No. 17-1390

CAPITAL CASE

IN THE
Supreme Court of the United States

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TIMOTHY FILSON, WARDEN, *et al.*,

Petitioners,

v.

PAUL BROWNING,

Respondent.

_____

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

_____

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

Whether the Ninth Circuit failed to adhere to the deferential requirements of review required by AEDPA in this case.

TABLE OF CONTENTS

TABLE OF CONTENTS (CONT.)

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

STATE CASES

FEDERAL STATUTES

INTRODUCTION

This petition asks for error correction where no error has occurred. Judge Gould's majority opinion for the Court of Appeals panel below correctly concluded that this case suffers from the kind of "extreme malfunction[] in the state criminal justice system" for which federal habeas relief remains available under the AEDPA. See App. 6 (quoting *Davis v. Ayala*, 135 S.Ct. 2187, 2202 (2015)).

The jury that convicted Respondent Paul Browning of this capital murder never heard evidence that strongly indicated that he was not the person who committed it. That evidence was developed in state habeas proceedings and was not brought out at Browning's trial due to the gross ineffectiveness of his court-appointed lawyer and the prosecution's violation of its disclosure duties. Among other things[1] that evidence included a police officer's testimony that bloody shoeprints found at the murder scene, which concededly were not Browning's, were there before first responders arrived, which meant they probably were left by the murderer. It included the fact the dying victim gave police a specific description of his killer Browning did not fit. It included the fact that the State's most important witness was a police informant who, contrary to what the jury was told, was rewarded by the prosecution for his testimony. It included the fact that a spot of blood on a jacket Browning had worn—blood which the prosecutor told the jury was the victim's and "proved Browning was the killer" by itself—wasn't the victim's at all.

[1] Because of his defense counsel's wholesale failure to investigate and prepare, Browning's jury also didn't hear forensic testimony indicating that a knife which the prosecutor said was the murder weapon could not have been; or police and witness testimony that Browning had no blood, cuts or scrapes on his person or his clothes when arrested minutes after the bloody crime; or the testimony of a witness who said she was with Browning in the victim's store (which was only two blocks from their hotel) the day before the crime, which explained his fingerprint on glass from the store counter; or another witness who had said that the prosecution's key informant was in possession of, and tried to sell, jewelry that was stolen in the robbery. See App. 47-50; RApp 58, 62-67, 309-11. The Court of Appeals did not decide whether the failure to obtain and present this additional evidence was prejudicial, because it found relief was warranted on Browning's ineffectiveness claim without considering it. App. 58-59 n.19.

Despite all this, the Nevada state courts rejected Browning's post-conviction claims of ineffective assistance and *Brady* violations, and did so based on findings and applications of established law that were plainly unreasonable. It found that defense counsel was ineffective for calling a police officer to testify without speaking to him beforehand—but then credited counsel's supposedly "strategic" decision not to find out what that officer saw at the crime scene. See App. 55-6. Its opinion missed the fact that "[t]he jury did not know that [an officer] … received a description of the assailant [that did not fit Browning] *from the victim himself*." See App. 77 (emphasis added); compare App. 148. It held that a prosecutor's obligation to disclose obviously exculpatory evidence is excused if defense counsel could have asked a police officer who had it. See Pet. 17. It ruled it was reasonable for defense counsel to refuse to let his investigator interview key witnesses because he, the lawyer, didn't conduct witness interviews himself—without any explanation why the investigator couldn't do them for him. App. 58. Even the dissenting judge below agreed that one of the state court's rulings was based on a finding which "the evidence does not support" (App. 83), and that at least two of its findings were unreasonable under §2254(d)(2) (App. 79, 99).

Still, the Court of Appeals majority deferred to the state court's conclusions that the prosecution improperly failed to disclose benefits given to its key informant-witness, that the bloody shoeprints were made before first responders arrived, and that defense counsel was ineffective for failing to speak to a police officer before calling him as a witness at trial. See App. 32-34, 50, 55. It directly disagreed with the state court on only one point—whether defense counsel's failure to learn the truth about the bloody shoeprints could be reasonably excused as "strategic." See App. 56. It also assumed the state court erred by holding that *Brady* violations can be excused by a lack of defense diligence—because petitioners conceded it. See

page 19, below. That left it with questions of materiality the state court had not answered. App. 36, 60. In an excess of caution the panel majority applied a deferential AEDPA standard anyway (App. 37-38, 60) and, in doing so, it declined to weigh exculpatory evidence developed in state post-conviction proceedings, rather than at trial.[2] See App. 39 n.9, 48-49 n.15 and 16, 50 n.17. Still, it concluded from the state trial record alone that any reasonable judge would agree that, if the concealed and undiscovered evidence had been presented, there is a reasonable probability the jury would have reached a different result. App. 51; see also App. 62. In doing that it made no error that warrants review by this Court.

JURISDICTION

Respondents are correct that final judgment below was entered on November 3, 2017, but not that a petition for *en banc* review was denied that day; no *en banc* petition was filed below.

STATUTORY PROVISIONS INVOLVED

This case also involves 28 U.S.C. Section 2254 (d), which provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

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[2]The majority of the Court of Appeals erred in both these regards. See pages 22, 24-25 below. But the error was in petitioner's favor, and provides no basis for certiorari review at their behest. Judge Callahan's dissent went farther and was based largely on the premise that *Cullen v. Pinholster*, 563 U.S. 170 (2011) *requires* federal courts to limit their review to evidence submitted at trial rather than state post-conviction. See App. 84, 86 n.8, 88 n.9. That is a clear misreading: *Pinholster* held that 28 U.S.C. § 2254(d)(1) "requires an examination of the state court decision *at the time it was made*" and "the record before the state court" "*at that same time*." 563 U.S. at 182 (emphasis added). Browning's *Brady* and ineffective assistance claims were decided by the state court in state habeas, and the decision was based on the state habeas record. See *Browning v. State*, 120 Nev. 347, 91 P.3d 39, 50 (2004) ("*Browning II*").

STATEMENT OF THE CASE

Paul Browning has always maintained he is innocent of the murder for which he was sentenced to death, and was framed by two police informants who were involved in the crime. The record is full of evidence—most of which was uncovered in state habeas proceedings, and little of which came out at trial— supporting his innocence claim.

- The victim, Hugo Elsen, was a jewelry store owner who was stabbed to death in a robbery. Bloody shoeprints led from his body toward the door from which the killer fled. The shoeprints concededly were not Browning's. The prosecution led the jury to believe the prints were made by police or medics, but did not disclose the fact that the prints were already there before police and medics arrived, and so likely were made by the killer. See App. 30-31, 38-40.

- Before he died, Mr. Elsen gave police a description of the murderer that did not match Browning; but the jury never heard what the description actually was, or who gave it. See App. 34-5, 43.

- Browning was arrested just minutes after the murder, which involved a bloody, multiple stabbing. There was no blood on his person or his clothes and he had no cuts or abrasions on his hands or body. See App. 47.

- The only physical evidence allegedly tying Browning to the killing was a spot of blood on a jacket he was shown to have worn. The prosecutor told the jury the spot was the victim's blood and that it alone conclusively proved Browning guilty. But in state habeas, Browning proved, and the State ultimately conceded, the blood on the jacket was not the victim's at all. See App. 49.

- The prosecution also argued that a fingerprint on a glass counter in the jewelry store tied Browning to the crime. But a woman named Marcia Gaylord told defense counsel that she and Browning had been in the store (which was just two blocks from their hotel) the day before the crime. Although defense counsel knew that Ms. Gaylord was a critical defense witness, he didn't subpoena her or secure her testimony at trial, and the jury never heard about what she had told him. See App. 47-9.

- The two key prosecution witnesses were indeed longtime serial police informants at least one of whom, contrary to what Browning's jury was told, was rewarded by the prosecution for his testimony with drastically reduced criminal charges and a job. See App. 23 41-2.

The list goes on (see note 1, above) because Browning's appointed defense counsel, Randall Pike, did virtually nothing to investigate or prepare his defense—even refusing requests from a court-provided investigator to do so—and prosecutor Dan Seaton took full advantage.

1. The Evidence Presented at Trial.

The case against Paul Browning was built with the kinds of evidence most frequently associated with wrongful convictions: unreliable, cross-racial eyewitness identification; serial informant testimony; and flawed forensics. See J. Gould and R. Leo, *100 Years Later: Wrongful Convictions After a Century of Research*, 100 J. CRIM. LAW & CRIM. 825, 841 (2010).

a. The only eyewitness at trial was Josy Elsen, the victim's wife. Mrs. Elsen said she heard a commotion, went into the showroom, got a fleeting side view of the killer from the back of the store, and ran for help. App. 44. She was asked the night of the crime to identify Browning but declined because she said she never saw the assailant's face. About a month after the crime, police showed Mrs. Elsen two photo arrays, both of which contained Browning's photo, but she did not pick him. *Id.* Yet at trial a year later, after she had seen Browning at more than a dozen pretrial appearances, the prosecutor managed to elicit a tentative identification from her. *Id.* In closing argument to the jury, the prosecutor argued that Mrs. Elsen's identification was "as good as you can ask for" (App. 44n.13).

In state habeas, Browning's new lawyers obtained a sketch of the scene trial counsel Pike never saw and did the scene investigation Pike failed to do. See App. 136; Respondent's Appendix ("RApp.") 248n.31; 6ER1634-36.[3] That investigation revealed that Mrs. Elsen could

[3]Respondent's Appendix contains the briefs filed by both sides in the Court of Appeals. That briefing and this Brief also reference to documents in the Excerpts of Record ("ER" and "SER") filed in the Court of Appeals. See *Browning v. Baker*, 9th Cir. No. 15-99002, Docket Nos. 8-3 – 8-8 (1ER – 6ER), 10-3 (7ER), 25-1 - 25-2 (1SER – 2SER), 35-1 – 35-2 (8ER-9ER), 69 (1SuppSER), 76 (10ER).

not have seen the killer's face from the vantage point she described. *Id.* When Browning's state habeas lawyers produced their results, the prosecution changed its position and conceded Mrs. Elsen never positively identified Browning at all.[4]

Three other witnesses were called at trial to describe people they saw outside the jewelry store, before and after the robbery. Two of them identified Browning as a person they saw jog past the store—not run from it—shortly after the crime. App. 9-11. Neither said the person they saw was carrying a jewelry tray or a knife or jewelry, and neither saw any blood on him or his clothing. *Id.*; see also App. 46; RApp. 230. A third scene witness, found by police but called by the defense, said he saw a suspicious-looking "Cuban" individual, not Browning, outside the store a few minutes before the robbery. App. 14-15.

b. The informant testimony came from Randy and Vanessa Wolfe, both of whom had long criminal records and histories of trading information with the Las Vegas police. Randy Wolfe led police to Browning, who he said was in the Wolfes' hotel room with Vanessa. App. 11-12. Vanessa left the room when she was told that the police were coming. See 4ER1026. The police then found Browning sitting on the Wolfes' bed (or in a chair next to it—their testimony conflicts). App. 13; see RApp. 295. A few items of the jewelry taken in the robbery were scattered on the hotel room floor. App. 13. Browning had no cuts or blood or other evidence on his body or clothing, and none of the jewelry was on his person (see App. 47, RApp. 14), but the Wolfes both told police Browning had admitted to them he had committed the crime, and the police arrested him. App. 13.

[4] This concession, which was not clearly referenced in the briefing below (see App. 44 n.13), read as follows: "Ms. Elsen, as demonstrated by Defendant's own closing brief, never made an in court identification…. Her testimony was that Defendant, from the side resembled the perpetrator that she saw in the store…. Ms. Elsen never positively identified Defendant." 9ER1932.

The search of the Wolfes' hotel room turned up only the few pieces of jewelry on the floor and a jewelry tray in the bathroom. App. 13; RApp. 230n.22. A search of Browning's hotel room turned up nothing. RApp. 14. Later, after the Wolfes were questioned and released, they returned and gave the police another 65 pieces of jewelry they claimed were overlooked in the search. App. 46; see RApp. 14, 17, 295. Browning's fingerprints were not on any of the jewelry. App. 46.[5] Vanessa Wolfe also gave police a knife she claimed Browning gave her to hide, and led them to a hat in a dumpster near the hotel. App. 67-8. No blood or trace evidence was found on either the knife or the hat (App. 49-50)—but at trial the prosecutor told the jury Browning "took *that knife* and … plunged it into the heart of Hugo Elsen" (3ER875, emphasis added); and witnesses gave conflicting testimony about whether the hat was the one worn by the person they saw at the crime scene. See App. 10-11, 15.

The Wolfes were the prosecution's most important witnesses. App. 41. Both testified Browning brought the jewelry to their hotel room and confessed the crime to them. App. 12-13. Randy Wolfe admitted he had some of the jewelry and had lied about it at Browning's preliminary hearing, but he denied involvement in the crime and both he and the prosecutor told the jury he was getting nothing for his testimony. App. 32, 61. Only in state habeas was it learned that after Browning's trial Randy was given probation for crimes that qualified him for prosecution as an habitual criminal. *Id.*; see App. 135. The judge who gave him probation said he did so because Prosecutor Seaton told him Wolfe had been helpful to the prosecution on "several occasions" in a "few cases," including Browning's. App. 22; RApp. 239.

[5] The only item recovered by police with Browning's fingerprint on it was a broken Casio watch. See App. 189. The watch concededly was not one of the items taken in the jewelry. RApp. 15n.6, 232n.24.

Vanessa Wolfe was an admitted prostitute, drug addict and con artist. App. 41. In state habeas it was confirmed that she was a police informant and had falsely accused a man of a knife assault the week before Browning's trial was to begin. App. 22; see RApp. 20n.9. It was also learned that while Browning's case was pending she was not prosecuted on nine arrests, and on a tenth charge—assaulting a police officer—she received only a fine. See RApp. 23.

c. The most important forensic testimony at Browning's trial involved a jacket found in the Wolfes' hotel room. The jacket had a spot of blood on it which police had tested and found was the same blood type as Hugo Elsen. App. 14. The prosecutor found a picture of Browning wearing the jacket, and closed his argument to the jury by saying the jacket "had *Hugo Elsen's blood* on it," "the *same blood as Hugo Elsen had flowing through his veins* that day," and "[t]his proves [Browning's] … guilt as much as anything … *[Y]ou don't have to spend five minutes* in the deliberation room." RApp. 29, 193 (emphasis added); see App. 88-9 n.10.

In state habeas, Browning's lawyers had the blood spot tested and Hugo Elsen was excluded as its source. App. 49 n.16. The State so stipulated. *Id.* But the Nevada Supreme Court declined to address Browning's claim that his trial lawyer was ineffective for failing to have the spot tested, saying obliquely that the claim wasn't supported by "cogent argument" (App. 128)—although Browning's briefing cited seven reported decisions and two textbooks showing that testing that would have disproven the prosecution's claim that the spot was "Hugo Elsen's blood" was available to counsel in 1986. See RApp. 105-106.

The prosecution at Browning's trial also presented forensic testimony that among "some twenty odd fingerprints from the scene," two of his fingerprints were lifted from pieces of glass from the jewelry counter. App. 47. Browning told trial lawyer Pike he had been in the store a day or two before the robbery, and early on Browning's girlfriend, Marcia Gaylord, told Pike the

same thing. App. 48-49n.15. But Pike didn't put Ms. Gaylord under subpoena or take other steps needed to secure her testimony at trial, so the jury never heard this explanation, which was first made of record in state habeas. App. 19. Browning's state habeas counsel also submitted forensic testimony that contradicted the prosecution's claim that the location of the prints meant they could not have been made by a customer leaning over the showcase. App. 19.

b. The Exculpatory Evidence Discovered in State Habeas.

The exculpatory evidence listed and described above (on page 4) was all presented for the first time in state habeas proceedings, where Browning had new counsel.

Two of the most important pieces of new evidence came from Las Vegas Police Officer Gregory Branon. Officer Branon was with the first officers to enter the store after the crime and saw bloody shoeprints leading toward the shop door—from which the killer allegedly fled. App. 31, 38-39; see RApp. 35. The shoeprints were compared with the shoes Paul Browning was wearing when arrested and they didn't match. App. 14. At trial, the prosecution did not call Officer Branon but instead called Criminalistics Specialist David Horn, who testified in essence "that responding paramedics and off duty detectives often wear tennis shoes at crime scenes, misleadingly suggesting that the shoeprints came from them." App. 30. It was only at the state habeas hearing that Officer Branon revealed that the shoeprints were there before any of the responders entered. App. 23. He said he hadn't included that fact in his report because "I had mentioned it to the general detail detectives there" at the scene and "I would have mentioned it to Criminalistics Specialist Horn." RApp. 36. No one testified to the contrary.[6]

[6] Based on this, in state and federal habeas Browning claimed that Spec. Horn's testimony violated the due process rule of *Napue v. Illinois*, 360 U.S. 264 (1959). See RApp. 69-75. The Nevada courts did not separately address the claim. The District Court below summarily rejected it saying Branon's testimony that he "would have" told Horn what he saw was not credible (App.120) but issued a a certificate of appealability on the claim. The Court of Appeals rejected the *Napue* claim on the different

In denying Browning's postconviction appeal, the Nevada Supreme Court credited Officer Branon's testimony, saying it is "now evident that the prints were present before police and paramedics arrived." *Browning II*, 91 P.3d 46.[7] However, it said that was immaterial, based on a speculation that was never suggested at trial: "the bloody shoeprints were likely left by Mrs. Elsen and/or Coe." *Id.* This was based on no evidence. App. 38, 83. To the contrary, the trial evidence included photos showing the prints were "larger than a typical woman's shoe," and a defense forensic report submitted in state habeas confirmed that was so. See App. 39 and n. 9.[8]

Officer Branon was called by the defense at trial to testify about a description of the killer he broadcast over police radio minutes after the crime. He testified "[t]he description we received" was a black male adult with "a mustache and what was described as a shoulder length J[h]eri-type curl." App. 15. Browning had a short, dry looking "afro" hairstyle, and the defense tried to argue that the "jeri curl" description excluded him. See App. 16. But the prosecutor—who pointedly asked Officer Branon no questions—responded in closing argument that the discrepancy could simply mean that "some white person" used the term "jeri curl" without knowing what it meant. *Id*.

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ground that "it was not clearly established at the time of the Supreme Court of Nevada's decision that a police officer's knowledge of false or misleading testimony would be imputed to the prosecution." App. 36. But petitioner submitted circumstantial evidence indicating that prosecutor Seaton knew what Officer Branon saw, and the Nevada courts never expressly ruled on the *Napue* claim (see RApp. 69-71, 73-75, 167, 218-225)—so this was another error in the Warden's favor.

[7] See also *id.* ("the prints did not match Browning's shoes and could not have been left by paramedics"); *id*. at 55 ("bloody shoeprints near the victim were already present when the first police officer arrived at the crime scene").

[8] In federal habeas, Browning's counsel additionally presented statements from Mrs. Elsen and Mrs. Coe confirming the shoeprints could not have been theirs (see RApp. 49, 212), but the Court of Appeals did not consider them. See note 2, above.

In state habeas, Officer Branon revealed that the description of the killer's hair actually came directly from the victim, Hugo Elsen, and the exact words Mr. Elsen used to describe it were "shoulder length," "wet looking," and "loosely curled"—none of which terms fit Browning. App. 23-4. The Nevada Supreme Court held that defense counsel was ineffective for failing to find this out by speaking with Officer Branon before calling him as a witness, but said the discrepancy was not so prejudicial as to warrant relief. *Browning II*, 91 P.3d at 46-47.

As noted above, the evidence and testimony at the state habeas hearing also undermined the case against Browning on several other points. Testing on the blood on the tan jacket showed beyond dispute it was not Mr. Elsen's, as the prosecution had contended. App. 49. Prosecutor Seaton admitted he rewarded Randy Wolfe with a much reduced sentence and a job. App. 32, 61. Court records showed Vanessa Wolfe also had an array of charges against her dropped after she testified against Browning. RApp. 23. A witness said that Randy Wolfe was selling some of the jewelry from the robbery. RApp. 18. Defense counsel Pike admitted Marcia Gaylord told him that she was in the jewelry store with Browning days before the robbery, but he then lost track of her. App. 19, 51. Browning himself testified and described how Wolfe had directed him to the hotel room minutes after the robbery, and left him there with Vanessa to be caught by the police. RApp. 123, 203.

The Nevada Supreme Court never considered the significance of most of this evidence. The Court of Appeals below didn't either, because it concluded that any reasonable jurist would agree that the shoeprint evidence, the dying declaration, and the benefits given to Randy Wolfe alone undermine confidence in Browning's conviction. See App. 58-59 and note 19.

REASONS FOR DENYING THE WRIT

I. THE COURT OF APPEALS PROPERLY APPLIED AEDPA'S STANDARDS FOR REVIEWING CONSTITUTIONAL CLAIMS REJECTED BY STATE COURTS ON THEIR MERITS.

Petitioners claim that the Court of Appeals majority applied an invalid "articulation" of AEDPA's deference requirement and relied on Circuit precedent to identify clearly established law. Petition at 11-13. Neither claim is true.

A. The Court of Appeals did not apply an incorrect review standard.

Petitioners are correct that, in describing the AEDPA standard of review, the panel majority quoted this passage from *Hernandez v. Small*, 282 F.3d 1132, 1142 (9th Cir. 2002):

> A state court's decision can involve an unreasonable application of Federal law if it either [(1)] correctly identifies the governing rule but then applies it to a new set of facts in a way that is objectively unreasonable, or [(2)] extends or fails to extend a clearly established legal principle to a new context in a way that is objectively unreasonable.

App. 26-27. They then say "*[t]o the extent* the panel majority based its decision on the second half of the *Hernandez* standard, the majority opinion conflicts with this Court's decision in [*White v.*] *Woodall* [134 S. Ct. 1697 (2014)]" Pet. 13 (emphasis added).

The last part of this statement appears to be so, but it doesn't call for review here because—as petitioners' dodgy language suggests—"the second half of the *Hernandez* standard" played no part in the decision below, and "[t]his Court . . . reviews judgments, not statements in opinions." *Black v. Cutter Laboratories*, 351 U.S. 292, 297 (1956). Petitioners point to nothing in the panel opinion that purports to extend a legal principle established by this Court,[9] or that

[9] Petitioners say they can't locate any such extension because "the panel majority … engage[d] in its own *de novo* review of Browning's claims, rather than applying AEDPA deference." Pet 13. Even if that were true, it is unclear why it would make it more difficult to identify the precedent and legal principles the court applied. But it is not true: the panel majority expressly *declined* to engage in *de novo* review of any issue in the case, though Browning argued (and maintains) it should have. App. 27.

faults the Nevada Supreme Court for not doing so. The only place "extension" even came up with respect to the claims petitioners are challenging[10] was in the Court of Appeals' discussion of the nondisclosure of the victim's dying description of the killer. On that issue, the dissent argued that the majority took "a novel view of *Brady* that extends the state's obligations into the murky zone of interpretations of otherwise neutral facts." App. 78.[11] But what Browning argued, and what the majority held, was that the prosecution was obligated to disclose the facts—the "exact words [the victim] … used to describe his assailant"—not any "interpretation" of those words. See App. 35. There was nothing "novel" about this *Brady* ruling. The victim described the killer's hair in terms which did not match Browning. If the description was ambiguous, or subject to interpretation, or if its source was "some white person" without any identifiable basis, it might not be exculpatory. But no reasonable jurist could doubt that a *specific* description of a murderer *by the victim* that does not match the defendant is exculpatory evidence that should be disclosed. See note 15, below. The panel majority correctly so held based only on this Court's clearly established precedents. See also App. 35n. 8 (discussing an analogous holding in *Kyles v. Whitley*, 514 U.S. 419 (1995)).

Petitioners' suggestion that the panel majority used a different review standard and faulted the state courts for not expanding on this Court's precedents has no support in the record.

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[10] The panel majority expressly declined to apply what it said would be an extension of this Court's decision in *Napue* to Browning's claim that Spec. Horn gave intentionally misleading testimony about the likely source of the bloody shoeprints. App. 31-32; see note 6, above.

[11] The dissent, like the Nevada Supreme Court, misread the record on this issue, saying that "the prosecutor's argument [was] the 'purported source' of the description was the victim, Hugo Elsen." App. 78. As the dissent itself noted elsewhere, "[t]he jury did not know that Officer Branon received a description of the assailant from the victim himself. Instead, Branon recounted the description that Hugo gave him, without identifying its source." App. 77. Nor did the prosecutor suggest to the jury that the source of the description was Mr. Elsen, only that it probably came from "some white person." App. 16, 78.

B. The Court of Appeals did not rely on circuit precedent.

The "clearly established law" against which the Court of Appeals measured the reasonableness of the state courts' decision was the law established by decisions of this Court. See App. 26-29, 31, 34-35, 37-38, 51-54, 56-57, 59-61. Petitioners claim the opposite, that at critical points the Court of Appeals

> shifted to its own precedents to assess Browning's *Brady* and *Strickland* claims, invoking circuit precedent when addressing Browning's ability to satisfy different aspects of relevant constitutional standards. App. 42, 54-56.

Pet. 12. If true, that would be serious, because this Court has made clear that the precedents that count under section 2254 are its own. *Lopez v. Smith*, 135 S.Ct. 1, 2 (2014). But it is not true.

Petitioners baldly cite four pages of the Court of Appeals majority opinion to document this transgression. Pet. 12. The first is page 42, where the opinion addressed Browning's *Giglio* claim arising from the undisclosed rewards given Randy Wolfe for his testimony. There the opinion first quotes *United States v. Bagley*, 473 U.S. 667, 683 (1985) that the "possibility of a reward gave [the informant witness] … a direct, personal stake in [the defendant's] … conviction." It then applies that principle to Wolfe:

> The other impeachment evidence concerning the Wolfes' criminal activity and penchant for lying suggested to the jury that the Wolfes were untrustworthy. But evidence suggesting that Randy had a personal stake in Browning's conviction would have shown the jury why the Wolfes would lie in this particular case.

App. 42. Then comes the target of petitioner's critique: a "see" citation to *Maxwell v. Roe*, 628 F.3d 486, 510 (9th Cir. 2010), with this parenthetical: "The undisclosed benefits that the informant received added significantly to the benefits that were disclosed and certainly would have cast a shadow on the informant's credibility. Thus, their suppression was material." But that quotation was of no moment in the Court of Appeals' decision because—unlike the

informant in *Maxwell* and like the informants in *Bagley*—"[a]t trial, Wolfe denied receiving or expecting *any* benefits for his testimony." See App. 134 (emphasis added).

The second place petitioners claim the majority opinion transgressed is on page 53, in its discussion of defense counsel's "'duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.'" *Id.* (quoting *Strickland v. Washington*, 466 U.S. 668, 691 (1984)). In identifying the scope of that duty, the opinion referenced the ABA STANDARDS FOR CRIMINAL JUSTICE, which it correctly said could be "'guides to determining what is reasonable.'" App. 53-54 (quoting *Wiggins v. Smith*, 539 U.S. 510, 524 (2003)). It then cited *Summerlin v. Schriro*, 427 F.3d 623, 629–30 (9th Cir. 2005) for the proposition that the ABA standards to consider were those "in effect at the time of Browning's trial"—the 1980 edition, rather than later ones. That was exactly consistent with the law established by this Court. *Bobby v. Van Hook*, 558 U.S. 4, 7 (2009). Moreover, no one argued below that Pike should be held to the *more* demanding requirements of *later* editions of the ABA Standards.

The conclusion of this passage was that Pike had a "duty ... to conduct a prompt investigation ... includ[ing] efforts to secure information in the possession of the prosecution and law enforcement authorities." App. 54, (quoting ABA STANDARDS, Standard 4-4.1 (2d ed. 1980)). Again, this Court said the same thing in *Van Hook.* 558 U.S. at 7.

Petitioners also find fault on the next page, where the panel opinion said it was "examin[ing] Pike's performance in a 'highly deferential' manner", and "because we are operating under AEDPA deference, our review is 'doubly deferential,'" requiring a "demonstrate[ion] that 'there is no possibility fairminded jurists could disagree that the state court's decision conflicts with' Supreme Court precedent." App. 54 (quoting

Strickland, 466 U.S. at 689, *Pinholster*, 563 U.S. at 190, and *Harrington v. Richter*, 562 U.S. 86, 102 (2011)). The opinion then noted the Circuit had previously held that "it ordinarily falls below the *Strickland* level of required competence to put a witness on the stand without interviewing him." *Jackson v. Calderon*, 211 F.3d 1148, 1160 (9th Cir. 2000). But it didn't rely on that precedent, because the Nevada Supreme Court had found Pike's conduct was deficient *for this same reason*, and neither party challenged that finding. App. 54.

The last target of this challenge is a citation in the discussion of Pike's alleged reason for not asking questions about the bloody shoeprints. There, after pointing out Pike could have learned about the shoeprints' significance without risk and had no valid reason not to do so,[12] the panel quoted *Weeden v. Johnson*, 854 F.3d 1063, 1070 (9th Cir. 2017), for the proposition that "[c]ounsel cannot justify a failure to investigate simply by invoking strategy. . . . Under *Strickland*, counsel's investigation must determine strategy, not the other way around." App. 56.[13] It then said that "a decision not to investigate particular facts may be reasonable *when the attorney has reason to believe* doing so would reveal inculpatory evidence," and cited *Richter* as an example. *Id*. (original italics). But it noted

> Here, the facts are the opposite [from *Richter*]. Pike had no reason to disbelieve Browning's assertions that he had been framed by the Wolfes. And more importantly, contrary to Pike's fears, there was little risk that investigation into the source of the shoeprints could damage Browning's defense theory.

App. 57.

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[12] The opinion said that petitioners' defense of Pike's explanation for his failure rested on the "constitutionally untenable" notion that "if your criminal attorney does not believe your story, your attorney need not investigate your case." App. 56. That defense was not only untenable but baseless, because Pike never said he didn't believe what Browning had told him.

[13] See *Wiggins*, 539 U.S. at 521-22 ("'strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.'" [quoting *Strickland*, 466 U.S. at 690–91]).

This conclusion was driven less by precedent than by logic. Pike defended his "strategic" decision not to do anything to learn about the source of the bloody shoeprints by saying that investigation could backfire if, for example, he "interviewed the ambulance driver" and "they had shoes that matched the track." RApp. 85. But that was a red herring; no one said Pike should have checked the shoes of all the first responders. To argue that would be absurd, because it is not necessary the check shoes to know that people can't leave prints in a place where they haven't been. As the panel noted, all Pike had to do is to ask Officer Branon what he saw when he arrived at the scene, and if the officer said he saw shoeprints ask whether anyone had entered before him. App. 57. Neither Pike nor the state courts said there was any risk in that.[14] Moreover, as noted above, the Nevada Supreme Court held that Pike was ineffective for not speaking with Officer Branon before calling him to the stand. App. 55. It has never been explained how such an interview could proceed without asking the officer what he saw at the crime scene.

None of the conclusions petitioners challenge were based on circuit law rather than law established by this Court "at the time of the state-court adjudication on the merits." *Greene v. Fisher*, 565 U.S. 34, 37 (2011). The panel limited itself to this Court's precedents, even where AEDPA deference arguably was not required. See notes 2 and 6, above. The major premise of petitioners' proposed question presented—that Judge Gould's opinion "relied on circuit precedent to define the contours of constitutional rights," Pet. i—is untrue.

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[14] The dissent below contended that asking Branon whether others entered the store before him could have backfired if he volunteered "Yes, and they're the reason why there were bloody shoeprints all over the place." App. 96-7n.13. But in making that argument the dissent conflated what could happen in an interview with what could happen if the question were asked at trial, "after Horn's testimony." *Id.* That missed the main point: that it made no sense not to ask the question *before calling Branon as a witness*, partly because doing so could backfire if counsel did not know what he might say. *Cf. Rompilla v. Beard*, 545 U.S. 374, 383 (2005) (defense counsel ineffective for failing to review file of prior conviction he knew prosecution would bring out at trial); RApp. 84.

II. THE NEVADA SUPREME COURT'S POSTCONVICTION DECISIONS IN BROWNING'S CASE WERE OBJECTIVELY UNREASONABLE APPLICATIONS OF ESTABLISHED LAW.

A. The *Brady* claims.

Petitioners are correct that "[t]he state court denied Browning's claim that the State had suppressed [the facts regarding the bloody footprints and the victim's dying declaration] … because trial counsel could have discovered that information merely by interviewing Officer Branon prior to trial." Pet. 15; see *Browning II*, 91 P.3d at 55. It is also true that "[t]he panel majority below never assessed whether that conclusion was reasonable." Pet. 15. In fact, neither the majority nor the dissent below made that assessment—because the petitioners did not argue below that this basis for the state court decision was reasonable.

To the contrary, petitioners' Court of Appeals brief disavowed the Nevada Supreme Court's position on nondisclosure and defended only its determination that the bloody shoeprints were not "material." It said "it is the finding of a lack of materiality by the Nevada Supreme Court, which results in the court's decision not being objectively unreasonable." RApp. 155. Petitioners thus abandoned the argument they are making now.

If their argument had been made below, clearly established law would have obligated the Court of Appeals to reject it. It has been settled since *United States v. Agurs*, 427 U.S. 97 (1976) that obviously exculpatory evidence must be disclosed without any defense request. *Id*. at 110.[15] The Court has reiterated this time and again. *See, e.g.*, *Kyles*, 514 U.S. at 432 (prosecutors have an "affirmative duty to disclose evidence favorable to a defendant"); *Banks v. Dretke*, 540 U.S.

[15] The Court in *Agurs* gave this example of exculpatory evidence that must be disclosed without a request: "a report indicating that … fingerprints on the item . . . which the defendant is alleged to have assaulted somebody turn out not to be the defendant's." *Id*. at 102 n.4, 110n.18. The undisclosed information in this case comes very close to fitting that archetype: a report of a description the assailant by the victim that turned out not to fit the defendant; and a report indicating that shoeprints were left during the crime that turned out not to be the defendant's.

668, 696 (2004) ("A rule ... declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process.")

The cases petitioners cite in support of a "diligent investigation" exception (Pet. 17) predate *Kyles* and *Dretke*, and did not involve information known only to the police and prosecution, as this case does. *See United States v. Wilson*, 901 F.2d 378, 380 (4th Cir. 1990) (no duty to disclose a "few bits of relevant information" from neutral witness known to the defense); *Lugo v. Munoz*, 682 F.2d 7, 9 (1st Cir. 1982) (no duty to disclose court order in witnesses' unrelated prosecution that was "a matter of public record"); *see also Steese v. State*, 114 Nev. 479, 960 P.2d 321, 331 (1998) (cited in *Browning II*, 91 P.3d at 55) (no duty to disclose defendant's own phone records). This is a fundamental distinction.

> (T)he fact that [exculpatory] … evidence was available to the prosecutor and not submitted to the defense places it in *a different category than if it had simply been discovered from a neutral source after trial*.... If the standard applied to the usual motion for a new trial based on newly discovered evidence were the same when the evidence was in the State's possession as when it was found in a neutral source, there would be no special significance to the prosecutor's obligation to serve the cause of justice.

Agurs, 427 U.S. at 111 (emphasis added).

Regarding the other item of undisclosed exculpatory evidence on which the decision below rested—the benefits given Randy Wolfe for his testimony—petitioners fault the panel majority for "assum[ing] that Randy Wolfe 'knew,' that the prosecutor was going to help him." Pet. 19. But that was the state court's "assumption" as well, and until now "at no point in this case has the state challenged" it. App. 34n.7. The dissent below argued that in so holding the Nevada Supreme Court made an "unreasonable determination of the facts." App. 79. But there was every reason to believe that Wolfe and Prosecutor Seaton had an understanding. Wolfe was a long time police informant. App. 20. Seaton admitted in state habeas that he had spoken up on

behalf of informants "a lot of times over my career." 6ER1444. Defense counsel Pike, a former prosecutor, testified it was common for prosecutors to do this by "passive agreement" (App. 20), making incentives difficult to discover. The judge who gave Randy Wolfe probation said that Seaton told him Wolfe had been of assistance not just in Browning's case but on "several occasions," in a "few cases." App. 22; RApp. 239. And the Nevada Supreme Court was well acquainted with "Mr. Seaton's prosecutorial misconduct, so frequently repeated heretofore …." *Santillanes v. State*, 104 Nev. 699, 703, 765 P.2d 1147 (1988).[16]

It was not objectively unreasonable for the Nevada Supreme Court to discern from all this that Seaton and Wolfe had at least a tacit agreement, the kind of "implication" of a reward that *Giglio* held must be disclosed. *See* 405 U.S. at 153n.4.

Finally, petitioners claim that "the panel majority did not apply AEDPA deference to the Nevada Supreme Court's determination on materiality." Pet. 19. But the panel opinion said the opposite, stating the question before it—"Was it objectively unreasonable for the Supreme Court of Nevada to conclude that there was not a reasonable probability that the jury would have reached a different result?" if the facts about the shoeprints, the victim's description, and Randy Wolfe's dealings with the prosecution had been revealed—and then explaining in detail why "the answer is yes." App. 37; see App. 38-50. Petitioners argue in that discussion the majority gave too little weight to the testimony of Vanessa Wolfe. Pet. 19. But as the opinion explained, there were many reasons a juror could disbelieve Ms. Wolfe, who was Randy Wolfe's partner in

[16] The Nevada Supreme Court found several instances of misconduct by prosecutor Seaton occurred in Browning's case—including an "outrageous" argument to the jury in which he referred to "the'presumption of innocence' as a farce," *Browning v. State I*, 104 Nev. 269, 757 P.2d 351, 353n.1 (1988)—but held them all insufficiently prejudicial to require reversal.

crime.[17] Finally, petitioners argue that in assessing the reasonableness of the materiality determination the majority made assessments of credibility and the weight certain evidence should be given. Pet 19. But as the panel explained, some assessment of credibility and weight is unavoidable in any determination of materiality—especially of impeachment evidence, App. 42-3n.12—since materiality depends on the likelihood undisclosed evidence would have produced a different result.

Petitioners' challenge to the panel's assessment of materiality also forgets that such assessments must be made by considering the undisclosed evidence "collectively" rather than "item by item." *Kyles*, 514 U.S. at 436; see App. 37. The Nevada Supreme Court never made such an assessment. It expressly considered the materiality of Officer Branon's revelations about the bloody shoeprints in isolation (see *Browning II*, 91 P.3d at 55) and in doing so it contradicted clearly established law by basing its decision on "a reason that the jury *could* have" discounted that evidence without determining that the jury necessarily "*would* have done so," *Smith v. Cain*, 565 U.S. 73, 76 (2012)[18]—speculation that "the bloody shoeprints were likely left by Mrs. Elsen and/or Coe" (*Browning II*, 91 P.3d at 46).

The Nevada Supreme Court's opinion closed with a brief statement about "cumulative error," but that intermingled constitutional and nonconstitutional errors and failed to include some of the most egregious ones, including the nondisclosure of the truth about the bloody

[17] The panel majority delineated a "mountain of evidence providing potential reasons to doubt" Vanessa Wolfes' credibility—including prostitution, drug addiction, a long record of theft and other petty crime. App. 41. It could have included in this list the fact that it was the Wolfes who had most of the jewelry taken in the robbery (App. 46) and that Vanessa, like Randy, had serious criminal charges against her dropped and reduced after her testimony. RApp. 20, 23.

[18] Accord, *Porter v. McCollum*, 558 U.S. 30, 43 (2009) (per curiam) ("it was not reasonable to discount entirely the effect that [a defendant's expert's] testimony might have had on the jury" because of contrary testimony); *Kyles*, 514 U.S. at 449, 451 (argument that evidence is not conclusively exculpatory "confuses the weight of the evidence with its favorable tendency").

shoeprints. *Id.* at 91 P.3d at 56. Because of these deficiencies, the Court of Appeals was not obligated to give deference to the materiality "prong" of the state court's *Brady* (and ineffectiveness) decisions. See *Cone v. Bell*, 556 U.S. 449, 472 (2009) ("Because the Tennessee courts did not reach the merits of Cone's *Brady* claim … the claim is reviewed *de novo*.") (citing *Rompilla v. Beard*, 545 U.S. at 390 ["*de novo* review where state courts did not reach prejudice prong under *Strickland*"]). But the panel majority nonetheless approached the materiality question deferentially, carefully considering both inculpatory and exculpatory evidence. See App. 37-50. Going even beyond *Pinholster*, it limited its review to *trial* evidence, unnecessarily disregarding many exculpatory facts that came out in state habeas. See App. 39 n.9, 48-49 n.15 and 16, 50 n.17.

The Nevada Supreme Court's "cumulative error" determination was nothing like that. In addition to failing to consider the significance of the bloody shoeprints, it erroneously assumed the jury was made aware that the "description of the perpetrator's hair [that] did not match Browning's hair" came from the victim himself. *Browning II*, 91 P.3d at 56.[19] It credited the Wolfes' testimony about Browning's alleged admissions, despite the many reasons to doubt their veracity. *Id*. It repeated the false claim Browning was "surrounded" by jewelry when he was arrested. *Id*.; see App. 46; RApp. 232-33. And it overlooked the powerfully exculpatory fact that Browning was taken into custody just minutes after, and a few hundred yards from, the bloody crime scene, with no scratches, cuts or blood on his person or on his clothing. *Id.*; compare App. 38-50.

[19] *See id*. at 46 ("Officer Branon testified at trial that he received *from the dying Elsen* a description of the … 'jeri-type curl.'" and "the prosecutor argued that it was understandable if a white person, *such as the victim*, incorrectly used the term 'jeri-curl'" [emphasis added]). The trial record clearly shows neither of these italicized statements are correct. *See* note 11, above; App. 77; RApp. 27.

The panel majority did not err in concluding that, if the state court properly considered all the evidence before it, it could not reasonably have found the *Brady* violations here immaterial.

B. The Ineffective Assistance Claim.

In both federal and state court Browning claimed defense counsel Pike had not just made isolated errors but wholly failed to investigate the case and prepare for trial. See App. 53; *Browning II*, 91 P.3d at 45. According to Pike's time records, he spent less than a dozen hours on case investigation before trial. RApp. 243. His stated approach was "overcasting a shadow of a doubt, as opposed to proving" (App. 20) and his inaction showed it.

Although Pike was authorized to use an investigator, he did not ask him to do anything on the case until nine months after Browning was charged, when Browning contacted the investigator from jail to ask what was being done. RApp. 104. Even then, Pike wouldn't let the investigator interview key witnesses or follow up leads to the Wolfes' Cuban associate, and he ignored the investigator's repeated protests that the investigation was inadequate. App. 20-21; RApp. 19, 104; 8ER1783-87. Pike failed to secure the testimony of Marcia Gaylord, although he had told the court Browning "has no defense at all without Miss Gaylord's testimony" (D.Ct. Dkt. 83-22 at 31:5) which he said would be "potentially exonerating" (RApp. 67). See App. 19; RApp. 19, 249.[20] Pike did not do a scene investigation or obtain the scene sketch that showed Mrs. Elsen could not have seen the killer's face. See page 5-6, above; RApp. 248 n.31. He did not hire or consult a single forensic expert, though the prosecution relied on experts on blood typing, pathology, scene investigation, and fingerprints. See App. 13-14.

[20] Pike claimed in the state habeas hearing that "attempts to locate Marsha Gaylord by the defense investigator were to no avail." 6ER1639. However, the memos by which Schopp communicated with Pike show no effort to find Gaylord, only a record check on her on December 11, 1986—after Browning's trial had begun. See 6ER1651.

At trial Pike called only three witnesses. One was Officer Branon, who he had not spoken to and consequently did not know what to ask. App. 15. The second was a hairdresser whose testimony about "jeri curls" Pike thought relevant because he hadn't asked Officer Branon where that phrase came from. *Id.* The third was a scene witness who told police about the "Cuban" man he saw outside the store before the crime (App. 14-15)—testimony that might have had an impact if Pike had allowed his investigator to follow up leads to a Cuban friend of the Wolfes, which Pike refused to do. See App. 19, 21.

The evidence Browning's lawyers submitted in postconviction showed that basic investigation would have changed the case completely, and likely changed the result. The Court of Appeals so held considering only one of Pike's deficiencies: the failure to learn what Officer Branon knew before calling him as a witness. That alone cost the defense both his "uniquely exculpatory" testimony about the bloody shoeprints and the "powerful evidence of Browning's innocence" in Hugo Elsen's description of the killer. App. 61. There was much more that could, and on full review should, be considered: not only Marsha Gaylord's testimony and the other leads to a Cuban suspect,[21] and the evidence of Randy and Vanessa Wolfe's possession of the jewelry and dealings with the prosecution, and the defects in Josy Elsen's identification; but also forensic analysis showing that the blood on the jacket the prosecutor said was "Hugo Elsen's blood" was not,[22] and that the knife the prosecutor said Browning "plunged … into the heart of Hugo Elsen" did not fit Mr. Elsen's wounds, and that the facts did not support the prosecution's

[21] Pike testified that among other things Ms. Gaylord had told him she knew of the Wolfes' Cuban associate. 5ER1280.

[22] The state argued to the Nevada Supreme Court that the kind of testing that showed the blood was not Mr. Elsen's was not available in 1986, but Browning's lawyers showed it was, citing textbooks and a number of cases from the same era in which such testing was done. See RApp. 105-06.

claims about the significance of the location of Browning's fingerprints. See RApp 58-67, 90-91, 103-107. But as noted above, the Court of Appeals found it unnecessary—and may have mistakenly thought it impermissible—to consider most of this post-trial evidence in concluding there is a reasonable probability minimally effective representation would have produced a different result. See App. 49-51 notes 15-17; note 2, above.

The Nevada Supreme Court never considered Pike's representation as a whole and the total impact of his ineffectiveness. It credited Pike's preposterous "strategic" reason for not investigating the bloody shoeprints, contradicted itself by holding elsewhere that Pike should have interviewed the very officer who knew the answer, and accepted Pike's nonsensical claim that he didn't have his investigator conduct interviews because he didn't want to do them himself. The majority opinion below correctly found that those rulings were objectively unreasonable. App. 56-58.

Both the majority and dissenting judges below agreed that the ineffectiveness claims should be evaluated as a whole (App. 52, 91 n.11), and petitioners do not argue otherwise. But the state court didn't recognize or even acknowledge many of Pike's errors, and never purported to consider the full scope of the prejudice Browning suffered from his failures. That is another reason the Court of Appeals could properly have addressed the prejudice "prong" of the ineffectiveness claim *de novo*. See *Rompilla*, 545 U.S. at 390. But again the Court of Appeals majority declined to do that, and instead considered whether any reasonable jurist could conclude Browning was not prejudiced by Pike's wholesale failure. App. 60. Its careful assessment of even the limited part of the evidence encompassed in its review showed clearly and correctly that none could. App. 61-62.

III. THIS CASE INVOLVES AN EXTREME BREAKDOWN IN THE STATE CRIMINAL JUSTICE SYSTEM THIS COURT SHOULD NOT CONDONE.

Petitioners' defense of the Nevada Supreme Court's decision in this case should be rejected because granting it would drastically lower the standards this Court has set—and set well before the Nevada Supreme Court's postconviction decision in this case—for effective counsel and disclosure of evidence in criminal trials. Randal Pike's handling of Paul Browning's defense could not pass muster even under the "farce and mockery" standard for measuring effective assistance of counsel, which the Court discarded in *Strickland*. The prosecutorial misconduct here was extreme. See notes 4, 6, and 16, above. The facts the police and prosecutors failed to disclose here were obviously and prototypically exculpatory. See note 15, above. Accepting the long-since-rejected argument that such failures by prosecutors can be nullified by corresponding failures by defense counsel would badly corrode the standards of fairness in criminal trials which this Court has worked long to establish.

There is no good reason review should be granted in this case, and many reasons it should be denied.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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