No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

CHRISTOPHER ADIN GRAHAM,
Petitioner

v.

THE UNITED STATES OF AMERICA,
Respondent

On Petition For A Writ Of Certiorari
To The United States Court of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the court of appeals correctly denied petitioner a certificate of appealability under 28 U.S.C. 2253(c) on his ineffective assistance of counsel claims?

LIST OF PARTIES

Petitioner is Christopher Adin Graham defendant-appellant below. Respondent is the United States of America, plaintiff-appellee below. All parties appear in the caption of the case on the cover page.

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Defendant-Appellant Christopher Adin Graham respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit denying a certificate of appealability in his case.

OPINIONS BELOW

The Court of Appeals' order denying petitioner's request for a certificate of appealability and the District Court's opinion and order denying petitioner's motion to vacate, set aside, or correct the sentence pursuant to 28 U.S.C. §2255 are unpublished. The Court of Appeals' order is attached to this decision at Appendix 1a, the District Court's opinion and order is attached at Appendix 2a.

JURISDICTION

The Court of Appeals motions panel issued an order in this case denying petitioner's request for a certificate of appealability on October 9, 2018. (Pet. App. 1a.) The opinion became final on November 1, 2018, after petitioner declined to file a petition for rehearing. This court has jurisdiction under 28 U.S.C. § 1254(1).

LEGAL PROVISIONS INVOLVED

U.S. Const. Amend. VI:

> In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

28 U.S.C. §2253:

> (a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.
>
> (b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.
>
> (c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from…
>
> (B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

28 U.S.C. §2255:

(a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

(b) Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate…

(d) An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus…

STATEMENT OF THE CASE

On December 21, 2011, petitioner was indicted by the State of Oregon and charged with two counts of compelling prostitution, two counts of promoting prostitution, one count of assault in the second degree, one count of assault in the fourth degree, and four counts of tampering with a witness. The state case was dismissed on February 15, 2012, and a federal indictment was handed down on April 17, 2012, charging petitioner with one count of sex trafficking by force, fraud and coercion in violation of 18 U.S.C. §1591 and two counts of tampering with a witness in violation of 18 U.S.C. §1512(b)(3).

During his trial in March 2014, the government accused petitioner of compelling Misty Losinger to perform commercial sex acts both within the state of Oregon and in other locations within the United States, physically abusing her, and later attempting to bribe her in order to keep her from testifying against him. While petitioner did not dispute that Ms. Losinger actually performed the acts of prostitution alleged by the government, he strongly denied the allegations that he knowingly compelled this prostitution, that he used force, fraud, or coercion to do so, or that he attempted to obstruct Ms. Losinger's testimony by bribing her.

After petitioner was federally indicted, the District Court assigned an assistant federal public defender to represent him. Approximately nine months later, the court granted that attorney's motion to withdraw as counsel based on an irreparable breakdown of the attorney-client relationship and appointed Criminal Justice Act panel attorney Krista Shipsey to take over the representation. The

Court later appointed Gareld Gedrose, a staff attorney with the Metropolitan Public Defender (a nonprofit firm that exclusively handles state court public defense cases) to assist Ms. Shipsey in representing petitioner on a pro bono basis.

On March 11, 2014, a jury unanimously convicted petitioner of the three offenses he was charged with. On September 25, 2014, petitioner was sentenced to 300 months prison on the sex trafficking charge and 60 months in prison on each of the witness tampering counts, to be served concurrently with each other and consecutively to the 300-month sex trafficking term. In addition, petitioner was sentenced to a lifetime term of supervised release. Petitioner is currently incarcerated at the Federal Correctional Institution Victorville I in Victorville, California.

Following his conviction and sentencing, petitioner appealed to the United States Court of Appeals for the Ninth Circuit, where his convictions were affirmed in a memorandum decision filed on March 18, 2016. Petitioner's subsequent petition for certiorari was denied on October 6, 2016. Following the termination of his direct appeal, petitioner filed a motion to vacate, set aside, or correct the sentence pursuant to 28 U.S.C. §2255 on October 2, 2017.

REASONS FOR GRANTING THE PETITION

Petitioner argues that he should be granted a writ of certiorari in this case because he was not provided with effective assistance from his appointed trial counsel in two important respects. First, counsel talked petitioner out of testifying

in his own defense, despite their earlier trial strategy that anticipated calling petitioner to testify. This abrupt change in strategy prejudiced petitioner by undermining counsel's credibility, contradicting the jury's expectations concerning petitioner's trial strategy that counsel had created, unnecessarily broaching petitioner's state conviction, and causing the jury not to hear exculpatory testimony that would have been presented by petitioner. Second, counsel went on to give an incoherent closing argument during which the attorney who was not arguing departed the courtroom and did not return, prejudicing petitioner by failing to adequately explain how the evidence presented to the jury created reasonable doubts requiring acquittal, creating confusion for jurors, causing the jury to believe that petitioner's lead defense counsel had lost faith in his case, and undermining the defense team's credibility.

As a result of these errors, petitioner's conviction and sentence for one count of sex trafficking by force, fraud and coercion in violation of 18 U.S.C. §1591 and two counts of tampering with a witness in violation of 18 U.S.C. §1512(b)(3) should be vacated and the case should be remanded for retrial or resentencing.

II. LEGAL STANDARDS FOR INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS.

The Sixth Amendment to the United States Constitution safeguards the right of each criminally accused person "to have the Assistance of Counsel for his defence." Federal courts have interpreted this Sixth Amendment guarantee as imposing minimum standards of competency on defense counsel and have

accordingly vacated convictions or sentences of defendants who have not received adequate representation from their attorney. In order to vacate a conviction or sentence based on a Sixth Amendment ineffective assistance of counsel claim, a defendant must prove that (a) the counsel's assistance fell below an objective standard of reasonableness, giving due deference to the facts and circumstances making each case distinct, and (b) that counsel's poor performance caused actual prejudice to the party. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). "Counsel's errors must be 'so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.'" *Harrington v. Richter*, 562 U.S. 86. 104, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011), quoting *Strickland*, 466 U.S. at 687.

Subsequent decisions of this Court have built on *Strickland*'s reasonableness standards for effective assistance of counsel. In *McMann v. Richardson*, 397 U.S. 759, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970), the Court held that a counsel's performance must fall "within the range of competence demanded of attorneys in criminal cases." 397 U.S. at 771. As for the performance prong of *Strickland*, the Court held that the required showing

> focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process. In other words, in order to satisfy the "prejudice" requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.

Hill v. Lockhart, 474 U.S. 52, 59, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985).

III. MR. GRAHAM RECEIVED INEFFECTIVE ASSISTANCE FROM HIS COUNSEL DURING HIS TRIAL

A. Mr. Gedrose Wrongly Talked Petitioner Out of Testifying After Counsel Had Structured Their Defense Around His Testimony

Petitioner's defense strategy at trial included his anticipated testimony. Until the day on which petitioner was supposed to testify in his own defense, that strategy remained in force, leading the Court and petitioner's counsel to tell the jury that petitioner would testify. On the day that petitioner was to take the stand, however, Mr. Gedrose advised him that it would be best for him not to take the stand. In petitioner's declaration in support of his §2255 motion, he explained that his defense strategy was always to have him testify in his own defense, a strategy that remained intact until the very final day of his trial.

On that day, Mr. Gedrose asked petitioner in no uncertain terms to reconsider testifying and promised that he and Ms. Shipsey would address any necessary evidentiary topics by other means, including at their closing argument. Petitioner stated that he was shocked when his counsel did not adequately address those evidentiary topics during the remainder of his trial. Despite his relative lack of recent federal trial experience, Mr. Gedrose used his age and his gender to convince petitioner that his perspective was superior to Ms. Shipsey's, and while Ms. Shipsey clearly advised petitioner to testify, Mr. Gedrose overrode that advice and induced petitioner not to take the stand. While Ms. Shipsey clearly disagreed with Mr. Gedrose's strategy on this point, she did not take any additional steps to

limit the potential harm to petitioner's case that this sudden change would cause or to try to talk Mr. Gedrose out of pursuing this tactic.

Mr. Gedrose rendered ineffective assistance by advising petitioner not to testify in light of the promises Ms. Shipsey had made during her opening statement. As the Seventh Circuit has explained,

> Turnabouts of this sort may be justified when "unexpected developments … warrant … changes in previously announced trial strategies." *Ouber v. Guarino*, 293 F.3d 19, 29 (1st Cir. 2002) (citing *Dutton v. Brown*, 812 F.2d 593, 598 (10th Cir.), *cert. denied*, 484 U.S. 836, 108 S. Ct. 116, 98 L. Ed. 2d 74 (1987)); *see also, e.g. Drake v. Clark*, 14 F.3d 351, 356 (7th Cir. 1994). However, when the failure to present the promised testimony cannot be chalked up to unforeseeable events, the attorney's broken promise may be unreasonable, for "little is more damaging than to fail to produce important evidence that had been promised in an opening." *Anderson v. Butler*, 858 F.2d 16, 17 (1st Cir. 1988); *see also Washington v. Smith* … 219 F.3d [620,] 634 [(7th Cir. 2000)] (failure to produce witness identified in notice of alibi and mentioned during voir dire gave rise to "negative inference" against the defendant). The damage can be particularly acute when it is the defendant himself whose testimony fails to materialize:
>
> "When a jury is promised that it will hear the defendant's story from the defendant's own lips, and the defendant then reneges, common sense suggests that the course of trial may be profoundly altered. A broken promise of this magnitude taints both the lawyer who vouchsafed it and the client on whose behalf it was made."
>
> *Ouber*, 293 F.3d at 28.

United States ex rel. Hampton v. Leibach, 347 F.3d 219, 257 (7th Cir. 2003).

This principle is not confined to the Seventh Circuit's case law. In *Williams v. Woodford*, 859 F. Supp. 2d 1154 (E.D. Cal. 2012), the court determined that counsel was ineffective in a murder case for failing to call the petitioner or his alibi witness to testify after promising at least 13 times in opening statement that the defense

would present this testimony. The petitioner was a drug dealer. His house had been burglarized and some of his drugs stolen. The burglars left a pager behind. The next day a person the petitioner could have suspected of the burglary and theft as a result of finding the pager at his house was killed. The state's case was based on this theory, the testimony of an informant that the petitioner confessed to him, and a belt and rope found on the victim. *Id.* at 1162-1163. Even though counsel believed that the petitioner should not testify due to evidence of other crimes and had advised petitioner accordingly, counsel told the jury ten times during his opening statement that the petitioner would testify. This conduct "was highly unprofessional" and prejudicial as it highlighted the petitioner's failure to testify and "undermined the presumption of innocence." *Id.* at 1164. The Court should conclude that Mr. Gedrose's decision to advise petitioner not to testify, in light of the promises made to the jury by Ms. Shipsey in opening statement (and her own puzzlement and frustration at his course of action later) is sufficient to establish the performance prong of petitioner's claim of ineffective assistance of counsel.

B. Mr. Gedrose's Decision to Talk Petitioner Out of Testifying Prejudiced Petitioner

Petitioner was prejudiced in two ways by not being able to testify in his own defense. First, the jury was left unavoidably speculating that petitioner had something to hide, and possibly that something had gone awry with his defense during trial, given the broken promise that he would testify. Second, the jury did not get a chance to explore numerous evidentiary topics through the lens of

petitioner's perceptions, memory, and reflection on the past. As soon as the jury retired to deliberate, petitioner endeavored to explain to the court that something had gone horribly wrong. He told the court that:

> I was hoping to testify in my trial. During the counsel's advice, we agreed that we were going to present some very sound evidence with the ER reports, the hospital records. And I asked a few other pieces of evidence to be submitted. We had an agreement and a promise that those were going to be presented to the jury. They were not presented.
>
> … [S]o I'm having some concern. I don't know what kind of… court, judicial motion that is, or how do I address that? But I was hoping that you could understand that, and get it on the record.

Tr 1307.[1]

This state of affairs deprived petitioner of a fair trial – that is, of a trial whose outcome could be deemed reliable. *Strickland*, 466 U.S. at 687. While a petitioner must prove prejudice, it is important to remember that "although the possibility of a different outcome must be substantial in order to establish prejudice, it may be less than fifty percent. *See Strickland*, 466 U.S. at 693 … (explaining that 'a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case')." *Ouber*, 293 F.3d at 25-26. In light of the case law on point, petitioner has proven prejudice here because he has undermined the reliability of the jury's verdict in light of the vast sweep of information from

[1] All citations to exhibits refer to the exhibits introduced in the §2255 proceeding before the District Court. All transcript citations refer to the transcript of the underlying trial. An excerpt of this transcript is appended at 39a.

petitioner of which the jury was deprived as a result of Mr. Gedrose's bad advice to petitioner, as well as the whipsaw effect of the broken promise itself.

C. Mr. Gedrose Gave a Devastatingly Incompetent Closing Argument and Ms. Shipsey Compounded the Error by Publicly Abandoning Petitioner During the Argument

At the end of the court day on March 10, Ms. Shipsey told the court that Mr. Gedrose would be delivering the closing argument the next morning, and that she might not appear in court. Just before the jurors entered the courtroom on the morning of March 11, Ms. Shipsey told the court that, although she was present at counsel table, she would not be offering a closing argument and was not on duty that day.

In view of the seriousness of the charges petitioner faced, the damage wrought by Ms. Shipsey's abdication of responsibility and Mr. Gedrose's needless self-destruction of the one chance to argue petitioner's case to the jury was profound. Ms. Shipsey recalls that preparations for closing seemed to be going well but that the argument itself ran off the rails.

> Mr. Gedrose deviated greatly from the planned closing argument and failed to use a powerpoint [sic] presentation that I prepared. Although I would have preferred it if the powerpoint had been used, Mr. Gedrose had prepared his own outline that did not rely on technology. Mr. Gedrose felt that because he was not adept at using technology, he would be more comfortable with a strictly oral presentation. Although this is not the way I would have done it, I deferred to Mr. Gedrose who had been a successful litigation attorney for over 40 years.

Ex 3 (Shipsey decl) ¶9.[2] Eli Rosenblatt, the defense investigator, gives a more powerful and vivid account of what went wrong, and how it went wrong.

> The original plan was for Ms. Shipsey to present the closing argument. At some point, for a reason I do not know, the plan changed, and Mr. Gedrose was to argue the case instead of Ms. Shipsey.
>
> I prepared a KeyNote presentation for Mr. Gedrose to show to the jury during closing argument. The attached printout is a complete and accurate copy of the presentation that I prepared. I reviewed the presentation with Mr. Gedrose in preparation for argument. I attempted to spend more time reviewing it with Mr. Gedrose and had reserved time in the mornings of multiple trial days, before the daily trial sessions began, in order to do so. Mr. Gedrose, however, did not contact me as requested in order to utilize those reserved times. Therefore, we did not spend sufficient time reviewing the presentation for Mr. Gedrose to be adequately prepared to work with it. During closing argument, Mr. Gedrose deviated from both the KeyNote presentation and from the attached argument notes, with which I am also familiar and whose accuracy and completeness I can also certify. The great bulk of Mr. Gedrose's remarks in closing argument were not delivered in accordance with the notes and the KeyNote presentation. Instead, Mr. Gedrose appeared to be improvising his argument. As a result, the argument that was presented was disjointed, rambling, at times incoherent, inconsistent, and out of chronological order. In my opinion as an experienced criminal defense investigator, Mr. Gedrose's argument was more likely than not confusing to the jury. I had a vantage point facing the jury as the KeyNote presentation operator and can testify that I saw jurors tilting their heads and giving Mr. Gedrose quizzical looks at times during the argument.

Ex 102 (Rosenblatt decl) ¶¶10-12.[3]

Simply put, Mr. Gedrose's argument was a mess. From the beginning, he could not keep his words straight, calling for instance for a "not guilty plea" rather than a "verdict" from the jury twice, and referring to the prosecution as "the state" three times. He also confused Misty Losinger with a high-profile Portland murder

[2] Ms. Shipsey's declaration is appended at 41a.
[3] Mr. Rosenblatt's declaration is appended at 47a.

victim, Misty Largo, twice within a few seconds and then also almost doing it a third time a few minutes later. Mr. Gedrose even explicitly acknowledged to the jury that he had gotten lost in the middle of the argument, then lost his place in the argument multiple additional times in the ensuing minutes, second-guessing himself in front of the jury and thereby undercutting his own authority as an advocate. This corroborates Mr. Rosenblatt's account of Mr. Gedrose's refusal to devote adequate time to argument preparation.

But the substantive errors Mr. Gedrose made go even deeper. For instance, Mr. Gedrose was supposed to explicitly call Ms. Losinger's credibility into account, but in fact he never used the words "credible" or "credibility" at any time in closing. Indeed, he explicitly shied away from calling Ms. Losinger a liar. Worst of all, though, his argument simply omitted many concepts and illustrations that he was supposed to cover. Finally, Mr. Gedrose capped this lamentable performance not with a thorough discussion of what the government's burden means in practice — the words "reasonable doubt" appear nowhere in his argument — but instead with an apology for his own performance that basically told the jury not to pay too much attention to what he had just said and suggested the government would be able to blow his argument full of holes.

Mr. Gedrose's closing was quite brief in view of the seriousness of the case and the number of issues to cover. It occupies only 25 pages of transcript, whereas the government's two arguments add up to 44 pages, meaning that the government had almost double the closing argument time that the defense had. By contrast, Ms.

Shipsey's opening statement occupies 16 pages of transcript, while the government's opening occupies 17 pages — near-parity.

As Mr. Gedrose made the argument, petitioner's daughter got up and left the courtroom. Ms. Shipsey followed her. This literal abandonment by the only lawyer that the court was paying to defend petitioner during a critical stage of his trial was crushing to his hopes. Ms. Shipsey admitted in her declaration that she knew things had gone awry.

> I do not recall the exact moment that I left the courtroom but I believe it was in response to a family member who became distraught, leaving the courtroom. I believe I went out to console the family member. I did not come back into the courtroom because it was clear that Mr. Gedrose was going off script and several times appeared to be frustrated. I was not able to offer any help in that situation.

Ex 3 (Shipsey decl) ¶10.

When defense counsel so utterly wastes the unique opportunity of closing argument, habeas and post-conviction courts will grant relief. *Yarborough v. Gentry*, 540 U.S. 1, 5, 124 S. Ct. 1, 157 L. Ed. 2d 1 (2003), citing *Bell v. Cone*, 535 U.S. 685, 701-702, 122 S. Ct. 1843, 152 L. Ed. 2d 914 (2002), and *Herring v. New York*, 422 U.S. 853, 865, 95 S. Ct. 2550, 45 L. Ed. 2d 593 (1974). To be sure, "counsel has wide latitude in deciding how best to represent a client, and deference to counsel's tactical decisions in his closing presentation is particularly important because of the broad range of legitimate defense strategy at that stage." *Yarborough*, 540 U.S. at 5-6. That being said, though, there is a point beyond which courts will no longer defer. *Ainsworth v. Woodford*, 268 F.3d 868, 875 (9th Cir. 2001); *Stouffer v. Reynolds*, 214

F.3d 1231, 1232-1234 (10th Cir. 2000); *Dobbs v. Turpin*, 142 F.3d 1383, 1389 (11th Cir. 1998). From this record, it is impossible to discern a strategic, or even a tactical, purpose animating the decision to put Mr. Gedrose before the jury rather than Ms. Shipsey in view of the demonstrated faults in his performance.

D. Mr. Gedrose's Incompetent Closing Argument Prejudiced Petitioner

A better closing might have created a reasonable probability of a different outcome. The question is what the jury did not get to hear from Mr. Gedrose, or what aspects of the government's initial closing argument Mr. Gedrose never rebutted. The record makes it painfully apparent that the prosecutor was poised and polished where Mr. Gedrose was scattered and hazy. Petitioner's ability to tie together the disparate strands of this large, complex case was prejudiced as a result. See *Ainsworth*, 268 F.3d at 878; *Stouffer*, 214 F.3d 1231.

Ms. Shipsey incorrectly downplays the cumulative prejudice to petitioner's case that resulted from her departure from the courtroom.

> I did not come back into the courtroom because it was clear that Mr. Gedrose was going off script and several times appeared to be frustrated. I was not able to offer any help in that situation. I was not looked at as lead counsel. In the eye of the jury, I believe we were co-counsel. Throughout the trial, there were times that one of us would leave the courtroom, to prepare a witness etc. So, I don't believe this was out of the ordinary.

Ex 3 (Shipsey decl) ¶10. After five full days of work with the jury, counting from the day of jury selection, it beggars credulity to expect that the jury would not notice or

care Ms. Shipsey getting up from the table during the solemn and high-stakes final argument.

Prejudice may be presumed when a defendant is completely deprived of counsel during a critical stage of the trial, such as closing argument. *United States v. Cronic*, 466 U.S. 648, 659, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984); *see Tippins v. Walker*, 77 F.3d 682, 687 (2d Cir. 1996). Even if Mr. Gedrose's presence, such as it was, prevents the application of the rule in *Cronic* to petitioner's case — meaning that prejudice is not *presumed* — petitioner should be able to *prove* prejudice under these unusual and troubling circumstances. The prejudice caused by Mr. Gedrose's bad closing argument was compounded by the ultimate negative demonstrative exhibit — a defense lawyer apparently so averse to her own client's case that she could no longer bear to watch it unfold.

CONCLUSION

Petitioner made at minimum a substantial showing that he was denied his Sixth Amendment right to effective assistance of counsel under the standards set forth in *Hill v. Lockhart* and *Strickland v. Washington*. Thus, petitioner should have been granted a certificate of appealability. The petition for a writ of certiorari should be granted.

Dated January 7, 2019.

Respectfully submitted,

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