IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

No. [redacted]

UNITED STATES OF AMERICA	)
	)
	)
v.	)
	)
[redacted],	)
	)
Defendant.	)

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT [redacted] PRETRIAL MOTIONS

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PRELIMINARY STATEMENT

This memorandum of law is respectfully submitted on behalf of defendant [redacted] in support of his pretrial motions for an Order: a) requiring the government to preserve and review the recorded prison telephone calls of its witnesses for possible Jencks Act or Brady materials; b) suppressing the fruits of an alleged plain view search of the defendant's vehicle; c) compelling the government to disclose the names of its witnesses; and d) permitting the filing of additional motions should the disclosure of additional information warrant it.

The defendant is charged in a three count indictment alleging the use of a firearm in connection with an incident which allegedly occurred at the United States Postal Service General Mail Facility in Raleigh, North Carolina on February 3, 1997. Count One of the Indictment charges the defendant with assault on a United States Postal Service Employee in violation of 18 U.S.C. §§ 111(a)(1) and (b); Count Two charges the attempted murder of a Postal Service Employee in violation of 18 U.S.C. § 1114; and, Count Three charges the defendant with the use and carrying of a firearm during and in relation to the conduct charged in Count One of the indictment (18 U.S.C. § 924(c)).

STATEMENT OF FACTS

A. The Incident at the Post Office and the Detention of the Defendant

On February 3, 1997 at approximately 10:30 pm, officers from the Wake County Sheriff's Office responded to a 911 call in which a shooting at the United States Postal Service General Mail Facility in Raleigh was reported. According to several witnesses at the scene, as Post

Office Employees Ronald Dotson and LaToye Wilson exited the Post Office and walked through the parking lot, a gold or silver Jeep Grand Cherokee pulled up and a young black male fired one or two rounds at them. The driver then got back into his vehicle and drove off. After interviewing several witnesses to the shooting approximately 30 minutes later, officers stopped a green Jeep Grand Cherokee driven by the defendant as he exited the Post Office parking lot. The defendant was questioned by officers from the Sheriff's Office and the Postal Inspector's Office. A showup was arranged in the parking lot but Ronald Dotson was unable to ascertain whether the defendant was the shooter. The defendant was then released but only after receiving a citation for driving without a valid license. He was not permitted to leave with his vehicle and was told by officers to have someone pick it up at a later time. Sometime within the next week or so, the defendant arranged for his vehicle to be picked up from the Post Office parking lot. See September 29, 1999 Affidavit of [redacted] (hereafter referred to as "[redacted] Aff."); September 29, 1999 Affidavit of Jeffrey Lichtman, Esq.(hereafter referred to as "Lichtman Aff.").

B. The Indictment and the Discovery Process

Approximately 28 months later, the defendant was indicted. Three months later, after he learned of the charges against him, the defendant, now a prison guard at the Bedford Hills Prison Facility in New York, surrendered to the Postal Inspector's Office in Brooklyn.

On September 2, 1999, the government served 28 pages of redacted Jencks Act material on the defendant. Within these materials were witness statements of Frank and Maureen Crosson. According to the statements, the Crossons owned a silver Jeep which the defendant was allegedly driving at the time of the shooting on February 3. Also included in these materials

was a statement from LaToye Wilson. Mention was also made of a jacket which was recovered from the green Jeep the defendant was driving when he was stopped outside of the Post Office on February 3, 1997.

On September 8, the defendant served a detailed request for discovery items on the government. Included in this letter was a request for the preservation and review of

> all taped telephone conversations within the possession of the Bureau of Prison of all cooperating witness who are presently, or had been, imprisoned during the course of the investigation of this case. The government is requested to disclose all tapes which contain any exculpatory or impeachment evidence pursuant to Brady or Giglio. Additionally, the government should review these tapes for any material which must be disclosed at the appropriate time to the defendant pursuant to the Jencks Act.

(Exhibit A at 5) The defendant also requested a list of the government's anticipated trial witnesses. Id. at 3.

The defendant's requests included all supporting materials relating to the searches of the defendant's Jeep Grand Cherokee; the search of the Crossons' Jeep Grand Cherokee and their house; and the search of the house of LaToye Wilson. These searches were all mentioned by the government during the defendant's bail hearing on August 18, 1999. Id. at 8.

On September 13, the defendant served a supplementary discovery letter on the government. (Exhibit B) One of the requests was for a copy of the tape of the 911 call made by one of the witnesses to the shooting. Id. at 2. This call was described in one of the witness statements previously provided to the defendant.

On September 14, the government formally responded to the defendant's initial discovery letter. (Exhibit C) The government, in its letter, refused to turn over its list of witnesses. The

government did agree to provide all search warrant materials and Brady materials as they become available. No mention was made of the defendant's request for the preservation and review of prison telephone calls.

On September 17, the government forwarded materials relating to the search of the Crosson house and Jeep. (Exhibit D) During a telephone conversation with defense counsel, the prosecutor indicated that the search of LaToye Wilson's house was consensual and, while a relevant letter was found, officers did not seize it. (Lichtman Aff. at ¶ 13)

C. The Search of the Defendant's Jeep

Items seized from the defendant's Jeep, according to the prosecutor, was the result of a plain view seizure from his Jeep. Id. According to the defendant, however, after he was released by authorities on February 3, 1997, he was required to leave his Jeep on the side of Westgate Road in Raleigh because he did not have a valid driver's license. ([redacted] Aff. at ¶ 4) He was instructed by Postal Inspector Gerard Cucurullo to have a friend pick the Jeep up. Id. The last thing the defendant did prior to leaving the Post Office the night of February 3 was to lock his Jeep. Id.

The Jeep was not where he had left it, however, when Mr. [redacted] went with a friend within the next few days to pick it up. Id. at ¶ 5. After making some phone calls over the next few days, the defendant learned that Postal Inspector Cucurullo was in possession of his Jeep. Cucurullo had apparently had the Jeep towed after the defendant was permitted to leave the Post Office parking lot. Id. at ¶¶ 6-7.

The defendant and a friend went to Cucurullo's office and picked up the Jeep. Inspector Cucurullo provided a receipt for the Jeep; however, no inventory of items seized was included.

Id. at ¶ 8. According to the defendant, the jacket which was later claimed to have been found in his Jeep was never in the Jeep. Id. at ¶ 9. Therefore, the jacket could not have been found inside the Jeep pursuant to a plain view seizure.

D. The 911 Tape

The government indicated that the tape recording of the 911 call, as well as certain materials found on Frank Crosson during an interview on February 5, 1997, either do not exist or are not in the possession of the government. (Lichtman Aff. at ¶ 14)

E. The Prison Tapes

By September 23, 1999, the government had not yet responded to the defendant's request regarding the taped telephone conversations of its cooperators. On that date, the defendant requested that the government, should it not agree to the defendant's request, "contact the relevant prisons and require them to preserve these tapes pending the completion of any litigation on this issue ...." (Exhibit E) This request was made due to the Bureau of Prisons' policy of destroying recordings of inmate telephone conversations after a period of time, usually six or eight months. Id. at ¶ 16.

On September 24, 1999, the government refused to either review or even preserve the requested prison tapes. It explained that it was not "aware of any authority the United States Attorney's Office has to require the Bureau of Prisons to preserve tapes. Further, we know of no legal authority requiring the prosecution to make such tapes available for a 'fishing expedition." (Exhibit F)

POINT I

THE DEFENDANT IS ENTITLED TO THE PRESERVATION AND DISCLOSURE OF PRISON TAPE RECORDINGS OF GOVERNMENT WITNESSES PURSUANT TO THE JENCKS ACT AND BRADY v. MARYLAND AND ITS PROGENY

The tape recordings of inmate-witness conversations requested by defendant [redacted] contain potential material required to be disclosed pursuant to, inter alia, 18 U.S.C. § 3500, and Brady v. Maryland, 373 U.S. 83 (1963) and United States v. Giglio, 405 U.S. 150 (1972) and their progeny. Because these tapes are maintained by the Bureau of Prisons[1], which is governed by the Department of Justice, the United States Attorney's Office has, at a minimum, constructive possession of these tapes. For these reasons, the Court should order the government to preserve these tapes for review and ultimately disclosure to the defendant.

The Prison Tapes are Within the Possession of the Government

The defendant advances two theories for the discovery of the recorded prison telephone conversations of its main witness, Frank Crosson. Pursuant to the Jencks Act, the government is required to turn over to the defense any witness statements "in the Possession of the United States." 18 U.S.C. § 3500. As the defendant is prepared to show in an *in camera* submission, Crosson has spoken on the prison telephone about [redacted] and in a manner that will serve to impeach him at trial. (Lichtman Aff. at ¶ 18) Of course, such impeachment material would also be discoverable pursuant to Brady and its progeny. Giglio, supra; Kyles v. Whitley, 514 U.S. 419 (1995). The timing of the tapes' disclosure is an issue that can be addressed once the government actually secures the tapes. See United States v. Beckford, 1997 WL 168646 at *6-13

[1] As the Court undoubtedly knows, federal prisons routinely record all non-privileged telephone conversations by prisoners. 28 C.F.R. § 540.102.

(E.D.Va. 1997)(Noting that "where a Jencks statement is exculpatory or impeaching, the statement covered by the Jencks Act also constitutes Brady material;" the timing of disclosure must be resolved through a "balancing analysis.").

In order for the government to be required to turn over Jencks Act or Brady material, the government must have merely constructive, not actual possession. United States v. Capers, 61 F.3d 1100, 1103, (4th Cir. 1995), cert. denied, 517 U.S. 1211 (1996)(to prevail on Giglio or Jencks Act claims, appellants need only show that the government was "aware" of the materials.); see also United States v. Bryant, 439 F.2d 642, 650 (D.C. Cir. 1970)("Rule 16 and the Jencks Act refer, respectively, to evidence gathered 'by the government' and by 'the United States', not simply that held by the prosecution."). The government was made aware of the existence of these tapes -- and the defendant's contention that these tapes contain information valuable to the defendant -- upon its receipt of the defendant's first discovery letter in this case. As such, the government has a duty to preserve the tapes and review them.

The government cannot hide behind the claim that the Bureau of Prisons is not an arm of the prosecution. The only known courts to have considered the question of whether the prosecutor's Brady obligations extend to information within the possession of the Bureau of Prisons have answered in the affirmative. See United States v. Santiago, 46 F.3d 885, 894 (9th Cir.), cert. denied, 515 U.S. 1162 (1995)("case law indicates that Bureau of Prison files are within the custody and control of the United States Attorney."); United States v. Youngsworth, 657 F. Supp. 860, 862 (W.D.N.C. 1987)(Court ordered government to preserve exculpatory prison tapes); United States v. Ruffo, Crim. No. 3:97 CR 84 (E.D.Va. June 20, 1997)(Williams, J.)(Order attached as Exhibit G)(Court noted that "[w]hile there is no Fourth Circuit case on

point, courts in other circuits have plainly held that Bureau of Prisons files are within the custody and control of the United States Attorney. ... [T]he prosecution is obligated to actively review these [prison tapes] and determine whether they contain any exculpatory or impeachment evidence that must be disclosed pursuant to Brady or Giglio, or ... the Jencks Act ...."); United States v. Owens, 933 F. Supp. 76, 87 (D.Mass.), aff'd, 98 F.3d 1333 (1st Cir. Mass. 1996)(Brady requires the government to search "all the offices of the United States Attorney and the Justice Department itself ... it governs the Bureau of Prisons."); United States v. Avellino, 1995 WL 228352 (E.D.N.Y. 1995)(Government ordered "to preserve the tape recordings of conversations of [government witness] Anthony Casso which he made from prison."); and the "El Rukin" cases: United States v. Griffen, 856 F. Supp. 1293 (N.D.Ill. 1994); United States v. Burnside, 824 F. Supp. 1215 (N.D.Ill. 1993); United States v. Boyd, 833 F. Supp. 1277 (N.D.Ill. 1993), aff'd, 55 F.3d 239 (7th Cir. 1995); and United States v. Andrews, 824 F. Supp. 1273 (N.D.Ill. 1993).

Further, as pointed out in Boyd, 833 F. Supp. at 1357, any prosecution attempt to divorce itself from the Bureau of Prisons, "which, as of May 14, 1930, is controlled by and within the Department of Justice," would be absurd in light of the fact that, as a matter of policy, the Bureau of Prisons' first response to a defense subpoena for such tapes would be to send them to the prosecutors for review. In addition, the government routinely avails itself of prison tapes when necessary for its own investigative or prosecutorial goals. As the Boyd court stated, "[g]iven the incestuous relationship between the two entities," information held by the Bureau of Prisons is subject to Brady disclosure. Id.; see also United States v. Jennings, 960 F.2d 1488, 1490 (9th Cir. 1992)(government's Brady obligation "cannot be evaded by claiming lack of control over the files or procedures of other executive branch services.").

For example, in Burnside, the defendants -- members of the El Rukin gang -- were granted a new trial based upon the prosecution's Brady violations. Specifically, the government failed to disclose to the defense, inter alia, information relating to: 1) the cooperating witnesses' drug use while incarcerated at the MCC in Chicago; and 2) a variety of benefits which had been provided to the witnesses by government personnel, including "patch through" phone privileges and "contact visits." 824 F. Supp. at 1224-25, 1245. The court found that the prosecution had actual knowledge of the suppressed Brady material. Id. at 1251-53. However, the court went on to note:

> even if none of the U.S. Attorney's personnel nor the federal agents nor the police officers had been aware of the undisclosed Brady material as they were, knowledge of the information would still be attributable to the government for Brady purposes since much of the undisclosed Brady material was possessed by the Warden and other personnel in the MCC.

Id. at 1254 (citation omitted). See also Andrews, 824 F. Supp. at 1289 (court rejected the government's contention that Brady information possessed by the Bureau of Prisons or WITSEC was not possessed by the "prosecution team").

In a subsequent decision in the Burnside case, the court noted that yet additional Brady material had been withheld from the defendants both during the trial as well as in the post-trial hearings relating to the withheld Brady material. See Griffen, supra. Among the evidence that the court indicated should have been provided to the defense were tape recordings -- such as those at issue in this case -- of telephone conversations between the inmate-witnesses and government personnel, family and friends, which had been recorded by the MCC Chicago as part of its regular monitoring of inmate phone calls. 856 F. Supp. at 1297-99. Moreover, the court

noted that the government had failed to produce, pursuant to Brady, a log book maintained by the MCC and which related to the unit which the government's witnesses had been housed. Id. at 1296 n.2.

In conclusion, the government should be required to preserve and review all of the inmate telephone calls of its witnesses because: a) the Bureau of Prisons is part of the Department of Justice; b) the taped calls contain information which is both helpful to the defendant and relates to issues at trial; c) the government routinely obtains similar tapes for investigative or evidentiary use without any difficulty; and d) the government was immediately made aware of the existence of such tapes.

POINT II

THE JACKET ALLEGEDLY FOUND IN THE DEFENDANT'S VEHICLE SHOULD BE SUPPRESSED AS IT WAS NOT THE PRODUCT OF A PLAIN VIEW SEIZURE

The jacket allegedly found inside the defendant's green Jeep Grand Cherokee should be suppressed since this jacket was not seized in plain view. An evidentiary hearing is required because the defendant's version of events are in apparent conflict with the government's version. United States v. Taylor, 13 F.3d 786 (4th Cir. 1994).

Counsel for the government has indicated that this jacket was found inside the Jeep in plain view subsequent to the defendant being required to abandon the vehicle on the night of February 3, 1997. (Lichtman Aff. at ¶ 13) It is well-settled, of course, that a "warrantless seizure is justified under the plain view doctrine if the officer has a legal right to be in the place from where he sees the object subject to seizure and a 'lawful right of access to the object itself,' and if 'the object's incriminating nature is immediately apparent.'" United States v. Berkowitz, 927 F.2d 1376, 1388 (7th Cir. 1991), quoting Horton v. California, 496 U.S. 128 (1990).

As noted in the affidavit of defendant [redacted], however, this jacket was never in his vehicle. ([redacted] Aff. at ¶ 9) Supporting the defendant's position is the fact that the witness who initially described this jacket was interviewed *prior* to the defendant being stopped and required to participate in a showup. Nonetheless, the officers did not notice this jacket inside the defendant's Jeep after he was subsequently stopped and detained for a lengthy period of time. It was not until after the defendant was required to abandon the Jeep on Westgate Road in Raleigh did a member of law enforcement supposedly first notice the jacket lying inside in plain view. (Lichtman Aff. at ¶ 13)

As the Fourth Circuit has explained, "[w]hen material facts that affect the resolution of a motion to suppress evidence seized during a warrantless search are in conflict, the appropriate way to resolve the conflict is by holding an evidentiary hearing after which the district court will be in a position to make findings." Taylor, 13 F.3d at 789. See also United States v. Starks, 40 F.3d 1325, 1332 (1st Cir. 1994)(hearing "required" upon mere "sufficient showing that a warrantless search has occurred"); United States v. Culotta, 413 F.2d 1343, 1345 (2d Cir. 1969), cert. denied, 396 U.S. 1019 (1970)(trial court is "required as a matter of law to hold a [] [suppression] hearing if appellant's moving papers ... state sufficient facts which, if proven, ... require[] the granting of the relief requested ...." Indeed, the Fourth Circuit vacated the conviction in Taylor and remanded the case "[b]ecause the district court did not conduct an evidentiary hearing to resolve the material factual disputes ...." Taylor, 13 F.3d at 789.

Undoubtedly, the government will parry with a line of authority holding that bald, conclusory or general allegations of investigatory impropriety "do not raise factual issues" meriting "an evidentiary hearing." United States v. Feola, 651 F. Supp. 1068, 1120 (S.D.N.Y. 1987). But that rationale surely does not control here, where the defendant "cannot be expected to have knowledge" of the circumstances surrounding an alleged illicit activity. United States v. De Yian, No. 94 Cr. 719, 1995 WL 368445 at *6 (S.D.N.Y. June 21, 1995). In this respect, the present case resembles, for example, a civil fraud action in which "material necessary to prove or disprove [the claim] lies p[eculiarly] within [the opponent's] knowledge." United States v. DeCoster, 624 F.2d 196, 228 (D.C. Cir.1979)(En Banc) (MacKinnon, J., concurring)(Citation and internal quotes omitted). To some inevitable extent, such a claim is inherently speculative and conclusory, as the fraud's circumstances, of necessity, cannot be pled with Fed.R.Civ.P.

9(b)'s requisite particularity. See, e.g., Quaknine v. MacFarlane, 897 F.2d 75, 81 (2d Cir. 1990). Rather, the most the plaintiff can hazard is an educated guess as to what might have happened, reserving the details for development through discovery and depositions. As the Second Circuit -- reaffirming the adage "you can't prove a negative -- recently stressed in a related setting:

> [A]lthough the assertion that [Miranda] warnings were not given is conclusory, any statement that a specific event did not occur will normally be conclusory, see generally Kamen v. AT & T Co., 791 F.2d 1006, 1015 n.1 (2d Cir. 1986)(Kearse, J. dissenting), since it is ordinarily impossible to state all of the facts that show that an event never occurred. Indeed, an attempt to give a detailed recitation of what did happen, without a conclusory denial, may well leave a negative pregnant.
>
> An assertion that Miranda warnings were not given, when the government asserts the contrary, thus creates a specific factual dispute. That dispute cannot properly be resolved without an evidentiary hearing.

United States v. Mathurin, 148 F.3d 68, 69 (2d Cir. 1998).

So it is here. For given the government's superior "access to the facts"of the alleged plain view search, DeCoster, 624 F.2d at 228, our good faith assertion of "the possibility of improper conduct" alone should trigger "a hearing on the issue." De Yian, 1995 WL 368445 at *6; see, e.g. Feola, 651 F. Supp. at 1120 ("relying on the good faith of [defense] attorney and in the interests of justice, this Court will exercise its discretion and grant [a suppression] hearing.").

In sum, the defendant and the government have contrasting positions on the facts leading up to the plain view seizure of the jacket from the green Jeep Cherokee. At this preliminary juncture, there can be no better grounds for an evidentiary hearing.

POINT III

THE GOVERNMENT SHOULD BE COMPELLED TO DISCLOSE ITS LIST OF WITNESSES

Due to the long period of time which has passed since the alleged offenses have occurred, the defendant is at a distinct disadvantage in the preparation of his defense. For this reason and the ones discussed below, the government should be required to provide to the defense a list of its witnesses or others who have knowledge of facts pertinent to this case.

Within the defendant's discovery letter of September 8, 1999 was a request for the names and addresses of all of the government's proposed trial witnesses. (Exhibit A at 3) In its letter of September 14, 1999, the government declined to provide this information. (Exhibit C)

In United States v. Stroop, 121 F.R.D. 269, 274-75 (E.D.N.C. 1988)(Dixon, J.), Magistrate Judge Dixon noted that while "[n]o specific statute or rule mandates pre-trial disclosure of witness lists in non-capital cases .... the general discretion of district courts to compel the government to identify its witnesses is widely acknowledged" (citations omitted). In order to merit a government witness list, "a defendant must make a specific or 'particularized' showing that such disclosure is both material to the preparation of his defense and reasonable in light of the circumstances." Id. at 275. The court pointed out that in making this determination "[e]ach case must turn on its own peculiar facts ...." Id.

The charges alleged in the indictment revolve around an incident which occurred almost three years ago. The defendant is disadvantaged since the government has had approximately 32 months to investigate its case while the defendant, a New York resident, is left with virtually no leads in his attempt to interview witnesses to the alleged shooting at the Raleigh Post Office.

The need for the names of the witnesses is especially acute in a case such as the one at hand where nearly the entirety of the evidence against the defendant is in the form of witness testimony. As for the government's anticipated response, it can hardly claim that it is concerned with the intimidation or danger to any of its witnesses where: a) there has been no allegation that the defendant has obstructed justice at all during the time leading up to the indictment; and, b) the government has already supplied the name of a number of its witnesses in the materials provided to the defendant pursuant to 18 U.S.C. § 3500.

Judge Dixon recognized the significance of the names of witnesses to the defendant's need to prepare his defense:

> One of the immediate tasks for responsible counsel in preparing for any case is to seek to interview those witnesses involved in the transactions which form the basis for the litigation. Indeed, in a number of circumstances, a failure to so investigate can result in cognizable claims of ineffective assistance of counsel. In the civil context, our courts clearly recognize the importance of this task by demanding, at a minimum, that counsel exchange witness lists well in advance of trial. E.g., Local Rules 25.02, 25.03(e), E.D.N.C. If this is so in the civil context, the defendants' interest in obtaining this same information in a criminal case, where their very liberty is at stake, is even more compelling.

Id. at 275 (citing United States v. Opager, 589 F.2d 799, 804 (5th Cir. 1979)). Indeed, the witness statement produced by the government have revealed certain conflicting accounts of the incident charged in the indictment. Without the names and addresses of the witnesses, the defendant may be unable to either interview them or compel them to appear as trial witnesses.

In Stroop, Judge Dixon ordered the disclosure of the government's witness list upon making a number of findings many of which are pertinent to the case at hand: 1) "[t]he indictment alleges offenses occurring *almost five years old*, rendering preparation of a defense a

difficult proposition at best;" 2) "The critical, dispositive evidence in this case will flow ... from anecdotal testimony of either the co-defendants, unindicted co-conspirators, other participants to the transactions, or a combination of all of these;" and 3) "[A] number of these witnesses are within the control of the government and are not openly available to the defense for investigation and interview ...." Stroop, 121 F.R.D. at 275-76. Lastly, the Court found that the government was unable to make any showing that "by supplying the witnesses' names prior to trial ... will ... increase the likelihood that the witnesses will not appear at trial, will be unwilling to testify, or will be harassed, threatened or intimidated." Id. at 275-76 (citing United States v. Price, 448 F. Supp. 503 (D. Colo. 1978)). The defendant argues that such a showing cannot be credibly made.

For all of these reasons, the defendant is entitled to the immediate disclosure of the names of the government's witnesses so that he can properly prepare a defense to the charges lodged against him in this case.

POINT IV

DEFENDANT EXPRESSLY RESERVES THE RIGHT TO MAKE ANY FURTHER MOTIONS WHICH ARE NECESSITATED EITHER BY THE GOVERNMENT'S DISCLOSURE OF DOCUMENTS OR INFORMATION, OR BY THE DISCOVERY OF NEW FACTS OF WHICH DEFENDANT IS PRESENTLY UNAWARE

CONCLUSION

For the foregoing reasons, defendant [redacted] pretrial motions should be granted in their entirety.

Dated: New York, New York
September 29, 1999

Respectfully submitted,

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