No. 18-8785

IN THE SUPREME COURT OF THE UNITED STATES

TEMARCO SARTORIO POPE, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Fourth Amendment allowed a police officer to stop and frisk petitioner based on reasonable suspicion that he was carrying a concealed weapon, in a State where carrying a concealed weapon is presumptively unlawful.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (S.D. Iowa):

United States v. Pope, No. 17-cr-00057 (Jan. 22, 2018)

United States Court of Appeals (8th Cir.):

United States v. Pope, No. 18-1264 (Dec. 10, 2018)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 6-12) is reported at 910 F.3d 413. The order of the district court (Pet. App. 2-5) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 10, 2018. A petition for rehearing was denied on January 10, 2019. The petition for a writ of certiorari was filed on April 8, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Southern District of Iowa, petitioner was convicted of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1). Judgment 1. The court sentenced petitioner to 37 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 6-12.

1. At around 4:00 a.m. one morning in January 2017, police officers in Des Moines, Iowa responded to a complaint about noise from a motel. Pet. App. 6. After the police arrived on the scene, an officer heard loud music and smelled marijuana emanating from one of the motel rooms. Ibid. The officer knocked on the door, and an occupant opened it. Ibid. The officer saw that around 30 people were crowded into the room, and he recognized some of the partygoers as gang members. Id. at 6-7. The officer asked the partygoers who had rented the room, but nobody responded, so he ordered all of them to leave. Ibid.

The officer saw petitioner, who was in the back of the room, place a pistol in the waistband of his jeans and cover it with his shirt. Pet. App. 7. As petitioner approached the officer to leave, the officer could see the outline of the gun through his shirt. Ibid. The officer stopped petitioner, placed him in handcuffs, and disarmed him. Ibid. Petitioner admitted he did not have a permit to carry the gun. Ibid.

2. A grand jury in the Southern District of Iowa returned an indictment charging petitioner with possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1). Pet. App. 7. Petitioner moved to suppress the gun and his statements to police, arguing that the officer lacked the reasonable suspicion necessary to stop him because the officer had no reason to believe that he lacked a permit to carry the gun. Id. at 4-5. The district court denied the motion. Id. at 2-5.

The district court found that the officer had reasonable suspicion of criminal activity based on "the large group of people inside the room, the alcohol, marijuana odors that were coming from the room, * * * recognizing several occupants[] [as] gang members * * * [and] observing the firearm." Pet. App. 4. The court also found that the officer had reasonable suspicion that petitioner was violating Iowa Code § 724.4(1) (2017) -- which prohibits carrying a concealed pistol -- because the officer "personally observed [petitioner] grab a firearm, put it in his waistband, [and] purposely conceal it with his t-shirt." Pet. App. 4. The court explained that "[w]hether or not the officer knew the [petitioner] had a valid permit to carry weapons is immaterial," because under Iowa law the possession of a permit was only an "affirmative defense[]" to a charge of carrying a concealed weapon. Ibid.

Petitioner pleaded guilty, reserving his right to appeal the denial of his motion to suppress. Pet. App. 7.

3. The court of appeals affirmed. Pet. App. 6-12.

a. The court of appeals first rejected petitioner's contention that the officer lacked reasonable suspicion to stop him. Pet. App. 7-10. The court explained that "[c]arrying a concealed weapon in Iowa is a criminal offense," and that the officer had reasonable suspicion that petitioner was committing that offense because he "personally observed [petitioner] place the gun in his waistband." Id. at 9. The court further explained that the lawfulness of the stop did not turn on whether the officer also had reasonable suspicion that petitioner lacked a permit. Ibid. The court observed that, under Iowa law, "possession of a concealed-weapons permit is merely an affirmative defense to a charge"; as a result, "carrying a concealed weapon in Iowa is presumptively criminal until the suspect comes forward with a permit." Ibid.

The court of appeals noted that both the Eighth Circuit and other courts of appeals had concluded that a police officer ordinarily may not stop a person merely because that person "openly" carries a firearm "in a state that requires no permit for doing so." Pet. App. 9. The court observed, however, that "that is not the situation [it] face[d]" here, where petitioner had concealed the firearm, and the concealed carrying of firearms was "presumptively criminal" under state law. Ibid.

b. The court of appeals also rejected petitioner's contention that, "even if the officer had reasonable suspicion to

stop him, the officer did not have reasonable suspicion to frisk him for weapons as well." Pet. App. 10. The court observed that, under Terry v. Ohio, 392 U.S. 1 (1968), an officer may frisk a suspect whom he reasonably believes is "armed and dangerous." Pet. App. 10 (quoting Terry, 392 U.S. at 27). The court identified three of this Court's decisions -- Adams v. Williams, 407 U.S. 143 (1972), Terry, and Pennsylvania v. Mimms, 434 U.S. 106 (1977) (per curiam) -- as precedent for "frisk[ing] a suspect reasonably believed to be armed even where it could be that the suspect possesses the arms legally." Pet. App. 10.

The court of appeals observed that, in Adams, this Court had explained that the purpose of a Terry frisk is not to find evidence of a crime "but to allow the officer to pursue his investigation without fear of violence," and that, as a result, "the frisk for weapons might be equally necessary and reasonable, whether or not carrying a concealed weapon violated any applicable state law." Pet. App. 10 (quoting 407 U.S. at 146). In Terry, this Court had stated that a suspect's carrying of weapons "thus presented a threat to the officer's safety." Ibid. (quoting 392 U.S. at 28). And in Mimms, this Court had determined that an officer's observation of a bulge in a suspect's jacket "permitted the officer to conclude that [the suspect] was armed and thus posed a serious and present danger." Pet. App. 10-11 (quoting 434 U.S. at 112) (brackets in original).

The court of appeals additionally found that the officer could permissibly frisk petitioner for a handgun even though the officer had already handcuffed him. Pet. App. 11. The court noted that "[h]andcuffs limit but do not eliminate a person's ability to perform harmful acts." Ibid. The court further observed that, "unless [petitioner] were to go home in the officer's handcuffs, at some point the officer would have to remove them, at which point [petitioner] would have unfettered access to his gun." Ibid. "The Fourth Amendment," the court explained, "does not require officers to submit themselves to such dangers." Ibid.

c. Finally, the court of appeals declined to review any "Second Amendment challenge" to Iowa's concealed-carry law, noting that petitioner had "failed to raise the argument in his opening brief." Pet. App. 12.

ARGUMENT

Petitioner contends (Pet. 7-12) that a police officer may not stop a person on the basis of reasonable suspicion that the person is carrying a concealed weapon, unless the officer also has reasonable suspicion that the person lacks a concealed-carry permit. The court of appeals correctly rejected that contention in the circumstances of this case. The reasonable-suspicion standard does not require the police to investigate the validity of potential affirmative defenses before conducting an investigatory stop, and possession of a concealed-carry permit is only an affirmative defense in Iowa. The court's decision does

not conflict with any decision of this Court or any other court of appeals or state court of last resort. In all events, this case would be a poor vehicle for reviewing the issue, because the officer in this case did have reasonable suspicion that petitioner lacked a permit.

Petitioner also contends (Pet. 12-17) that a police officer who has stopped a person may not frisk him on the basis of a reasonable belief that the person is armed, unless the officer also has a reasonable belief that the person is dangerous. The court of appeals correctly rejected that contention as well. Under this Court's precedents, an officer's reasonable belief that a stopped person is carrying a concealed weapon suffices to justify a frisk for the protection of the officer and the public. The court of appeals' decision does not conflict with any decision of this Court or any other court of appeals or state court of last resort. And this case would in any event be an unsuitable vehicle for addressing petitioner's general contention about frisks, because additional indicia of dangerousness, beyond the presence of a concealed firearm, supported the particular frisk in this case. This Court has previously denied review of a petition presenting a similar issue, see Robinson v. United States, 138 S. Ct. 379 (2017) (No. 16-1532), and it should follow the same course here.*

* Similar issues are raised in the petition for a writ of certiorari in No. 18-8988, Sykes v. United States.

1. A writ of certiorari is not warranted to review petitioner's contention that his stop was unconstitutional.

a. In Terry v. Ohio, 392 U.S. 1 (1968), this Court "held that the police can stop and briefly detain a person for investigative purposes if the officer has a reasonable suspicion supported by articulable facts that criminal activity 'may be afoot.'" United States v. Sokolow, 490 U.S. 1, 7 (1989) (quoting Terry, 392 U.S. at 30). That standard is "less demanding than * * * probable cause" and "considerably less than proof of wrongdoing by a preponderance of the evidence." Ibid.

The court of appeals here correctly recognized that the reasonable-suspicion standard does not require an officer to inquire into the availability of affirmative defenses before making an investigatory stop. "A determination that reasonable suspicion exists * * * need not rule out the possibility of innocent conduct." United States v. Arvizu, 534 U.S. 266, 277 (2002). To the contrary, even where "the conduct justifying the stop [i]s ambiguous and susceptible of an innocent explanation," "officers [may] detain the individuals to resolve the ambiguity." Illinois v. Wardlow, 528 U.S. 119, 125 (2000).

In addition, an affirmative defense, by definition, "constitutes a separate issue" from the state's case that a defendant is guilty of a crime. Patterson v. New York, 432 U.S. 197, 207 (1977). The Sixth Amendment thus does not require the prosecution to disprove affirmative defenses to the jury beyond a

reasonable doubt; rather, "the long-accepted rule [i]s that it [i]s constitutionally permissible to provide that various affirmative defenses are to be proved by the defendant." Id. at 211. Similarly, the Fifth Amendment does not require the prosecution to "anticipate affirmative defenses" before the grand jury. United States v. Sisson, 399 U.S. 267, 288 (1970). And just as the State need not preemptively rebut an affirmative defense "in the courtroom," the Fourth Amendment does not require an officer to do so "on the street," Pet. App. 9, in order to conduct an investigatory stop.

In this case, the district court and the court of appeals both determined that, under Iowa state law, carrying a concealed weapon is "presumptively criminal" and that "possession of a concealed-weapons permit is merely an affirmative defense to a charge." Pet. App. 9; see id. at 4. Petitioner does not appear to contest that interpretation of state law, and, in any event, this Court "generally accord[s] great deference to the interpretation and application of state law by the courts of appeals." Pembaur v. City of Cincinnati, 475 U.S. 469, 484 n.13 (1986). And on that understanding of state law, the Fourth Amendment allowed the officer to stop petitioner based on the reasonable belief that petitioner was carrying a concealed weapon, without requiring the officer to anticipate and reject potential affirmative defenses, such as the possession of a permit.

b. The decision below does not conflict with the decision of any other court of appeals or state court of last resort. The only other court of appeals to have considered the issue in a published opinion agrees that, in a state where "carrying a concealed handgun is a crime to which possessing a valid license is an affirmative defense," the police may stop a person "based solely on the information that [the person] was carrying a concealed handgun." United States v. Gatlin, 613 F.3d 374, 378 (3d Cir.), cert. denied, 562 U.S. 1015 (2010); see also United States v. Montague, 437 Fed. Appx. 833, 835-836 (11th Cir. 2011) (per curiam) (reasoning in unpublished opinion that police may stop a person on the basis of "reasonable suspicion that he was carrying a concealed weapon," notwithstanding that "proof of a license may be raised as an affirmative defense"), cert. denied, 562 U.S. 1072 (2012).

Petitioner errs in contending (Pet. 8-9 & n.2) that the decision below conflicts with the decisions of other federal courts of appeals in United States v. Black, 707 F.3d 531 (4th Cir. 2013), Northrup v. City of Toledo Police Department, 785 F.3d 1128 (6th Cir. 2015), and United States v. King, 990 F.2d 1552 (10th Cir. 1993). As the court below explained, the "situations" in those cases differed from "the situation [it] face[d]" here. Pet. App. 4. Specifically, in each of those three cases, the stopped individual was engaging in activity that was presumptively lawful under state law, not an activity that was presumptively criminal

but for which he might have an affirmative defense. In Black, the police stopped a person for openly "display[ing]" a firearm in North Carolina, a State that "permit[s] its residents to openly carry firearms." 707 F.3d at 540. In Northrup, the police stopped a person for "open possession of a firearm" in Ohio, a State that had "made open carry of a firearm legal" and that "does not require gun owners to produce or even carry their licenses for inquiring officers." 785 F.3d at 1131-1132. And in King, police in New Mexico stopped a person for carrying a weapon in his car, even though New Mexico "permit[ted] motorists to carry loaded weapons, concealed or otherwise, in their vehicles." 990 F.2d at 1555.

Petitioner likewise errs in contending (Pet. 8 n.2) that the decision below conflicts with Commonwealth v. Couture, 552 N.E.2d 538 (Mass. 1990). Although the Massachusetts Supreme Judicial Court concluded in that case that "[t]he mere possession of a handgun was not sufficient to give rise to a reasonable suspicion that the defendant was illegally carrying that gun," id. at 541, it did so in the context of a statutory scheme that differs markedly from Iowa's. In Massachusetts, unlike in Iowa, "[c]arrying a gun" -- even if "concealed" -- "is not a crime"; only "[c]arrying a firearm without a license (or other authorization) is." Commonwealth v. Alvarado, 667 N.E.2d 856, 859 (Mass. 1996). As a result, the carrying of a concealed firearm is not presumptively unlawful in Massachusetts, as it is in Iowa.

Petitioner also errs in contending (Pet. 8-9 & n.2) that the decision below conflicts with the decisions of state courts of last resort in State v. Williamson, 368 S.W.3d 468 (Tenn. 2012), and Commonwealth v. Hawkins, 692 A.2d 1068 (Pa. 1997). In both Williamson and Hawkins, the state courts invoked their state constitutions, rather than resting on the Fourth Amendment alone. See Williamson, 368 S.W.3d at 473 & n.3 (relying on the "Tennessee Constitution" and explaining that "[the] state constitution has been interpreted to offer more protection than the corresponding provisions of the Fourth Amendment in some contexts"); Hawkins, 692 A.2d at 1071 (relying on "the Constitution of Pennsylvania"). Moreover, in both Williamson and Hawkins, the state courts found that the investigatory stops at issue were unlawful largely on the ground that the police had relied on unreliable and uncorroborated anonymous tips -- not on the ground that the police must anticipate affirmative defenses when gauging reasonable suspicion. See Williamson, 368 S.W.3d at 483 (explaining that "the anonymous report of an armed party, absent corroboration and other indicia of reliability as to criminal activity, did not establish reasonable suspicion"); Hawkins, 692 A.2d at 1071 (explaining that "the police acted on an anonymous tip and had no basis for believing that the tip was reliable").

c. In all events, this case would be a poor vehicle for addressing this issue, because the police officer in this case did have reasonable suspicion that petitioner lacked a permit to carry

a concealed handgun. The officer encountered petitioner under suspicious circumstances: Petitioner was part of a "large group of people" making noise in a motel room late at night, the officer detected "marijuana odors" from the room, "several occupants" of the room were "gang members," and the occupants refused to say who had rented the room. Pet. App. 4; see id. at 6-7. Moreover, the officer observed petitioner place his pistol "in his waistband" and "purposely conceal it with his t-shirt" (suggesting an effort to hide the weapon from the officer). Id. at 4. Those facts gave the officer a "particularized and objective basis," Arvizu, 534 U.S. at 273 (citation omitted), for suspecting not just that petitioner was carrying a handgun, but also that petitioner was doing so without a permit. Petitioner thus would be entitled to no relief even if the Court were to agree with his position on the first question presented in the petition.

2. A writ of certiorari is also not warranted to review petitioner's contention that his frisk was unconstitutional.

a. In Terry, this Court held that, once the police lawfully stop a person for questioning, the police may, "for the protection of the police officer," frisk the suspect for "weapons," so long as the officer "has reason to believe that he is dealing with an armed and dangerous individual." 392 U.S. at 27. "The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances

would be warranted in the belief that his safety or that of others was in danger." Ibid.

The court of appeals correctly determined that, under this Court's precedents, reasonable suspicion that a person possesses a concealed weapon can itself justify a safety-based frisk during a lawful stop, irrespective of whether the officer has notice of additional indicia of dangerousness or whether possession of the weapon may be legal. In Terry itself, this Court upheld the frisk of a lawfully stopped suspect because "a reasonably prudent man would have been warranted in believing [the suspect] was armed and thus presented a threat to the officer's safety." 392 U.S. at 28 (emphasis added). In other words, "the danger" in Terry was "found in the presence of a weapon during a forced police encounter." United States v. Robinson, 846 F.3d 694, 699-700 (4th Cir.) (en banc), cert. denied, 138 S. Ct. 379 (2017). Similarly, in Pennsylvania v. Mimms, 434 U.S. 106 (1977) (per curiam), this Court determined that an officer was justified in frisking a lawfully stopped suspect because he saw a bulge in the suspect's jacket pocket; the bulge "permitted the officer to conclude that [the suspect] was armed and thus posed a serious and present danger." Id. at 112 (emphasis added).

It makes sense that a police officer may frisk for weapons during a lawful investigatory stop. The Fourth Amendment demands that searches and seizures be reasonable, and it is reasonable for a police officer to "tak[e] steps to assure himself that the person

with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him." Terry, 392 U.S. at 23. Moreover, the seizure of a firearm during an investigatory stop is inherently temporary. If the lawful stop proceeds in the ordinary course and the police do not uncover evidence of a crime, the officer must return the firearm to the individual when the stop ends and the individual departs. The interest in protecting the lives of police officers justifies such brief and limited seizures.

Petitioner errs in contending (Pet. 13) that the possession of a firearm cannot itself justify a frisk because carrying a gun is "an inherently lawful" activity. As an initial matter, "carrying a concealed weapon in Iowa is presumptively criminal," Pet. App. 9 -- not "inherently lawful." More fundamentally, this Court has made it clear that a police officer's authority to frisk a stopped suspect for weapons does not turn on whether state law allows the carrying of the weapons. In Adams v. Williams, 407 U.S. 143 (1972), the Court observed that "[t]he purpose of this limited search is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence, and thus the frisk for weapons might be equally necessary and reasonable, whether or not carrying a concealed weapon violated any applicable state law." Id. at 146. And in Michigan v. Long, 463 U.S. 1032 (1983), the Court upheld the search of a car's passenger compartment for weapons where officers reasonably

suspected that the driver possessed a knife, which the Court "[a]ssum[ed], arguendo, that [he] possessed lawfully." Id. at 1052 n.16. The Court explained that, in Adams, it had "expressly rejected the view that the validity of a Terry search depends on whether the weapon is possessed in accordance with state law." Ibid.

b. The court of appeals' decision does not conflict with the decisions of other courts of appeals or state courts of last resort. The Fourth Circuit, the only other court of appeals that has addressed the issue, has rejected petitioner's theory. See Robinson, 846 F.3d at 700 ("[T]he risk of danger is created simply because the person, who was forcibly stopped, is armed.").

The cases on which petitioner relies (Pet. 12-13 & n.3) are largely inapposite. In two of the cases -- Northrup, supra, and State v. Serna, 331 P.3d 405 (Ariz. 2014) -- the police lacked the reasonable suspicion needed to stop the suspect in the first place. In Northrup, the Sixth Circuit concluded that the police could not stop a person simply for carrying a firearm openly, where state law "permit[ted] the open carry of firearms." 785 F.3d at 1131. Similarly, in Serna, the Supreme Court of Arizona concluded that the police could not stop a person simply for carrying a firearm, because Arizona "freely permits citizens to carry weapons, both visible and concealed." 331 P.3d at 410. This case, in contrast, involves a frisk in the course of an investigatory stop found to be valid.

In another of the cases cited by petitioner, State v. Bishop, 203 P.3d 1203 (Idaho 2009), the police properly stopped the suspect, but lacked reasonable suspicion that the suspect was carrying weapons. The court in that case emphasized that the officer "did not report observing any unusual bulges in [the suspect's] clothing or other facts that would have indicated that [the suspect] was carrying a weapon." Id. at 1220. The officer asserted that the suspect "could possibly" have been armed, but the court determined that "an officer's bare assertion that a suspect 'could possibly' be carrying a weapon" could not alone justify a frisk. Id. at 1219 n.13. In this case, by contrast, the officer had ample reason to believe that petitioner was armed; he had "personally observed [petitioner] grab a firearm, put it in his waistband, [and] purposely conceal it with his t-shirt." Pet. App. 4.

The Seventh Circuit's decision in United States v. Leo, 792 F.3d 742 (2015), is similarly inapposite. In that case, the police seized the defendant on suspicion of attempted burglary with a gun, frisked him without finding a weapon, handcuffed his hands behind his back, and then opened and emptied a backpack that was no longer within his reach, finding a firearm. Id. at 744-745. The defendant did not dispute that the police could lawfully frisk him and "pat[] down the backpack to search for weapons." Id. at 749. The defendant instead raised, and prevailed on, the argument that officer-safety concerns did not justify opening and emptying

the backpack, which was outside the defendant's reach at the time of the search. Id. at 749-752. The decision does not conflict with -- indeed, the defendant's concession is consistent with -- the decision below, which involves a frisk of the suspect's person rather than the opening and emptying of an inaccessible backpack.

Finally, in State v. Vandenberg, 81 P.3d 19 (2003), the Supreme Court of New Mexico upheld a police officer's protective frisk of the occupants of a vehicle that had been stopped for speeding, because the suspects' movements in the car gave the officer cause to believe that they were "armed and dangerous, justifying a protective frisk for weapons." Id. at 27. Petitioner appears to rely on two sentences in the opinion in which the court stated that an officer may search a stopped suspect only if the person is "both armed and presently dangerous," rather than "either armed or dangerous." Id. at 25. But those sentences were unnecessary to the court's decision, which found that the police had reason to believe that the suspects were both armed and dangerous. Id. at 27. And petitioner identifies no decision of that court finding a Fourth Amendment violation in circumstances like those here, in contravention of the precedents of this Court.

c. In all events, this case would be an unsuitable vehicle for addressing the frisk issue, because the police officer in this case had reason to believe both that petitioner was armed and that he was dangerous. The officer observed petitioner's handgun in the context of a late-night encounter, at a party fueled by

"alcohol" and "marijuana," in the company of "several * * * gang members." Pet. App. 4. In that context, the officer could reasonably believe that petitioner's gun posed a threat to his safety during the stop. Contrary to petitioner's contention (Pet. 15), those contextual factors are sufficiently "particularized" to the facts of his own specific police encounter for purposes of the reasonable-suspicion inquiry. This Court has emphasized that the reasonable-suspicion determination turns on the "totality of the circumstances," Arvizu, 534 U.S. at 276, including "contextual considerations" such as whether "the stop occurred in a 'high crime area,'" Wardlow, 528 U.S. at 124 (citation omitted).

3. Petitioner suggests that the stop and frisk in this case also violated his "Second Amendment rights," Pet. 7, by making the exercise of Second Amendment rights "contingent upon the forbearance of" his Fourth Amendment rights, Pet. 14 (citation omitted). This Court, however, is "a court of review, not of first view," Cutter v. Wilkinson, 544 U.S. 709, 718 n.7 (2005), and its ordinary practice "precludes a grant of certiorari" to review contentions that were "'not pressed or passed upon below,'" United States v. Williams, 504 U.S. 36, 41 (1992) (citation omitted). The court of appeals expressly refused to address petitioner's Second Amendment argument, observing that "he failed to raise the argument in his opening brief." Pet. App. 12. No sound basis exists for this Court to address petitioner's forfeited Second Amendment argument in the first instance.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 2019