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NO. 79208-9

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**SUPREME COURT OF THE STATE OF WASHINGTON**

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KEITH ELMORE,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

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**ANSWER TO PETITION FOR REVIEW**

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**ORIGINAL**

## TABLE OF CONTENTS

I.	ISSUES PRESENTED FOR REVIEW.....	1
	A. Whether review is appropriate in this case as there are conflicting Court of Appeals’ decisions regarding the constitutionality of the annual review provisions of the sexually violent predator statute and this issue is one of substantial public interest.....	1
II.	STATEMENT OF THE CASE.....	1
	A. The Indefinite Nature of Commitment as an SVP Flows From the Chronic and Intractable Mental Disorders From Which Sexually Violent Predators Suffer.....	1
	B. The Post-Commitment Annual Review Procedures of the Statute Reflect the Indeterminate Nature of SVP Commitment. ....	3
	C. Court of Appeals’ Decision in <i>Young AR</i> : An Increase in Age Alone is a Change in Condition Requiring a Recommitment Trial. ....	6
	D. The Legislative Response to <i>Young AR</i> Clarified Its Intent that Commitment as an SVP is Indefinite in Nature and Strengthened the Treatment and Community Safety Goals of the Statute. ....	7
	E. Proceedings in the Trial Court.....	10
	F. The Court of Appeals’ Decision in This Case. ....	14
III.	ARGUMENT.....	15
IV.	CONCLUSION.....	17

**TABLE OF AUTHORITIES**

**Cases**

*In re Detention of Elmore*,  
\_\_\_Wn.App.\_\_\_, 139 P.3d 1140 (2006)..... 14, 16

*In re Detention of Petersen*,  
145 Wn.2d 789, 42 P.3d 952 (2002)..... 5

*In re Detention of Young*,  
120 Wn. App. 753, 86 P.3d 810 (2004)..... passim

*In re the Detention of Petersen*,  
138 Wn.2d 70, 980 P.2d 1204 (1999)..... 2, 6

*In re Ward*,  
125 Wn.App. 381, 104 P.3d 747 (2005)..... 16

*In re Young*,  
22 Wn.2d 1, 857 P.2d 989 (1993)..... 2, 3, 6

**Statutes**

RCW 71.05 ..... 1

RCW 71.09 ..... passim

RCW 71.09.010 ..... 1

RCW 71.09.050(2)..... 11

RCW 71.09.070 ..... 3, 12

RCW 71.09.090 ..... passim

RCW 71.09.090(2)..... 7

RCW 71.09.090(2)(a) ..... 4

RCW 71.09.090(2)(b) ..... 6

RCW 71.09.090(2)(c)(i).....	5, 12
RCW 71.09.090(2)(c)(ii) .....	12
RCW 71.09.090(2)(c)(ii)(A).....	5
RCW 71.09.090(4).....	9, 10
RCW 71.09.090(4)(a) .....	10
RCW 71.09.090(4)(b).....	9

**Session Laws**

S.B. 5582, 56 <sup>th</sup> Leg., Reg. Sess. (Wash. 2005).....	passim
--	--------

**Rules**

RAP 13.4(b)(2) .....	15
RAP 13.4(b)(4) .....	15
RAP 2.3(b)(4) .....	14

**Laws of 2005**

Laws of 2005, Ch. 344.....	8
Laws of 2005, Ch. 344 §1 .....	8
Laws of 2005, Ch: 344 §4.....	11

## I. ISSUES PRESENTED FOR REVIEW

- A. **Whether review is appropriate in this case as there are conflicting Court of Appeals' decisions regarding the constitutionality of the annual review provisions of the sexually violent predator statute and this issue is one of substantial public interest.**

## II. STATEMENT OF THE CASE

Mr. Elmore stipulated to civil commitment as a sexually violent predator (SVP) in 2001. This petition for review stems from the 2003 post-commitment annual review conducted to determine whether there is a sufficient basis upon which to order a recommitment trial. In order to better understand the issues raised in the petition for review, as well as the State's agreement with Mr. Elmore that review is appropriate, a description of the commitment scheme, the annual review procedures, and the recent legislative amendments to those procedures is a helpful introduction to what occurred below in this case.

- A. **The Indefinite Nature of Commitment as an SVP Flows From the Chronic and Intractable Mental Disorders From Which Sexually Violent Predators Suffer.**

In enacting the SVP statute, the Legislature noted that the standard civil commitment statute, RCW 71.05, is "designed to provide short-term treatment" and is therefore inadequate for SVPs. RCW 71.09.010. The Legislature found that SVPs have "personality disorders and/or mental abnormalities which are unamenable to existing mental illness treatment

modalities” and, as a result, “the treatment needs of this population are *very long term.*” *Id.* (emphasis added).

This Court has repeatedly recognized the indeterminate and long-term nature of commitment under RCW 71.09. In its first examination of the statute, the Court noted that civil commitment as an SVP is “not subject to any rigid time limit. Rather, the commitment is tailored to the nature and duration of the mental illness.” *In re Young*, 122 Wn.2d 1, 39, 857 P.2d 989 (1993). The Court later expanded upon this, holding that:

Our sexually violent predator statute unequivocally contemplates an indefinite term of commitment, not a series of fixed one-year terms with continued commitment having to be justified beyond a reasonable doubt annually at evidentiary hearings where the State bears the burden of proof.

*In re the Detention of Petersen*, 138 Wn.2d 70, 81, 980 P.2d 1204 (1999) (*Petersen I*).

This Court explained that commitment as an SVP “is potentially indefinite because it depends upon the cure or elimination of the person’s sexually violent predilections.” *Id.* at 81, n. 7. Indeed, “the statute contemplates a *prolonged period of treatment,*” because the treatment needs of the SVP population are long-term and their mental disorders are chronic. *Id.* at 78 (emphasis added). Such indefinite detention is constitutionally appropriate under due process because it serves the twin

compelling state interests of treatment and incapacitation, and the nature and duration of commitment is compatible with these interests.

*In re Young*, 122 Wn.2d at 33, 35.

**B. The Post-Commitment Annual Review Procedures of the Statute Reflect the Indeterminate Nature of SVP Commitment.**

The annual review procedures of RCW 71.09.090 reflect the relatively long period of time required to reduce the risk the committed person poses to the community through treatment of the underlying mental disorder. The SVP statute, therefore, provides that recommitment trials are not held every year, but only when there is sufficient evidence to believe that the committed person's mental condition has "so changed" such that he or she no longer meets the definition of an SVP. RCW 71.09.090.

The Special Commitment Center (SCC), the facility where persons detained under RCW 71.09 are housed and treated, must conduct an annual review of the mental condition of each person who is civilly committed as an SVP. RCW 71.09.070. The annual review addresses two issues: 1) Whether the person continues to meet the definition of an SVP;

and 2) Whether conditional release to a less restrictive alternative placement (LRA) is appropriate.<sup>1</sup> *Id.*

An annual review does not automatically come before the trial court. Instead, an annual review show cause proceeding is required only if the committed person so requests, petitions for a hearing, or otherwise refuses to affirmatively waive his right to a show cause hearing. RCW 71.09.090(2)(a).

The purpose of the show cause hearing is not to “re-commit” the person. Rather, the purpose of the hearing is to ensure that there is a continuing basis for the commitment and to determine whether there is sufficient evidence of a change in the committed person’s underlying mental condition to justify reopening the commitment decision.

The purpose of the annual review hearing is reflected in the statutory procedures. The trial court must determine whether “probable cause exists to warrant a hearing on whether: (i) The person’s condition has *so changed* that he or she no longer meets the definition of a sexually violent predator.” *Id.* (emphasis added). Probable cause to order a trial to determine whether the person continues to meet the definition of an SVP –

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<sup>1</sup> The LRA provision is not relevant in this proceeding since Mr. Elmore seeks a recommitment trial. As a result, the State will not discuss the LRA portions of the annual review provisions of the statute.

a recommitment trial - may be found in one of two ways: Either failure in the State's proof, or through proof presented by the committed person.

The evidence presented by the State (typically the annual review evaluation conducted by the SCC) may fail to provide prima facie evidence that the committed person continues to meet the definition of an SVP. RCW 71.09.090(2)(c)(i). However, even if the State's evidence is sufficient, the committed person may present evidence that establishes probable cause to believe that his condition has so changed that he is no longer an SVP. RCW 71.09.090(2)(c)(ii)(A). This procedure has been endorsed by this Court. *In re Detention of Petersen*, 145 Wn.2d 789, 798-99, 42 P.3d 952 (2002) (*Petersen II*).

In determining whether there is probable cause to order a recommitment trial, the trial court is not permitted to weigh the evidence presented by the parties. *Id.* at 798. Rather, the court must determine whether the facts presented, if believed, warrant a full trial. *Id.*

This Court has stressed the summary nature of the annual review show cause proceeding, holding:

The show cause hearing is in the nature of a summary proceeding wherein the trial court makes a threshold determination of whether there is evidence amounting to probable cause to hold a full hearing. The show cause hearing is an expression of the Legislature's wish that judicial resources not be burdened annually with full evidentiary hearings for sexually violent predators absent

at least some showing of probable cause to believe such a hearing is necessary.

*Petersen I*, 138 Wn.2d at 86. Like a summary judgment proceeding, it is limited to the submission of affidavits or declarations. RCW 71.09.090(2)(b).

**C. Court of Appeals' Decision in *Young AR*: An Increase in Age Alone is a Change in Condition Requiring a Recommitment Trial.**

In 2004, the Court of Appeals issued a decision addressing the annual review process that deviated from, and undercut, the fundamental policy rationale of the SVP commitment scheme. *In re Detention of Young*, 120 Wn. App. 753, 86 P.3d 810 (2004) (*Young AR*).<sup>2</sup> The appellant in *Young AR* was Andre Young, who had been committed as an SVP in 1991. Mr. Young's annual review expert, Dr. Howard Barbaree, conducted an evaluation of Mr. Young and concluded Mr. Young's condition had changed since his commitment in 1991 such that he no longer met the definition of an SVP. *Id.* at 756, 760-61.

The change identified by Dr. Barbaree was not the result of any treatment gains made by Mr. Young or any debilitating health problems.

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<sup>2</sup> This case is designated as *Young AR* (for "annual review") to distinguish it from Mr. Young's other published appellate decision from this Court in 1993: *In re Young*, 122 Wn.2d 1, 857 P.2d 989.

Rather, the change identified by Dr. Barbaree was simply that Mr. Young had aged since his commitment in 1991 and was now over 60 years old.

Dr. Barbaree concluded that new scientific research conducted since Mr. Young's 1991 commitment supports the conclusion that rapists released after age 60 rarely ever sexually reoffend. *Id.* at 760-61. The trial court examined Dr. Barbaree's opinion and rejected it, denying Mr. Young's request for a recommitment trial. *Id.* at 756, 759.

The Court of Appeals reversed the trial court, holding that the trial court had erred by weighing Dr. Barbaree's opinion that an increase in Mr. Young's age, standing alone, reduced his risk to below the statutory threshold supporting continued commitment. *Id.* at 758-60. The court found that Dr. Barbaree's report constituted prima facie evidence establishing probable cause to believe that Mr. Young's increase in age constituted a change in his underlying condition within the meaning of RCW 71.09.090, thus triggering the right to a recommitment trial under RCW 71.09.090(2). *Id.*

**D. The Legislative Response to *Young AR* Clarified Its Intent that Commitment as an SVP is Indefinite in Nature and Strengthened the Treatment and Community Safety Goals of the Statute.**

In response to the *Young AR* court's misunderstanding of its intent embodied in RCW 71.09, the Legislature in 2005 amended the annual

review provisions of RCW 71.09.090. S.B. 5582, 56<sup>th</sup> Leg., Reg. Sess. (Wash. 2005), enacted as Laws of 2005, Ch. 344. The amendments to RCW 71.09.090 found in S.B. 5582 do not alter the State's constitutional requirement to present prima facie proof of a continuing basis for the commitment. Rather, they are directed to clarifying the level of proof that a committed person must provide to establish probable cause for a new trial revisiting his indefinite civil commitment.

In its findings, the Legislature echoed those it made in 1990 when it enacted the SVP statute: That the mental disorders from which SVPs suffer are “severe and chronic” and, as a result, commitment as an SVP is designed to “address the ‘very long-term’ needs of the sexually violent predator population for treatment and the equally long-term needs of the community for protection from these offenders.” Laws of 2005, Ch. 344 §1. The statute serves these goals by providing for treatment of SVPs in a secure facility. For those committed persons who make sufficient progress in treatment, the statute provides for transition to an intensively monitored community placement.

The Legislature found that *Young AR* runs contrary to the spirit of the SVP commitment scheme. The Legislature recognized that “severe medical conditions like stroke, paralysis, and some types of dementia” can render a committed person unable to sexually reoffend. *Id.* However, “a

mere advance in age or a change in gender or some other demographic factor after the time of commitment does not merit a new trial proceeding under RCW 71.09.090.” *Id.*

Indeed, the Legislature found that ordering a recommitment trial solely on the basis of an increase in age seriously undermines the goals of the SVP statute, noting that *Young AR* “subverts the statutory focus on treatment and reduces community safety by removing all incentive for successful treatment participation in favor of passive aging and distracting committed persons from fully engaging in sex offender treatment.” *Id.*

To clarify its intent in light of *Young AR*, the Legislature amended the operative annual review provisions of RCW 71.09.090. These additions, found in a new RCW 71.09.090(4), expressly define the nature of the change in a committed person’s condition that is required before a recommitment trial, “may be ordered, or held.” RCW 71.09.090(4)(b). Pursuant to S.B. 5582, the change in a committed person’s condition that will trigger a recommitment trial is either:

(b)(i) An identified physiological change to the person, such as paralysis, stroke, or dementia, that renders the committed person unable to commit a sexually violent act and this change is permanent; or

(b)(ii) A change in the person’s mental condition brought about through positive response to continuing participation in treatment which indicates that the person . . .

. would be safe to be at large if unconditionally released from commitment.

(c) For purposes of this section, a change in a single demographic factor, without more, does not establish probable cause for a new trial proceeding under subsection (3) of this section. As used in this section, a single demographic factor includes, but is not limited to, a change in the chronological age, marital status, or gender of the committed person.

RCW 71.09.090(4).

In addition, S.B. 5582 specifies the relevant time frame in which the changes in condition must occur. Only changes in the committed person's condition that have occurred "since the person's last commitment trial proceeding" are relevant and may require a recommitment trial. RCW 71.09.090(4)(a). In making these clarifications to the annual review provisions of the law, the Legislature restored the annual review process to one which focuses on a meaningful change in the person's mental condition brought about through treatment participation.

#### **E. Proceedings in the Trial Court**

In July 1999, the State filed a petition for the civil commitment of Mr. Elmore as an SVP. CP 276. At the time the petition was filed, Mr. Elmore had just completed a prison sentence for the abduction and assault of the wife of a former co-worker. CP 8-52; 54-55; 238. By his own admission, Mr. Elmore had intended to kill, dismember, and eat his

victim, thereby consummating his long-standing sexual fantasy of becoming a woman by doing so. *Id.*

Mr. Elmore retained Dr. Richard Wollert, a licensed psychologist, to evaluate him and provide expert testimony at the commitment trial. CP 145; RCW 71.09.050(2). Dr. Wollert concluded that Mr. Elmore did not meet the definition of an SVP. CP 176.

Despite Dr. Wollert's opinion, Mr. Elmore stipulated to commitment as an SVP. CP 1-7; 276. The psychological evaluation of Mr. Elmore by Dr. James Manley, rather than that of Dr. Wollert, was used as the factual basis of the stipulation. CP 3; 276-77. Dr. Manley, a licensed psychologist at the Special Commitment Center (SCC), the facility where persons detained pursuant to RCW 71.09 are housed, evaluated and treated, concluded that Mr. Elmore meets the definition of an SVP. CP 192. Since his commitment, Mr. Elmore has resided at the SCC, where he has been involved in treatment. CP at 241-44; 250-52.

Mr. Elmore's first and second annual review hearings were combined and held before the trial court on March 17, 2004.<sup>3</sup> CP 277. At the hearing, the State relied upon the SCC's two annual reviews of Mr. Elmore's condition to satisfy its burden of establishing prima facie evidence to believe Mr. Elmore continues to meet the criteria for

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<sup>3</sup> It should be noted that this hearing was held before the S.B. 5582 amendments to RCW 71.09.090 became effective on May 9, 2005. Laws of 2005, Ch. 344 §4.

commitment as required by RCW 71.09.090(2)(c)(i). These evaluations indicated that Mr. Elmore continues to meet the definition of an SVP and that release to an LRA is not appropriate at this time. CP 222-23; 252-53.

Mr. Elmore again retained Dr. Wollert as his expert. CP 260; RCW 71.09.070. Dr. Wollert did another evaluation of Mr. Elmore, which Mr. Elmore presented at the annual review hearing in an effort to establish probable cause that his condition has so changed since his commitment that he no longer meets the definition of an SVP.<sup>4</sup> CP 260-75; 277-78; RCW 71.09.090(2)(c)(ii).

Dr. Wollert's evaluation reflects his belief that there have been four changes in Mr. Elmore's condition since his commitment. CP 265 -70. First, he concluded that Mr. Elmore has completed the residential portion of his treatment program. CP 265-66. In addition, Dr. Wollert stated that Mr. Elmore does not suffer from Sexual Sadism and Personality Disorder NOS, two of the diagnoses assigned by the State's evaluators.<sup>5</sup> CP 266. The third change in Mr. Elmore's condition identified by Dr. Wollert is the risk Mr. Elmore poses to the community. CP 268-69.

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<sup>4</sup> Dr. Wollert had been retained by Mr. Elmore as part of the first annual review proceeding, but did not complete his evaluation until the time of the second annual review hearing.

<sup>5</sup> This is consistent with Dr. Wollert's pre-commitment conclusion on this issue, as reflected in his pre-commitment evaluation. CP 173.

The last of the four alleged changes in Mr. Elmore's condition identified by Dr. Wollert is the two-year increase in Mr. Elmore's age since his commitment. CP 269-70. According to Dr. Wollert, this increase in age results in a decrease in Mr. Elmore's risk to reoffend from 16% to 9%, as measured using the Static-99, one of the actuarial risk assessment tools. *Id.*

Dr. Wollert based this calculation on the 2001 and 2003 conclusions of "different investigators." *Id.* However, Dr. Wollert provided no information about these "investigators" that would allow the trial court to determine whether their apparent conclusions are scientifically grounded and generally accepted in the relevant scientific community.

The trial court rejected the first three changes in Mr. Elmore's condition claimed by Dr. Wollert. CP 278-79. However, the trial court found that the last change cited by Dr. Wollert – the alleged reduction in risk flowing from Mr. Elmore's two-year increase in age since commitment – was sufficient to establish probable cause to believe Mr. Elmore is no longer an SVP and to order a recommitment trial. CP 5-6.

The trial court believed that *Young AR* required it to find that the new evidence relied upon by Dr. Wollert establishes probable cause. *Id.* The trial court noted the following in regard to the impact of *Young AR*:

The ramifications of this ruling [*Young AR*] are significant. The case can be read to require an evidentiary hearing on a yearly basis, no matter what, simply because a respondent will always be a year older than he or she was the proceeding (sic) year.

CP 281.

The parties jointly asked the trial court to certify its ruling as appropriate for review by the Court of Appeals pursuant to RAP 2.3(b)(4). The trial court did so and the Court of Appeals accepted review.

**F. The Court of Appeals' Decision in This Case.**

In a published decision issued on August 8, 2006, the Court of Appeals held that Dr. Wollert's evaluation did not demonstrate probable cause to believe there had been a relevant change in Mr. Elmore's mental condition since his commitment. *In re Detention of Elmore*, \_\_\_ Wn.App. \_\_\_, 139 P.3d 1140 (2006). In reaching its conclusion, the court applied the amended version of RCW 71.09.090, stating that it did so because the clarifications made by the Legislature in S.B. 5582 were the most complete expression of the intent underlying RCW 71.09. *Id.* at 1145.

In relying on the amended version of RCW 71.09.090, the court concluded that it was not bound by *Young AR*'s holding regarding age-related expert evidence since the amendments made pursuant to S.B. 5582 superceded that decision. *Id.* at 1147. The court went on to hold that

application of amended RCW 71.09.090 demonstrates that the trial court clearly erred in granting Mr. Elmore a recommitment trial based on Dr. Wollert's age-based opinion. *Id.*

The court rejected Mr. Elmore's claim that the other, non-age related bases of Dr. Wollert's opinion were sufficient to require a recommitment trial, as well as Mr. Elmore's constitutional claim that the trial court violated due process by engaging in impermissible weighing of the opinions of Dr. Wollert and the SCC expert. *Id.* at 1147-49. In rejecting Mr. Elmore's due process claim, the court appears to have come into conflict with the decision in *Young AR*.

In *Young AR*, the court suggested that denying a committed person a recommitment trial based on evidence tending to show the person no longer meets commitment criteria violates due process. *Young AR*, 120 Wn.App. at 763. Although this suggestion appears to be dicta, to the extent it is not, the Court of Appeals' decision in Mr. Elmore's case, rejecting his due process argument, conflicts with it.

### **III. ARGUMENT**

The State does not believe that the Court of Appeals' decision in this case is erroneous. However, the State concurs with Mr. Elmore that review by this Court is appropriate in this case pursuant to RAP 13.4(b)(2) and (4).

As noted, Division Two's decision in this case appears to conflict with Division One's decision in *Young AR*. Specifically, *Young AR* intimated that due process is violated when a committed person is not permitted to present evidence that the committed person no longer meets the criteria for commitment at the annual review show cause hearing (and thereby obtain a full recommitment trial).

An additional reason to accept review in this matter is that the constitutionality and interpretation of the annual review procedures of RCW 71.09.090 are an issue of substantial public interest. The annual review provisions of the SVP statute have been the subject of several recent published Court of Appeals' decisions including *Young AR*, *In re Ward*, 125 Wn.App. 381, 104 P.3d 747 (2005), and *Elmore*. As noted, it appears these decisions may conflict.

In addition, there are other pending appellate matters that involve constitutional challenges to RCW 71.09.090. These include *In re Detention of Ambers*, No. 57926-6-I, which the State, represented by the King County Prosecutor's Office, has recently moved the Court of Appeals to certify for transfer to this Court. Other cases include: *In re Detention of Reimer*, No. 35242-7-II and *In re Detention of Savala*, No. 24691-4-III. In order to bring finality and certainty to any questions surrounding the constitutionality of the annual review provisions of

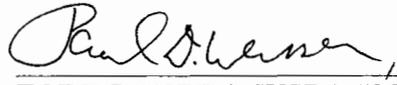
RCW 71.09.090, an issue of substantial public interest, this Court should accept review of this matter.

**IV. CONCLUSION**

For the foregoing reasons, the State respectfully requests that this Court grant the petition for review filed in this matter.

RESPECTFULLY SUBMITTED this 9<sup>th</sup> day of October, 2006.

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THE SUPREME COURT  
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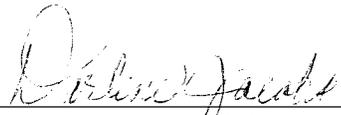
CERTIFICATE OF  
SERVICE

I, DARLENE JACOBS, certify I placed a copy of Respondent's  
ANSWER TO PETITION FOR REVIEW, in the United States Mail,  
postage prepaid, addressed as follows:

DAVID SHULTZ  
ATTORNEY FOR PETITIONER  
430 NE. EVERETT STREET  
CAMAS WA 98607

I declare under penalty of perjury of the laws of the State of  
Washington that the foregoing is true and correct to the best of my  
knowledge.

SIGNED this 7<sup>th</sup> day of October, 2006, at Olympia, Washington.

  
DARLENE JACOBS

BY C. J. MERRITT

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