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IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. SC13-865

REBECCA LEE FALCON,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

REPLY BRIEF OF PETITIONER REBECCA LEE FALCON

ON DISCRETIONARY REVIEW OF A DECISION OF THE
FIRST DISTRICT COURT OF APPEAL

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ARGUMENT

I. REBECCA FALCON'S LIFE-WITHOUT-PAROLE SENTENCE IS UNCONSTITUTIONAL UNDER *MILLER v. ALABAMA*.

The state is correct that, if this Court holds *Miller v. Alabama*, --- U.S. ----, 132 S. Ct. 2455 (2012), nonretroactive, Rebecca Falcon's mitigation, which evinces that she was not that "rare" 15-year old for whom lifetime incarceration is a constitutional sentence, need not be addressed. State's Brief ("SB") at 10. But the mitigation is nonetheless significant in that it underscores *Miller*'s *raison d'etre*, by substantiating *Miller*'s elucidation of "a juvenile's 'lessened culpability' and greater 'capacity for change.'" *Id.* at 2460. *Miller*'s purpose – to avoid the very real risk of an unconstitutionally disproportionate life sentence for children for whom rehabilitation is probable – may best be understood when juxtaposed against the factors pertinent to this 15-year-old first-time offender and the mature Rebecca Falcon. Her mitigation demonstrates why "children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Id.* at 2469.[1]

II. THE UNITED STATES SUPREME COURT'S APPLICATION OF *MILLER* TO A SENTENCE CHALLENGED IN STATE COLLATERAL-REVIEW PROCEEDINGS COMPELS RETROACTIVE APPLICATION TO REBECCA FALCON.

The state contests that the relief granted to Kuntrell Jackson by the Supreme

[1] As for the remedy, the state suggests that, if *Miller* is retroactive, the case should be remanded to the trial court. (SB at 10). Petitioner agrees, but would add that the order denying post-conviction relief must be reversed, with directions to grant the motion and conduct an individualized sentencing under *Miller*.

Court is pertinent to the retroactivity question. The state seems to be arguing that because Jackson was seeking relief under an "extension" of *Graham v. Florida*, 560 U.S. 48 (2010) – a decision which likely was retroactive – the Court's decision to grant Jackson relief does not establish *Miller*'s retroactive application to similarly situated defendants in state collateral proceedings. (SB at 12). But the state sidesteps petitioner's argument on *Jackson*'s significance.

The state concedes that *Jackson* and *Miller* presented the same issue to the Supreme Court, with *Jackson* on collateral review and *Miller* on direct review. (SB at 11-12). But the state can offer no reason for the Court having taken Jackson's case – in addition to Miller's – and its ultimate grant of relief to Jackson.

The state conveniently ignores the Supreme Court's explanation in *Teague v. Lane*, 489 U.S. 288 (1989), that it would "refuse to announce a new rule in a given case unless the rule would be applied retroactively to the defendant in the case and to all others similarly situated," *id.* at 316, for "once a new rule is applied to the defendant in the case announcing the rule, evenhanded justice requires that it be applied retroactively to all who are similarly situated." *Id.* at 300. Thus, if *Miller*'s rule was to be confined to defendants on direct review, there was no reason to review Jackson's sentence. Under Supreme Court jurisprudence, the Court would not have taken Jackson's case unless the relief afforded him would be similarly granted to all state defendants seeking collateral relief.

Unable to offer any refutation of this argument, the state turns instead to what it describes as a "related" issue: whether a successive petition for writ of habeas corpus can be filed in federal court under *Tyler v. Cain*, 533 U.S. 656

(2001). (SB at 12). But the state fails to place this decision in context.

In *Tyler*, the Court construed a section of the Antiterrorism and Effective Death Penalty Act (AEDPA) that restricts when a state prisoner can file a second or successive federal habeas corpus petition. *Id.* at 660. Section 2244(b)(2)(A) of title 28 provides that such a petition can only be filed when based on a new constitutional rule "made" retroactive by the Supreme Court to cases on collateral review. The Supreme Court, after noting that AEDPA "greatly restricts the power of federal courts to award relief to state petitioners who file second or successive habeas corpus applications," concluded that Congress intended that the new rule had to have been previously held retroactive by the Supreme Court. 533 U.S. at 661, 663-64, 666.[2] *Tyler* thus neither undercuts, nor even addresses, the rule that, when the Court grants relief to a state prisoner on collateral review, that relief will be granted to similarly situated defendants.[3]

Cases from other jurisdictions have explicitly recognized the significance of the relief granted to Jackson on collateral review in addressing the retroactivity

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[2] The state's citations to excerpts from *Tyler* (SB at 12-13), are misleading in that they omit the quotation marks in that decision that show that the Court was interpreting the word "made," as used by Congress in the statute.

[3] Moreover, the case on which the state petitioner in *Tyler* was relying for retrospective relief, *Cage v. Louisiana*, 498 U.S. 39 (1990), was not a collateral-review case. The Court granted Cage relief on direct review, similar to the grant of relief to Miller on direct review. Thus, *Teague*'s rule of equal justice to similarly situated defendants was not at issue. But Rebecca Falcon is not relying on the grant of relief to *Miller*. Rather, her claim is premised on the Supreme Court's grant of relief to Jackson whose case was before the Court on *collateral* review. And finally, Rebecca Falcon is not seeking relief from a federal court on a successor habeas corpus petition, and thus 28 U.S.C. § 2244 has no bearing.

question. *Hill v. Snyder*, No. 10-14568, 2013 WL 364198, at *2 n.2 (E.D. Mich. Jan. 30, 2013) (after Court's grant of collateral relief to Jackson, "evenhanded justice requires that it be applied retroactively to all who are similarly situated" (citing *Teague*, 489 U.S. at 300)); *State v. Ragland*, 836 N.W.2d 107, 116 (Iowa 2013) ("[t]here would have been no reason for the Court to direct such an outcome if it did not view the *Miller* rule as applying retroactively to cases on collateral review"); *Jones v. State*, 122 So. 3d 698, 703 n.5 (Miss. 2013) (holding that *Miller* applies retroactively to cases on collateral review and concluding that its disposition of the case "comports with the disposition of *Miller*'s companion case *Jackson* … on collateral review"); *People v. Williams*, 982 N.E.2d 181, 197 (Ill. App. Ct. 2012) ("instructive" that Jackson was granted relief since once "a new rule is applied to the defendant in the case announcing the rule, evenhanded justice requires that it be applied retroactively to all who are similarly situated" (quoting *Teague*, 489 U.S. at 300)); *People v. Morfin*, 981 N.E.2d 1010, 1022-23 (Ill. App. Ct. 2012) (*Miller* is retroactive because it "mandates a sentencing range broader than that provided by statute," a holding "reinforced" by "the relief granted to Jackson" on collateral review).[4] "[I]f ever there was a legal rule that should – as a

[4] *See also Commonwealth v. Cunningham*, No. 38 EAP 2012, 2013 WL 5814388, at *17 (Pa. Oct. 30, 2013) (Baer, J., dissenting) (noting Justice Alito's reference to two "carefully selected cases" and finding it a "fair, if not compelling, inference" that Court intended retroactive application because "[i]t is implausible that the Supreme Court granted review of these two juvenile life-without-parole cases randomly"); *but see id.* at *3 & n.10, *6 (holding *Miller* not retroactive; suggesting that it is not clear that retroactivity issue was before the Supreme Court when granting Jackson relief, but recognizing that the state conceded retroactivity for Jackson in state court on remand); *People v. Carp*, 828 N.W.2d 685, 712-13 (Mich.
(continued . . .)

matter of law and morality – be given retroactive effect, it is the rule announced in *Miller*." *Hill*, *supra* at *2.[5]

To the extent that federal cases are pertinent, it should be noted that United States Attorneys within the Second, Third, and Eighth Circuits have taken the position that *Miller is* retroactive. *See Alejandro v. United States*, Nos. 13-4364 & 290-06, 2013 WL 4574066, at *1 (S.D.N.Y. Aug. 22, 2013) (on second successive motion to vacate, "the Government conceded that Alejandro's motion should be granted, and that he should be resentenced to determine whether a life sentence or some other sentence is appropriate in light of the Supreme Court's decision in *Miller*"); *In re Pendleton*, 732 F.3d 280, 282 (3rd Cir. 2013) (noting that the "United States asserts that *Miller* is retroactive" as to one petitioner, while contesting as to two); *Johnson v. United States*, 720 F.3d 720, 721 (8th Cir. 2013) ("[t]he government here has conceded that *Miller* is retroactive"); Government's Response to Petitioner's Application for Authorization to File a Second or

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(. . . continued)
Ct. App. 2012) (holding *Miller* not retroactive; "mere fact" that Court remanded *Jackson* for resentencing does not constitute a retroactivity holding where state never raised retroactivity), *appeal granted by* No. 307758, 2013 WL 5943450 (Mich. Nov. 6, 2013).

[5] The state principally relies on two federal decisions (SB at 13), neither of which even notes the grant of relief to Jackson. *Craig v. Cain*, No. 12-30035, 2013 WL 69128 (5th Cir. Jan. 2, 2013) (unpublished decision holding *Miller* not retroactive for purposes of permitting appeal from denial of habeas corpus petition; decision does not address Court's grant of relief to Jackson); *In re Morgan*, 713 F.3d 1365, 1367-68 (11th Cir. 2013) (federal prisoner seeking collateral relief; court analyzed whether *Miller* was "made" retroactive under 28 U.S.C. § 2244(b)(3)(A) and *Tyler* rule; no reference to *Jackson*).

Successive Motion Under 28 U.S.C. § 2255, filed May 9, 2013, in *Williams v. United States*, No. 13-1731, at 14 (8th Cir.) (conceding *Miller*'s holding is substantive and retroactive because it "categorically expands the range of permissible outcomes of the criminal proceeding").[6]

Finally, the state contends that *Miller* and *Jackson* were not "two carefully selected cases" and that Justice Alito's dissent was making a different point. (SB at 18-20). But the state misses the significant point that Judge Benton made in his concurring opinion here. *Falcon*, 111 So. 3d at 975 (Benton, C.J., concurring). The Supreme Court could have announced its new rule only in *Miller*; the Court must have taken *Jackson* as *Miller*'s companion case for a reason.

Under *Teague,* the selection of Jackson's case to announce the new rule and grant relief was carefully made. Controlling Supreme Court law and the Supremacy Clause mandate retrospective application to Rebecca Falcon. *See Geter v. State*, 115 So. 3d 385, 387 n.2 (Fla. 3d DCA 2013) (Emas, J., dissenting from denial of rehearing *en banc*). Contrary to the state's argument, retroactivity was an issue in the *Jackson* case (SB at 15), and "evenhanded justice requires that [*Miller*] be applied retroactively to all who are similarly situated." *Teague*, 489 U.S. at 300.

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[6] As noted in Judge Benton's concurring opinion, the State of Florida also initially conceded *Miller*'s retroactivity: "[T]he state agreed relief was 'appropriate' because the 'sentencing scheme was unconstitutional as applied to a clear class of offenders.' The state specifically 'recognize[d] that the *Miller* decision is retroactively applied, if not under federal law, as a matter of Florida law.'" *Falcon v. State*, 111 So. 3d 973, 975 n.3 (Fla. 1st DCA 2013) (Benton, C.J., concurring).

III. *MILLER* IS RETROACTIVE UNDER THE *WITT* STANDARDS.

The state wrongly suggests that *Miller* changes only the *procedure* required to *give* a life-without-parole sentence, as if that sentence is a foregone conclusion. (SB at 18). The state ignores that lifetime sentences, as the Supreme Court explained, are constitutionally proportionate *only* in the most "uncommon" of cases, and that juveniles for whom that sentence is constitutionally tolerable are "rare." *Miller*, 132 S. Ct. at 2469.

Thus, the new "procedure" mandated by *Miller* is, in all but the rarest and most uncommon of cases, a procedure *not* to give that sentence in almost all cases. It follows, then, that *mandatory* lifetime incarceration is strictly prohibited. Thus, the first prong of *Witt v. State*, 387 So. 2d 922, 929 (Fla. 1980), is satisfied.[7]

As to the "purpose-reliance-effect" category, the state agrees that the first of the three components – the purpose served by the new constitutional rule – is "foremost." (SB at 22). But the state then ignores this Court's second-category framework (IB at 23-28), by suggesting that a new rule will not be given retroactive effect if it pertains to the accuracy and integrity of the sentence, rather than the conviction, or is procedural rather than substantive. (SB at 22-28).

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[7] The state's reliance on *Hughes v. State*, 901 So. 2d 837 (Fla. 2005), in which the Court held that *Apprendi v. New Jersey*, 530 U.S. 466 (2000), is not retroactive (SB at 19-20), misses the mark. The state has blurred the demarcation between *Witt*'s first and second categories. This Court, in *Hughes,* rightly failed to consider the retroactivity question under the first category, simply noting the obvious: that *Apprendi* did not fall within that category, and then moved on to the pertinent question whether it was within the second category. 901 So. 2d at 840. And petitioner demonstrated in her initial brief why this Court's analysis under the second category is inapposite here. (IB at 30-32).

First, that a new rule pertains to the sentence is *not* dispositive. As this Court explicitly pointed out in *State v. Barnum*, 921 So. 2d 513, 519 (Fla. 2005) (quoting *Witt*, 387 So. 2d at 929 n.25), the three-part test was adapted from the ABA Standards Relating to Post-Conviction Remedies (Approv. Draft 1968), of which Section 2.1(a)(vi) provides that post-conviction remedies "ought to be sufficiently broad to provide relief … for meritorious claims," *including* "that there has been a significant change in law, whether substantive or procedural, applied in the *process* leading to applicant's *conviction or sentence*." *Barnum*, 921 So. 2d at 519 (emphasis supplied). What is key is the significance of the rule. (IB at 24-27).

The state overlooks this Court's decisions granting retroactive application to sentencing rules (IB at 24-27), and instead, simply cites cases that use language concerning the accuracy of the guilty verdict, implying that rules pertaining to the integrity of a sentence do not warrant retroactive application. (SB 22-23). But the state ignores that cases addressing whether a rule that affects convictions will be retroactive speak in terms of the *integrity and accuracy* of the guilty verdict, *e.g.*, *Brown v. Lousiana*, 447 U.S. 323 (1980), while decisions granting retroactive application to sentencing rules similarly speak in terms of the *integrity and accuracy* of the sentence. *E.g.*, *Witherspoon v. Illinois*, 391 U.S. 510, 521 n.20 (1968) (procedural fairness requirements cannot be "ignored simply because the determination … differs in some respects from the traditional assessment of whether the defendant engaged in a proscribed course of conduct"); *State v. Callaway*, 658 So. 2d 983, 986-87 (Fla. 1995) ("significantly impacts a defendant's constitutional liberty interests" and "to ensure that sentences of criminal

defendants … are not doubly enhanced"), *receded from in part on other grounds, Dixon v. State*, 730 So. 2d 265 (Fla. 1999); *State v. Stevens*, 714 So. 2d 347, 348 (Fla. 1998) ("imposition of a hefty criminal sentence pursuant to a patently 'irrational' sentencing scheme 'could not withstand a due process analysis'"). Thus, the decisional language is driven by the context of the new rule. That "*Miller* does not affect the 'determination of guilt or innocence of a juvenile defendant'" (SB at 23) (quoting *Geter v. State*, 115 So. 3d 375, 378-79 (Fla. 3d DCA 2012)), in no way resolves the retroactivity question.

Indeed, *Witherspoon* conclusively refutes any suggestion that the rule of *Stovall v. Denno*, 388 U.S. 293 (1967), and *Linkletter v. Walker*, 381 U.S. 618 (1965), as adopted in *Witt*, 387 So. 2d at 926, is concerned only with convictions, and not the sentencing process. *Witherspoon* held retroactive the rule invalidating death sentences where the jury was not constitutionally selected. 391 U.S. at 523 n.22. The Court expressly relied on *Linkletter*'s language, but deleted the adjective "fact-finding" to modify "process," because the new rule affected instead the integrity of the *sentencing* process: "the jury-selection standards employed here necessarily undermined 'the very integrity of the * * * process' that decided the petitioner's fate." *Id.* (modifications in original) (quoting *Linkletter*, 381 U.S. at 639). *Witherspoon*'s rule was retroactive; that it affected the sentence, not the conviction, was of no moment.

The state also misconceives *Witt*'s scope by describing *Miller* as a mere *procedural* rule that is unworthy of retroactive respect. (SB at 23-24, 26-28). While this distinction is significant under *Teague*'s federal retroactivity test, *see,*

e.g., *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004), it is not controlling under Florida's test. Indeed, *Witt* itself settles this issue. *Barnum*, 921 So. 2d at 519 ("post-conviction remedy" proper for a "significant change in law, *whether substantive or procedural*, applied in the *process* leading to applicant's conviction or sentence" (quoting *Witt*, 387 So. 2d at 929 n.25; ABA Standards, *supra*; (emphasis supplied))). And this Court's retroactive application of *Lockett v. Ohio*, 438 U.S. 586 (1978), and *Hitchcock v. Dugger*, 481 U.S. 393 (1987), cases that do not categorically preclude a death sentence but affect the sentencing process (IB at 32-39), conclusively resolves any contrary notion suggested by the state.

The state's attempt to distinguish this Court's cases retroactively applying *Lockett* and *Hitchcock* is difficult to comprehend. The state ignores the striking similarities between *Lockett/Hitchcock*'s sentencing rule – that changed the sentencing process to require consideration of nonstatutory mitigating factors – and *Miller*'s rule. (IB at 32-35). The state seems to seize upon the significance of the jury in the capital scheme as the actual basis for this Court's retroactivity holding. (SB at 25-26).[8] But if this is what the state is asserting, then it overlooks that this Court granted retroactive application when the integrity of the jury sentencing was *not* at issue. *McCrae v. State*, 510 So. 2d 874, 880-81 (Fla. 1987) (where jury recommended life sentence, retroactive relief required resentencing by trial court

[8] Of course, the state's focus on the import of jury-sentencing findings is at odds with its reliance on cases rejecting *Apprendi*'s retroactivity. (SB at 23-25). More importantly, the state again has failed to respond to Ms. Falcon's explanation (IB at 30-32), of why *Apprendi*'s rule is not analogous to *Miller*'s.

only).[9] The infirmity that plagued the *Lockett/Hitchcock* collateral cases – that the state describes as "the preclusion of this [mitigating] evidence [that] affected the reliability or accuracy of the sentencing phase determination" (SB at 27) – equally invalidates mandatory lifetime sentences for children under *Miller*.

It is no answer that juveniles have a remedy in executive clemency. (SB at 26). Simply put, the inadequacy of that remedy is beyond question. *See* Ashley Nellis, *Tinkering with Life: A Look at the Inappropriateness of Life Without Parole as an Alternative to the Death Penalty*, 67 U. Miami L. Rev. 439, 451 (2013) ("[o]ne might think that clemency is an option for relief from an LWOP sentence, but governors nationwide have denied virtually all clemency requests over the past three decades"). Moreover, it is offensive to suggest that this Court should let stand a sentence that is unconstitutionally disproportionate in all but the rarest of cases, with the hope that the executive branch might someday fix the Eighth Amendment violation. It is the judiciary's role to provide a remedy for constitutional violations.

Because both Ms. Falcon and the state concur that the first component is "foremost" and because the state's retort to the second and third components of *Witt*'s second category are addressed in the initial brief (IB at 39-42), Ms. Falcon would only add that at issue are the sentences of less than 200 children, dispersed

[9] The state's distinction is pertinent to the third ("effect-on-the-administration-of-justice") component of the *Witt* test, for it is correct that in most of the *Lockett*/*Hitchcock* grants of relief, new jury sentencing proceedings were required, while Ms. Falcon seeks only a sentencing proceeding before the trial court – where none was originally provided due to the mandatory sentence compelled.

throughout Florida's 20 circuits, who must be granted, not a new trial or even a second sentencing, but the *first* sentencing in which the facts of their youth and attendant characteristics can be finally considered.[10] The state's hyperbolic suggestions that "floodgates" are about to open and that "murders which occurred before the 1994 amendment to the statute" are going to be affected (SB at 30), are sheer nonsense.

Ultimately, the answer to whether *Miller* should be applied retroactively under Florida law is found in the text of the *Witt* decision:

> Thus, society recognizes that a sweeping change of law can so drastically alter the substantive or procedural underpinnings of a final conviction and sentence that the machinery of post-conviction relief is necessary to avoid individual instances of obvious injustice. Considerations of fairness and uniformity make it very difficult to justify depriving a person of his liberty or his life, under process no longer considered acceptable and no longer applied to indistinguishable cases.

387 So. 2d at 925 (internal quotation marks and footnote omitted). Fundamental fairness and uniformity mandate that a child – who is not the uncommon and rare child for whom lifetime incarceration might be appropriate – not be imprisoned for the rest of her life because of timing.

[10] For all but the rarest of these defendants, the life-without-parole sentences will be reduced in accordance with *Miller*'s guidelines and their relevant mitigation. Putting aside basic notions of fairness, the savings to the State of Florida in custodial and medical costs to incarcerate until death, juveniles who, if trial judges could apply *Miller*, would never be sentenced to LWOP, is difficult to overstate.

IV. *MILLER* SATISFIES THE FEDERAL RETROACTIVITY STANDARDS.

Ms. Falcon concurs with the state's argument that this Court's "more expansive retroactivity standards" apply and the Court need not address the narrower and inapplicable federal retroactively test. (SB at 33-34). But the state is wrong in asserting that *Miller* is nonretroactive under *Teague*.

First, Ms. Falcon agrees that under the federal test, the substantive-vs.-procedural distinction is important. But *Miller* announced a substantive rule under the standard acknowledged by the state: it is one of the rules that "necessarily carry a significant risk that a defendant … faces a punishment that the law cannot impose upon him." (SB at 36, 38) (quoting *Schriro*, 542 U.S. at 352) (citations and internal quotation marks omitted). The state fails even to cite the controlling decision of *Sumner v. Shuman*, 483 U.S. 66 (1987), in which collateral relief was granted due to a mandatory death sentence that the law could not impose because of the requirement of mitigating consideration. *Id.* at 68, 72, 78, 84. And the state's trivializing note that the "mere fact" that a child may receive a different sentence after *Miller* does not make its rule substantive and retroactive (SB at 38), ignores *Miller*'s Eighth Amendment holding that lifetime incarceration is unconstitutional in all but the rarest and most uncommon of cases, and mandatory lifetime incarceration, precisely like the mandatory death-penalty scheme in *Sumner*, is prohibited in *all* cases. As Dean Erwin Chemerinsky cogently stated, in explaining why *Miller* announced a substantive, retroactive rule:

> [T]he *Miller* Court did more than change procedures; it held that the government cannot constitutionally impose a punishment. As a

> substantive change in the law which puts matters outside the scope of the government's power, the holding should apply retroactively.

Erwin Cheminsky, *Chemerinsky: Juvenile Life-Without-Parole Case Means Courts Must Look at Mandatory Sentences*, A.B.A. J. Law News Now (Aug. 8, 2012) (quoted in *Ragland*, 836 N.W.2d at 117).

When considering *Teague*'s second test for procedural rules, the state finally concedes that *Miller* is "highly important." (SB at 42). But the state then dismisses *Miller* as only an "outgrowth" of prior decisions that pertain to individualized sentencing. *Id.* Of course, under our common-law system, any decision can be traced as an "outgrowth" of other precedent, so this assertion is of little significance on the retroactivity question, particularly where the state, earlier in its brief, "agrees that '[t]he decision of the Supreme Court in *Miller* established a new rule of constitutional law.'" (SB at 35) (citation omitted).

But this argument leads to a significant final point that the state fails to address. The individualized sentencing cases, *Lockett*, *Hitchcock*, and *Sumner*, do not *preclude* a sentence. Instead, the cases insist that the sentence neither be mandatorily imposed nor imposed without a process for consideration of mitigation. They are indeed *Miller*'s precursors. And these decisions have been rightly applied retroactively on collateral review, and so must *Miller*.

Respectfully submitted,

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