

LIST OF PARTIES

All parties appear in the caption of the cover page

QUESTIONS PRESENTED

- I. Whether the lower courts denial is contrary to this Honorable Supreme Court's holding in Boykin v. Alabama in the Plea matter.**
- II. Whether the lower courts denial is contrary to this Honorable Supreme Court's holding in Strickland v. Washington in the Ineffective Assistance of Counsel matter.**
- III. Whether the Court of Appeals erred in denying Petitioner's appeal.**

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Strickland v. Washington, 466 U.S. 668, 690, 104 S. CT. 2052, 80 L. ED. 2D 674 (1984)

IN THE SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

For cases from federal courts:

The opinion of the United States Court of Appeals appears at Appendix A to the petition and is *unpublished*.

The opinion of the United States District Court appears at Appendix B to the petition and is *unpublished*.

For cases from state courts:

The Supreme Court of Tennessee denied review on the merits appears at Appendix C to the petition and is *unpublished*.

The opinion of the Criminal Court of Appeals appeals appears at Appendix D to the petition and is *unpublished*.

JURISDICTION

For cases from federal courts:

The date on which the United States Court of Appeals decided Petitioner's case was 11/30/2017. No petition for rehearing was timely filed in my case. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Sixth Amendment to the United States Constitution.

STATEMENT OF THE CASE

I. Factual and Procedural Background

The Davidson County Grand Jury indicted the Petitioner for the following charges: Count 1: First Degree Premeditated Murder; Count 2: Especially Aggravated Robbery; and Count 3: First Degree Felony Murder.

On January 25, 2012, the Petitioner entered a best interest guilty plea to Second Degree Murder as to Count 1. Counts 2 and 3 were dismissed. Pursuant to the plea agreement, the Petitioner was sentenced outside his range to 32 years in the Department of Correction as a Range II, violent offender. The judgment specifically stated, "Defendant waives range of punishment for Murder 2nd & will receive 32 yrs. as Range 2."

II. State Habeas Corpus Proceedings

On July 15, 2013, Petitioner filed a petition for writ of habeas corpus. In his petition, Petitioner argued that he was sentenced out of his range and, therefore, he was being "illegally restrained." On August 14, 2013, the habeas corpus court filed an order dismissing the petition. That order stated the following in part:

"[T]his Court is of the opinion that the petitioner's argument that he was improperly sentenced as a Range II offender is without merit. The judgment form reflects that the petitioner pled guilty to second degree murder in exchange for an out-of-range sentence of 32 years as a Range II offender."

Petitioner appealed from the summary dismissal of his petition. On April 23, 2014, the Court of

Criminal Appeals filed an opinion affirming the trial court's judgment. The order stated the following in part:

"Petitioner argues that he was illegally sentenced as a Range II offender when in fact he was eligible to be sentenced as a Range I offender. The judgment reflects Petitioner was sentenced as a violent offender to thirty-two years confinement for second degree murder, a Class A felony. Under "Offender Status" on the judgment form, the "Multiple Offender" box was checked. The sentence range for a Class A felony multiple offender is twenty-five to forty years. T.C.A. § 40-35-111(b)(1). Because the Petitioner was sentenced to punishment falling within the spectrum for a Class A felony, his sentence was proper. See Davis, 313 S.W.3d at 759-60; McConnell, 12 S.W.3d at 798; Hicks, 945 S.W.2d at 707. Petitioner is not entitled to relief."

III. Post-Conviction Proceedings

In his petition for post-conviction relief, the Petitioner argued that his guilty plea was involuntary and unknowing. He also claimed he was denied effective assistance of counsel because: (1) trial counsel did not explain that the Petitioner would be pleading out-of-range to Second Degree Murder; (2) trial counsel failed to inform him that the State did not intend to call three witnesses whom the Petitioner believed would testify against him at trial; and (3) trial counsel, along with the Petitioner's mother, pressured him into accepting the plea agreement.

At the post-conviction hearing, the Petitioner stated that he was from East Nashville and he graduated from Pearl Cohn High School in 2005. During high school he was enrolled in special education programs. In regard to his guilty plea, the Petitioner explained that he believed he was entering his plea as a Range I offender. However, he admitted that, at the time he entered his guilty plea, he did not know the difference between Range I and Range II classification. He explained that he met with trial counsel and discussed his case "in general," but he claimed they did not discuss the difference between Range I and Range II classification or that the Petitioner would be entering an out-

of-range plea.

Trial counsel discussed with the Petitioner the State's evidence against him. The Petitioner understood that the State intended to call three jailhouse informants to testify against him at trial and that each would state that the Petitioner admitted to committing the offenses for which he was charged. The Petitioner explained that his belief that these informants would testify "play[ed] a role" in his decision to plead guilty.

The Petitioner explained that, on the day of his guilty plea, he initially wanted to go to trial and he told trial counsel that he "wasn't going to cop-out to nothing." However, trial counsel told him that he could be sentenced to life in prison if he lost at trial. He asked to speak with his family, and trial counsel brought the Petitioner's wife and mother to visit with him. His wife and mother were crying during the meeting and told the Petitioner to accept the plea offer. The Petitioner stated that these conversations also "play[ed] a role" in his decision to plead guilty and that he felt like he was being pressured to accept the plea agreement.

On cross-examination, the Petitioner admitted that, during the plea negotiations, trial counsel told him that the State was offering a 32-year sentence. The Petitioner refused that offer, but trial counsel explained that 32 years was "as low as it was going to get." The Petitioner also admitted that, during the plea colloquy, the State announced that he was pleading out-of-range. However, the Petitioner maintained that trial counsel "failed to explain" the plea agreement to him and that, even though the State said he was pleading out-of-range, he did not know he was pleading as a Range II offender.

Trial counsel testified that she met with the Petitioner many times in the year and a half to two years that the case was pending. Trial counsel discussed the out-of-range plea with the Petitioner, but she admitted that she "may not have used the word[] range." She explained:

"I don't specifically remember but it would be my habit to use language like, ["]You would only be able to get a 15- to 25-year sentence if the jury convicted you of second, but we're agreeing to a higher sentence as part of the plea bargain where each side gives a little. The DA is coming off the 51-year life sentence, but you are going to have to go above what you would get if you were actually found guilty of second-degree murder.["] So it is entirely possible that I did not use language about Range I or Range II."

Trial counsel recalled that the State had three jailhouse informants who would testify that the Petitioner had admitted to committing the crime. However, after the Petitioner entered his guilty plea, co-counsel informed her that the State had told co-counsel that they did not intend to call the jailhouse informants to testify. Trial counsel did not know this information until after the guilty plea, and she said that she would have preferred to have shared that information with the Petitioner before he entered his guilty plea.

The State introduced the Petition to Enter a Plea of Guilty as an exhibit to the hearing. Immediately above the Petitioner's signature on that document is a handwritten note that clearly reads, "Best Interest Guilty Plea to count 1 reduced to Second Degree murder. 32 years at 100%. [The Petitioner] agrees to sentence outside of range I. Dismiss counts 2 & 3."

In a detailed written order, the post-conviction court denied all of the Petitioner's claims. As to whether trial counsel coerced the Petitioner into pleading guilty, the court found that the Petitioner's and trial counsel's respective testimonies conflicted and credited trial counsel's testimony. As to the information about the jailhouse informants, the post-conviction court noted that co-counsel's statement

to trial counsel was hearsay and its truthfulness could not be verified. However, even if the statement could be verified, the post-conviction court found that the evidence against the Petitioner was "nearly insurmountable," and the court was not convinced that the absence of three witnesses would have had a significant impact on the Petitioner's decision to plead guilty. Finally, regarding the Petitioner's understanding that he was pleading as a Range II offender, the post-conviction court found that trial counsel sufficiently explained the Petitioner's punishment and noted that both the plea petition and plea waiver stated that the Petitioner was pleading out-of-range. Consequently, the post-conviction court denied relief, finding that trial counsel was not ineffective and the Petitioner's guilty plea was voluntary and intelligent. This timely appeal followed. And the Court of Criminal Appeals affirmed Post-Conviction Court's denial.

IV. Federal Habeas Corpus Proceeding:

(District Court Proceeding)

(1) Petitioner raised the following questions:

ISSUE 1: THE PETITIONER'S SENTENCE IS ILLEGAL BECAUSE HE DID NOT HAVE THE REQUISITE NUMBER OF PRIOR CONVICTIONS TO QUALIFY AS A RANGE II OFFENDER AND DID NOT KNOWINGLY WAIVE HIS RIGHT TO BE SENTENCED ACCORDINGLY TO HIS LAWFUL RANGE.

ISSUE 2: THE PETITIONER DID NOT KNOWINGLY WAIVE HIS RIGHTS WHEN HE PLED GUILTY, RENDERING HIS PLEA INVOLUNTARY.

a. NO ONE EXPLAINED THE MEANING OF A "BEST INTEREST"

b. NO ONE EXPLAINED THE MEANING OF HIS WAIVER OF HIS RIGHT TO BE SENTENCED AS A RANGE I OFFENDER.

ISSUE 3: THE PETITIONER RECEIVED THE INEFFECTIVE ASSISTANCE OF COUNSEL DUE TO COUNSEL'S FAILURE TO ADEQUATELY INVESTIGATE AND PRESENT MITIGATING EVIDENCE DURING THE SENTENCING HEARING.

ISSUE 4: THE PETITIONER'S GUILTY PLEA WAS NOT KNOWING AND VOLUNTARY.

ISSUE 5: THE TRIAL COURT LACKED JURISDICTCTION [sic] TO SENTENCE THE PETITIONER BECAUSE IT DID NOT FIND BEYOND A REASONABLE DOUBT THAT THE PETITIONER WAS A RANGE II OFFENDER.

ISSUE 6: THE TRIAL COURT ABUSED ITS DISCRETIONH[sic] WHEN IT DISMISSED THE PETITIONER'S STATE HABEAS PETITION WITHOUT RELYING ON THE TRANSCRIPT OF THE GUILTY PLEA HEARING.

ISSUE 7: THE PETITIONER DID NOT RECEIVE NOTICE FROM THE STATE THAT HIS PLEA WAS A BEST INTEREST PLEA.

ISSUE 8: THE PETITIONER DID NOT KNOWINGLY, UNDERSTANDINGLY, AND INTELLIGENTLY PLEAD GUILTY TO AN OUT-OF-RANGE SENTENCE.

ISSUE 9: TRIAL COUNSEL FAILED TO EXPLAIN THE DIFFERENT[sic] BETWEEN A RANGE I AND RANGE II SENTENCE TO THE PETITIONER.

ISSUE 10: THE TRIAL COURT FAILED TO EXPLAIN THE DIFFERENT[sic] BETWEEN A RANGE I AND RANGE II SENTENCE TO THE PETITIONER.

(2) The State opposed as following:

A. PROCEDURALLY DEFAULTED CLAIMS.

ANSWER 1: THE PETITIONER FAILED TO PRESENT THE HIGHER STATE COURT WITH THE FEDERAL CONSTITUTIONAL CLAIM HE NOW ADVANCES, AND THE CLAIM IS PROCEDURALLY DEFAULTED. (Petitioner's Claim 2)

ANSWER 2: THE STATE COURT'S DETERMINATION THAT THE PETITIONER HAD WAIVED HIS CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE BECAUSE HE RAISED IT FOR THE FIRST TIME ON APPEAL CONSTITUTES A RESOLUTION OF THE ISSUE ON AN INDEPENDENT AND ADEQUATE STATE PROCEDURAL GROUND, AND THE CLAIM IS PROCEDURALLY DEFAULTED. (Petitioner's Claim 3)

ANSWER 3: THE PETITIONER DID NOT PRESENT THE HIGHER STATE COURT WITH THE ALLEGATION THAT THE TRIAL COURT LACKED SUBJECT MATTER TO SENTENCE THE PETITIONER, AND IT IS PROCEDURALLY DEFAULTED. (Petitioner's

Claim 5)

ANSWER 4: THE STATE COURT'S DETERMINATION THAT THE PETITIONER HAD WAIVED HIS CLAIM THAT THE HABEAS COURT ABUSED ITS DISCRETION BY DISMISSING THE PETITION WITHOUT CONSULTING THE GUILTY PLEA HEARING TRANSCRIPT BECAUSE HE RAISED IT FOR THE FIRST TIME ON APPEAL CONSTITUTES A RESOLUTION OF THE ISSUE ON AN INDEPENDENT AND ADEQUATE STATE PROCEDURAL GROUND, AND THE CLAIM IS PROCEDURALLY DEFAULTED. (Petitioner's Claim 6)

ANSWER 5: THE STATE COURT'S DETERMINATION THAT THE PETITIONER HAD WAIVED HIS CLAIM THAT THE STATE FAILED TO NOTIFY HIM THAT HIS PLEA WAS A BEST INTEREST PLEA RATHER THAN A GUILTY PLEA BECAUSE HE RAISED IT FOR THE FIRST TIME ON APPEAL CONSTITUTES A RESOLUTION OF THE ISSUE ON AN INDEPENDENT AND ADEQUATE STATE PROCEDURAL GROUND, AND THE CLAIM IS PROCEDURALLY DEFAULTED. (Petitioner's Claim 7)

ANSWER 6: THE PETITIONER DID NOT PRESENT THE STATE COURT WITH THE ALLEGATION THAT HIS GUILTY PLEA WAS NOT KNOWING, UNDERSTANDING, OR INTELLIGENT BECAUSE THE JUDGMENT LACKED PROOF THAT THE PETITIONER KNOWINGLY ACCEPTED THE TERMS OF THE JUDGMENT, AND THE CLAIM IS PROCEDURALLY DEFAULTED. (Petitioner's Claim 8)

ANSWER 7: THE PETITIONER DID NOT PRESENT THE HIGHER STATE COURT WITH THE ALLEGATION THAT HIS GUILTY PLEA WAS NOT KNOWING AND VOLUNTARY BECAUSE THE TRIAL COURT FAILED TO EXPLAIN THE DIFFERENCE BETWEEN A RANGE I AND RANGE II SENTENCE, AND IT IS PROCEDURALLY DEFAULTED. (Petitioner's Claim 10)

B. PROPERLY EXHAUSTED CLAIMS.

ANSWER 1: THE STATE COURT'S DECISION THAT THE PETITIONER'S GUILTY PLEA WAS KNOWING AND VOLUNTARY WAS NOT CONTRARY TO, NOR AN UNREASONABLE APPLICATION OF, CLEARLY ESTABLISHED SUPREME COURT PRECEDENT AND WAS BASED ON A REASONABLE DETERMINATION OF THE FACTS IN LIGHT OF THE EVIDENCE PRESENTED AT PETITIONER'S GUILTY PLEA HEARING AND POST-CONVICTION PROCEEDINGS. (Petitioner's Claim 1, 2.a, and 4)

ANSWER 2: THE STATE COURT'S DECISION THAT THE PETITIONER RECEIVED THE EFFECTIVE ASSISTANCE OF COUNSEL WAS NOT CONTRARY TO, NOR AN UNREASONABLE APPLICATION OF, CLEARLY ESTABLISHED SUPREME COURT PRECEDENT AND WAS BASED ON A REASONABLE DETERMINATION OF THE FACTS IN LIGHT OF THE EVIDENCE PRESENTED AT PETITIONER'S GUILTY PLEA HEARING AND POST-CONVICTION PROCEEDINGS (Petitioner's Claim 9)

(3) The United States District Magistrate judge recommended as following:

ANALYSIS GROUND ONE: Unlawful Sentence as a Range II Offender Because Guilty Plea Involved.

Analysis: "Honorable Magistrate Judge recommended that Phillips received a constitutionally adequate explanation of the plea he was entering and the rights being waived by doing so. He (Petitioner) said he understood and will not be heard now to contradict that solemn statement in open court. He has not shown that the Tennessee Court of Criminal Appeals decision is in any way an objectively unreasonable application of Boykin or other Supreme Court precedent. Phillips' First Ground for Relief should be denied on the merits."

ANALYSIS GROUND TWO: Invalid Guilty Plea.

Analysis: "The respondent asserted that this claim is procedurally defaulted. And Honorable Magistrate Judge found that the [Tennessee] appellate court made the relevant findings in the portion of its decision quoted above where it found that the practical effect of the plea agreement was explained – a guilty plea to second-degree murder with a sentence 'outside of range 1' at 32 years and it also found Phillips signed the Petition to Enter a Guilty Plea with that language in it. That constitutes an objectively reasonable decision on the merits of this claim under Boykin, *supra*, for the same reasons given above as to Ground One. Again, when an explanation of a plea is made in open court and a defendant says he understands and does not ask any questions, he will not be heard later to say he didn't understand. Ground Two should be dismissed ion the merits.

ANALYSIS GROUND THREE: Ineffective Assistance of Trial Counsel in the Plea Process.

Analysis: "(After mentioning Sutton, Martinez and Trevino, The Magistrate Judge finds)... Like most other States, Tennessee has a rule that a litigant may not raise on appeal an issue he or she has not presented to the court below. It forced that rule against Phillips here and he has

not shown excusing cause and prejudice for failing to raise it in the court below. Phillips' Third Ground for Relief should be dismissed as procedurally defaulted.”

ANALYSIS GROUND FOUR: Invalid Guilty Plea.

Analysis: “Phillips asserted his guilty plea was not knowing and voluntary. For the reasons given above as to Ground One, this ground for relief is without merit because the Tennessee Court of Criminal Appeals decision is an objectively reasonable application of Boykin, *supra*. Ground Four should be dismissed.”

ANALYSIS GROUND FIVE: Lack of Subject Matter Jurisdiction to Sentence.

Analysis: “Ground Five for Relief is procedurally defaulted and should be dismissed.”

ANALYSIS GROUND SIX: Failure of the State Habeas Court to Review the Plea Transcript.

Analysis: “Even this claim were not procedurally defaulted, it is not recognizable in habeas corpus. *Sidistaj V. Burt*, 66 F.3d 804 (6th Cir. 1995). Ground Six should therefore be dismissed.”

ANALYSIS GROUND SEVEN: Lack of Notice from the State that the Plea was to be a Best Interest Plea.

Analysis: “In his Seventh Ground for Relief, Phillips asserts he did not receive adequate notice from the State that the plea was to be a 'best interest' plea. This Ground for Relief is procedurally defaulted on the same basis as Ground Six, to wit, that it was presented for the first time on appeal from denial of the state habeas corpus petition, Ground Seven should be dismissed.”

ANALYSIS GROUND EIGHT: Invalid Guilty Plea.

Analysis: “In his Eighth Ground for Relief, Phillips offers another twist on his invalid plea claim, this time because allegedly the form of the judgment is improper. Respondent asserts this claim is procedurally defaulted because it was raised for the first time on appeal from denial of state habeas. Respondent's argument is well taken for the reasons given for Grounds Six, Seven.

If the Court were to reach the merits of this claim, it would find it has no merit based on the findings recited as to Ground One: Phillips was adequately advised on the nature of his plea and of the out-of-range sentence to which he was agreeing[.] Ground Eight should be dismissed.”

ANALYSIS GROUND NINE: Ineffective Assistance of Counsel: Failure to Explain the Difference Between a Range I and a Range II.

Analysis: “Respondent concedes this claim is preserved for merit consideration, but asserts this Court should defer 28 U.S.C. § 2254(d)(1) to the decision of the Tennessee Court of Criminal Appeals on post-conviction..... Phillips merely asserts that these conclusions are an objectively unreasonable application of Strickland and Hill v. Lockhart, without showing how. Had he gone to trial, he would have faced a possible life sentence. Regardless of whether the jail informants ever testified against him, his blood was on the deceased. He points to no way in which it would have been reasonable for him to insist on going to trial. Because the court of appeals decision is a reasonable application of Strickland, it is entitled to deference under 28 U.S.C. § 2254(d)(1). Ground Nine should be dismissed.

ANALYSIS GROUND TEN: Trial Court Error in Failing to Explain the Difference Between a Range I and Range II Sentence.

Analysis: “Because this claim was never presented to the state courts, it is procedurally defaulted and should be dismissed with prejudice.”

CONCLUSION ON ANALYSIS:

“Based on the foregoing analysis, it is respectfully recommended that the Petition herein be dismissed with prejudice. Because reasonable jurists would not disagree with the conclusion, Petitioner should be denied a certificate of appealability and the Court should certify to the Sixth Circuit that any appeal would be objectively frivolous and therefore should not be permitted to proceed in forma pauperis.”

(4) The United States District Court denied relief and a Certificate of Appealability was not issued.

In sum, the denial reason was that Petitioner/Appellant knew what he plead for and Procedural default.

(United States Court of Appeals Proceeding)

The United States Circuit Court denied Petitioner's appeal on 9/19/2018 Order, (18-5829). This Petition is timely.

REASONS FOR GRANTING THE PETITION

PETITIONER'S ISSUE/CLAIM 1 IS MERITORIOUS UNDER BOYKIN V. ALABAMA, 395 U.S. 238, 89 S. CT. 1709, 23 L. ED. 2D 274 (1969), PETITIONER'S COUNSEL WAS INEFFECTIVE UNDER STRICKLAND V. WASHINGTON, 466 U.S. 668, 690, 104 S. CT. 2052, 80 L. ED. 2D 674 (1984), AND STATE COURT'S DECISION WAS CONTRARY TO, AND/OR AN UNREASONABLE APPLICATION OF, CLEARLY ESTABLISHED SUPREME COURT PRECEDENT AND WAS NOT BASED ON A REASONABLE DETERMINATION OF THE FACTS IN LIGHT OF THE EVIDENCE PRESENTED AT PETITIONER'S GUILTY PLEA HEARING AND POST-CONVICTION PROCEEDINGS.

At the Post-Conviction proceeding, Petitioner claims that, at the time he pleaded guilty, he did not understand that he was pleading out-of-range as a Range II offender.

Petitioner was testified that, “at the time he entered his guilty plea, he did not know the difference between Range I and Range II classification.” “Petitioner maintained that trial counsel failed to explain” the plea agreement to him and that, even though the State said he was pleading out-of-range, he did not know he was pleading as a Range II offender.”

Petitioner's Trial counsel testified that, “She [trial counsel] discussed the out-of-range plea with the Petitioner, but she admitted that she "may not have used the word[] range.” She explained:

“I don't specifically remember but it would be my habit to use language like, ["]You would only be able to get a 15- to 25-year sentence if the jury convicted you of second, but we're agreeing to a higher sentence as part of the plea bargain where each side gives a little. The DA is coming off the 51-year life sentence, but you are going to have to go above what you would get if you were actually found guilty of second-degree murder.["] So it is entirely possible that I did not use language about Range I or Range II.”

Petitioner's trial counsel testified that, “She [Trial counsel] recalled that the State had three jailhouse informants who would testify that the Petitioner had admitted to committing the crime.

However, after the Petitioner entered his guilty plea, co-counsel informed her that the State had told co-counsel that they did not intend to call the jailhouse informants to testify. Trial counsel did not know

this information until after the guilty plea, and she said that she would have preferred to have shared that information with the Petitioner before he entered his guilty plea.

In given fact and evidence, in light favorable to the State, it is clear that Petitioner's trial counsel failed in not providing Petitioner with the necessary sentencing information (regarding the Ranges), failed in advising Petitioner with false/wrong information (regarding the jailhouse informants), and failed misleading Petitioner with alluring term of "Best Interest Plea." Petitioner's guilty plea was unknowing, unwilling and unintelligent in the meaning of Boykin v. Alabama, 395 U.S. 238, 89 S. CT. 1709, 23 L. ED. 2D 274 (1969)

Further, under the Strickland test, Petitioner's counsel was ineffective in this matter and such ineffective assistance was prejudicial to Petitioner. Without counsel's ineffectiveness in this matter the court outcome more than likely different. Petitioner would have received the 25-year sentence within the Range I, which he is. Satisfying Strickland two (2) prong tests were satisfied. Strickland v. Washington, 466 U.S. 668, 690, 104 S. CT. 2052, 80 L. ED. 2D 674 (1984).

The lower court's denial was contrary to, and/or an unreasonable application of, clearly established supreme court precedent and was not based on a reasonable determination of the facts in light of the evidence presented at petitioner's guilty plea hearing and post-conviction proceedings.

Petitioner entitled a hearing with an appointment of counsel in this matter.

CONCLUSION

The petition for writ of certiorari should be granted to correct a fundamental miscarriage of justice.

Respectfully submitted,



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