No. _____

In the
Supreme Court of the United States

JERI LYNN RICH, as representative for Gavrila Covaci Dupuis-Mays, an incapacitated person,
Petitioner,

v.

MICHAEL PALKO, ET AL.,
Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Court's "collateral order" doctrine permits interlocutory appeal with a two- pronged test for a government official's claim to qualified immunity: (i) whether the official violated a constitutional right, and (ii) whether the right was clearly established in the context involved.

When determining jurisdiction to review, some Circuits require the appellant to 1) stipulate to the Plaintiff's version of the facts; 2) accept the trial courts' recitation of the facts; 3) or review the trial courts' identification of material disputes of fact for legal sufficiency only and 4) when there are no specific findings by the trial court, remand for the findings or "scour the record" for the disputed issues of material fact that might suggest a Constitutional violation.

Also, some lower courts, including the Fifth Circuit, also bifurcate the second prong and separately ask whether the defendant's conduct was objectively unreasonable. This can result in factual reasonableness being considered in the second prong.

Accordingly, the question presented is: When courts are deciding qualified immunity in Fourth Amendment cases, shouldn't they recite the trial court's identification of the disputed issues of material fact regarding the seizure and excessive force when exercising "collateral order" jurisdiction and before applying the second, "clearly established" prong of the test?

PARTIES TO THE PROCEEDINGS

Jeri Lynn Rich, is petitioner here and was plaintiff-appellee below.

Michael Palko and Keith Duane Hudgens, are the respondents here and were defendants-appellants below.

STATEMENT OF RELATED PROCEEDINGS

Jeri Lynn Rich as representative for Gavrila Covaci Dupuis-Mays, an incapacitated person v. Michael Palko; Keith Duane Hudgens, No. 18-40415 (United States Court of Appeals for the Fifth Circuit) 920 F.3d 288 (5th Cir 2019). (judgment issued as the mandate on May 15, 2019).

Jeri Lynn Rich as representative for Gavrila Covaci Dupuis-Mays, an incapacitated person v. The City of McKinney, Texas, No. 4:16-CV-870-ALM-KPJ (In the United States District Court Eastern District of Texas, Sherman Division). (memorandum adopting report and recommendation of United States Magistrate judge entered on March 13, 2018).

There are no additional proceedings in any court that are directly related to this case.

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PETITION FOR A WRIT OF CERTIORARI

Jeri Lynn Rich respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at 920 F.3d 288 (5th Cir. 2019) and reprinted at Appendix A. The trial court's decision and the Magistrate Judges memorandums are attached.

JURISDICTION

The court of appeals denied rehearing *en banc* on May 2019. App. D. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the U.S. Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

To protect the rights of those arrested for mental health concerns,

Texas law provides:

a) A peace officer, without a warrant, may take a person into custody if the officer:
   1) has reason to believe and does believe that:
      A. the person is a person with mental illness; and
      B. because of that mental illness there is a substantial risk of serious harm to the person or to others unless the person is immediately restrained ; and
   2) believes that there is not sufficient time to obtain a warrant before taking the person into custody.

b) A substantial risk of serious harm to the person
   1) the person's behavior; or
   2) evidence of severe emotional distress and deterioration in the person's mental condition to the extent that the person cannot remain at liberty

d) A peace officer who takes a person into custody under Subsection (a) shall immediately transport the apprehended person to:
   1) the nearest appropriate inpatient mental health facility;

g) A peace officer who takes a person into custody under Subsection (a) shall immediately inform the person orally in simple, nontechnical terms:
   1) of the reason for the detention.

Texas Health and Safety Code § 573.001

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress….

INTRODUCTION

The trial Court referred the pretrial matters to the Magistrate Judge pursuant to 28 U.S.C. § 636. The Magistrate Judge made detailed findings from the evidence, which follow below. (App. 27-34) The video which supports these findings may be viewed https://drive.google.com/drive/folders/1n-Z4Cxx8CqSe5V-pmBr7pJEw1hhOP6k4.

"Gavrila Covaci Dupuis-Mays ("Mays") sustained a brain injury as an infant and has cerebral palsy, mental retardation, and has been declared an incapacitated person by the State of Texas. Mays also has various physical and mental limitations including limited utilization of his left hand, bi-polar disorder, depression, traumatic brain injury, ADHD, epilepsy, GERD, legal blindness (no peripheral vision), and uses disposable briefs.

On July 11, 2015, Officers Palko and Hudgens were called by Mays' caseworker, Rhonda Holley ("Holley") to the group home in McKinney, Texas, where Mays was living. Holley requested Mays be transported to Green Oaks Hospital ("Green Oaks"), as he was in need of inpatient care.

Defendant Officers arrived at the Group Home. Defendant Officers made audio and video recording (the "Hudgens Dashcam Video") of their arrival to the Group Home, their interaction with Dupuis-Mays and D&S staff, and the subsequent transport of Dupuis-Mays to Green Oaks in Dallas, Texas. The Hudgens Dashcam Video shows that, when Defendant Officers arrived at the Group Home, they had a brief conversation with one of Dupuis-Mays's caretakers. The caretaker (whose name is unclear in the audio) stated that Dupuis-Mays was becoming increasingly psychotic and reported that Green Oaks told the Group Home staff to bring him in for care. The caretaker continued on to say that Dupuis-Mays was covered in feces and that she and other staff did not feel safe transporting him to Green Oaks and that they had their children with them. Next, Defendant Officers approached Dupuis-Mays and had an extended interaction with him, talking with him about what was happening that night and urging him to shower and change clothes. During this interaction, Dupuis-Mays remained calm and eventually agreed to shower and put on clean clothes.

While Dupuis-Mays showered, personnel at the Group Home spoke with Defendant Officers about the events leading up to their arrival. Specifically, Caseworker Holley stated that Dupuis-Mays had defecated on himself, removed his clothes, and put them on the porch of the Group Home. She also stated that although Dupuis-Mays had not been physically aggressive that particular night, he had been physically aggressive in the past and was generally being verbally aggressive and non-compliant with the Group Home's rules before Defendant Officers arrived. The record before the Court showed that McKinney Police officers were also called to the Group Home two times earlier that same night in response to calls about Dupuis-Mays' non-compliant behavior.

Once Dupuis-Mays finished showering, he walked back to Defendant Officers on his own volition. Defendant Officers then allowed Dupuis-Mays to smoke a cigarette outside, where they laughed and talked casually for approximately ten minutes. After the conversation, and nearly forty minutes after arriving at the Group Home, Defendant Officers told Dupuis-Mays he would be going for a ride in the police car. Defendant Officers handcuffed Dupuis-Mays and told him he would need to remain handcuffed while riding in the police car. Before entering the police car, Dupuis-Mays asked Defendant Officers if they could remove the handcuffs. Defendant Officers told him they could not, Dupuis-Mays also repeatedly asked if he was going to jail, and Defendant Officers assured him he was not.

As Defendant Officers transported Dupuis-Mays from the Group Home to Green Oaks, they talked casually with Dupuis-Mays, asked him about his favorite types of music, and listened to the radio. Defendant Officers arrived at Green Oaks with Dupuis-Mays without any issue about thirty minutes after leaving the group home.

Defendant Officers guided Dupuis-Mays into the waiting room about twenty minutes after arriving at the Green Oaks parking lot. Dupuis-Mays remained in handcuffs and walked on his own, following Defendant Officers as they entered the Green Oaks waiting room. Once inside the Green Oaks waiting room, Dupuis-Mays remained handcuffed and was placed in a chair near the door to the triage room. After about fifteen minutes, Dupuis-Mays stood up from the chair and began speaking to Defendant Officers. The video shows that after a few minutes of this interaction, Defendant Officers pushed Dupuis-Mays back down to the chair to restrain him. About ten seconds after being placed in the chair, Dupuis-Mays appeared to spit towards Defendant Officers. Defendant Officers immediately turned away from the spitting then turned back towards Dupuis-Mays, grabbed his head, and pushed it down between his legs. Defendant Officers held Dupuis-Mays in this position for nearly five minutes. A few minutes later, a nurse came out from the triage room to bring Dupuis-Mays in for further examination. For this entire period, Dupuis-Mays remained handcuffed.

Inside the Green Oaks triage room, after being in handcuffs for nearly one-and-a-half hours, Dupuis-Mays grew increasingly agitated and began making angry expressions, such as "I hate cops" and "I hope the cops die." During this time, the triage nurse was attempting to calm Dupuis-Mays down and assess his medical needs; eventually, the triage nurse left the room after Dupuis-Mays responded that he would not calm down. When Dupuis-Mays was left in the triage room alone with Defendant Officers, he remained irritated and spit either in the direction of or on Defendant Palko. Immediately after this, the video shows that Defendant Palko stepped towards Dupuis-Mays, grabbed him by the head, and took him towards the ground with both hands; Defendant Hudgens also moved towards Dupuis-Mays and assisted in taking him to the ground. On the way to the ground, Dupuis-Mays' head was pushed into a metal file cabinet, causing his head to bleed; the video shows blood stains on the wall and on Dupuis-Mays' face and clothing. After the incident, Defendant Officers falsely told Green Oaks staff that Dupuis-Mays "bumped his head while they were not in the room." Plaintiff submitted a photo of the resulting injury to Dupuis-Mays; the photo shows that Dupuis-Mays suffered a large laceration to his head which required numerous staples.

Soon after the incident, Green Oaks staff contacted Officer Terry Qualls of the McKinney Police Department ("McKinney PD") because they "wished to report some concerns involving two McKinney Police Officers over the weekend." In response, an internal investigation was initiated by the McKinney PD Internal Affairs Division and Sergeant Randy Agan

("Sergeant Agan") was assigned to conduct the investigation. On July 13, 2015, Green Oaks staff reiterated their concerns to Sergeant Agan, stating "that a review of the video showed more than what was reported [by Defendant Officers] and requested that [he] come view the video." According to Sergeant Agan's report, that same day, he met with the Green Oaks management team to review "the video of the incident that gave them concern."

Based on a review of the evidence, Sergeant Agan's "Administrative Investigation" report contains a synopsis and analysis of the July 11, 2015, incident involving Defendant Officers and Dupuis-Mays. Sergeant Agan's report stated that, after reviewing the audio and video of the incident, he had numerous concerns with the incident as reported by Defendant Officers. Specifically, Sergeant Agan stated that "[i]t is not clear other than violating house rules why Officers Hudgens and Palko took Mays into custody" and "[t]he report does not describe how Mays was a danger to himself or others and if not taken into custody how he posed such a threat." Further, Sergeant Agan stated he "did not see anything in the video to substantiate [the claim that Dupuis-Mays was being aggressive towards Defendant Officers in the Green Oaks triage room] as Mays was sitting cuffed with his hands behind his back and appeared to be talking."

The Magistrate Judge made findings and recommendations. The Defendants objected. The District Court specified the disputed material issues of fact supporting the claim the Officers violated the Fourth Amendment in the seizure, the subsequent use

of excessive force and the falsification of the reports following the event and denied qualified immunity on both prongs. The officers appealed.

The plaintiff objected to the exercise of jurisdiction citing *Kinney v. Weaver*, 367 F.3d 337(5th Cir. 2004) (en banc) because the facts as recited by the Magistrate Judge and the Trial Court were very detailed and specific. Both recited the paltry evidence of probable cause and the unfounded basis for beating a physically and mentally disabled person, who is seated and handcuffed simply because he spit at the officer in the triage room at Green Oaks.

Nevertheless, The Fifth Circuit panel exercised jurisdiction and reversed and rendered applying a hybridized analysis under the second prong, which asks whether the right allegedly violated was clearly established. But in supposedly applying the second prong, the court actually performed the analysis that constitutes the first prong and decided that Palko and Hudgens acted reasonably considering the facts of the encounter.

This happened because the Fifth Circuit sometimes bifurcates the second prong of qualified immunity in Fourth Amendment cases, accepts collateral order jurisdiction and asks, not only whether the law was clearly established when applied to the facts at hand, but also whether the defendant's conduct was objectively unreasonable in light of that law.

This formulation nullifies the lower courts considerable effort at evaluating the evidence to recite the disputed evidence of material facts and permits the Circuit Courts to consider the factual unreasonableness of the arrest under the second prong despite this Court's teaching that the two prongs should remain distinct and that factual unreasonableness is part of the first prong. *See Saucier v. Katz,* 533 U.S. 194, 204-06 (2001).

The exercise of collateral order jurisdiction in such circumstances is contrary to law. The Fifth Circuit is internally divided on the issue despite an *en banc* decision.

The Court should grant the petition to resolve the split in how courts apply "collateral order" jurisdiction and interpret the second prong of qualified immunity. When the Magistrate and the Trial Court spend considerable effort reviewing the evidence for the disputed issues of material fact regarding the clearly established Constitutional transgressions and make very specific factual recitations straight from the record, injecting factual reasonableness into what is supposed to be the purely legal, second prong immunity analysis will confound the lower courts efforts in deciding the issues. Also, the Fifth Circuit apparently misapprehends *Tolan v. Cotton*.

As then-Judge Sotomayor recognized when dissenting from the Second Circuit's similarly bifurcated version of the second prong, it will "give defendants a second bite at the immunity apple, thereby thwarting a careful balance that the Supreme Court has struck" in fashioning the doctrine of

qualified immunity. *Walczyk v. Rio*, 496 F.3d 139, 166 (2d Cir. 2007) (Sotomayor, J., dissenting). The Court should therefore review this case, reverse the decision below, and permit Rich's claim to proceed to trial.

STATEMENT OF THE CASE

A. Palko and Hudgen's Conduct Found By the Magistrate Judge and District Court

The "genuinely" disputed issues of material fact were clearly recited by the Magistrate Judge. All the facts supporting the Plaintiff's argument that no evidence supported probable cause and the force was excessive came from police audio, video or the internal affairs reports that flowed after the officers told Mays he was going for a ride and that they would listen to music. The Magistrate Judge recommended Palko and Hudgens claim of qualified immunity be denied. The officers appealed the Magistrate Judge's ruling to the District Court and attempted to boot strap new arguments in the appeal. The District Court sustained the Magistrate Judge's reasoning and pointed out the new arguments asserted by Palko and Hudgens were waived and even if they weren't, the new arguments were factually impossible. (App. 20-24) The Fifth Circuit's published opinion didn't address the disputed issues as found in the trial court.

One of the new objections stated the officers who arrested Mays somehow knew his psychiatric history. The Trial court noted:

Defendant Officers next object that "the right [to be free from detention under the circumstances] was not clearly established," arguing that based on Dupuis-Mays's psychiatric history, Defendant Officers reasonably concluded he was a danger to himself and/or others. *See* Dkt. #71 at 3-4. First, the Court notes that Defendant Officers have not made this argument prior to their objections to the Report. The Fifth Circuit has held that issues raised for the first time in objections to the report of a magistrate judge are not properly before the Court. *See Finley v. Johnson*, 243 F.3d 215, 218 n. 3 (5th Cir. 2001) (citing *United States v. Armstrong*, 951 F.2d 626, 630 (5th Cir. 1992)).

Even considering Defendant Officers' argument, the Court finds two fatal flaws: first, Defendant Officers, pursuant to the record before the Court, did not have Dupuis-Mays's "psychiatric history" at any time during the incident. The record contains Dupuis-Mays's Medical Records from Medical City Dallas Hospital (Dkt. #65-1 at 8-10); however, such records were obtained during the subsequent investigation *after* the incident. Second, Defendant Officers have admitted that Dupuis-Mays was not violent when they arrived at the scene and throughout the extended period of time prior to being detained. *See* Dkt. #71 at 3-4. Furthermore, Defendant Officers cite no case law for the proposition that, based on a person's behavioral and psychiatric *history*, police officers may lawfully detain a non-violent person.[1]

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[1] The panel revised the record to support probable cause, ignoring the Trial Court by stating "The parties do not dispute that Dupuis

The Defendants also objected to the findings of excessive force. The Trial Court reasoned:

In support, Defendant Officers offer a new and different interpretation of the video evidence before the Court, now arguing that "Dupuis-Mays's own movement and momentum result[ed] in his accidentally striking the filing cabinet." *See id.* at 5. The Court again notes that Defendant Officers have not made this argument prior to their objections, and thus, the issue is not properly before the Court. *See Finley*, 243 F.3d at 218 n. 3 (citing *Armstrong*, 951 F.2d at 630). Even considering Defendant Officers' argument, however, the Magistrate Judge found a jury could find Defendant Officers' videotaped use of force was unreasonable, especially when viewed in conjunction with Sergeant Agan's report. Although Defendant Officers now offer a different description of the events seen on the video, this does not change the objective video evidence: a seated, handcuffed, and disabled person was forcibly brought to the ground by two police officers and suffered a serious laceration to the head. Accordingly, the Court finds no error in the

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Mays is "mentally ill" under Texas law." That issue was disputed. At one time or another every person exhibits some abnormal behavior which might be perceived by some as symptomatic of a **mental** or emotional disorder, but which is in fact within a range of conduct that is generally acceptable. Obviously, such behavior is no basis for compelled treatment and surely none for confinement. *Addington v. Texas*, 441 U.S. 418, 426-27, 99 S. Ct. 1804, 1810 (1979)

Magistrate Judge's conclusion, and this objection is likewise overruled.[2]

The Defendants also objected to the conclusion they fabricated their reports to justify probable cause which was a constitutional violation. The Trial Court noted:

Defendant Officers next object to the Magistrate Judge's finding that their reporting falsities were consequential to Dupuis-Mays's unlawful detention and excessive force claims. Defendant Officers rely on the timing of the submitted reports to argue they could not have possibly contributed to any deprivation of Dupuis-Mays's constitutional rights. *See id.* Namely, Defendant Officers state they submitted their reports "long after Dupuis-Mays was tak[en] into custody." As the Magistrate Judge stated, however, these reporting falsities obstructed the investigation regarding the incident and continue to serve as a potential basis for the justification of the alleged unlawful detention and use of excessive force. For this reason, they are proper matters for a jury to review.

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[2] The panel stated preexisting law must dictate, that is truly compel … that what the defendant is doing violates federal law in the circumstances. (pg 7). A finding of "mental illness" alone cannot justify a State's locking a person up against his will and keeping him indefinitely in simple custodial confinement. Assuming that that term can be given a reasonably precise content and that the "mentally ill" can be identified with reasonable accuracy, there is still no constitutional basis for confining such persons involuntarily if they are dangerous to no one and can live safely in freedom. *O'Connor v. Donaldson*, 422 U.S. 563, 575, 95 S. Ct. 2486, 2493 (1975)

B. The Decisions Below

A panel of the Fifth Circuit accepted jurisdiction under the collateral order doctrine stating the doctrine…" does not apply when the summary judgment motion is based on a claim of [QI]". Then stated they exercised jurisdiction to decide whether the district court erred in concluding as a matter of law the officers are not entitled to [QI] on a given set of facts.[3] The panel reversed and rendered judgement for the officers, but on a different ground. App. A.

The panel skipped the first prong of qualified immunity relating to the merits of Rich's Fourth Amendment claim and proceeded directly to the second prong, which it defined "as we have jurisdiction only to decide whether the district court erred in concluding as

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[3] It is unclear which facts the panel was referencing: the ones in the record, the Magistrates report, The Trial Court's order, the video evidence or *ipse dixit*. For instance, the panel stated the IA investigation was prompted by Hudgens' false report. To the contrary, the Magistrate stated the IA was initiated by Green Oaks because the officers falsely told the nurses "Mays bumped his head while they were not in the room". Later, Green Oaks again reiterated to Agan "come see the video". The panel also in footnote 3 stated: "We will not, however, accept a plaintiff's version of the facts "for purposes of [QI] when it is 'blatantly contradicted' and utterly discredited' by video recordings." The plaintiff is providing the Court an internet link to the 911 call, the Officers video to the Group home with its audio, the video captured conversations at the Group Home, the hand cuffing, the drive to Green oaks in Dallas Texas, the 20 minute audio silence after Mays asks where they are and what are they doing, and the video from Green Oaks with Hudgens audio overlaid after Hudgens learned Palko had turned off the microphone for the Courts convenience and because of the footnote.

a matter of law that officials are not entitled to [QI] on a given set of facts":

> whether the allegedly violated constitutional rights were clearly established at the time of the incident; and, we must be able to point to controlling authority- that defines the contours of the right in question with a high degree of particularity." "In sum, QI "represents the norm, and the courts should deny a defendant immunity only in rare circumstances". "It is the Plaintiff's burden to find a case in his favor that does not define the law at a high level of generality" if so, whether the conduct of the defendants was objectively unreasonable in the light of that then clearly established law.

App. 10 (emphasis in original) (quoting *Romero v. City of Grapevine and Vasnn v. Cityn of Southhaven*). (App. 7-9)

The court concluded Palko and Hudgens acted reasonably and were therefore entitled to immunity in light of the facts of the situation, such that the facts recited in the Magistrate Judge's Report and the District Court's findings never existed.

Rich petitioned for rehearing *en banc*, which the court denied. App. D. Rich urged the Circuit to follow *Tolan* and its *Kinney* decision regarding the exercise of jurisdiction, to no avail.

REASONS FOR GRANTING THE PETITION

I. The Fifth Circuit's Exercise of Collateral Order Jurisdiction confounds the question of when the "Collateral Order" doctrine applies. Despite a cogent and specific review by the Magistrate Judge and Trail Court which identified the disputed issues of material fact and the constitutional violations, the Court never questioned jurisdiction.

The collateral order doctrine is an exception to the final order requirement of 1291. In the context of [QI] the circuits are split on what will invoke the doctrine.

In the second circuit:

We have held that "a district court's mere assertion that disputed factual issues exist[] [is not] enough to preclude an immediate appeal." *Salim v. Proulx*, 93 F.3d 86, 89 (2d Cir. 1996). Immediate appeal is available from fact-related rulings "as long as the defendant can support an immunity defense on stipulated facts, facts accepted for purposes of the appeal, or the plaintiff's version of the facts that the district judge deemed available for jury resolution." *Id.* at 90; *see also Terebesi v. Torreso*, 764 F.3d 217 (2d Cir. 2014); *Poe*, 282 F.3d at 132; *Jemmott v. Coughlin*, 85 F.3d 61, 65-66 (2d Cir. 1996). *Raspardo v. Carlone*, 770 F.3d 97, 112 (2d Cir. 2014).

In the Seventh Circuit:

See *Jones v. Clark*, 630 F.3d 677, 680 (7th Cir. 2011) ("In a collateral-order appeal like this one, where the defendants say that they accept the plaintiff's version of the facts, we will take them at [**8] their word and consider their legal arguments in that light."); *Knox v. Smith*, 342 F.3d 651, 656-57 (7th Cir. 2003) (following the same approach). *Strand v. Minchuk*, 910 F.3d 909, 914 (7th Cir. 2018) If we detect a "back-door effort" to contest facts on appeal, we lack jurisdiction. *Jones*, 630 F.3d at 680; see also *Gutierrez v. Kermon*, 722 F.3d 1003, 1010 (7th Cir. 2013) (reiterating limits of appellate jurisdiction over appeal from denial of qualified immunity and stating that a party "effectively pleads himself out of court by interposing disputed factual issues in his argument").*Strand v. Minchuk*, 910 F.3d 909, 914 (7th Cir. 2018)

In the Fifth Circuit:

We therefore "can simply take, as given, the facts that the district court assumed when it denied summary judgment for that (purely legal) reason." *Johnson v. Jones*, 515 U.S. 304, 319, 115 S. Ct. 2151, 132 L. Ed. 2d 238 (1995). We also have jurisdiction over the legal issues of whether factual disputes are material. *See Short v. West*, 662 F.3d 320, 325 (5th Cir. 2011). We give *de novo* review to the legal issues relating to qualified immunity. *Id*. *King v. Handorf*, 821 F.3d 650, 653 (5th Cir. 2016)

On interlocutory appeal of the denial of summary judgment on the issue of qualified immunity, this court's jurisdiction is very limited. "Although a denial

of a defendant's motion for summary judgment is ordinarily not immediately appealable, the Supreme Court has held that the denial of a motion for summary judgment based upon qualified immunity is a collateral order capable of immediate review." *Kinney*, 367 F.3d at 346. "Our jurisdiction is significantly limited, however, for it extends to such appeals only 'to the extent that [the denial of summary judgment] turns on an issue of law.'" *Id.* (internal citation [**12] omitted). *Dean v. Phatak*, 911 F.3d 286, 291 (5th Cir. 2018)

We have jurisdiction to review a district court's denial of qualified immunity "only to the extent that the appeal concerns the purely legal question whether the defendants are entitled to qualified immunity on the facts that the district court found sufficiently supported in the summary judgment record." *Kinney v. Weaver*, 367 F.3d 337, 347 (5th Cir. 2004) [*662] (en banc). "[W]e lack the power to review the district court's decision that a genuine factual dispute exists" and "instead consider only whether the district court erred in assessing the legal significance of conduct that the district court deemed sufficiently supported." *Id.* at 348. *Hamilton v. Kindred,* 845 F.3d 659, 661-662 (5th Cir. 2017).

Stated differently, in an interlocutory appeal we cannot challenge the district court's assessments regarding the sufficiency of the evidence—that is, the question whether there is enough evidence in the record for a jury to conclude that certain facts are true." *Kinney v. Weaver*, 367 F.3d 337, 346-47 (5th Cir. 2004) (en banc) (internal quotation marks and citations omitted). Although we lack jurisdiction to resolve "the

genuineness of any factual disputes," we have jurisdiction to determine "whether the factual disputes are material." *Kovacic v. Villarreal*, 628 F.3d 209, 211 n.1 (5th Cir. 2010); *Trent v. Wade*, 776 F.3d 368, 376 (5th Cir. 2015).

"Where factual disputes exist in an interlocutory appeal asserting qualified immunity, we accept the [plaintiff's] version of the facts as true." *Id*. at 348 (citation omitted). We do not have jurisdiction to rule on contentions that require us to resolve factual disputes in defendant's favor. *Id*. *Juarez v. Aguilar*, 666 F.3d 325, 331-332 (5th Cir. 2011).

Given the clear, unequivocal, and emphatic pronouncement of the district court that it was denying qualified immunity because Charles had borne his burden of demonstrating the presence of issues of fact, of which none can contest the genuineness, our lack of appellate jurisdiction is pellucid -- and should have been to counsel for Grief. Every argument in counsel's brief to the court might be correct and might ultimately prevail: They simply cannot be heard at this juncture.

Charles v. Grief, 507 F.3d 342, 343 (5th Cir. 2007).

This court has jurisdiction over the appeal only to the extent it "challenges the *materiality* of factual issues, but" not when "it challenges the district court's *genuineness* ruling—that *genuine issues* exist concerning material facts." *Bazan ex rel. Bazan v. Hidalgo Cnty.*, 246 F.3d 481, 490 (5th Cir. 2001). When the basis of the district court's denial is unclear, the appellate court "can either scour the record and

determine what facts the plaintiff may be able to prove at trial and proceed to resolve the legal issues, or remand so that the trial court can clarify the order." *Thompson v. Upshur Cnty., Tex.*, 245 F.3d 447, 456 (5th Cir. 2001).

This means that the Court cannot second-guess the district court's determination that genuine factual disputes exist. *See id.* at 348 (citing *Behrens v. Pelletier*, 516 U.S. 299, 313, 116 S. Ct. 834, 133 L. Ed. 2d 773 (1996)). Rather, the Court will "consider only whether the district court erred in assessing the legal significance of the conduct that the district court deemed sufficiently supported." *Id.* (citing *Behrens*, 516 U.S. at 313; *Jones*, 515 U.S. at 313). In doing so, the Court views the facts in the light most favorable to the plaintiff. *See Gonzales v. Dallas Cnty.*, 249 F.3d 406, 411 (5th Cir. 2001) ("[O]n interlocutory appeal the public official must be prepared to concede the best view of the facts to the plaintiff and discuss only the legal issues raised by the appeal." (citing [*333] *Berryman v. Rieger*, 150 F.3d 561, 562-63 (6th Cir. 1998))).

See also, We cannot and will not revise the district court's identification of genuine fact disputes. *Cole v. Carson*, 905 F.3d 334, 347 (5th Cir. 2018).

The Magistrate Judge made very specific findings regarding the disputed issues of material fact regarding probable cause for the detention and the subsequent use of force on a handcuffed disabled person. The panel nevertheless exercised jurisdiction and never addressed the disputed issues of material

fact as recited by the Magistrate Judge and the district court.

Therefore the Circuit should be obliged to recite the findings of the Trail Court which support the exercise of "collateral order" jurisdiction. Otherwise the Circuits will be flooded with appeals from the denial of Qualified Immunity.

Every year the courts of appeals decide hundreds of cases in which they must determine whether thin evidence provided by a plaintiff is just enough to survive a motion for summary judgment or not quite enough. *Salazar-Limon v. City of Hous.*, 137 S. Ct. 1277, 1277 (2017).

This is not one of those cases.

II. The Fifth Circuit's Decision Transforms the Second Prong of Qualified Immunity by Injecting Factual Reasonableness into the Inquiry

Two questions must be answered when a defendant asserts qualified immunity.

In resolving questions of qualified immunity at summary judgment, courts engage in a two-pronged inquiry. The first asks whether the facts, "[t]aken in the light most favorable [*656] to the party asserting the injury, . . . show the officer's conduct violated a [federal] right[.]" *Saucier v. Katz*, 533 U. S. 194, 201, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001). When a plaintiff alleges excessive force during an investigation or arrest, the federal right at issue is the Fourth Amendment right against unreasonable seizures.

Graham v. Connor, 490 U. S. 386, 394, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989). The inquiry into whether this right was violated requires a balancing of "'the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.'" [**1866] *Tennessee v. Garner*, 471 U. S. 1, 8, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985); see *Graham, supra,* at 396, 109 S. Ct. 1865, 104 L. Ed. 2d 443.

The second prong of the qualified-immunity analysis asks whether the right in question was "clearly established" at the time of the violation. *Hope v. Pelzer*, 536 U. S. 730, 739, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002). Governmental actors are "shielded from liability for civil damages if their actions did not violate 'clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Ibid.* "[T]he salient question . . . is whether the state of the law" at the time of an incident provided "fair warning" to the defendants "that their alleged [conduct] was unconstitutional." *Id.*, at 741, 122 S. Ct. 2508, 153 L. Ed. 2d 666. *Tolan v. Cotton,* 572 U.S. 650, 655-56, 134 S. Ct. 1861, 1865-66 (2014).

Rather than apply this Court's precedent defining and distinguishing the two prongs of qualified immunity, the Fifth Circuit jumbles them together and injects merits-related factual reasonableness into the purely legal, second prong immunity analysis. This approach began in a decision predating *Saucier*. In *Hare*, the Fifth Circuit announced that the second prong "is better understood as two separate inquiries." 135 F.3d at 326. The first of these is whether the right

at issue was clearly established, while the second is "whether the conduct of the defendants was objectively unreasonable in the light of that then clearly established law." *Id*. By subdividing the second prong this way, the court licensed consideration of factual reasonableness as part of the immunity analysis rather than the merits. In *Hare*, for instance, the court found the defendants immune under the second prong based on the facts of the case rather than any reasonable legal misunderstanding by officials. *See id*. at 329 ("we hold that the undisputed facts, viewed in the light most favorable to the nonmovant, do not constitute objectively unreasonable conduct when applied against the deliberate indifference standard").

Decisions after *Hare* have defined the second prong the same way.[4] And the court repeated the error in this case. The panel's opinion describes something other than what the Magistrate Judge stated and that the District Court reaffirmed and confirmed. The panel doesn't mention where the lower court supposedly erred.

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[4] *See, e.g., Tarver v. Edna,* 410 F.3d 745, 750 (5th Cir. 2005); *Felton v. Polles*, 315 F.3d 470, 477 (5th Cir. 2002), *overruled on other grounds, Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006); *Estate of Sorrells v. City of Dallas*, 45 Fed. Appx. 325, 2002 WL 1899592 at * 2 (5th Cir.), *cert. denied*, 537 U.S. 1072 (2002); *Palmer v. Johnson*, 193 F.3d 346, 351 (5th Cir. 1999).

The panel opinion without basis in the record states: " The parties do not dispute that Mays is "mentally ill" under Texas law. It ignored and didn't question the recitation of the Magistrate Judge and the Trial Judge.

This is a first prong analysis about whether the arrest was reasonable in light of the events that occurred on the scene. It has nothing to do with the legal, second prong question whether applicable law was sufficiently settled in this context for Palko and Hudgens to appreciate that their conduct was unlawful. The court committed this error because it used the circuit's qualified immunity test first enunciated in *Hare*, which predates *Saucier's* clarification of the two different prongs. It also required Plaintiff to cite a case in his favor that does not define the law at a high degree of generality to demonstrate the violation was clearly established. (App. 9)

A case on point is not required. "Of course, there can be the rare obvious case, and where the unlawfulness of the officer's conduct is sufficiently clear even though existing precedent does not address similar circumstances." *City of Escondido v. Emmons*, 139 S. Ct. 500, 504, 202 L. Ed. 2d 455, 460, (2019).

III. Circuit Courts Are Divided in How They Define and Apply the Second Prong of Qualified Immunity

The Fifth Circuit's decision highlights two related divisions in how courts of appeals approach the second prong of qualified immunity. First, the decision echoes the split among and even within circuits about

jurisdiction and whether objective unreasonableness should be a separate or third element plaintiffs have to prove to overcome the defense. For example, the Second Circuit has been divided about whether the qualified immunity test has two or three prongs, the third resembling the Fifth Circuit's bifurcated scheme and asking, "even if the right was 'clearly established,' whether it was 'objectively reasonable' for the officer to believe the conduct at issue was lawful." *Gonzalez v. City of Schenectady,* 728 F.3d 149, 154 (2d Cir. 2013); *see Bailey v. Pataki*, 708 F.3d 391, 404 n. 8 (2d Cir. 2013) ("There is some tension in our Circuit's cases as to whether the qualified immunity standard is of two or three parts, and whether the "reasonable officer" inquiry is part of step two – the "clearly established" prong – or whether it is a separate, third step in the analysis"); *Taravella v. Town of Walcott,* 599 F.3d 129, 136 (2d Cir. 2010) (Straub, J., dissenting) (collecting two-step and three-step decisions).

Then-Judge Sotomayor pointed out that the Second Circuit's "approach splits the single question of whether a right is 'clearly established' into two distinct steps, contrary to Supreme Court precedent." *Walczyk*, 496 F.3d at 166 (Sotomayor, J., dissenting). As she explained:

> Contrary to what our case law might suggest, the Supreme Court does not follow this 'clearly established' inquiry with a second, ad hoc inquiry into the reasonableness of the officer's conduct. Once we determine whether the right at issue was clearly established for the particular context that the officer faced, the qualified immunity inquiry is complete.

Id. at 166-67. Other judges on that court have agreed with Justice Sotomayor. *See Taravella*, 599 F.3d at 138 (Straub, J., dissenting) ("we run the risk that lower courts will interpret the third step – the 'objective reasonableness' inquiry – as a hurdle that is somehow distinct from, and in addition to, the 'reasonableness' inquiry that is already a part of the second step"). And some panels have simply ignored the intra-circuit conflict, disregarded the circuit's own precedent, and applied the standard two-pronged test from Saucier. *See, e.g., Zalaski v. City of Hartford*, 723 F.3d 382, 388 (2d Cir. 2013); *Russo v. City of Bridgeport*, 479 F.3d 196, 211 (2d Cir.), *cert. denied*, 552 U.S. 818 (2007).

There is analogous division within the Sixth Circuit. Some panels apply a three-part test and ask a third question about reasonableness akin to that employed in the Fifth and Second Circuits: "whether the plaintiff has offered sufficient evidence to indicate that what the official allegedly did was objectively unreasonable in light of the clearly established constitutional rights" *Holzemer v. City of Memphis*, 621 F.3d 512, 519 (6th Cir. 2010). Other decisions note that this third question need only be considered "in some instances" to "increase the clarity of the proper analysis" – leaving it uncertain when and whether the test has two or three parts. *See, e.g., Quigley v. Tuong Vinh Thai*, 707 F.3d 675, 681 n. 2 (6th Cir. 2013); *Hensley v. Gassman*, 693 F.3d 681, 687 n. 5 (6th Cir. 2012), *cert. denied*, 133 S. Ct. 1800 (2013). One panel called the third step "redundant" in excessive force cases, *Grawey v. Drury*, 567 F.3d 302, 309 (6th Cir. 2009); another objected to

it as inconsistent with *Saucier, see Dunigan v. Noble*, 390 F.3d 486, 491 n. 6 (6th Cir. 2005).

Other circuits have also struggled with whether to include a third prong requiring a separate and additional inquiry into objective reasonableness. *See, e.g., Maldonado v. Fontanes*, 568 F.3d 263, 269 (1st Cir. 2009) (abandoning three-part test with third question on objective reasonableness in favor of *Saucier's* two-part analysis); *CarePartners LLC v. Lashway*, 545 F.3d 867, 876 n. 6 (9th Cir. 2008) ("We have previously expressed the qualified immunity test as both a two-step test and a three-step test"), *cert. denied*, 129 S. Ct. 2382 (2009). As Second Circuit Judge Straub points out, "the case law is divided, not only in our Circuit, but also in courts around the country. Several circuits have used a three-step analysis, even after the Supreme Court mandated a two-step inquiry in *Saucier*…. [C]ourts have been inconsistent in their treatment of the proper standard for qualified immunity." *Taravella*, 599 F.3d at 138 n. 2 (Straub, J., dissenting). *LaMont v. New Jersey*, 637 F.3d 177, 185 (3d Cir. 2011) ("In short, the dispute in this case is about the facts, not the law. The doctrine of qualified immunity is therefore inapposite").

Other circuits have also maintained the proper division between the two prongs. *See, e.g., Estate of Escobedo v. Bender*, 600 F.3d 770, 779 n. 3 (7th Cir. 2010) (objective reasonableness of officers' tactics in using force relates to first prong of qualified immunity analysis, not second), *cert. denied*, 131 S. Ct. 463 (2010); *Cowan v. Breen*, 352 F.3d 756, 762 (2d Cir. 2003) ("if the analysis focuses on whether an officer

made a reasonable mistake of fact that justified his conduct, what is being examined is whether there was a constitutional violation, not whether the officer is entitled to qualified immunity"); *Gould v. Davis*, 165 F.3d 265, 273 (4th Cir. 1998) ("The question in qualified immunity is not whether the officers acted 'reasonably' in the sense in which that term is used in tort law. The question is whether a reasonable person would have known about controlling law, once that law is deemed to have been clearly established under the second prong"). The Fifth Circuit's decision illustrates how subdividing the second prong to require separate proof of objective unreasonableness leads to the misapplication of the test for qualified immunity, giving rise to a further circuit split.

IV. The Court Should Resolve the Confusion Surrounding Consideration of Factual Unreasonableness in the Qualified Immunity Analysis

There are four important reasons to address the division and uncertainty over how lower courts account for factual unreasonableness when deciding qualified immunity.

First, then-Judge Sotomayor has explained how subdividing the second prong and considering reasonableness as a separate component or as a third question altogether alters the balance struck by the qualified immunity doctrine and makes it unduly difficult for plaintiffs to recover for constitutional violations. As she wrote when dissenting from the Second Circuit's practice of treating reasonableness as a separate third step:

> I recognize that the distinction I am drawing is a fine one, but I believe it has real consequences. Our approach does not simply divide into two steps what the Supreme Court treats singly, asking first, whether the right is clearly established *as a general proposition*, and second, whether the application of the general right to the facts of this case is something a reasonable officer could be expected to anticipate. Instead, we permit courts to decide that official conduct was "reasonable" even after finding that it violated clearly established law in the particularized sense. By introducing reasonableness as a separate step, we give defendants a second bite at the immunity apple, thereby thwarting a careful balance that the Supreme Court has struck "between the interests in vindication of citizens' constitutional rights and in public officials' effective performance of their duties."

Walczyk, 496 F.3d at 168-69 (Sotomayor, J., dissenting) (emphasis in original) (quoting *Anderson v. Creighton*, 483 U.S. 635, 639 (1987)).

This Court has long recognized that, "[i]f the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct." *Crawford-El v. Britton*, 523 U.S. 574, 591 (1998) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982)). But repeating consideration of factual reasonableness when resolving the second prong – giving defendants the "second bite at the immunity

apple" then-Judge Sotomayor described – risks immunizing unconstitutional behavior even when the defendant should have known what the law demanded in the situation at hand. It also places a thumb on the scale in favor of the defendant by erecting an extra and wholly unnecessary hurdle for the plaintiff. See *Taravella*, 599 F.3d at 138 (Straub, J., dissenting)

When a court considers the first prong, finds a violation, but then confers immunity under the second prong, it "says 'Although this official is immune from damages today, what he did violates the Constitution and he or anyone else who does that thing again will be personally liable.'" *Camreta v. Greene*, 131 S. Ct. 2020, 2029 (2011). Such rulings "promote clarity – and observance – of constitutional rules" in the future, just as repeated avoidance of constitutional questions through immunity "threatens to leave standards of official conduct permanently in limbo." *Id.* at 2030-31. "Qualified immunity thus may frustrate the development of constitutional precedent and the promotion of law-abiding behavior." *Id.* at 2031 (citations and quotations omitted); see also *Bunting v. Mellen*, 541 U.S. 1019, 1024 (2004) (Scalia, J., dissenting from denial of certiorari).

The danger of excessive constitutional avoidance in Fourth Amendment cases rises considerably if Circuit courts can exercise "collateral order" jurisdiction and decide factual reasonableness as part of the legal immunity inquiry notwithstanding the trial courts identification of the disputed issues of material fact giving rise to the concomitant Constitutional violation. Whether an arrest or use of force was reasonable in

light of the facts of the incident determines the merits of a Fourth Amendment claim. If that question is shunted into the second prong intended to resolve immunity, as the Fifth Circuit framework encourages and as occurred in this case, trial courts will have even fewer occasions to examine specific law enforcement practices and decide whether they comply with the Constitution. More disputes on the merits will be decided under the guise of determining immunity. The first prong, created to sort out the facts of the case and set the constitutional boundaries governing official action, will have little to do if the Fifth Circuit's approach stands.

Third, importing factual reasonableness into the immunity prong will diminish the vital role trial courts and juries play in establishing what is reasonable under the Fourth Amendment. Juries represent the "conscience" or "voice" of the community. *See, e.g., Jones v. United States*, 527 U.S. 373, 382 (1999) (capital sentencing); *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 600 (1996) (Scalia, J., dissenting) (punitive damages). Deciding whether conduct is reasonable is typically a jury function. Juries "are more representative institutions than is the judiciary; they reflect more accurately the composition and experiences of the community as a whole, and inevitably make decisions based on community values more reliably, than can that segment of the community that is selected for service on the bench." *Spaziano v. Florida*, 468 U.S. 447, 486-87 (1984) (Stevens, J., concurring in part and dissenting in part).

Juries were meant to play a central role in determining and policing the reasonableness of government action under the Fourth Amendment. See, e.g., Akil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L. J. 1131, 1180 (March 1991) ("Reasonableness vel non was a classic question of fact for the jury; and the Seventh Amendment, in combination with the Fourth, would require the federal government to furnish a jury to any plaintiff-victim who demanded one, and protect that jury's finding of fact from being overturned by any judge or other government official"). Today too, juries perform this invaluable service. As the Third Circuit recognized in an excessive force case, "since we lack a clearly defined rule for declaring when conduct is unreasonable in a specific context, we rely on the consensus required by a jury decision to help ensure that the ultimate legal judgment of 'reasonableness' is itself reasonable and widely shared." *Abraham v. Raso*, 183 F.3d 279, 289-90 (3d Cir. 1999).

Because deciding whether the law is clearly established is reserved to the court as a legal matter, resolving cases under the second prong as formulated by the Fifth Circuit cuts juries out of the task of assessing whether actions by officers are factually reasonable. As a result, Fourth Amendment law will increasingly lack the essential input of ordinary citizens, while judges assume the task of parsing through questions of fact better suited to jurors. That is what occurred here – the panel rearranged the facts of the incident and decided to render a judgment on whether Mays was a threat to himself or others but then it used that factual determination to make

what is supposed to be an entirely legal decision on immunity.

V. The Fifth Circuit's Decision is Erroneous

Finally, the Fifth Circuit erred in granting summary judgment.

In addition, the panel completely ignored the factual dispute over whether probable cause existed for the arrest of Mays.

Aren't police officers on notice that the Constitution, under the circumstances of this case, requires them to follow the specific mental health statute; to follow the form that tracks the statute; that they are not to mislead the mentally challenged person as to the reason for the warrantless detention, that departing from the statute, fabricating the reasons for the mental health detention and beating the disabled person while seated and handcuffed, thereby causing serious injury is a violation. That is self-evident.

Additionally, the law is well defined:

This Court repeatedly has recognized that civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection. *See, e.g., Jackson v. Indiana*, 406 U.S. 715 (1972); *Humphrey v. Cady*, 405 U.S. 504 (1972); *In re Gault*, 387 U.S. 1 (1967); *Specht v. Patterson*, 386 U.S. 605 (1967). Moreover, it is indisputable that involuntary commitment to a mental hospital after a finding of probable dangerousness to self or others can engender adverse social consequences to the individual. Whether we label this phenomena "stigma" or choose to

call it something else is less important than that we recognize that it can occur and that it can have a very significant impact on the individual.

Addington v. Texas, 441 U.S. 418, 425-26, 99 S. Ct. 1804, 1809 (1979).

> A false or scientifically inaccurate report is equivalent to any other false evidence created by investigators, such as a falsepolice report; as we have stated, there is no reason a government scientific expert "should enjoy immunity greater than that of other investigators." 14 As the First Circuit held, "if any concept is fundamental to our American system of justice, it is that those charged with upholding the law are prohibited from deliberately fabricating evidence . . . ." 15 And, as that court explained, the right of criminal defendants to be free from false or fabricated evidence was well settled by 1959 or earlier. *Brown v. Miller*, 519 F.3d 231 (5th Cir. 2008).
>
> In assessing the reasonableness of the use of force, the court must give "careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Graham v. Connor*, 490 U.S. 386, 396, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989).

Palko and Hudgens could not have reasonably believed Mays was a threat to himself or others. The Circuit never even mentioned the officers tricked Mays into getting in to their car for a ride. Consequently, reaching the legal issues raised by this petition would not be "an essentially academic exercise," but would change the outcome of the case." *Pearson v. Callahan*, 555 U.S. 223, 237 (2009).

CONCLUSION

The Court should grant the petition for writ of certiorari.

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