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Supreme Court No. 86119-6

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

BRYAN EDWARD ALLEN,

Petitioner.

SUPPLEMENTAL BRIEF OF PETITIONER

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ORIGINAL

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A. INTRODUCTION

Eyewitness identifications are demonstrably unreliable, and the correlation between eyewitness misidentification and wrongful conviction is proven by empirical research and recognized by this Court. The problems endemic to eyewitness identifications are particularly acute in cases involving cross-racial identifications. At the same time, however, juries credit eyewitness identification testimony more than other, more reliable forms of evidence. Further, an uninformed jury makes lay assumptions about the trustworthiness of an eyewitness identification that are directly contrary to the research. These factors irreducibly undermine the fairness of convictions based upon eyewitness identifications, in violation of due process.

Although expert testimony remains the most effective way to educate juries regarding the dangers of undue reliance upon eyewitness identification testimony, experts are costly and their testimony is often difficult to secure. For these reasons, many courts now require a jury instruction be issued regarding eyewitness identifications, particularly in cases involving a cross-racial identification.

This case – involving a cross-racial identification made under circumstances that call into question the identification’s reliability – bears the hallmarks associated with wrongful conviction stemming from

eyewitness misidentification. Washington should join the many jurisdictions requiring a special jury instruction on cross-racial eyewitness identification testimony. Such an instruction would not violate our state constitutional prohibition on comments on the evidence, and would minimize the risk of unjust conviction. This Court should hold the failure to give such an instruction in this case violated due process.

In addition, this Court has held that in a harassment prosecution, the First Amendment demands a finding that a threat was a "true threat." Lower courts, however, have characterized this constitutional prerequisite as a definitional term, creating an unacceptable risk that a conviction will be based on protected speech. This Court should expressly hold that the "true threat" requirement is an essential element of any harassment prosecution that must be pled in the information and included in the "to convict" instruction.

Finally, this case involves a remarkably egregious instance of prosecutorial vouching that violated the prosecutor's duty of candor to the tribunal. This misconduct separately warrants reversal of the conviction.

B. ISSUES PRESENTED FOR REVIEW

1. Should this Court exercise its plenary authority to require juries be instructed on the problems associated with eyewitness identification testimony? Is the issuance of a jury instruction in cases involving a cross-

racial identification constitutionally necessary to ensure convictions meet basic standards of due process?

2. To avoid intrusions on protected speech, only "true threats" may be criminalized under the First Amendment. Is the constitutionally-necessary prerequisite that a threat was a "true threat" an essential element of a harassment statute that must be pled in the information and included in the "to-convict" instruction?

3. Should this Court hold that prosecutorial misconduct that vouched for the complainant and falsely painted him as a model citizen violated the prosecutor's duty of candor to the tribunal and denied Allen a fair trial?

C. STATEMENT OF THE CASE

1. Circumstances giving rise to the flawed identification. While walking in the University District of Seattle at dusk, Gerald Kovacs, who is white, was confronted by two young African American men who tried to sell him marijuana. 10/21/09 RP 6, 8.¹ Annoyed, Kovacs told them to "fuck off," and the smaller of the two men started cursing and swearing at Kovacs. 10/21/09 RP 9-10. Kovacs told the men to leave him alone, and eventually they walked away. Id.

Several minutes later, Kovacs noticed that the young men were

¹ References to the verbatim report of proceedings are by date, followed by page number.

following him. The smaller man, who was wearing a red hooded sweatshirt and had an afro, told Kovacs, "My friend's going to shoot you." 10/21/09 RP 11. The other young man then said, "I'm going to kill you, you bitch," and lifted the front of his own hooded sweatshirt to reveal a handgun at his waist. Id. Kovacs fled to a nearby gas station, where he called the police. 10/21/09 RP 12. Kovacs provided a description of the individual who allegedly had the gun to the 9-1-1 dispatcher.² Kovacs mentioned the gun to the dispatcher three times, but otherwise was unable to provide a clear description of the suspect apart from his race and his clothing. 10/22/09 RP 1-5.

Based on this report, some distance away, a University of Washington patrol officer attempted to stop two young African American men. One of the young men was wearing a white t-shirt, and the other, later identified as petitioner Bryan Allen, was wearing a hooded sweatshirt and dark pants, similar to what Kovacs described. 10/21/09 RP 40. The young man in the t-shirt ran away, but Allen did not. 10/21/09 RP 43.

Allen was soon detained, and Kovacs was transported for a show-up identification procedure. To "set[] the stage" for the show-up, a police officer testified that he "pull[ed] [Allen's] hat down a little bit on his head

² The 9-1-1 call was transcribed during the proceedings on October 22, 2009 at pages 1-6. Those pages are attached for the Court's convenience as Appendix A to this brief.

and place[d] his sunglasses over his eyes, as he had been during the crime.” 10/21/09 RP 70.

Except for his clothes and his race, Allen did not match the description provided by Kovacs. 10/21/09 RP 66. Kovacs had described the man with the gun as African American, in his mid-20s, 5’9” tall and weighing about 220 pounds. 10/21/09 RP 32-33. Allen is 6’1” tall and weighed about 280 pounds. 10/21/09 RP 66. Kovacs nevertheless identified Allen as the person who had threatened him. 10/21/09 RP 25-26. Allen was searched incident to his arrest and no gun was found. 10/21/09 RP 44, 73. Allen also had no marijuana or cash on his person. 10/21/09 RP 73.

2. Trial court proceedings. The King County prosecutor charged Allen with felony harassment. CP 1. Prior to trial, Allen requested the court instruct the jury regarding cross-racial identifications.³ CP 61-62. The court refused Allen’s request. 10/21/09 RP 75-76.

In rebuttal closing argument, the prosecutor attempted to bolster Kovacs credibility by vouching for his character:

So what’s most important here is whether or not you accept Mr. Kovacs. I would point out to you from the evidence Mr. Kovacs is not a flake. He’s not some derelict. The evidence would show he’s a teacher, very passionate about his work. Not only is he a teacher he’s a special ed teacher.

³ Allen’s proposed instructions are reproduced in Appendix B.

10/21/09 RP 105-06. Allen objected to this argument on the basis that the State was vouching for Kovacs' credibility, but the court overruled the objection. 10/21/09 RP 106. After two days of deliberation, Allen was convicted as charged.

3. Court of Appeals decision. On appeal, Allen argued the denial of the cross-racial identification instruction violated his right to a defense and to due process. Allen also contended the "true threat" requirement of the felony harassment statute is an element that must be pled in the information and included in the to-convict instruction, and that prosecutorial misconduct in closing argument denied him a fair trial. The Court of Appeals found Allen's arguments regarding the cross-racial identification instruction persuasive but, under this Court's opinion in State v. Laureano, 101 Wn.2d 745, 682 P.2d 889 (1984), reversed on other grounds, State v. Brown, 111 Wn.2d 124, 132-33, 761 P.2d 588 (1988), the Court felt constrained to affirm. The Court rejected Allen's remaining arguments. This Court granted review.

D. ARGUMENT

1. A SPECIAL INSTRUCTION IN CASES INVOLVING A CROSS-RACIAL IDENTIFICATION IS NECESSARY TO ENSURE CONVICTIONS MEET BASIC REQUIREMENTS OF DUE PROCESS.

a. The fallibilities of cross-racial identifications are established beyond dispute but seldom understood by juries. More wrongful convictions stem from mistaken eyewitness identifications than from all other causes combined. United States v. Brownlee, 454 F.3d 131, 142 (3rd Cir. 2006); State v. Riofta, 166 Wn.2d 358, 371, 209 P.3d 467 (2009) (79% of DNA exonerees were falsely convicted based upon eyewitness testimony) (citing Brandon L. Garrett, Judging Innocence, 108 Colum. L. Rev. 55, 60 (2008)). Numerous factors – such as stress, weapon focus, the duration and conditions of the event, the witness’s and suspect’s race, as well as suggestive police procedures – may infect the integrity of an eyewitness’s memory and irrevocably corrupt an identification. State v. Henderson, 208 N.J. 2d 208, 27 A.3d 872, 895 (2011). All of these variables must be considered in assessing an identification’s reliability. State v. Henderson, Report of the Special Master 10 (2010)⁴ (hereafter, “Special Master’s Report”).

⁴ In Henderson, infra, after granting certification and hearing oral argument, the New Jersey Supreme Court remanded the case and appointed a Special Master to evaluate scientific and other evidence about eyewitness identifications. Seven experts testified at the hearing and hundreds of scientific studies were considered. The New

Memory is a “constructive, dynamic, and selective process” that can be impaired, contaminated, and even falsified. Special Master’s Report at 10. Distorted and unreliable eyewitness “memories” severely compromise the ability of jurors to appropriately evaluate the accuracy of eyewitness testimony. Id. at 48-50. “Because the eyewitness is testifying honestly (i.e., sincerely), he or she will not display the demeanor of the dishonest or biased witness.” Jules Epstein, The Great Engine that Couldn’t: Science, Mistaken Identity, and the Limits of Cross-Examination, 36 Stetson L. Rev. 727, 772 (2007).

Further, the findings of the social science research are counterintuitive for the average juror. Jacqueline McMurtrie, The Role of the Social Sciences in Preventing Wrongful Convictions, 42 Am. Crim. L. Rev. 1271, 1277 (2005). Jurors “seldom enter a courtroom with the knowledge that eyewitness identifications are unreliable.” Brownlee, 454 F.3d at 142 (citation omitted); see also, State v. Long, 721 P.2d 483, 490 (Ut. 1986) (since jurors do not appreciate the fallibility of such testimony, they tend to give eyewitness identifications undue weight). Cross-examination by even a skilled practitioner is ineffective at addressing an

Jersey Supreme Court adopted most of the Special Master’s findings. Henderson, 27 A.3d at 877. The Special Master’s report is available at <http://www.judiciary.state.nj.us/pressrel/HENDERSON%20FINAL%20BRIEF%20.PDF%20%2800621142%29.PDF> (last accessed December 6, 2011).

uninformed lay juror's stock assumption that a confident witness is a reliable witness. Epstein, 36 Stetson L. Rev. at 772.

Though eyewitness identifications are generally subject to mistake, these problems are amplified in the case of cross-racial identification. State v. Allen, 161 Wn. App. 727, 735, 255 P.3d 784 (2011) (court characterizes cross-racial identifications as "especially problematic"). The research studies show that due to "own-race bias" or "cross-race impairment," a witness's ability to make an accurate identification is severely undermined when she is asked to identify a person of another race. John P. Rutledge, They All Look Alike: The Inaccuracy of Cross-Racial Identifications, 28 Am. J. Crim. L. 207, 211 (2001). This bias is strongest "when white witnesses attempt to identify black subjects." Id. (quoting People v. McDonald, 690 P.2d 709, 720 (Cal. 1984)).

40% of DNA exonerations in cases resting on eyewitness identifications involved cross-racial identifications. The Innocence Project, Facts on Post-Conviction DNA Exonerations.⁵ A meta-analysis reviewing 39 research articles, involving over 5,000 subjects, found a mistaken identification was 1.56 times more likely in other-race conditions. Special Master's Report at 48. At the same time, only 38% to

⁵ Available at: http://www.innocenceproject.org/Content/Facts_on_PostConviction_DNA_Exonerations.php (last accessed November 15, 2011).

47% of jurors agree that cross-race bias is an issue that may affect the reliability of an identification. Henderson, 27 A.3d at 911 (citation omitted).

b. Given the strong evidence that cross-racial identifications are untrustworthy, an instruction should be provided to the jury in all such cases. “When social scientific experiments in the field of eyewitness identification produce ‘an impressive consistency in results,’ those results can constitute adequate data on which to base a ruling.” Henderson, 27 A.3d at 917; State v Ferguson, 804 N.W.2d 586, 607 (Minn. 2011) (Anderson, J., concurring) (studies presented at hearing before New Jersey Special Master “are based on serious and verifiable science,” and consensus among 90% or more cognitive psychologists, social psychologists, and other experts that research on eyewitness misidentification is reliable “marks a dramatic change in the scientific community’s understanding of eyewitness identification”). In recognition of the fact that the admission of eyewitness identification testimony may undermine the integrity of a conviction, the New Jersey Supreme Court adopted two significant, substantive changes to its state procedures. First, the Court jettisoned its pre-existing test for the admission of such evidence, modeled on the standard enunciated in Manson v. Brathwaite, 432 U.S. 98, 112-16, 97 S.Ct. 2243 53 L.Ed.2d 140 (1977). Henderson,

27 A.3d at 918.⁶ Second, the Court concluded that “courts should develop and use enhanced jury charges to help jurors evaluate eyewitness identification evidence.” *Id.* at 919, 924.

The Court directed that such instructions must be given along with all concluding instructions at the close of a case and, if warranted, during the trial itself. *Id.* This rule was dictated by basic considerations of due process: “it is the court’s obligation to help jurors evaluate evidence critically and objectively to ensure a fair trial.” *Id.*

“We are not immune from wrongful convictions based upon mistaken eyewitness identifications.” *Allen*, 161 Wn.2d at 757 (Ellington and Cox, JJ., concurring). Indeed, as Judges Ellington and Cox recognized below, “Basic fairness requires that jurors be informed about established frailties in certain kinds of evidence when such frailties are not common knowledge.” *Id.* (emphasis added); see also *Ferguson*, 804 N.W.2d at 609 (Anderson, J., concurring) (advocating that trial court “look closely at New Jersey’s safeguards and determine if those safeguards are appropriate here” and, if expert testimony is not “otherwise appropriate,” recommending the lower court “consider alternative

⁶ Based on the extensive hearing and expert testimony before the Special Master, the New Jersey Supreme Court concluded that the Manson test “does not adequately meet its stated goals: it does not provide a sufficient measure for reliability, it does not deter, and it overstates the jury’s innate ability to evaluate eyewitness testimony.” 27 A.3d at 876.

approaches to educating jurors on the variables that “can lead to misidentifications”).

The Henderson Court also saw a pragmatic benefit to requiring special jury instructions in cases involving cross-racial identifications:

Jury charges offer a number of advantages: they are focused and concise, authoritative (in that juries hear them from the trial judge, not a witness called by one side), and cost-free; they avoid possible confusion to jurors created by dueling experts; and they eliminate the risk of an expert invading the jury’s role or opining on an eyewitness’ credibility.

Henderson, 27 A.3d at 925.⁷ In addition, as the Court of Appeals observed below, “[j]urors are more apt to comfortably discuss racial differences with such an instruction.” Allen, 161 Wn. App. at 737 (citing American Bar Association Criminal Justice Section Report to House of Delegates on Cross-Racial Identification 2 (2008) (“ABA Report”).

In short, the scientific data is irrefutable. The underlying studies raise a serious question as to the reliability of convictions founded on eyewitness testimony, which concern is amplified in cases involving cross-racial identifications. And, to a large extent, a jury instruction would ameliorate these concerns. This Court should require an instruction

⁷ Without criticizing the New Jersey Supreme Court’s summary of the advantages of an instruction, this Court should note the decisions and studies that have found an instruction alone is “not a panacea” and should not serve as a substitute for expert testimony. See generally State v. Clopten, 223 P.3d 1103, 1107-1115 (Ut. 2009) (discussing cases and studies).

be given in every case involving a cross-racial identification.

c. Alternatively, in cases where a cross-racial identification is a key issue in the case, but little corroboration exists or circumstances otherwise call into question the identification's reliability, an instruction ensures a conviction comports with due process. In the alternative, this Court should join the many jurisdictions that require a jury instruction be given where, as here, a cross-racial identification is a key issue in the case, but little corroboration exists or circumstances otherwise call into question the identification's reliability.

The rule in New Jersey for more than 10 years was that a cross-racial identification instruction must be given in every case in which "identification is a critical issue in the case, and an eyewitness's cross-racial identification is not corroborated by other evidence giving it independent reliability." State v. Cromedy, 158 N.J. 112, 727 A.2d 457, 467 (1999), abrogated by Henderson, 27 A.2d at 926 ("the additional research on own-race bias . . . and the more complete record about eyewitness identification in general, justify giving the charge whenever cross-racial identification is in issue at trial"). Many other jurisdictions require identification instructions under like circumstances. United States v. McLaurin, 22 M.J. 310, 312 (1986) (urging issuance of instruction when identification is a primary issue in the case, noting that most federal

courts are in accord with this rule, and citing cases); United States v. Telfaire, 469 F.2d 552, 557 (D.C. Cir. 1972) (setting forth model instruction to be used in future cases and admonishing that “a failure to use this model . . . would constitute a risk in future cases that should not be ignored”); State v. Ledbetter, 275 Conn. 534, 881 A.2d 290 (2005) (directing courts to charge the jury regarding the risk of misidentifications where law enforcement has failed to follow specified procedure); People v. Wright, 45 Cal.3d 1126, 755 P.2d 1049, 1058-59, 248 Cal. Rptr. 600 (1988) (approving instruction that lists factors pertinent to identification in neutral manner); cf., also, Cal. Jury Inst. – Crim. 2.92; Long, 721 P.2d at 492 (instruction must be given whenever eyewitness identification is a central issue in the case and such an instruction is requested by the defense); Brooks v. State, 380 So.2d 1012, 1014 (Ala. Cr. App. 1981) (instruction “deal[ing] realistically with the shortcomings and trouble spots of the identification process” should be given where principle not covered by court’s oral charge); State v. Warren, 230 Kan. 385, 635 P.2d 1236 (1981) (instruction should be given “in any criminal action” in which eyewitness identification is a critical part of prosecution’s case and “there is a serious question about the reliability of the identification”); Oh. Rev. Code 2933.33 (detailing procedures for administration of lineups and

providing that jury “shall be instructed” that it may consider evidence of noncompliance in determining the reliability of an identification).

In Long, the Court faulted the “narrowness of the vision of most lawyers and judges,” and commented, “[w]e tend to comfortably rely upon settled legal precedent and practice, especially when long-settled technical rules are concerned, and to largely ignore the teachings of other disciplines, especially when they contradict long-accepted legal notions.” 721 P.2d at 491. It is well past time that Washington courts acknowledge and seek to mitigate the effects of cross-racial identification testimony upon the reliability of convictions. This Court should mandate a cross-racial identification instruction be given in all cases where little evidence is adduced to corroborate a cross-racial identification or circumstances otherwise call into question the identification’s reliability.

d. Washington’s prohibition on judicial comments on the evidence poses no impediment to the issuance of a special jury instruction on cross-racial identifications. Constrained by this Court’s opinion in Laureano, the Court of Appeals declined to hold that the refusal to give Allen’s requested cross-racial identification instruction was error. 161 Wn. App. at 745; see also id. at 756 (“Under State v. Laureano, we are constrained to affirm.”) (Ellington and Cox, J., concurring). At the same time, the Court observed that this Court has approved comparable jury

instructions over complaints that the instructions were comments on the evidence. Id. at 743-44 (citing cases).

In Laureano, after a very brief discussion, this Court concluded a proposed instruction regarding the reliability of cross-racial identifications similar to that approved by the D.C. Circuit Court of Appeal in Telfaire was a comment on the evidence. Laureano, 101 Wn.2d at 767-68. This conclusion was based on two Court of Appeals decisions, State v. Jordan, 17 Wn. App. 542, 564 P.2d (1977), and State v. Edwards, 23 Wn. App. 893, 600 P.2d 566 (1979). Both decisions found the instructions improper because they called into question the credibility of certain witnesses. Jordan, 17 Wn. App. at 545; Edwards, 23 Wn. App. at 896-97. This emphasis, however, was inconsistent with this Court's decisions construing the prohibition against judicial comments on the evidence.

i. To constitute an unconstitutional comment on the evidence, an instruction must convey the court's attitude towards the merits of the cause or resolve disputed facts. This Court has held:

Art. IV, § 16 prohibits a judge from conveying to the jury his or her personal attitudes toward the merits of the case. In addition, a court cannot instruct the jury that matters of fact have been established as a matter of law.

State v. Becker, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997). This Court has consistently interpreted article IV, section 16 in this way. In State v.

Carothers, 84 Wn.2d 256, 525 P.2d 731 (1974), reversed on other grounds by State v. Harris, 102 Wn.2d 148, 685 P.2d 584 (1984), considering a constitutional objection to an accomplice liability instruction similar to that contained in WPIC 6.05, this Court emphasized, “To constitute a comment on the evidence, it must appear that the court’s attitude toward the merits of the cause are reasonably inferable from the nature or manner of the court’s statements.” 84 Wn.2d at 257 (emphasis added).

Likewise, in State v. Lane, 125 Wn.2d 825, 889 P.2d 929 (1995), this Court explained, “The purpose of prohibiting judicial comments on the evidence is to prevent the trial judge’s opinion from influencing the jury.” 125 Wn.2d at 838 (emphasis added). This Court stressed, “The touchstone of error in a trial court’s comment on the evidence is whether the feeling of the trial court as to the truth value of the testimony of a witness has been communicated to the jury.” Id.

Thus, in Lane this Court held that an instruction resolving the disputed question of the reason for early release of a key cooperating witness “charged the jury with a fact and expressly conveyed [the court’s] opinion regarding the evidence.” Id. at 839. In Becker this Court concluded a special verdict form that resolved whether a facility was a school for purposes of a sentencing enhancement removed a disputed fact from the jury’s consideration and “was tantamount to a directed verdict.”

Becker, 132 Wn.2d at 64-65. In State v. Boss, 167 Wn.2d 710, 223 P.3d 506 (2009), this Court concluded an instruction providing that Child Protective Services had custody of a child commented on the evidence because “it was for the jury to determine whether it believed the State’s evidence and witnesses and whether the State had proved beyond a reasonable doubt that CPS had a right to physical custody.” Id. at 720-21.

ii. A cross-racial identification instruction would neither resolve disputed facts nor convey the court’s attitude towards the merits, and would help to ensure convictions are obtained by just means.

By contrast, and pertinent here, in Carothers, this Court held that an instruction to view the testimony of an accomplice with caution “is an indication not of the judge’s attitude toward the testimony of a particular witness, but the attitude of the courts generally toward the testimony of witnesses of this type.” 84 Wn.2d at 267-68. This Court stressed,

The courts have an expertise upon this subject which the ordinary citizen cannot be expected to have. They have observed that innocent persons may be sent to prison or to death upon the testimony of an accomplice. At the same time such testimony is not invariably false and it may be the only proof available.

Balancing the right of society to punish the guilty against the duty to protect an innocent person falsely involved by another who has been offered leniency or immunity for his testimony, the courts have evolved the rule that the jury must be advised that the accomplice is a special kind of

witness, required, as a matter of law, to be given a special kind of attention[.]

84 Wn.2d at 267-68, cf., also, State v. Zimmerman, 130 Wn. App. 170, 181, 121 P.3d 1216 (2005) (no comment on the evidence where instruction provided, “[i]n order to convict a person of any crime defined in [chapter 9A.44 RCW, sex offenses] it shall not be necessary that the testimony of the alleged victim be corroborated”); Murgatroyd v. Dudley, 184 Wash. 222, 230-31, 50 P.2d 1025 (1935) (expert witness instruction not unconstitutional comment); State v. Carr, 13 Wn. App. 704, 710, 537 P.2d 844 (1975) (instruction stating that a person who has been convicted of a crime “is a competent witness in any civil or criminal proceeding, and such prior conviction may be considered by you only in determining what weight or credibility should be allowed his testimony as a witness in this case” not unconstitutional comment).

The Court of Appeals in Allen observed, “[t]he rationale applied in Carothers could apply in equal force to a cross-racial eyewitness identification instruction, [where an identification] is not invariably false and at times is the only proof available to the State but has resulted in the convictions of innocent people.” 161 Wn. App. at 745. One of the instructions proposed by Allen mirrored that endorsed by the American

Bar Association in the Criminal Justice Section's 2008 Report to the House of Delegates,⁸ and stated;

In this case, the defendant, Bryan [Allen], is of a different race than Gerald Kovacs, the witness who has identified him. You may consider, if you think it is appropriate to do so, whether the fact that the defendant is of a different race than the witness has affected the accuracy of the witness'[s] original perception or the accuracy of a later identification. You should consider that in ordinary human experience, some people may have greater difficulty in accurately identifying members of a different race than they do in identifying members of their own race. You may also consider whether there are other factors present in this case which overcome any such difficulty of identification.

Allen, 161 Wn. App. at 733; Appendix B.

This instruction, like the accomplice instruction that this Court approved in Carothers, does not convey a trial court's attitude towards the believability of Kovacs' testimony. It does however shed light on cross-racial identification testimony in general, permitting the jury to benefit from the court's "expertise on this subject which ordinary citizens cannot be expected to have." Carothers, 84 Wn.2d at 267-68. In Long, the Utah Supreme Court "[saw] little merit to [the] argument" that a cautionary instruction would comment on the evidence or suggest the weight to be accorded to certain testimony. 721 P.2d at 492.

A well-constructed cautionary instruction will not permit a judge to opine as to the credibility of the testimony. It will

⁸ The ABA Report also sets forth several cross-racial identification instructions approved by various jurisdictions. ABA Report at 4-6.

only pinpoint identification as a central issue and highlight the factors that bear on the reliability of that identification. This will do no more than apprise the jury of the inherent limitations of eyewitness identification. Such an instruction both “respect[s] the jury’s function and strike[s] a reasonable balance between protecting the innocent and convicting the guilty.” [This] approach . . . offers a defendant some protection from false conviction, while ensuring the efficacy of the jury system by providing jurors with the knowledge necessary for sound decision making.

Id. (internal citation omitted).

In short, far from conveying the court’s attitude towards the merits of a cause, a cross-racial identification instruction fulfills “the court’s obligation to help jurors evaluate evidence critically and objectively to ensure a fair trial.” Henderson, 27 A.3d at 925. This Court should reject any claim that a cross-racial identification instruction would violate Washington’s constitutional prohibition on judicial comments on the evidence. To the extent that Laureano may require a different result, Laureano should be overruled.

e. The failure to give an instruction in this case denied Allen due process and his right to a defense. The federal and state constitutions “guarantee[] criminal defendants ‘a meaningful opportunity to present a complete defense.’” Crane v. Kentucky, 476 U.S. 683, 690, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986) (quoting California v. Trombetta,

467 U.S. 479, 485, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984)); U.S. Const. amend. VI; Const. art. I, § 22.

Numerous factors call into question the reliability of Kovacs' identification of Allen as the person who threatened him. The suspect was of a different race than Kovacs. Kovacs' ability to view the suspect was limited by the time of day (dusk) and the brevity of the encounter. Further, Kovacs' attention may have been distracted by the voluble other suspect as well as by the gun that allegedly was displayed.

Before the show-up, the police had Allen pull down his hat and put on his sunglasses so he more closely resembled the suspect. In addition, there was little to no evidence corroborating the identification testimony – no gun was found, no money was found, no drugs were found, and the young man with Allen did not resemble the armed suspect's companion. As evidenced by the length of the jury's deliberation – two days, for one day of testimony – and the jury's several inquiries to the court, the jury plainly was troubled by this want of corroboration. A cross-racial jury instruction may well have meant the difference between a guilty verdict and an acquittal. This Court should conclude that the failure to give Allen's requested instruction denied him due process and his right to a defense.

2. THE "TRUE THREAT" REQUIREMENT IS AN ESSENTIAL ELEMENT OF A HARASSMENT OFFENSE THAT MUST BE PLED IN THE INFORMATION AND INCLUDED IN THE "TO CONVICT" INSTRUCTION.

a. Principles of due process require essential elements of an offense be pled in the information and included in the "to convict" instruction. Real notice of the nature of the charge is "the first and most universally recognized requirement of due process." Henderson v. Morgan, 426 U.S. 637, 645, 96 S.Ct. 2253, 49 L.Ed.2d 108 (1976) (quoting Smith v. O'Grady, 312 U.S. 329, 334, 61 S.Ct. 572, 85 L.Ed. 859 (1941)); U.S. Const. amend. XIV; Const. art. I, § 3. Thus, due process requires that all facts essential to punishment – whether statutory or nonstatutory – be pled in the information and proved beyond a reasonable doubt. State v. Goodman, 150 Wn.2d 774, 784, 83 P.3d 410 (2004). At a minimum, "the defendant would need to be aware of the acts and the requisite state of mind in which they must be performed to constitute a crime." State v. Osborne, 102 Wn.2d 87, 93, 684 P.2d 683 (1984) (citation omitted).

Further, the "to convict" instruction must contain all elements essential to the conviction. State v. Smith, 131 Wn.2d 258, 263, 930 P.2d 917 (1997); State v. Emmanuel, 42 Wn.2d 799, 819, 259 P.2d 845 (1953). A reviewing court "may not rely on other instructions to supply the

element missing from the 'to convict' instruction." State v. DeRyke, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003).

b. The "true threat" requirement is an element. Where a statute "criminalizes pure speech," it "must be interpreted with the commands of the First Amendment clearly in mind." State v. Kilburn, 151 Wn.2d 36, 84 P.3d 1215 (2004) (quoting State v Williams, 144 Wn.2d 197, 206-07, 26 P.3d 890 (2001), and Watts v. United States, 394 U.S. 705, 707, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969)). Only "true threats" may be prohibited without violating the First Amendment.⁹ Kilburn, 151 Wn.2d at 43.

This Court has reiterated this basic principle in both the criminal and civil arenas. In re Detention of Danforth, __ Wn.2d __, __ P.3d __, 2011 Westlaw 5436307 at 9-10, 16 (November 10, 2011) (a majority of this Court agrees that a "true threat" is required for civil commitment under RCW 71.09.020); State v. Schaler, 169 Wn.2d 274, 287-88, 236 P.3d 858 (2010) (reversing for insufficiency of instruction regarding constitutionally-required mens rea); State v. Johnston, 156 Wn.2d 355, 364-65, 127 P.3d 707 (2006) ("the jury must be instructed that a

⁹ In Kilburn this Court stated:

A true threat is a statement made in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted . . . as a serious expression of intention to inflict bodily harm upon or take the life of another person.

Kilburn, 151 Wn.2d at 43.

conviction under RCW 9.61.160 requires a true threat and must be instructed on the meaning of a true threat”) (emphases added).

Notwithstanding this Court’s decisions, however, the Court of Appeals repeatedly has refused to hold that the true threat requirement is an element of a harassment offense. Allen, 161 Wn. App. at 755-56; State v. Atkins, 156 Wn. App. 799, 236 P.3d 897 (2010) (holding that the “constitutional concept” of a true threat merely limits the scope of the threat requirement); State v. Tellez, 141 Wn. App. 479, 484, 170 P.3d 75 (2007) (holding that merely defining the term, “true threat,” suffices to protect First Amendment rights).

The Court of Appeals inverts the analysis. The “true threat” requirement does not “limit[] the scope of the essential threat element.” Atkins, 156 Wn. App. at 805. Rather, only true threats may support a prosecution under a harassment statute. Virginia v. Black, 538 U.S. 343, 359-60, 123 S.Ct. 1536, 155 L.Ed.2d 535 (2003); Kilburn, 151 Wn.2d at 43; Johnston, 156 Wn.2d at 364-65.

While the federal circuit courts are split regarding whether the analysis contains a subjective or only an objective component, the federal courts unanimously agree that the “true threat” requirement is an element. See e.g. United States v. Bagadasarian, 652 F.3d 1113, 1118 (9th Cir. 2011) (discussing application of true threat requirement to prosecution for

threats to presidential candidate or former President); United States v. D’Amario, 330 Fed. Appx. 409, 413 (3rd Cir. 2009) (two “essential elements of prosecution” for violation of 18 U.S.C. § 115 are true threat and intent to intimidate); United States v. Fuller, 387 F.3d 643, 647 (7th Cir. 2004) (“the only two essential elements for [a prosecution under 18 U.S.C. § 871] are the existence of a true threat to the President and that the threat was made knowingly and willfully”); United States v. Francis, 164 F.3d 120, 123 n. 4 (2nd Cir. 1999) (“We have routinely used the term “true threat” in setting forth the second element of the crime...”). These decisions are entirely consistent with this Court’s construction of the “true threat” requirement. Because only “true threats” may be prosecuted, the “true threat” requirement is an essential element of a harassment statute.

c. The omission of the element was prejudicial error.

Relying on its own decisions and ignoring the federal authorities cited by Allen, the Court of Appeals concluded that Allen’s challenge did not raise a manifest constitutional error. 161 Wn. App. at 756. But the Court could reach this result only by rejecting the premise that the “true threat” requirement is an element.

The “to convict” instruction “carries with it a special weight” because it is the “yardstick” by which the jury measures guilt or innocence. State v. Mills, 154 Wn.2d 1, 6, 109 P.3d 415 (2005). For this

reason, the omission of an essential element from the instruction is a manifest error affecting a constitutional right that may be reviewed for the first time on appeal. *Id.* Here, the omission of this element denied Allen the notice to which he was constitutionally entitled, and permitted the jury to convict even if it concluded that the young man who allegedly threatened Kovacs was engaging in mere braggadocio. This Court should conclude the omission of the essential "true threat" element was error.

3. THE PROSECUTOR VIOLATED HIS DUTIES OF CANDOR TO THE TRIBUNAL AND ENGAGED IN PREJUDICIAL MISCONDUCT BY VOUCHING FOR THE COMPLAINANT.

Like all lawyers, a prosecuting attorney has a duty of candor to the tribunal. RPC 3.3. A prosecutor also has a duty to ensure that an accused person receives a fair trial.

A prosecutor serves two important functions. A prosecutor must enforce the law by prosecuting those who have violated the peace and dignity of the state by breaking the law. A prosecutor also functions as the representative of the people in a quasijudicial capacity in a search for justice . . . Defendants are among the people the prosecutor represents. The prosecutor owes a duty to defendants to see that their rights to a constitutionally fair trial are not violated.

State v. Monday, 171 Wn.2d 667, 676, 257 P.3d 551 (2011) (citations omitted); Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L.Ed. 1314 (1935).

A prosecutor who vouches for a witness commits misconduct. State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). Vouching may occur in two ways: the prosecutor may place the prestige of the government behind the witness or may indicate that information not presented to the jury supports the witness's testimony. United States v. Roberts, 618 F.2d 530, 533 (9th Cir. 1980). This second type of vouching "may occur more subtly than personal vouching, and is also more susceptible to abuse." Id.

A prosecutor's misuse of evidence may also constitute misconduct that denies an accused person a fair trial. See e.g. State v. Fisher, 165 Wn.2d 727, 747-48, 202 P.3d 937 (2009) (prosecutor's misuse of ER 404(b) evidence admitted for a limited purpose required reversal); State v. Jones, 144 Wn. App. 284, 292-93, 183 P.3d 307 (2008) (reversing conviction where prosecutor improperly bolstered credibility of chief witness by alluding to facts not in evidence).

This prosecutor prevailed upon the trial court to exclude evidence that Kovacs had been convicted of attempted vehicular assault. 10/19/09 RP 8-10. Then, in his closing argument, the prosecutor solicited the jury to consider matters outside the record – i.e., that because Kovacs was "not a flake . . . not some derelict" and was a "special ed[ucation] teacher" his identification testimony should be viewed as more reliable than the

testimony of an ordinary witness. 10/21/09 RP 105-06. The prosecutor made this argument after stressing that “the most important thing” was whether or not the jury credited Kovacs’ testimony. 10/21/09 RP 106.

In fact, there were substantial reasons to doubt Kovacs. Kovacs used racially charged language to characterize his assailants, stating “they stuck out like a sore thumb” in the University District and “looked like gang bangers.” 10/21/09 RP 26-27. Kovacs was “100% positive” he saw a gun but Allen, the person arrested for the crime, was unarmed. 10/21/09 RP 29. If the State’s theory were to be believed, Kovacs also made significant errors in estimating his assailant’s height and weight. But because the prosecutor succeeded in excluding evidence of Kovacs’ prior serious felony conviction, he could falsely paint Kovacs as a model citizen, thereby ‘whitewashing’ his testimony.

The Court of Appeals first found that the argument was based on the evidence admitted at trial. Allen, 161 Wn. App. at 747-48. But whether Kovacs was a special education teacher or had otherwise served his community was not a fact at issue, nor were these facts relevant to Kovacs’ credibility as an eyewitness. Second, the Court wrongly accused Allen of challenging the court’s evidentiary ruling “via the backdoor.” Id. at 748. While it may have been appropriate for the court to exclude the conviction under ER 609, the ruling did not grant the prosecutor a blank

check to falsely portray its seminal witness. This Court should conclude that the prosecutor violated his ethical duties of candor to the tribunal and to seek justice, not convictions by vouching for the complainant and misrepresenting facts to the jury. Allen's conviction should be reversed.

F. CONCLUSION

This Court should exercise its plenary authority to require a special instruction be given to the jury whenever a cross-racial identification is an issue in the case. This Court should reverse Allen's conviction because the failure to issue such an instruction denied him due process. This Court should further hold that the "true threat" requirement is an element of a harassment prosecution. Finally, this Court should hold that the prosecutor committed prejudicial misconduct.

DATED this 8th day of December, 2011.

Respectfully submitted:

 WSBA#39042 for
SUSAN F. WILK (WSBA 28250)
Washington Appellate Project (91052)
Attorneys for Petitioner

APPENDIX A

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR KING COUNTY

STATE OF WASHINGTON) Cause No. 09-1-05166-2 SEA
) Court of Appeals No. 64466-1-I
 v.)
)
BRYAN EDWARD ALLEN)

VERBATIM REPORT OF PROCEEDINGS
VOLUME I

BE IT REMEMBERED that the Verbatim Report of
Proceedings was held in the above entitled and numbered cause
before JUDGE THERESA DOYLE, on October 22, 2009, at the King
County Courthouse, Seattle, Washington.

A P P E A R A N C E S:

FOR THE STATE: MR. ANDY HAMILTON
Deputy Prosecuting Attorney

FOR DEFENSE: MR. JESSE DUBOW
Attorney at Law

ALSO PRESENT: MR. BRYAN ALLEN

1 Seattle, Washington October 22, 2009

2 BAILIFF: All right for the jury.

3 THE COURT: Good morning. Good morning, jurors. I
4 understand that you wanted to listen to the 911 tape again and
5 we'll go ahead and play that for you now.

6 BAILIFF: If at any time - if at any time, can we stop
7 it, if any time we need to - is that possible?

8 THE COURT: Sure, we can stop it-

9 BAILIFF: If - because it's a CD, there's no point, I
10 mean there's no place to really stop it without having to play
11 it all over again.

12 THE COURT: I see, okay.

13 911 OPERATOR: "Emergency police and fire. This is 4."

14 UNIDENTIFIED: "Hello, fire. I want to [inaudible]"

15 MALE VOICE: "Hello?"

16 911 OPERATOR: "Hello."

17 MALE VOICE: "There's two people, two black males, one
18 younger, looks like he's about fifteen [inaudible] they're
19 chasing me, because one guy came up to me and tried to sell me
20 drugs and I told him to go away and then he started to call me
21 names, so I called him a name back and all of a sudden they
22 started following me and then when I came up around the corner
23 here to come to the gas station, the guy pulled a gun on me."

24 911 OPERATOR: "How long ago was this?"

25 MALE VOICE: "It seemed like a minute ago. I was just
26 walking to the store. And I heard -"

27 911 OPERATOR: "Where are they at now?"

28 MALE VOICE: "Well, when I was coming over here, they

1 were outside on the corner of - "

2 911 OPERATOR: "Where are they at now? Do you see them?"

3 MALE VOICE: "No, I can't see them. But they were right
4 there on the corner of University and - "

5 911 OPERATOR: "Which direction did they go?"

6 MALE VOICE: "Uh, it looked like they [inaudible]"

7 911 OPERATOR: "A call at Brooklyn, 4700 Brooklyn Avenue
8 Northeast at the Chevron? Caller said about one minute ago a
9 male brandished a gun at him, he said the suspect was following
10 him with another male, there were two males following the
11 caller before this. He cannot see the suspects anymore."

12 MALE VOICE: "It looked like they were heading east on.
13 47th. Back towards University."

14 911 OPERATOR: "What race was the guy with the gun?"

15 MALE VOICE: "Uh, African American. They were wearing
16 kind of big - "

17 911 OPERATOR: "How old did he look?"

18 MALE VOICE: "Maybe mid 20s."

19 911 OPERATOR: "What color shirt?"

20 MALE VOICE: "He was wearing like a black hoodie and
21 jeans and he had like a baseball cap on and he had these big,
22 he had like big sunglasses on with gold, it kind of gold on the
23 frames."

24 911 OPERATOR: "Did he threaten you?"

25 MALE VOICE: "Yeah, he took a gun out of his pants. He
26 went boom, I'm gonna shoot you. And the other kid goes yeah
27 bitch, yeah bitch, you know, whatever."

28 911 OPERATOR: "What was the race of the other guy?"

1 MALE VOICE: "African American. He looked about
2 fifteen. He had a big 'fro."
3 911 OPERATOR: "Okay, and he was with that guy?"
4 MALE VOICE: "Yeah. He goes he brought his gun."
5 911 OPERATOR: "He had a black Afro?"
6 MALE VOICE: "Yeah, kid had a black Afro."
7 911 OPERATOR: "What color shirt did the guy have?"
8 MALE VOICE: "I want to say he had a red kind of shirt
9 on, I really can't remember."
10 911 OPERATOR: "Okay, what color was the gun?"
11 MALE VOICE: "Uh, dark, dark black or something."
12 911 OPERATOR: "Was it a handgun?"
13 MALE VOICE: "I guess so, yeah."
14 911 OPERATOR: "Did you actually see the gun, did you
15 actually see it?"
16 MALE VOICE: "I thought he had like in his pants
17 [inaudible] I can't remember."
18 911 OPERATOR: "And you're still at the Chevron?"
19 MALE VOICE: "Yeah, I'm not coming out of here. They
20 were following me - I was going to use the pay phone but I came
21 in here. They're still outside."
22 911 OPERATOR: "So you actually called 911?"
23 MALE VOICE: "No, the guy in the store here called for
24 me, he got on the phone."
25 911 OPERATOR: "Okay, you said you tried to call 911 on
26 the cell? Or on the pay phone?"
27 MALE VOICE: "Yeah, I tried to but I didn't want to walk
28 out there, they were following me, it was all the way on the

1 other side of the parking lot."

2 911 OPERATOR: "Only one of them had the gun, right? The
3 guy that was wearing [inaudible]"

4 MALE VOICE: "The older looking guy."

5 911 OPERATOR: "Anything else about him you remember?
6 Like how tall he was?"

7 MALE VOICE: "Maybe five-nine, he was about my height."

8 911 OPERATOR: "How much do you think he weighed?"

9 MALE VOICE: [inaudible]

10 911 OPERATOR: "Any facial hair?"

11 MALE VOICE: "Not that I remember."

12 911 OPERATOR: "So he had a baseball cap? What color?"

13 MALE VOICE: "Uh, kind of dark. Maybe black or navy blue
14 or something."

15 911 OPERATOR: "Baseball cap, sunglasses with gold
16 frames, dark - did he have jeans?"

17 MALE VOICE: "Yeah."

18 911 OPERATOR: "What color jeans?"

19 MALE VOICE: "Uh, navy blue, dark blue."

20 911 OPERATOR: "What about that other guy? How tall did
21 his buddy look?"

22 MALE VOICE: "The younger kid was shorter, he was
23 probably like around 5'5."

24 911 OPERATOR: "How much did he weigh?"

25 MALE VOICE: "He was skinny, skinny as a rail, man, maybe
26 around 150."

27 911 OPERATOR: "Anything else about that guy you remember
28 other than his black Afro and the red shirt?"

1 MALE VOICE: "Oh yeah, his big mouth. He kept calling me
2 names the whole time. The other guy didn't say anything."

3 911 OPERATOR: "All right, officer's en route right now.
4 You cannot see the suspects anymore, correct?"

5 MALE VOICE: "I can't see them. They're not here at the
6 corner - I'm inside the store. I think they must have walked
7 back towards the Ave."

8 911 OPERATOR: "Okay, we'll be out there as soon as we
9 can, okay?"

10 MALE VOICE: "Okay, bye."

11 911 OPERATOR: "Thanks, bye."

12 THE COURT: Okay, thank you, Madam Bailiff. [break] All
13 right, this is the case of State v. Bryan Allen, 09-1-05166-2
14 SEA. The jury has sent out a note at 10:45 today which reads
15 as follows: "The jury has a question about whether the victim
16 pressed charges to move forward with this case." Madam Bailiff
17 has called both the prosecutor, Mr. Hamilton, and the defense
18 attorney, Mr. Dubow, and they've both indicated that they waive
19 their right to be present for a discussion of the Court's
20 proposed answer which they also have agreed to. And the
21 Court's proposed answer is you have all the evidence that was
22 admitted at trial. So the Court will give the bailiff the
23 answer and then she'll bring that back to the jury room. Off
24 the record - [break]

25 BAILIFF: The Superior Court is in session, the Hon.
26 Theresa Doyle presiding.

27 THE COURT: Thank you, you may be seated. Okay, we're
28 back on the record with v. Bryan Allen, 09-1-05166-2 SEA. Mr.

APPENDIX B

State v. Allen, No. 86119-6

First Proposed Cross-Racial Identification Instruction

In this case the identifying witness is of a different race than the defendant. In the experience of many it is more difficult to identify members of a different race than members of one's own. Psychological studies support this impression. In addition, laboratory studies reveal that even people with no prejudice against other races and substantial contact with persons of other races still experience difficulty in accurately identifying members of a different race. Quite often people do not recognize this difficulty in themselves. You should consider these facts in evaluating the witness's testimony, but you must also consider whether there are other factors present in this case that overcome any such difficulty of identification.

CP 61.

State v. Allen, No. 86119-6

Second Proposed Cross-Racial Identification Instruction

In this case, the defendant, Bryan [Allen], is of a different race than Gerald Kovacs, the witness who has identified him. You may consider, if you think it is appropriate to do so, whether the fact that the defendant is of a different race than the witness has affected the accuracy of the witness' original perception or the accuracy of a later identification. You should consider that in ordinary human experience, some people may have greater difficulty in accurately identifying members of a different race than they do in identifying members of their own race.

You may also consider whether there are other factors present in this case which overcome any such difficulty of identification.

CP 62.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

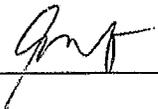
STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 86119-6
v.)	
)	
BRYAN ALLEN,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 8TH DAY OF DECEMBER, 2011, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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ANN MARIE SUMMERS, DPA	<input type="checkbox"/> HAND DELIVERY
DENNIS MCCURDY, DPA	<input type="checkbox"/> _____
KING COUNTY PROSECUTING ATTORNEY	
APPELLATE UNIT	
KING COUNTY COURTHOUSE	
516 THIRD AVENUE, W-554	
SEATTLE, WA 98104	

SIGNED IN SEATTLE, WASHINGTON THIS 8TH DAY OF DECEMBER, 2011.

X _____


Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710

OFFICE RECEPTIONIST, CLERK

To: Maria Riley
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Subject: RE: 861196-ALLEN-SUPPLEMENTAL BRIEF

Rec. 12-9-10

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State v. Bryan Allen
No. 86119-6

Please accept the attached documents for filing in the above-subject case:

SUPPLEMENTAL BRIEF OF PETITIONER

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By

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