No. _____

IN THE

Supreme Court of the United States

STEVEN RICHARD TAYLOR,

Petitioner,

v.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

CAPITAL CASE

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CAPITAL CASE

QUESTIONS PRESENTED

1. Was Petitioner prejudiced by trial counsel's failure to move for adversarial testing of the State's novel DNA testing and statistics under *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923)?

2. Does a State's obligation to disclose exculpatory DNA analysis from one of its own experts depend on whether the State analyst "d[id] any tests or wr[o]te a report"?

3. Did an officer's question to Petitioner without counsel present, after Petitioner invoked his right to counsel, constitute an illegal interrogation under *Rhode Island v. Innis*, 446 U.S. 291 (1980), and *Oregon v. Bradshaw*, 462 U.S. 1039 (1983)?

LIST OF DIRECTLY RELATED PROCEEDINGS

Direct Review

Caption: *Taylor v. State*
Court: Florida Supreme Court
Docket: 79080
Decided: December 16, 1993
Published: 630 So. 2d 1038 (Fla. 1993)

State Collateral Review

Caption: *State v. Taylor*
Court: Circuit Court of the Fourth Judicial Circuit, Duval County, Florida
Docket: 1991-CF-2456
Decided: June 22, 2009
Published: 2009 WL 9419304 (Fla. Cir. Ct. June 22, 2009)

Caption: *Taylor v. State*
Court: Florida Supreme Court
Docket: SC09-1382; SC10-143
Decided: February 10, 2011
Published: 62 So. 3d 1101 (Fla. 2011)

Caption: *State v. Taylor*
Court: Circuit Court of the Fourth Judicial Circuit, Duval County, Florida
Docket: 1991-CF-2456
Decided: February 17, 2017
Published: 2017 WL 11567540 (Fla. Cir. Ct. Feb. 17, 2017)

Caption: *Taylor v. State*
Court: Florida Supreme Court
Docket: SC17-818
Decided: January 24, 2018
Published: 234 So. 3d 649 (Fla. 2018)

Caption: *State v. Taylor*
Court: Circuit Court of the Fourth Judicial Circuit, Duval County, Florida
Docket: 1991-CF-2456
Decided: March 1, 2018
Published: N/A

Caption: *Taylor v. State*
Court: Florida Supreme Court

Docket: SC18-520
Decided: December 20, 2018
Published: 260 So. 3d 151 (Fla. 2018)

Federal Habeas Review

Caption: *Taylor v. Secretary, Fla. Dep't of Corr.*
Court: United States District Court for the Middle District of Florida
Docket: 3:12-cv-444-BJD-MCR
Decided: May 19, 2021
Published: 2021 WL 2003122 (M.D. Fla. May 19, 2021)

Caption: *Taylor v. Secretary, Fla. Dep't of Corr.*
Court: United States Court of Appeals for the Eleventh Circuit
Docket: 21-12883
Decided: April 11, 2023
Published: 64 F.4th 1264 (11th Cir. 2023)

Certiorari Review

Caption: *Taylor v. Florida*
Court: Supreme Court of the United States
Docket: 93-9068
Decided: October 3, 1994
Published: 513 U.S. 832 (1994)

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TABLE OF AUTHORITIES

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Statutes:

Petitioner Steven Taylor, a prisoner on Florida's death row, petitions for a writ of certiorari to review the Eleventh Circuit's April 2023 decision affirming the denial of federal habeas relief.

OPINION BELOW

The Eleventh Circuit's opinion is reported at 64 F.4th 1264. It is also reprinted in the Appendix (App.) at 3a-21a.

JURISDICTION

On April 11, 2023, the Eleventh Circuit affirmed the Middle District of Florida's denial of 28 U.S.C. § 2254 relief. App. 3a. Rehearing was denied on June 26, 2023. App. 1a. This Court has certiorari jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment provides, in relevant part:

> No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law.

The Sixth Amendment provides, in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.

The Fourteenth Amendment provides, in relevant part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law.

28 U.S.C. § 2253(c) provides, in relevant part:

> (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from–
>
> > (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of the process issued by a State court . . .

> (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.

28 U.S.C. § 2254 provides, in relevant part:

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

STATEMENT OF THE CASE

In 1991, Petitioner Steven Taylor was convicted of murder, burglary, and sexual battery in a Florida court. He was sentenced to death for the murder conviction. The Florida Supreme Court affirmed on direct appeal, App. 108a; *Taylor v. State*, 630 So. 2d 1038 (Fla. 1993), and upheld the denial of state postconviction relief, App 59a; *Taylor v. State*, 62 So. 3d 1101 (Fla. 2011).

The Middle District of Florida denied federal habeas relief and a certificate of appealability (COA). App. 22a; *Taylor v. Sec'y, Fla. Dep't of Corr.*, No. 3:12-cv-444, 2021 WL 2003122 (M.D. Fla. May 19, 2021). The Eleventh Circuit granted a COA but affirmed. App. 3a; *Taylor v. Sec'y, Fla. Dep't of Corr.*, 64 F.4th 1264 (11th Cir. 2023).

I. Trial, direct appeal, and *Frye* reversals of co-defendant's conviction

Forensic DNA science was in its infancy in 1991 when the State's expert, Dr. James Pollock, told Taylor's jury that seminal DNA found on the victim's blouse "matched" Taylor, and that the odds of the DNA belonging to another person were at

least one-in-six million, and perhaps only one-in-23 million. One year prior, after taking a four-month course at the FBI, Pollock opened the State's first forensic DNA laboratory. Taylor's case was one of the lab's earliest cases. T. 555, 585, 592-94.

Defense counsel, Frank Tassone, questioned Pollock about the DNA evidence, first through voir dire of Pollock's qualifications and later through cross-examination. But Tassone did not move for a novel-scientific-evidence hearing to challenge the admissibility of the DNA evidence, which under Florida law would have used the standard of *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) (requiring scientific evidence and techniques to have gained general acceptance in the field).

After hearing the DNA statistics and other evidence, the jury convicted Taylor and, by a 10-2 vote, recommended the death penalty, which the trial court imposed. R. 261, 280. On direct appeal, no DNA-admissibility issues were raised. The Florida Supreme Court rejected, among other things, a Fifth Amendment claim under *Miranda v. Arizona*, 384 U.S. 436 (1966), based on the trial court's refusal to suppress a statement Taylor made in response to an officer's question without counsel present.

Taylor had a co-defendant, Gerald Murray, who was separately convicted and sentenced to death for the same murder. Murray's trial also included DNA evidence—a purported hair from Murray found on the victim. But in Murray's case, defense counsel moved for adversarial testing of the State's novel DNA evidence under *Frye*, and on direct appeal, the Florida Supreme Court reversed Murray's conviction under *Frye*, finding that the State had failed to prove that its DNA evidence was derived from generally accepted techniques. *Murray v. State*, 692 So. 2d 157, 163 (Fla. 1997).

Murray was convicted at his retrial, but the Florida Supreme Court again reversed his conviction under *Frye*, based on different DNA testimony that the court found had not gained general acceptance. *Murray v. State*, 838 So. 2d 1073, 1081 (Fla. 2002). Murray was again convicted and sentenced to death, but because the new sentence was imposed after 2002, the Florida Supreme Court later vacated it under *Hurst v. Florida*, 577 U.S. 92 (2016). *State v. Murray*, 262 So. 3d 26, 35 (Fla. 2018).

II. State postconviction

In state postconviction, Taylor presented evidence that Pollock's DNA testing was flawed, that his methodology improperly deviated from the FBI protocols his lab had adopted, and that his statistical testimony was unreliable. Taylor's evidence included: (1) the FBI protocol, with Pollock's handwritten modifications, PCR Ex. 451-96; (2) Shirley Zeigler, a DNA analyst in Pollock's lab who "second-read" his results and testified that she would have deemed two of the four probes he matched at trial inconclusive, PCR 1254-86; and (3) Dr. Randell Libby, a neurogeneticist and DNA expert who testified that three of the probes should have been deemed inconclusive, that aspects of Pollock's methodology and lab procedures were not generally accepted, and that Pollock's statistical databases and methods were unreliable. PCR 1455-97, 1502-1659. Tassone and the prosecutor also testified. PCR 1197-1244, 1349-1448.

Based on the postconviction evidence, Taylor first claimed that Tassone had been ineffective, under *Strickland v. Washington*, 466 U.S. 668 (1984), in failing to seek an adversarial hearing under *Frye* to challenge the admissibility of the DNA

evidence—a procedure that was well-established in Florida and was the basis for the Florida Supreme Court twice vacating Murray's convictions for the same crimes.

Taylor also claimed that the State violated its discovery obligations under *Brady v. Maryland*, 373 U.S. 83 (1963), with respect to (1) Pollock's undisclosed deviations from the FBI protocol, and (2) Zeigler, whose identity and role Tassone did not learn about until the middle of Pollock's cross-examination.

Relatedly, Taylor claimed that counsel had been ineffective under *Strickland* for not claiming a state-law discovery violation, under *Richardson v. State*, 246 So. 2d 771 (Fla. 1971), upon learning of Zeigler mid-trial.

In affirming the denial of relief, the Florida Supreme Court found no deficient performance under *Strickland* in Tassone's failure to seek a *Frye* hearing, reasoning that most of its precedent applying *Frye* to DNA evidence in Florida did not develop until after Taylor's trial. The court declined to reach *Strickland*'s prejudice prong on the *Frye*-ineffectiveness claim. App 64a-66a; *Taylor*, 62 So. 3d at 1110-11.

As to the *Brady* claims, the Florida Supreme Court ruled that Pollock's protocol deviations were not material because, even if they were disclosed, it was unlikely that they would have affected the verdict. App 70a-71a; *Taylor*, 62 So. 3d at 1115. With respect to the *Brady* claim based on Zeigler, the Florida Supreme Court found the claim non-cognizable because "Taylor ultimately asserts a discovery violation that was discovered and known during trial," meaning that "this claim should have been raised pursuant to *Richardson* at trial, not in a *Brady* claim at the postconviction stage." App. 71a-72a; *Taylor*, 62 So. 3d at 1116. Alternatively, the court found that

Zeigler was not suppressed because her initials were on lab reports turned over to the defense the weekend before trial. App. 72a-73a; *Taylor*, 62 So. 3d at 1116-17.

For the same reason, the Florida Supreme Court ruled that Tassone was not ineffective for failing to seek a *Richardson* hearing after learning about Zeigler at trial. Because defense counsel was given lab reports with Zeigler's initials on them, the court reasoned, there was no suppression by the State and could be no deficient performance for failing to seek sanctions. App. 66a-67a; *Taylor*, 62 So. 3d at 1112.[1]

III. Federal habeas

The Middle District of Florida denied federal habeas relief and a COA. *Taylor*, 2021 WL 2003122. The Eleventh Circuit granted a COA on the *Frye*-ineffectiveness, *Richardson*-ineffectiveness, and Fifth Amendment claims. App7a-12a; *Taylor*, 64 F.4th at 1268-69. The Eleventh Circuit granted a COA on the *Brady* issue only in part. A *Brady* COA was granted as to the non-disclosure of Pollock's deviations from the FBI protocol, but not as to the State's suppression of Ziegler. *Id.*

On April 11, 2023, the Eleventh Circuit affirmed. As to the *Frye*-ineffectiveness claim, the court declined to address deficient performance, the only *Strickland* prong reviewed by the Florida Supreme Court. The Eleventh Circuit instead reviewed prejudice de novo, ruling that (1) a motion for a *Frye* hearing likely would have failed,

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[1] The Florida Supreme Court also stated in addressing the *Richardson*-ineffectiveness claim that Zeigler would not have changed the outcome because while she disagreed with Pollock's testing procedures, "she did not ultimately disagree with his findings." *Id.* at 1116. However, that ruling was not relied on by the Eleventh Circuit below and, as explained later in this petition, contradicts the record.

and (2) even if one succeeded, "the jury had ample evidence before it to convict Taylor even without the DNA." App. 9a-19a; *Taylor*, 64 F.4th at 1269-72.

As to *Brady*, the Eleventh Circuit ruled that the Florida Supreme Court reasonably determined that the protocol deviations were not material because "[e]ven if Tassone had introduced other evidence following a disclosure, a reasonable jurist could conclude that it wouldn't have made a difference to the jury." App. 12a-14a; *Taylor*, 64 F.4th at 1270. The Eleventh Circuit, like the Florida Supreme Court, did not address whether the protocol deviations were suppressed. App. 9a-14a; *Taylor*, 64 F.4th at 1269-70. And given the lack of a COA, the Eleventh Circuit did not address whether Zeigler's non-disclosure was a *Brady* violation.

On the *Richardson*-ineffectiveness issue, the Eleventh Circuit again declined to address the Florida Supreme Court's deficient-performance analysis, instead reviewing *Strickland*'s prejudice prong de novo. The Eleventh Circuit found no prejudice because a *Richardson* motion would likely have failed, given that Zeigler was not suppressed. App. 18a; *Taylor*, 64 F.4th at 1272. The court found that Zeigler was not suppressed because the defense had her initials, as the Florida Supreme Court found, and also because she was not discoverable in the first place, in light of the fact that she "didn't do a test or write a report; she merely reviewed Dr. Pollock's report and compared it to her computer printout." App. 18a-19a; *Taylor*, 64 F.4th at 1272. The Eleventh Circuit further ruled that, even if a *Richardson* motion had succeeded, Zeigler would not likely have affected the verdict. App. 17a-19a; *Taylor*, 64 F.4th at 1272.

The Eleventh Circuit also rejected the *Miranda* claim from direct appeal, concluding that the Florida Supreme Court reasonably ruled that the officer's question to Taylor without counsel, after he had previously invoked his right to counsel, did not violate the Fifth Amendment. App. 19a-21a; *Taylor*, 64 F.4th at 1273.

REASONS FOR GRANTING THE WRIT

I. The Court should grant certiorari to review the Eleventh Circuit's de novo prejudice ruling on Taylor's *Frye*-ineffectiveness claim

Despite the deference AEDPA affords to state-court decisions, the Eleventh Circuit declined to address the Florida Supreme Court's deficient-performance ruling on Taylor's *Frye*-ineffectiveness claim, instead opting for its own de novo prejudice review. Certiorari is warranted because (1) the Florida Supreme Court's deficient-performance analysis was unreasonable, likely explaining the Eleventh Circuit's decision to bypass it; and (2) the Eleventh Circuit's prejudice analysis was wrong.

A. Trial counsel's ignorance of the law and failure to perform basic research on a critical issue establishes deficient performance

The decision below did not address deficient performance. But this Court can be assured that if it grants review of the Eleventh Circuit's de novo prejudice analysis, Taylor's *Strickland* claim is meritorious on both prongs. Trial counsel's deficient performance in failing to move for a *Frye* hearing is established by Tassone's admission that he did not know about *Frye* and did no research on it, even though

DNA was a nascent science and the State's expert intended to testify that only one in six million, up to one in 23 million,[2] people could have left seminal DNA on the victim.

If trial counsel had moved for a *Frye* hearing instead of only probing Pollock's qualifications and methods mid-trial, the State would have had the burden to prove—at the dawn of the forensic DNA era—that its evidence and statistics derived from generally accepted techniques. *See Ramirez v. State*, 651 So. 2d 1164, 1167-68 (Fla. 1995) ("In utilizing the *Frye* test, the burden is on the proponent of the evidence to prove the general acceptance of both the underlying scientific principle and the testing procedures used to apply that principle to the facts of the case at hand.").

According to Tassone, he failed to move for a *Frye* hearing not because he made a decision, but because he did not know that *Frye* hearings were the well-established mechanism for challenging novel scientific evidence in Florida. *See Hadden v. State*, 690 So. 2d 573, 577 (Fla. 1997) ("The question of the appropriate standard of admissibility of novel scientific evidence of any kind following the adoption of the evidence code was resolved by this Court in favor of the *Frye* test. *See, e.g.*, *Stokes v. State*, 548 So. 2d 188 (Fla.1989)."); *Ramirez*, 651 So. 2d at 1167 ("This standard, commonly referred to as the "*Frye* test," was expressly adopted by this Court in *Bundy v. State*, 471 So. 2d 9, 18 (Fla.1985)."). Tassone admitted that he was unfamiliar with *Frye* and that he did not research it—even describing himself as ineffective under the ABA standards and cases like *Rompilla v. Beard*, 545 U.S. 374 (2005). PCR 1393-98.

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[2] Pollock explained that the odds dropped from one-in-six million to one-in-23 million if the perpetrator was assumed to be white. T. 592-94. He did not explain whether there was any independent basis for assuming the perpetrator was white.

Given the State's powerful DNA statistics, trial counsel's ignorance of *Frye*, combined with his failure to do basic research, is what this Court has called "a quintessential example" of deficient performance. *Hinton v. Alabama*, 571 U.S. 263, 274 (2014) ("An attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*.") (citing *Williams v. Taylor*, 529 U.S. 362, 395-96 (2000); *Kimmelman v. Morrison*, 477 U.S. 365, 384-85 (1986)).[3]

The Florida Supreme Court, reaching only deficient performance, ruled that (1) Taylor could not rely on the Florida Supreme Court's refinements to *Frye* law as it relates to DNA issued after his trial; and (2) "the decision by trial counsel not to request a *Frye* hearing was reasonable" as within the range of strategic professional judgment described in *Strickland*. App. 64a-65a; *Taylor*, 62 So. 3d at 1110-11.

But as Taylor argued in the Eleventh Circuit, the Florida Supreme Court's first rationale was unreasonable under § 2254(d)(1) because his deficient performance argument did not rely on post-trial refinements to state *Frye*-DNA law. Taylor's argument was based on trial counsel's ignorance of the law and failure to do basic research—the situation this Court addressed in *Hinton*, *Williams*, and *Kimmelman*. PCR 1851-52; FSC Br. at 57, 66-68. The Florida Supreme Court missed the point by focusing on the existing depth of *Frye* precedent as it related to the nascent science

[3] Tassone was found ineffective by the Eleventh Circuit in another case for the same reason—failure to understand or research a key area of the law. *See Hardwick v. Sec'y, Fla. Dept. of Corr.*, 803 F.3d 541, 554 (11th Cir. 2015) ("Tassone did not understand mitigation law or the benefit to Hardwick at sentencing.").

of DNA at the time of trial. The fact that *Frye* had not yet been applied to many DNA cases—because DNA was such a new science—makes it all the more unreasonable for counsel to be ignorant of, and do no research on, the established procedure in Florida for challenging such new scientific techniques. It was only three years before Taylor's trial that Florida became the first state to ever convict a defendant with DNA evidence. *See Andrews v. State*, 533 So. 2d 841, 843 (Fla. 5th DCA 1988). Tassone never discovered that *Frye* was the method for challenging such new science.

The Florida Supreme Court's second rationale—that trial counsel's "decision" not to raise a *Frye* challenge was within the range of reasonable professional judgment—ignores that counsel, being ignorant of *Frye* and doing no basic research on the topic, could not have made any decision at all. Not only did Tassone confirm this in postconviction, but it also explains why at trial he awkwardly and improperly sought to challenge the DNA evidence through voir dire and cross-examination of Pollock, rather than through an adversarial *Frye* hearing. *See* T. 556-69.

The Eleventh Circuit chose to bypass deficient performance entirely, even though it was the only prong cloaked in AEDPA deference. This Court can be assured that, if it grants review of Eleventh Circuit's prejudice analysis, Taylor's deficient performance arguments will allow for his full *Strickland* claim to succeed.

B. The Eleventh Circuit's de novo prejudice analysis is belied by the record, the Florida Supreme Court's *Frye* precedent, and the two reversals of co-defendant Murray's conviction under *Frye*

The Eleventh Circuit ruled on de novo prejudice review that (1) a motion for a *Frye* hearing likely would have failed, and (2) even if successful, "the jury had ample

evidence before it to convict Taylor even without the DNA." App. 9a-12a; *Taylor*, 64 F.4th at 1269-72.

As to whether a *Frye* motion would have succeeded, the Eleventh Circuit emphasized Tassone's "rigorous voir dire" of Pollock, noting that it "covered some of the same issues that a *Frye* hearing would have," and found it "exceedingly unlikely that the same judge who certified Dr. Pollock as an expert following Tassone's thorough voir dire—which, again, covered *Frye* material—would have then excluded Dr. Pollock's evidence on a *Frye* motion." App. 14a-17a; *Taylor*, 64 F.4th at 1271. While the court seemed to acknowledge that trial counsel's voir dire only "covered *some* of the same issues that a *Frye* hearing would have," *id.* (emphasis added), it also badly underestimated what was lost by counsel's failure to make a *Frye* motion.

Frye hearings in Florida are adversarial and, as the Eleventh Circuit acknowledged, require the proponent to establish, by a preponderance of evidence, the general acceptance of the underlying scientific principles and the procedures used to apply those principles. App. 12a-14a; *Taylor*, 64 F.4th at 1270. That means that if Taylor's counsel had moved for a *Frye* hearing, the burden would have been on the State, in 1991, to prove the general acceptance of forensic DNA generally and of Pollock's methodology specifically.

Reasonable counsel would have presented his own expert and evidence at a *Frye* hearing, just as later counsel did in postconviction. And there is a reasonable likelihood that a *Frye* hearing would have revealed what the postconviction evidence did—that Pollock's testing and statistics fell below general acceptance in at least

three ways: (1) numerous improper deviations from the FBI protocol, including use of fewer probes, interpreting faint bands, declaring matches based on male DNA found in the female fraction, and interpreting bands with excess number of base pairs; (2) use of unreliable population databases and outmoded statistical methodology, and (3) inadequate second-review, documentation, and quality control within the State's lab. *See* T. 563-64; 568; PCR 1262, 1276-77; 1484, 1509-10; 1528-29; 1597-99; 1630.

Pollock admitted modifying the protocol at trial, but only mentioned one unrelated change. T. 606-07. He did not mention that his use of only four probes was the bare minimum number accepted to declare a match or that the FBI protocol called for five to eight probes. PCR 1506-09, 1565-66; PCR Ex. 466. Pollock did not mention that he crossed out the requirement in the protocol barring interpretation of bands with an excess of 10,000 base pairs, and then used such an oversized band to match the D4S139 probe, even though Pollock later acknowledged that the FBI believes such interpretations are unreliable. PCR 1685-86. And while Pollock acknowledged to the jury that he interpreted faint bands on the D4 and D1S7 probes, he did not say that he matched those two probes based on bands found in the female fraction, which the FBI protocol did not allow for. PCR 1265, 1266, 1275, 1546, 1623, 1649; Ex. 471. In addition, Pollock inappropriately interpreted the D17S79 probe despite the victim and suspect having the same size upper allele, making it unclear who contributed. PCR 1632. Together, these deviations would have undermined up to three probes, reducing the odds to one-in-10 or one-in-100, PCR 1635, and discredited the entire DNA process.

These issues would have been aired through adversarial testing at a *Frye* hearing, with the State carrying the burden. Under Florida law, the qualification of an expert is a different matter entirely. *See Ramirez*, 651 So. 2d at 1167. Even though Tassone's voir dire may have touched on DNA science generally, the trial judge's clear focus was on whether Pollock was qualified to testify. That is why, after Tassone's questioning, the court ruled simply: "I find that the expertise of Dr. James Pollock as an expert in forensic serology and expert in DNA analysis has been established sufficient to allow him to testify as to his findings and as to his opinion." T. 569. The court did not make any findings on the general acceptance of the DNA science.

The trial judge would have been in a completely different position if he was required to instead decide whether the State had met its burden on general acceptance, based on expert testimony and evidence presented at a *Frye* hearing. Taylor's postconviction counsel even elicited an admission from Pollock that only the "general FBI procedure," and not his lab's methodology, was generally accepted. PCR 1698. That would have been devastating testimony for the State at a *Frye* hearing. Contrary to the Eleventh Circuit's ruling, if the trial judge heard this evidence in 1991, there is a reasonable probability that the DNA would have been excluded.

The Eleventh Circuit found it significant that "Dr. Pollock's procedure didn't even give Tassone misgivings about his expertise, despite Tassone's obvious incentive to challenge his testimony." App. 14a-17a; *Taylor*, 64 F.4th at 1271. But Tassone was ignorant of the law and failed to do any research, so it is not surprising that he had

no misgivings. And Tassone admitted that he had never dealt with DNA before this case. PCR 1382.[4]

Even if the Eleventh Circuit believed the DNA evidence would have been admitted anyway, it failed to consider what would have happened on appeal. Florida law examines "the issue of general acceptance at the time of appeal rather than at the time of trial." *Hadden*, 690 So.2d at 579; *see also Hayes v. State*, 660 So. 2d 257 (Fla. 1995) (reversing under *Frye* based on information not available until appeal).

Based on similar cases from the same time period, there is a reasonable likelihood that even if the trial judge had denied Taylor's *Frye* motion, it would have been reversed on automatic appeal in the Florida Supreme Court. That is what happened twice in Murray's case, where the DNA evidence suffered many of the same flaws as Pollock's testing. *See Murray*, 692 So. 2d at 163-64; *Murray*, 838 So. 2d at 1077, 1080-81.

And strikingly, just three years after Taylor's trial, a Florida appellate court reversed under *Frye* in a case where Pollock testified to using the same flawed

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[4] The Eleventh Circuit also emphasized that Tassone had no concerns about the DNA even after consulting with Dr. David Goldman, an expert who Tassone spoke to before trial but who did not write a report, attend the trial, or testify. PCR 1385. But the record says little about the substance of Tassone's conversations with Goldman. Tassone, due to his ignorance, could have not told Goldman about *Frye* or the importance of establishing the general scientific acceptance of forensic DNA and Pollock's methodologies. And the record reflects that Tassone's conversations with Goldman were hurried. Tassone and Goldman did not receive the State lab files on Pollock's testing until the weekend before trial. Tassone asked for a continuance because Goldman needed more time to review the DNA, and because Goldman had a conflict with the trial date. But on the morning of trial, Tassone abruptly withdrew the motion and proceeded anyway, confident that he was comfortable enough with DNA science after just an hour-long talk with Goldman. PCR 1385-87.

databases and statistical methodology as in Taylor's case. *See Vargas v. State*, 640 So. 2d 1139, 1144-46, 1150 (Fla. 1st DCA 1994). If Tassone had preserved a *Frye* objection, Taylor likely would have secured similar relief on direct appeal.

The Eleventh Circuit alternatively reasoned that even if the DNA had been excluded entirely, "the jury had ample evidence before it to convict Taylor even without the DNA." App. 14a-17a; *Taylor*, 64 F.4th at 1271. But that is wrong for two reasons. First, the Eleventh Circuit ignored Taylor's argument that such powerful DNA statistics—one-in-six-million or one-in-23-million—cannot be extracted from the jury's decisionmaking for prejudice analysis. Without the overwhelming DNA statistics, the jury likely would have viewed the other evidence totally differently.

Second, almost none of the State's other evidence inculpated Taylor, as opposed to Murray, in specific criminal acts. Besides the DNA, the State's evidence against Taylor was: (1) testimony from Taylor's and Murray's friend that he dropped the pair off in the victim's neighborhood (also Murray's neighborhood) on the night of the murder, T. 371, 374; (2) a car that was stolen from the victim's (also Murray's) neighborhood on the night of the murder, seen near the victim's home, and recovered near Taylor's neighborhood, T. 378-81, 388-92; (3) a jailhouse snitch, Timothy Cowart, who testified that Taylor made inculpatory statements about his participation in the crime with Murray, T. 508-09, 518-19; (4) expert testimony that Taylor, along with a third of the population, had the same blood type as the contributor of the blouse DNA, T. 540-41; (5) a friend and roommate's testimony that, months after the murder, Taylor was digging in a location where some of the victim's jewelry was found, T. 397-

404, 410; and (6) an officer's testimony that Taylor made an inculpatory statement in response to a question he asked during execution of a search warrant for Taylor's blood sample, T. 498-500. Taylor presented expert testimony that hairs found on the victim were consistent with Murray only, T. 638-40.

Other than Cowart—who the jury heard contacted Taylor's prosecutors from jail in search of a deal—the DNA was the only evidence supporting Taylor's murder and sexual battery convictions independent of Murray. Without the DNA, there would have been a powerful case for reasonable doubt on both charges given Murray's co-participation in the crime. If the DNA evidence against Taylor had been excluded, there is at least a reasonable probability that the jury would have discounted Cowart and found the remaining evidence insufficient to inculpate Taylor specifically.[5]

But perhaps the clearest sign that the Eleventh Circuit's *Strickland* prejudice analysis deserves review is that the Florida Supreme Court twice reversed Murray's convictions for the same crime under *Frye*, based on unaccepted DNA science, even though the State had non-DNA evidence against Murray that was at least as strong as its non-DNA evidence against Taylor. Murray's case featured a jailhouse snitch in

[5] As to the Eleventh Circuit's reliance on the State's "evidence of Taylor's location at the time of the murder," App. 14a-17a; *Taylor*, 64 F.4th at 1271, that was the same testimony that placed Murray in the same area—Murray's neighborhood. As to "the jewelry found buried at [Taylor's] former residence," *id.*, that discovery was made months after the crime, at a house also frequented by Murray and his family. Taylor's "tacit statement to Officer Bogers" indicating he believed he would be arrested when the DNA results came back, *id.*, showed at most that he expected his DNA to be at the scene, not where it would be found. And the "testimony that Taylor—but not his co-defendant—matched the secretor type of semen found at the scene," *id.*, leaves out the fact that one-third of the population are the same secretor type.

addition to physical evidence—microscopic pubic hair analysis—untainted by the *Frye* errors on the DNA testing. *See Murray II*, 838 So. 2d at 1076. Taylor had no physical evidence against him aside from the putative DNA match. Given that the Florida Supreme Court twice found that Murray was prejudiced by *Frye*-DNA errors, the Eleventh Circuit's conclusion that the other, weaker evidence against Taylor defeated *Strickland* prejudice was wrong. This Court should grant certiorari review.

II. The Court should grant certiorari on the Eleventh Circuit's ruling that only State experts who do tests or write reports must be disclosed

The Eleventh Circuit ruled that no violation resulted from the State's failure to disclose Zeigler because she was not discoverable in the first place, given that she "didn't do a test or write a report; she merely reviewed Dr. Pollock's report and compared it to her computer printout." App. 17a-19a; *Taylor*, 64 F.4th at 1272. The Eleventh Circuit also approved of the Florida Supreme Court's ruling that Zeigler was not suppressed because her initials were on lab reports turned over to the defense shortly before trial. *Id.* This Court should grant certiorari to review those rulings in the context of *Brady* and the COA standard.

At trial, Pollock revealed during cross-examination that Zeigler had been involved in the case. In questioning Pollock about the autoradiographs, which visualized the DNA results, Tassone inquired why the initials "SZ" were on them. T. 607. Pollock revealed that they referred to Zeigler, another DNA analyst in his lab who performed the second-read of his results in Taylor's case. In postconviction, it

was revealed that Zeigler would have testified that two out of four probes that Pollock told the jury "matched" to Taylor were actually inconclusive. PCR 1264-67.[6]

The Eleventh Circuit's ruling on the Zeigler issue began with a violation of the COA standard. Throughout his federal habeas proceedings, Taylor raised the suppression of Zeigler as the basis for (1) a *Brady* claim, and (2) the ineffectiveness claim premised on counsel's failure to move for a *Richardson* hearing when he learned of Zeigler mid-trial. The Florida Supreme Court rejected the *Brady* claim based on its determinations that Zeigler was not suppressed because defense counsel possessed her initials, and also that Zeigler was not material. The state court applied the same rationales to reject Taylor's *Richardson*-ineffectiveness claim—if Zeigler was not suppressed, the court reasoned, counsel could not be deficient for failing to claim a discovery violation, and if the verdict would not likely be affected, there was no *Strickland* prejudice. App. 71a-73a; *Taylor*, 62 So. 3d at 1116-17. The district court addressed both claims on the merits too, finding the state court's rulings reasonable. *Taylor v. Secretary, Fla. Dep't. of Corr.*, No. 3:12-cv-444-BJD-MCR, 2021 WL 2003122, at *7-9 (M.D. Fla. May 19, 2021). App. At 30a-32a.

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[6] The Eleventh Circuit placed undue significance on the fact that Zeigler and Libby regarded some of Pollock's probe-matches as inconclusive, as opposed to wrong. *Taylor*, 64 F.4th at 1270. This misunderstands the nature of forensic DNA evidence, which is intrinsically probabilistic. The jury hears statistics based on the number of probes that can be conclusively matched. Here, the difference between Pollock telling the jury that he could match four probes, and Libby and Zeigler stating that only one or two probes could be reliably matched, is the difference between the jury hearing that there is only a one-in-six million or one-in-23-million chance of someone other than Taylor contributing the DNA—or a much larger one-in-10 or one-in-100 chance.

In other words, Taylor's *Brady* and *Richardson* arguments on the Zeigler suppression issue were inextricably intertwined in the state courts and district court. But while the Eleventh Circuit granted a COA on the *Richardson*-ineffectiveness issue based on Zeigler, a COA was denied on the *Brady* claim involving the same facts. *Taylor v. Sec'y, Fla' Dep't of Corr.*, No. 21-12883, ECF 21-1 at 1-2 (11th Cir. Feb. 16, 2022). That warrants review because in granting a COA on the *Richardson*-ineffectiveness claim, the Eleventh Circuit necessarily found it reasonably debatable whether Zeigler was suppressed and whether her suppression was prejudicial. Those same conclusions should have led the court to also grant a COA on the *Brady* claim.

If it was reasonably debatable whether Tassone was ineffective for failing to claim a discovery violation based on the State's suppression of Zeigler, it must also be reasonably debatable whether the State violated its obligations under *Brady* in failing to disclose Zeigler. *See Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)) (describing COA standard of reasonable debatability). This is particularly so because the COA inquiry Is "threshold" and "not coextensive with a merits analysis." *Buck v. Davis*, 580 U.S. 100, 115 (2017). During the appeal, Taylor pointed out this COA problem and asked for expansion of the COA to allow him to brief the Zeigler issue in the context of *Brady* as well as *Strickland*, *Taylor*, No. 21-12883, ECF 55 at 20 n.4., but the Eleventh Circuit ignored the request.

The Eleventh Circuit never explained why it excised the Zeigler issue from the *Brady* COA. But if it relied on the Florida Supreme Court's statement that "because Taylor ultimately asserts a discovery violation before trial, this claim should have

been raised pursuant to [*Richardson*] during trial, not in a postconviction motion pursuant to *Brady*," App. 71a; *Taylor*, 62 So. 3d at 1116, that was wrong and warrants this Court's review. Taylor's claim that the State suppressed Zeigler by failing to disclose her before trial, or set the record straight after her name was revealed, was properly raised as a postconviction *Brady* claim. Even after that statement, the Florida Supreme Court addressed the merits.

In the context of the *Richardson*-ineffectiveness claim, the Eleventh Circuit ruled that the State was not required to disclose Zeigler because she did not do any tests or write a report. App. 18a; *Taylor*, 64 F.4th at 1272. Had a COA be granted as to *Brady*, that suppression ruling would not have withstood review under this Court's *Brady* precedents. To say that an expert within Pollock's lab—whose purpose was to perform quality control on his results, and who would have testified that two of the probes that Pollock told the jury "matched" Taylor were actually inconclusive—was not discoverable contravenes this Court's *Brady* precedent.

The State is required to provide exculpatory evidence before trial so that the defense can adequately prepare. *See United States v. Bagley*, 473 U.S. 667, 683 (1985). There is no *Brady* carve-out for State experts who do not conduct independent tests or write reports. If a law enforcement DNA analyst like Zeigler has information that another analyst's "match" testimony is improper, the State cannot hide that evidence from the defense based on the absence of additional testing and reports by that

analyst.[7] If the State's expert's DNA information about the overall probability of a match is favorable to the defense, *Brady* requires its fair disclosure to the defense.

Had she been disclosed, Zeigler could have testified about her and Pollock's calculated fragment reports and told the jury what she said in postconviction—that the D4 and D1S probes were inconclusive and should not be included in the overall statistics. She could have confirmed that DNA from male semen should not be matched in the female fraction. And she could have confirmed FDLE's specific deviations from the FBI protocol, including ignoring the prohibition on interpreting bands with too many base pairs. *See* PCR 1259, 1263-67, 1274-77; Ex. 64. Zeigler was discoverable for *Brady* purposes, even without doing any testing or writing a report.

The Eleventh Circuit's separate agreement with the Florida Supreme Court that Zeigler was not suppressed based on Tassone's possession of the reports with her initials on them also warrants review. The record demonstrates that the State was on clear notice of its discovery obligations well before trial. Trial counsel filed a pretrial demand for discovery, requesting names and addresses of persons known to the State to have information relevant to the offense and any defenses. R. 10. The defense specifically requested the results of scientific tests, experiments, and comparisons, including the work of evidence technicians and crime lab personnel. R.

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[7] To hold otherwise would deal a serious blow to *Brady* by insulating what happens inside State labs from disclosure to the defense. Such a regime would have real-world consequences for capital defendants. In another Florida capital case pending in the Eleventh Circuit, Zeigler was threatened and assaulted by the local sheriff and prosecutor when her DNA testing did not link the defendant to the crime. *See Whitton v. Secretary*, No. 4:15-cv-200, ECF 119 at 28 (N.D. Fla. Nov. 30, 2022).

12. Trial counsel also filed a motion for production of favorable evidence. R. 115. The State's responses listed dozens of witnesses. R. 16-17, 20, 35, 65, 67, 91. But Zeigler's name was never disclosed. Def. Ex. 6, PCR 1214; 1368-69.

The fact that Zeigler's initials appeared on scientific materials in trial counsel's possession does not mean that the State did not conceal her for *Brady* purposes. The prosecutor's postconviction testimony makes clear that the initials were not intended as disclosure of Zeigler's identity, which the prosecutor said he believed he did not need to turn over. PCR 1214-20. And even if the State did intend the initials as disclosure, that would have been insufficient under *Brady* precedent.

The State's disclosure obligations are not satisfied simply because a key witness's initials appear on scientific records given to the defense on the eve of trial. That does not comport with fundamental notions of adversarial testing. The State is required to provide exculpatory evidence before trial so the defense can adequately prepare. *See Bagley*, 473 U.S. at 683 ("The reviewing court should assess the possibility that such effect might have occurred in light of the totality of the circumstances and with an awareness of the difficulty of reconstructing in a post-trial proceeding the course that the defense and the trial would have taken had the defense not been misled by the prosecutor's incomplete response.").

In *Strickler v. Green*, 527 U.S. 263, 289 (1999), this Court found suppression and a *Brady* violation when the prosecution failed to turn over exculpatory evidence despite employing an "open file policy." The Court made clear that it is reasonable for defense counsel to rely on the "presumption that the prosecutor would fully perform

his duty to disclose all exculpatory evidence." *Id.* At 284-85. As the Court further reiterated in *Banks v. Dretke*, 540 U.S. 668, 675-76 (2004), "[w]hen police or prosecutors conceal significant exculpatory or impeaching material in the State's possession, it is ordinarily incumbent on the State to set the record straight."

The Eleventh Circuit emphasized that Tassone was not "blindsided by Zeigler's name during the trial" because he had her initials. App. 18a; *Taylor*, 64 F.4th at 1272. But under *Bagley*, *Strickler*, and *Banks*, it was reasonable for Tassone to assume that the State had complied with its discovery obligations, especially given that the State said it had turned over everything discoverable. T. 73-74. Tassone should not be expected to have deciphered the initials "SZ" from scientific reports, turned over on the eve of trial, as belonging to an important witness the State never mentioned. If the State had disclosed that Zeigler performed a "second-read" quality-control procedure, Tassone would have wanted to speak with her. Given that he testified in postconviction that he would have wanted the Zeigler evidence, PCR 1379-80, there is a reasonable probability that his trial preparation or strategy would have changed.

It was the State's obligation to affirmatively disclose the evidence. *See Kyles v. Whitley*, 514 U.S. 419, 421 (1995). The State did nothing to ensure that Zeigler's analysis was known to the defense, even after her name was disclosed mid-trial. It was not until postconviction that it was revealed the Zeigler would have testified that half of the probes matched by Pollock were actually inconclusive. PCR 1264-65.

The bottom line is that the State made neither trial counsel nor the jury aware that a law enforcement DNA analyst, and second-reader of Pollock's results, would

have testified that only half the minimum four probes that Pollock declared "matched" Taylor at trial were actually conclusive enough for interpretation. The Eleventh Circuit found that Zeigler's suppression and the resulting prejudice to the trial were sufficient for a COA on the *Richardson*-ineffectiveness issue, but not as to Taylor's *Brady* claim. The *Brady* arguments were at least reasonably debatable and were meritorious. This Court should grant certiorari review.

III. The Court should grant certiorari on the Eleventh Circuit's ruling that Taylor was not illegally interrogated without counsel

The Florida Supreme Court rejected Taylor's *Miranda* claim, arising from a statement he made in response to an officer's question without counsel present, on the grounds that the officer's question was not an interrogation, and Taylor was the one who initiated the conversation. App. 111a; *Taylor*, 630 So. 2d at 1041. The Eleventh Circuit ruled that the Florida Supreme Court's decision on interrogation was reasonable under *Rhode Island v. Innis*, 446 U.S. 291 (1980), while referencing but not directly addressing the court's separate finding that relief was barred because Taylor initiated the conversation. App. 20a-21a; *Taylor*, 64 F.4th at 1273.

This Court held in *Innis* that interrogation means "any words or actions" the police "*should know* are reasonably likely to elicit an incriminating response from the suspect." 446 U.S. at 301 (emphasis added). Here, any reasonable officer in Bogers's position should have known that asking Taylor "why," at the moment when Bogers did, was reasonably likely to elicit an incriminating response. This Court should grant review to clarify that questions to a suspect like these—after the suspect has invoked his right to counsel—are intolerable under the Fifth Amendment.

During questioning at the police station, Taylor was told that he was being detained pending execution of a search warrant for his blood sample. Taylor invoked his right to counsel. R. 378-79. After invoking, Taylor was made to wait for a while, and then two officers walked him to the nurse's station at the jail. *Id.* at 379-84. He was taken through a back stairwell and behind three locked doors. T. 499-501. One of the officers, Bogers, stayed for the blood draw. According to his trial testimony, Bogers was aware that Taylor had invoked his right not to answer any further questions without counsel earlier at the police station. T. 500. After the samples were taken, Taylor asked Bogers how long it would take the DNA results to come back. T. 504. Bogers asked why. *Id.* Taylor said that he was wondering when they would be coming back to his house to pick him up. *Id.* Taylor's statement was admitted at trial after the court refused his motion to suppress it under *Miranda.* T. 502-03.

In affirming the denial of relief under *Miranda,* the Eleventh Circuit reasoned that Bogers's question, "why," could be interpreted as an ordinary, run-of-the-mill conversational question. App. 20a; *Taylor*, 64 F.4th at 1273. However, the Eleventh Circuit did not address precedent establishing that no matter how "benign" or "open-ended" a police officer's question may be, the suspect's autonomy and right to counsel are at risk of being violated if such questions are permitted. *See, e.g.*, *United States v. Hunter*, 708 F.3d 938, 947 (7th Cir. 2013). The Eleventh Circuit's decision is inconsistent with those principles.

There was no ordinary, run-of-the-mill reason for Bogers to ask Taylor his question when he did. Bogers was only assisting on Taylor's case for the blood draw.

He would not be following up with Taylor or receiving any further updates. The only reason for Bogers to ask "why" when he did is because he appreciated, consciously or not, that Taylor might say something useful. Bogers may not have intended Taylor to respond with an inculpatory statement, but he should have known that his question was reasonably likely to produce one. Under *Innis*, interrogation includes words the officer "*should know* are reasonably likely to elicit an incriminating response." 446 U.S. at 301 (emphasis added).

The word, "why," inherently prompts a detailed response. The First Circuit, for example, has rightly distinguished cases where an interrogation has occurred by looking to whether the officer's comment requires a response. *See, e.g.*, *United States v. Sweeney,* 887 F.3d 529 (1st Cir. 2023) (finding the officer's response to defendant's post-*Miranda* invocation question was not an interrogation because it did not require a response). Officer Bogers's open-ended question necessarily required a response—and he should have known an incriminating response was reasonably likely.

In finding the opposite, the Eleventh Circuit cited the "exceedingly small" likelihood that Bogers's question would actually elicit an incriminating response. App. 20a-21a; *Taylor*, 64 F.4th at 1273. But that is exactly what happened here. The court's finding that Taylor just happened to be among the exceedingly small class of those who would say something inculpatory in this situation deserves review.

The Florida Supreme Court separately found that Taylor reinitiated the conversation with Bogers by asking him how long the DNA results would take, making any interrogation that came after proper. App. 112a; *Taylor*, 630 So. 2d at

1041. While it is true that, under *Edwards v. Arizona*, 451 U.S. 477 (1981), a suspect may waive his prior invocation of his right to silence by re-initiating a conversation. But under *Oregon v. Bradshaw*, 462 U.S. 1039 (1983), not every bare initiation counts—the suspect must reveal a desire for generalized discussion about their case, not simply make a routine inquiry related to his custodial circumstances.

The Eleventh Circuit itself has clarified that, even if a suspect reinitiates a conversation, the officer may not "ask questions or make statements which open up a more generalized discussion relating directly or indirectly to the investigation." *Christopher v. State of Fla.*, 824 F.2d 836, 845 (11th Cir. 1987) (citing *Bradshaw*, 462 U.S. at 1045). That is, unless the suspect's re-initiation indicates a waiver of their previously invoked rights. *Id.* Here, Taylor's administrative question about the timing of results related only indirectly to the investigation and does not indicate a desire to talk about his case.

The Florida Supreme Court did not apply *Bradshaw*—it simply relied on the fact that Taylor was the first person in the conversation to speak. Under *Bradshaw*, Taylor's question was an administrative query related to the timing of DNA results, and hardly a knowing and voluntary waiver.

Without directly addressing the Florida Supreme Court's mistake on re-initiation, the Eleventh Circuit suggested a dichotomy whereby if Taylor's question to Bogers was casual enough to not constitute waiver, then Bogers's question was causal enough to not constitute interrogation. App. 20a; *Taylor*, 64 F.4th at 1273. That inappropriately conflated the Fifth Amendment standards for waiver and

interrogation. Waiver focuses on Taylor's constitutional protection after invoking his right to counsel. Under *Bradshaw*, only an expression of a desire to have a generalized discussion about the case is enough to waive a prior invocation. 462 U.S. at 1045-46. In contrast, deciding whether words or actions constitute interrogation under *Innis* requires focusing on what a professional police officer should know about suspect behavior. The bar for waiver is higher and not tethered to the interrogation analysis. Indeed, this Court has already recognized in *Bradshaw* that, "the inquiries are separate, and clarity of application is not gained by melding them together." *Id.* That Taylor's question did not constitute waiver has no bearing on whether Bogers's question was interrogation. This Court should grant certiorari and address these *Miranda* issues in conjunction with Taylor's DNA-related claims.

CONCLUSION

The Court should grant the petition for a writ of certiorari and review the Eleventh Circuit's decision.

Respectfully submitted,

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