IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL JOSEPH JEFFRIES, Defendant/Appellant, vs. THE STATE OF NEVADA, Plaintiff/Respondent.	CASE NO. 68338

APPELLANT MICHAEL JOSEPH JEFFRIES' PETITION FOR RECONSIDERATION *EN BANC*

Pursuant to Rule 40A of the Nevada Rules of Appellate Procedure ("NRAP"), Michael Joseph Jeffries, Defendant-Appellant in the above-entitled matter ("Petitioner"), by and through his attorney, Vincent Savarese III, Esq., of the law firm of Gentile Cristalli Miller Armeni Savarese, hereby respectfully petitions this Honorable Court for reconsideration *en banc* of the Order of the Panel affirming his conviction in the above-entitled case.[1]

In support of this Petition, Petitioner respectfully assigns the following:

1. That on July 6, 2017, a Panel of this Court filed its Order of Affirmance;
2. That on July 25, 2017, Petitioner filed his Petition for Rehearing of Panel Order of Affirmance;

[1] The Opinion of the Panel is published at ___ Nev. ___, 397 P.3d 21, 2017 WL 2884052 (July 6, 2017).

3. That on July 31, 2017, the Panel entered an Order Directing Answer to Petition for Rehearing;

4. That on September 15, 2017, the state filed its Answer to Petition for Rehearing;

5. That on September 29, 2017, the Panel filed its Order Denying Rehearing;

6. That the decision of the Panel affirming Petitioner's conviction is contrary to prior, published opinions of this Court; and therefore, reconsideration by the full court is necessary to secure and maintain uniformity of the decisions of this Court; and

7. That reconsideration by the full court is also appropriate in that this case involves substantial precedential, constitutional and public policy issues.

DATED this 13TH day of October, 2107,

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MEMORANDUM OF POINTS AND AUTHORITIES

ARGUMENT

I.

THE OPINION OF THE PANEL IS CONTRARY TO PRIOR, PUBLISHED OPINIONS OF THIS COURT AND INVOLVES SUBSTANTIAL PRECEDENTIAL, CONSTITUTIONAL AND PUBLIC POLICY ISSUES OF GENERAL APPLICATION; AND THEREFORE, RECONSIDERATION *EN BANC* IS NECESSARY AND APPROPRIATE.

A.

Prosecutorial Misconduct in Closing Argument

It is undisputed that on October 22, 2011, Petitioner killed his longtime friend, Eric Gore, by infliction of a single gunshot wound during a violent altercation occurring at Petitioner's Las Vegas residence. Thus, the only contested issues at Petitioner's trial on the charge of open murder were whether Petitioner had justifiably killed Gore in self-defense, or whether the circumstances were consistent rather with the lesser offense of voluntary manslaughter.

Also present at the time of the shooting were Petitioner's live-in girlfriend Mandy and her 13-year old daughter Brittany – who was the only other eyewitness to the event. 397 P.3d at 24. AA, Vol. 1, pp. 143, 220.[2]

[2] Citations to the Appellant's Appendix are herein designated "AA."

The evidence showed that a highly-intoxicated and agitated Gore had earlier expressed extreme anger with one of several guests invited to Petitioner's home, all of whom thereupon departed. 397 P.3d at 24. AA, Vol. 1, pp. 23-24, 48, 128, 133-138, 216-221; Vol. 2, pp. 307-310, 314-315, 323-327, 330-331, 369-370, 380; Vol. 3, pp. 542-548. When Petitioner thereafter told Gore to leave his home, Gore—who was still angry – refused to do so. 397 P.3d at 24. AA, Vol. 1, pp. 25-26, 221-224, 227-228. A heated verbal argument – and ultimately a fistfight – ensued between the two men in the Petitioner's kitchen. 397 P.3d at 24. AA, Vol. 1, pp. 24, 26, 48, 138-139, 224-225; Vol. 2, p. 283. And Petitioner ultimately retreated to his bedroom and retrieved a pistol, with Gore in pursuit. 397 P.3d at 24. AA, Vol. 1, pp. 1-4, 27-28, 31-34, 83, 139; Vol. 2, p. 283. Gore was shot outside the bedroom door at a distance of 2 to 3 feet. 397 P.3d at 24. AA, Vol. 1, pp. 27-28, 31-33, 141; Vol. 2, pp. 465-466.

In her initial statement to police immediately following the event, Brittany stated that when Gore aggressively lunged at him, Petitioner fired. This account was consistent with physical evidence at the scene observed by first responders and investigators. AA, Vol. 2, pp. 278-279, 288, 291, 414; Vol. 3, pp. 523-525, 528. However, in subsequent statements to police and during her preliminary hearing testimony, Brittany presented conflicting versions in which she stated that, upon

observing the gun in Petitioner's hand, Gore aborted his pursuit of Petitioner outside the bedroom door. 397 P.3d at 24.

At trial – which did not commence until March 23, 2015 – the state called Brittany as its first witness. *Id.* However, she testified that she could not remember many of the details she had previously recounted. *Id.*

During its rebuttal summation, the prosecutor – while injecting his personal affection for Brittany – argued to the jury that her professed lack of memory at trial was disingenuous; *categorically* asserting that Petitioner had "*certainly*" procured trial testimony by her to that effect by directly, or indirectly (by procuring the intercession of her mother), causing years of undue influence to be brought to bear upon her:

> "So we now have three versions of statements from Brittany . . . . And now we're here at trial, and Brittany . . . doesn't remember anything. You know . . . . *I really grew to like Brittany . . . during this whole period that I've had this case.* You know why? You saw it.
>
> Here's a wonderful young lady. She's a wonderful young lady. And think about the influences she has had . . . in her life that would influence her testimony. She . . . has influences now that she didn't have then. In 2011, there wasn't this influence that—you know, the [imminent] marriage of her mother to the man that she watched shoot Eric Gore dead.
>
> That's a huge influence. She hasn't had—back then, *during her reliable statements that she did remember, she didn't have the influence of three-and-a-half years of being worked on by mom and—perhaps indirectly, but certainly being worked on—by Mike Jeffries.*"

397 P.3d at 25-26 (emphasis in original).

There was no evidence *whatsoever* that Petitioner ever "worked on" Brittany in any manner – either directly or indirectly – in an effort to influence her testimony as the prosecutor argued. And Petitioner's trial counsel contemporaneously objected to the forgoing argument and moved for a mistrial on that basis. 397 P.3d at 24, 26. However, the objection was overruled and the motion was denied by the trial judge. *Id.* at 24.

In its Opinion, the Panel characterizes the foregoing portion of the prosecutor's rebuttal summation as "[an] argument that Jeffries *might have* indirectly influenced Brittany's testimony" and "[an] argu[ment] that Jeffries *could have* indirectly influenced her testimony at trial." *Id.* at 26 (emphasis added). And, on that basis, the Panel found that it was "an appropriate comment on the evidence presented." *Id.* at 26. Thus, although the Panel acknowledges that "Brittany [and her mother] testified that she had not been in contact with Jeffries since he shot Gore to ensure that she would be seen as a reliable witness," and that "Brittany also testified that her mother and Jeffries did not suggest how she should testify at trial," in arriving at this determination, the Panel points to "testimony . . . that Brittany's mother and Jeffries became engaged prior to trial," and the fact that "Brittany admitted that she did not want anything to happen to Jeffries." *Id.* And the Panel found that "[b]ased on this testimony, an inference that Brittany's mother and Jeffries

indirectly influenced her trial testimony is *relevant* to explain why Brittany failed to recall many of the details she recounted earlier." 397 P.3d at 26 (emphasis added).

(1.)

Inappropriate Argument that Petitioner Corruptly Influenced the Testimony of a Trial Witness

Petitioner respectfully submits that, although such an inference – if appropriate – may have been *relevant*, no such highly-prejudicial inference was *permissible* based on the evidence adduced in this case.

Here, the prosecutor did not merely argue that Petitioner "might have" or "could have" influenced Brittany's trial testimony as the Panel suggests. Instead, he *categorically* and *expressly* argued that Petitioner "*certainly*" did so, by affirmatively "*work[ing] on*" her "*for three-and-a-half-years*" – an argument that is *not* logically supported by the fact that Petitioner became engaged to Brittany's mother prior to trial nor the fact that Brittany did not want anything to happen to him – the only contextual circumstances cited by the Panel in support of the prosecutor's argument. Indeed, neither of those circumstances even arguably support the otherwise factually unhinged, categorical assertion actually argued here that Petitioner "*certainly*" "*worked on*" Brittany "*for three-and-a-half-years*" to influence her testimony – either directly or by procuring the affirmative intercession of her mother on his behalf. Thus, even assuming *arguendo* that those circumstances may have caused Brittany to have an *independent bias* favorable to Petitioner, they

by no means either constitute evidence, or fairly and logically support the inflammatory inference, that – by contrast – Petitioner corruptly and affirmatively "*worked on*" her "*for three-and-a-half-years*" to influence her testimony – which is a different proposition entirely. This is a critical distinction. Indeed, as the Eleventh Circuit explained in *Oliver v. Wainwright,* 795 F.2d 1524, 1532 (11th Cir. 1986): "While a prosecutor may point out that record evidence suggests that a witness may have had some *reason* to testify as the defendant wished, he or she may not suggest that *the defendant has suborned perjury* where such a suggestion finds no support in the record" (emphasis added). *Accord, e.g., Henry v. State of Florida,* No. 93-3673, 651 So. 2d 1267, 1268 (Fla. App. 4th Dist. March 15, 1995) ("The fact that a witness is impeached may imply that the witness is lying, *but it does not imply that someone else has made the witness change her story*. The implication by the prosecutor in this case was that the defense 'got to' the witness. That suggests that the defense was engaged in tampering with a witness and suborning perjury, both criminal offenses. Such a comment is highly irregular, impermissible, and prejudicial" (emphasis added)).

The Opinion of the Panel in this regard is contrary to the prior, published opinions of this Court in *Williams v. State,* 103 Nev. 106, 734 P.2d 700 (1987) and *Anderson v. State,* 121 Nev. 511, 118 P.3d 184 (2005). And therefore,

reconsideration by the full court is necessary to secure and maintain uniformity of the decisions of this Court.

In *Williams*, during closing argument, "[t]he prosecutor . . . . contended that appellant purchased . . . [false] alibi testimony although there was no evidence from which to draw such an inference." 103 Nev. at 110, 734 P.2d at 703. Instructing that "[a] prosecutor may not argue facts or inferences not supported by the evidence," this Court held that this was "clear . . . prosecutorial misconduct." *Id.*

Here, absent evidentiary foundation, the prosecutor similarly argued that Petitioner likewise procured false trial testimony of feigned memory loss by Brittany by causing undue influence to be brought to bear upon her for years.

In *Anderson,* absent supporting evidence, the prosecutor improperly argued to the jury in summation that "Anderson and his son had years to 'cook up a story and they did.'" 121 Nev. at 517, 118 P.3d at 187. And, despite the absence of contemporaneous objection by defense counsel, this Court found *sua sponte* that this argument constituted prejudicial prosecutorial misconduct and plain error affecting Anderson's substantial rights, requiring reversal of the defendant's conviction in that case; concluding that "the polemics of the prosecutor clearly changed the focus of the case to his personal views, not the evidence." 121 Nev. at 517, 118 P.3d at 187-88 and note 6.

Here, absent evidentiary foundation, the prosecutor very similarly and improperly argued to the jury that Petitioner "certainly" "worked on" his girlfriend's daughter "for three-and-a-half-years" to likewise cook up false trial testimony of feigned memory loss on her part.

Here, in contradistinction to *Williams* – which involved abundant evidence of a solicitation to commit a contract killing for hire, and ultimately, a cold-blooded first degree execution-style murder – the evidence of Petitioner's guilt of the crime of conviction in this case (second degree murder) was hardly "overwhelming." 103 Nev. at 111, 734 P.2d at 703. And, unlike as in that case, Petitioner's guilt of the crime of conviction is hardly "free from doubt." *Id.* Indeed, here there was ample evidence – including objective physical and forensic crime scene corroboration – that a very angry, aggressive and highly-intoxicated Eric Gore had behaved in an objectively threatening manner toward others present at Petitioner's home throughout the evening, causing them to depart; that he thereafter refused to leave the home despite Petitioner's repeated demands as homeowner that he do so; that he threatened to physically attack Petitioner in response to those demands; that he chased Petitioner from the scene of the ensuing kitchen fistfight to Petitioner's bedroom; and that he was charging at Petitioner – having closed to within 2-3 feet of Petitioner – when he was shot. This evidence was inconsistent with malice aforethought, and therefore fairly presented the issue of whether Petitioner

justifiably killed Gore in self-defense, or at minimum, in the heat of passion. Thus here, as in *Anderson,* "while the evidence was otherwise sufficient to sustain a conviction, that evidence was not overwhelming." 121 Nev. at 517, 118 P.3d at 188. And whereas Brittany was the *only* testifying witness who *ever* claimed to have observed the shooting of Eric Gore, the prejudicial effect of the state's unfounded and improper argument that Petitioner had procured perjury on her part cannot be underestimated.

(2.)

Inappropriate Vouching for a Trial Witness Called by the State

As part and parcel of his argument to the jury that Petitioner had purportedly procured disingenuous trial testimony by Brittany, the prosecutor pronounced to the jurors that "*I really grew to like Brittany . . . during this whole period that I've had this case . . . . [because] [s]he's a wonderful young lady.*" 397 P.3d at 25-26 (emphasis in original). And he thereby personally purported to "vouch" for his witness.

However, as this Court has admonished, it is improper for a prosecutor to offer personal opinion vouching for a government witness, and that to do so constitutes prosecutorial misconduct affecting substantial rights, justifying reversal of a criminal conviction *sua sponte* even under "plain error" review. *Anderson v. State,*

121 Nev. 511, 516-17, 118 P.3d 184, 187-88 (2005) (citing *Lisle v. State,* 113 Nev. 540, 553, 937 P.2d 473, 481 (1997).

Nevertheless, in rejecting this argument in the case at bar, the Panel held that "[a]lthough Jeffries objected and moved for a mistrial based on the lack of evidence to support the State's argument that Jeffries influenced Brittany's testimony at trial, Jeffries' objection and subsequent motion did not address the alleged improper vouching. Therefore, Jeffries failed to raise the issue of vouching below, and we conclude that he fails to demonstrate that plain error exists to warrant reversal."

However, the Panel does not explain in any manner why this is supposedly so. And in reaching this conclusion, the Panel's Opinion conflicts with this Court's previous published decision in *Anderson.*

Thus, in that case, prosecutorial vouching occurred *together with* the state's improper argument that the accused and another witness "had years to 'cook up a story and they did.'" Just as the prosecutor in this case personally vouched for Brittany (in an obviously *sympathetic* manner) together with, and in the immediate context of, his unfounded and improper argument that that Petitioner "certainly" "worked on" her "for three-and-a-half-years" to likewise cook up false trial testimony of feigned memory loss on her part. And he thereby exacerbated that improper argument, adding insult to injury, by couching it in yet another level of

prosecutorial misconduct in the form of witness vouching and creating an intolerable cumulative effect as the *Anderson* Court specifically observed.[3]

B.

Juror Misconduct

In rejecting Petitioner's challenge to what it acknowledges was in fact juror misconduct in this case, the Panel has determined that reversal is not required because, in support of Petitioner's motion for new trial, "appellant's trial counsel failed to adequately develop the record *to assess whether he was prejudiced by [that] juror misconduct*." 397 P.3d at 24, 27 (emphasis added). Thus, the Panel determined that "the district court was not required to act sua sponte to investigate whether actual prejudice attached as a result of the juror misconduct"; that "[i]t was upon the defense counsel to make such a request"; and that "Jeffries' trial counsel did not adequately develop the record to assess any prejudice." *Id.* at 27. And the Panel therefore "conclude[s] that [Petitioner] fails to demonstrate prejudice that would warrant a new trial." *Id.*

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[3] As this Court has often reiterated, prosecutorial misconduct is a matter of the utmost public concern in the administration of our constitutional system of criminal justice. *See e.g., Anderson v. State,* 121 Nev. 511, 517, 118 P.3d 184, 188 (2005); *Williams v. State,* 103 Nev. 106, 110, 734 P.2d 700, 703 (1987); *McGuire v. State,* 100 Nev. 153, 155, 158-59, 677 P.2d 1060, 1062, 1065 (1984). And for that reason as well, reconsideration *en banc* should be granted in this case.

Petitioner respectfully submits that the Panel's Opinion in this regard conflicts with the prior, published *en banc* decision of this Court in *Valdez v. State,* 124 Nev. 1172, 196 P.3d 465 (2001) (*en banc*); and therefore, that reconsideration *en banc* should be granted.

Quoting *Meyer v. State,* 119 Nev. 554, 563-64, 80 P.3d 447, 455 (2003), the Panel points out that "[i]n order for a defendant to prevail on a motion for a new trial based on juror misconduct, "the defendant must present admissible evidence sufficient to establish: (1) the occurrence of juror misconduct, and (2) a showing that the misconduct was prejudicial." 397 P.3d at 26. And the Panel duly acknowledges that, under *Meyer,* "[W]ith regard to the second prong, '*[p]rejudice is shown whenever there is a reasonable probability or likelihood that the juror misconduct affected the verdict.*' [119 Nev.] at 564, [80 P.3d] at 455." 397 P.3d at 26 (emphasis added).

However, the Panel simply states that "[t]he juror misconduct at issue here *involved independent research*" – with no further description. *Id.* at 27 (emphasis added). And in so doing, the Panel fails to consider that it is undisputed that the particular "research" in question was as to the statutory penalty ranges applicable to the corresponding gradations of homicide with which Petitioner was charged (Murder of the First Degree, Murder of the Second Degree, and Voluntary Manslaughter). Nor does the Panel reveal that it is likewise undisputed that, before

returning their verdict, the entire jury engaged in simultaneous discussion of those ascending penalty ranges during their deliberations on the question of guilt or innocence with respect to the corresponding levels of homicide submitted to them, thereafter returning a verdict of guilty – not as to the *lesser* offense of Voluntary Manslaughter, but as to the *greater* offense of Murder of the Second Degree.

As this Court, sitting *en banc*, explained in *Valdez*: "There is a reasonable probability that the misconduct affected the verdict because the jury considered the penalty while deliberating Valdez's guilt. In particular, the jury may have compromised, selecting the guilty verdict to impose the desired penalty." 124 Nev. at 1187, 196 P.3d at 475. Thus, as the *en banc* Court specifically held in that case: "Because of the *possibility* that the jury decided Valdez's guilt *by choosing its desired sentence, rather than based on the evidence*, there is a reasonable *probability* that the jury's deliberation of Valdez's sentence while deliberating his guilt *affected the verdict*." 124 Nev. at 1187, 196 P.3d at 476 (emphasis added). Accordingly, as *Valdez* instructs, under such circumstances – applicable here – prejudice attaches *per se*.

The panel has failed to apply this dispositive jurisprudence in this case. And therefore, reconsideration *en banc* should be granted.

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C.

Supplemental Clarifying Jury Instruction

In *Gonzalez v. State*, 131 Nev. Adv. Op. 99, 366 P.3d 680, 682 (2015) (*en banc*) this Court, sitting *en banc*, held that "in situations where a jury's question during deliberations suggests confusion or lack of understanding of a significant element of the applicable law, the judge has a *duty* to give additional instructions on the law *to adequately clarify the jury's doubt or confusion*" (emphasis added). And as the Panel acknowledges: "This holds true even when the jury is originally given correct, complete, and clear instructions." 397 P.3d at 28 (citing *Gonzalez*, 366 P.3d at 684).

As the *Gonzalez* Court explained, in that case:

> During jury deliberations, a juror sent two questions to the district court judge. The first question stated:
>
> *Legal question:*
>
> > Looking at Instruction no. 17: If a person has *no* knowledge of a conspiracy but their actions contribute to someone [else's] plan, are they guilty of conspiracy?
>
> The second question stated:
>
> > People in here are wondering if a person can only be guilty of 2nd degree murder or 1st. Can it be both?
>
> Both Gonzalez's attorney and the State agreed that the answers to both questions were no. The district court refused to answer the first question, instead stating:

> It is improper for the Court to give you additional instruction on how to interpret Instruction no. 17. You must consider all the instructions in light of all the other instructions.

The district court also refused to answer the second question, stating:

> You must reach a decision on each count separate and apart from each other count.

366 P.3d at 683.

As the *Gonzalez* Court explained: "Here, the jury's question on conspiracy went to the very heart of that offense . . . . *Because the jury's first question suggested confusion or a lack of understanding of [a] central element of the crime of conspiracy, we hold that the district court abused its discretion when it refused to answer the question.*" *Id.* at 684 (emphasis added).

As the Panel points out in this case:

> Here, the jury asked the following three questions presented in two notes during deliberations:
>
> > May we have more clarity/explanation on malice aforethought.
> >
> > Can we also get further understanding between 2nd degree vs. manslaughter.
> >
> > Does a conscious intent to cause death or great harm BEFORE committing the crime fall into the criteria of malice?

> (Emphasis in original.) In response to these juror notes, the district court informed the jury that the instructions in question are statutorily provided. The court clarified that it could only give the jury the law, which the jury must apply to the facts in order to reach a verdict.

397 P.3d at 28.

The Panel acknowledges that *"[t]he jury's questions suggested confusion concerning malice, which is a significant element of murder. Id.* (emphasis added). However, the Panel finds no error here because:

> Unlike in *Gonzalez*, however, *neither Jeffries nor the State proffered any supplemental instructions aimed at answering the jury's questions.* Even on appeal, Jeffries does not indicate what further instruction the district court should have provided. We conclude that this distinction is significant and clarify *Gonzalez* to the extent that a district court does not abuse its discretion when it refuses to answer a jury question after giving correct instructions if neither party provides the court with a proffered instruction that would clarify the jury's doubt or confusion. Accordingly, this case would fall outside of the scope of *Gonzalez,* leaving only the correct jury instruction on malice to review for error. Therefore, Jeffries fails to demonstrate that the district court abused its discretion.

Id. (emphasis added).

However, the jury's questions in *Gonzalez* were *specific* inquiries which indicated the precise nature and source of the jury's confusion. Whereas here, the jury's questions were wide-open requests for "more clarity/explanation" and "further understanding." And the nature and source of the jury's confusion was not apparent from the face of the notes. It would therefore have been *impossible* for counsel to have crafted proposed supplemental clarifying instructions sufficient to

alleviate the confusion of the jurors without further inquiry of the jury by the court in response to the questions presented in order to ascertain what the nature and source of the confusion was in this case. And whereas *Gonzalez* places a *duty* to alleviate juror confusion squarely upon the trial judge, the obligation to divine the nature of the jury's confusion cannot be delegated to counsel in a vacuum as the Panel has done in this case.

CONCLUSION

WHEREFORE, for all the foregoing reasons, Petitioner MICHAEL JOSEPH JEFFRIES respectfully prays that this Honorable Court grant reconsideration *en banc* in this matter, together with such other and further relief as the Court deems fair and just in the premises.

Respectfully submitted this 13TH day of October, 2107,

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CERTIFICATE OF COMPLIANCE PURSUANT TO NRAP 40 and 40A

1. I hereby certify that this Petition for *En Banc* Reconsideration complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

[**X**] It has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 font size and Times New Roman; or

[ ] It has been prepared in a monospaced typeface using [*state name and version of word processing program*] with [*state number of characters per inch and name of type style*].

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 40 or 40A because it is either:

[**X**] Proportionately spaced, has a typeface of 14 points or more, and contains 4,104 words; or

[ ] Monospaced, has 10.5 or fewer characters per inch, and contains ___ words or ___ lines of text; or

[ ] Does not exceed 10 pages.

Dated this 13th day of October, 2017.

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CERTIFICATE OF SERVICE

I hereby certify and affirm that the above and foregoing **APPELLANT MICHAEL JOSEPH JEFFRIES' PETITION FOR *EN BANC* RECONSIDERATION** was filed electronically with the Nevada Supreme Court on the 13 day of October, 2017. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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