child pornography. Thus, Marler argues that he was punished for behavior that he could not have known was illegal. We disagree.

{¶46} R.C. § 2907.321(A)(5) provides as follows:

{¶47} "(A) No person, with knowledge of the character of the material or performance

involved, shall do any of the following:

{¶48} "(5) Buy, procure, possess, or control any obscene material, that has a minor as one of its participants."

{¶49} "A clear and precise enactment may *** be overbroad if in its reach it prohibits constitutionally protected conduct." *Akron v. Rowland,* 67 Ohio St.3d 374, 387, 1993-Ohio-222, quoting *Grayned v. Rockford* (1972), 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222. "In considering an overbreadth challenge, the court must decide 'whether the ordinance sweeps within its prohibitions what may not be punished under the First and Fourteenth Amendments.'" Id. "'Only a statute that is substantially overbroad may be invalidated on its face.'" Id., quoting *Houston v. Hill* (1987), 482 U.S. 451, 107 S.Ct. 2502, 96 L.Ed.2d 398. "In order to demonstrate facial overbreadth, the party challenging the enactment must show that its potential application reaches a significant amount of protected activity. Nevertheless, criminal statutes 'that make unlawful a substantial amount of constitutionally protected conduct may be held facially invalid even if they also have legitimate application.'" Id. A defendant may challenge a statute as being facially overbroad in violation of the First Amendment "with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the required narrow specificity." *Broadrick v. Oklahoma* (1973), 413 U.S. 601, 612, 93 S.Ct. 2908, 37 L.Ed.2d 830.

{¶50} Initially, it should be noted that in *State v. Gillingham*, Montgomery App. No. 20671, 2006-Ohio-5758, we found that R.C. § 2907.321 contains an obscenity requirement that was not present in the statutes abolished by *Ashcroft*. In particular, we held that "a finding that materials are obscene avoids any need to apply the

alternative *Ferber* tests, which concern only materials that are not obscene, as well as [any need to apply] *Ashcroft's* particular application of *Ferber* to virtual materials that were prohibited by the federal statute but were not necessarily obscene." *Id*. *Ashcroft* held that pornographic materials that "appear to be" or "convey the impression" of a minor "engaging in sexually explicit conduct," but, in fact, do not involve the use of a minor, are protected speech, *unless they are obscene*. *State v. Kraft*, Hamilton App. No. C-060238, 2007-Ohio-2247. In light of our holding in *Gillingham*, we find that the United States Supreme Court's holding in *Ashcroft* is inapplicable to the offenses for which Marler was charged under R.C. § 2907.321(A)(5).

{¶51} Additionally, even if we were to apply the *Ashcroft* overbreadth analysis to R.C. § 2907.321, we find the reasoning of the Fifth District Court of Appeals in *State v. Eichorn*, Morrow App. No. 02 CA 953, 2003 , to be persuasive. In that case, the court found that R.C. § 2907.321 did not seek to prohibit virtual child pornography. The *Eichorn* court, therefore, held that R.C. § 2907.321 did not prohibit constitutionally protected speech, and was not overbroad.

{¶52} "The main distinction between the CPPA and the statutes under consideration is that the CPPA sought to prohibit virtual child pornography, that is, materials that appear to depict minors but were produced by means other than using real children. The statutes appellant challenges only prohibit materials produced by the use of real children and permit the trier of fact to infer that the person depicted in the material is in fact a minor if through the material's title, text, visual representation, or otherwise, the material represents or depicts the person as a minor. The state laws appellant challenges do not prohibit virtual child pornography, only pornography

produced by the use of real children." *State v. Eichorn*, Morrow App. No. 02 CA 953, 2003-Ohio-3415.

{¶53} In light of the foregoing analysis, we hold that the trial court did not err when it overruled Marler's motion to dismiss pursuant to U.S. Supreme Court's holding in *Ashcroft*. R.C. § 2907.321 does not prohibit the dissemination of virtual child pornography, rather the statute only prohibits pornographic materials produced through the use of actual minors. Thus, the statute was not constitutionally overbroad in its application to Marler.

{¶54} Marler's third assignment of error is overruled.

V

{¶55} Marler's fourth and final assignment of error is as follows:

{¶56} "THE TRIAL COURT ERRED DENYING MARLER'S MOTION TO DISMISS FOR EX POST FACTO CLAUSE VIOLATION."

{¶57} In his final assignment, Marler contends that the trial court erred when it overruled his motion to dismiss the indictment based on an alleged ex post facto clause violation. Specifically, Marler argues that R.C. § 2907.321 provides for a number of exceptions that would allow his defense counsel or expert witness to possess the State's evidence in this case for examination and review. Marler asserts, however, that his pursuit of such an exception under the Ohio child pornography statute would subject him to prosecution under the federal child pornography statute. Marler claims that this is an ex post facto violation.

{¶58} Marler's assertion that an ex post facto violation has occurred is without merit. As noted by the trial court in its decision overruling Marler's motion to dismiss

for ex post facto violation, Marler was free to pursue any of the exceptions/affirmative defenses available under R.C. § 2907.321 in order to avoid criminal liability for possession of child pornography. In light of the Ohio Supreme Court's recent decision in *Brady II*, Marler was free to examine and analyze the State's evidence at the prosecutor's office without fear of federal prosecution. 119 Ohio St.3d 375, 2008-Ohio-4493. Lastly, the trial court properly found that no changes in either the federal or Ohio state laws had been made between the time of Marler's alleged conduct and the time of his arrest. Thus, the trial court did not err when it held that no ex post facto violation occurred.

{¶59} Marler's fourth assignment of error is overruled.

VI

{¶60} All of Marler's assignments of error having been overruled, the judgment of the trial court is affirmed.

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BROGAN, J. and WOLFF, J., concur.

(Hon. William H. Wolff, Jr., retired from the Second District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio).

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