Docket No. _____

In the Supreme Court of the United States

SARAH DENISE CARDWELL, Petitioner,

v.

STATE OF SOUTH CAROLINA, Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the Supreme Court of South Carolina erred in applying a standard of "more likely than not" in concluding under the Fourth Amendment's plain view doctrine that evidence was subject to seizure.

II. Whether, after applying the plain view doctrine to a video file labeled with a cover image of a boy wearing a bra, the Supreme Court of South Carolina erred in holding that the doctrine justified playing the video file without a warrant.

III. Whether the South Carolina Supreme Court erred in applying the inevitable discovery doctrine without considering the entire record and without determining that the video file would actually be discovered through the issuance of a warrant.

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BASIS OF JURISDICTION

The Supreme Court of South Carolina entered the order sought to be reviewed on January 23, 2019. The Supreme Court of South Carolina entered an order denying rehearing on March 27, 2019. This Court has jurisdiction pursuant to 28 U.S.C §1257(a) because Petitioner asserts the deprivation of her right to freedom from unreasonable searches and seizures under the Fourth Amendment of the United States Constitution.

CONSTITUTIONAL PROVISIONS

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

STATEMENT OF THE CASE

> . . . So, yeah, I'm not asking you to take things out of context. I'm asking you to put it in context. I'm not telling you to look at those individual pictures and make your decision. I'm saying look at the entire video and use your common sense because the video as a whole is what makes it sexual. The video as a whole is what's going to make you all agree beyond a reasonable doubt that these parents . . . made a conscious, intentional, maybe reckless decision to videotape those children in a performance that includes sexual activity . . . .
>
> * * *

On December 8, 2010, Johnsonville Police Chief Ron Douglas entered the shop of David Marsh, a local computer technician. Trial Court's Exh. 3. Marsh frequently handled the police department's computer work. Trial Tr. 68, ll. 3-15. Chief Douglas came from the police station a half a block down the street to drop off some packages. Trial Tr. 68, ll. 16-18; Trial Tr. 91, ll. 1-10. The computers Marsh was working on were visible to Chief Douglas, and he saw flash across the screen of a laptop belonging to Petitioner an image of a child wearing a pink bra and "[h]is hands." Trial Tr. 71, l. 23 – Trial Tr. 73, l. 1; Trial Tr. 92, ll. 15-19. According to Marsh, Chief Douglas said to him, "I just saw something go across the screen, can you back it up?" At that point, Marsh "had no clue" what Chief Douglas was talking about. Upon seeing the computer, Marsh told Chief Douglas it belonged to Petitioner and had problems booting up, so he was backing up the files to an external hard drive. Trial Tr. 66, ll. 6-23; Trial Tr. 92, l. 20 – Trial Tr. 93, l. 6; Trial Court's Exh. 3. "Please back that up just a little bit," Chief Douglas repeated, and when Marsh did, the two saw that the image was a still from a video file with a play button at the top. Trial

Tr. 72, ll. 1-21. "[T]hat's what [Chief Douglas] said he saw and he wanted to see. So, we clicked play and we watched just a little . . . ." Trial Tr. 73, ll. 8-11.

In a written statement Marsh made on December 13, 2010, he reported that Chief Douglas "called me back in to the office and said for me to look at one of the computers. . . . He asked if I would look at one of the last files backed-up, and we saw it was a video. Upon request of [Chief Douglas], [w]e watched the video." Trial Court's Exh. 3. Chief Douglas also wrote a statement on December 13, 2010, stating that after he asked Marsh about what flashed across the screen, "[he] then asked to see the file that had just been backed up and [Marsh] searched until finding it and played it for me." Trial Court's Exh. 3.

Without Petitioner's consent, the two watched about a minute of the video, which was ostensibly filmed by Petitioner in her home and contained footage of her young son, daughter, and her then-fiancée Michael Cardwell, who was not biologically related to the children. Trial Tr. 73, l. 15 – Trial Tr. 74, l. 13; Trial Tr. 78, ll. 14-22; Trial Tr. 99, l. 17 – Trial Tr. 100, l. l; Trial Court's Exh. 3. Marsh recognized all of them. Trial Tr. 73, ll. 20-25.

Because Chief Douglas feared that the file would be lost if the computer failed, he instructed Marsh to copy the file to a disk:

> Q: [I]n your experience as an investigator as well is one of the things you're concerned about the preservation of potential evidence in a case?
>
> A: Definitely, that's exactly why I told him what I did.

Trial Tr. 95, ll. 4-8; Trial Tr. 93, ll. 1-17; Trial Court's Exh. 3.

Chief Douglas believed lacked authority to secure the computer himself because Petitioner lived in Georgetown County, which was "not in [his] jurisdiction." Accordingly, he "instructed [Marsh] to . . . secure the computer until [he] could contact someone with Georgetown Sheriff's Office to see if they would assist with the investigation and take over that." Trial Tr. 93, ll. 13-24; Trial Tr. 94, ll. 9-16; Trial Court's Exh. 3.

Chief Douglas contacted Investigator Phillip Hanna with the Georgetown County Sheriff's Office about the investigation. On December 10, 2010, Investigator Hanna asked Marsh to meet him at the Johnsonville Police Department with the computer and the back-up disk with the video. When Marsh arrived, Investigator Hanna watched the video. Hanna then seized the computer and the disk and obtained a search warrant to search the entire computer. Trial Tr. 97, l. 12 – Trial Tr. 103, l. 4; Trial Court's Exh. 3.

Based on the video's contents, the Georgetown County grand jury true-billed four indictments against Petitioner. Indictments. Two indictments arose under a statute criminalizing sexual exploitation of a minor, first degree:

> An individual commits the offense of first degree sexual exploitation of a minor if, knowing the character or content of the material or performance, he . . . permits a minor under his custody or control to engage in sexual activity or appear in a state of sexually explicit nudity when a reasonable person would infer the purpose is sexual stimulation for a live performance or for the purpose of producing material that contains a visual representation depicting this activity or a state of sexually explicit nudity when a reasonable person would infer the purpose is sexual stimulation . . . .

S.C. Code Ann. § 16-15-395(A). The other two indictments arose under a statute criminalizing unlawful conduct towards a child:

> It is unlawful for a person who has charge or custody of a child, or who is the parent or guardian of a child, or who is responsible for the welfare of a child as defined in Section 63-7-20 to . . . place the child at unreasonable risk of harm affecting the child's life, physical or mental health, or safety . . . .

S.C. Code Ann. § 63-5-70(A).

On October 29, 2012, Petitioner proceeded to trial before a jury and the Honorable Edward B. Cottingham. Trial Tr. I. In a pretrial hearing, Petitioner moved to suppress the video file, arguing that the technician's playback of the video at the Johnsonville Chief's instruction constituted an impermissible warrantless search. The trial judge denied the motion for two reasons. First, the judge ruled Petitioner had no expectation of privacy in the computer because she left it with the technician. Second, no search occurred because the Johnsonville Chief saw in plain view "evidence of a serious child pornography crime," and he therefore had "every right to pursue his interest in determining where the truth lies." Trial Tr. 14, l. 3 – Trial Tr. 18, l. 17. Petitioner also argued that Investigator Hanna's viewing of the video prior to obtaining a warrant was illegal. The judge again ruled that no search occurred because the computer was "in the public domain." Trial Tr. 19, l. 5 – R. 20, l. 10. Petitioner renewed the motion during the trial, moving to exclude the computer and any files taken from it. The trial judge continued to deny the motion. Trial Tr. 69, l. 19 – Trial Tr. 70, l. 12; Trial Tr. 79, l. 22 – Trial Tr. 80, l. 1; Trial Tr. 485, l. 16 – Trial Tr. 486, l. 4.

In his testimony in front of the jury, Chief Douglas stated that he saw an image "that concerned [him]," that he asked "what was that," and that he "knew there was something that needed to be looked into." Trial Tr. 92, l. 15 – Trial Tr. 93, l. 12. David Marsh testified that Chief Douglas said to him, "I just saw something go across the screen, can you back it up?" Trial Tr. 72, ll. 1-3. "[T]hat's what [Chief Douglas] said he saw and he wanted to see. So, we clicked play and we watched just a little . . . ." Trial Tr. 73, ll. 8-11.

Through Marsh, the State moved into evidence six printed still frames from the video. Marsh testified over objection about reporting requirements:

> Q: . . . [A]nd with the kind of information and just based on your experience and what you were doing, was this a matter where you felt that you had to report this to law enforcement, even if Chief Douglas hadn't been there?
>
> A: Yes, it's required of all PC techs.

Trial Tr. 81, l. 12 – Trial Tr. 85, l. 18. Over objection, the State then moved the entire video into evidence. Trial Tr. 86, l. 21 – Trial Tr. 87, l. 7.

At the close of the State's case, the defense moved for a directed verdict. Trial Tr. 376, ll. 2-12. Commenting on the contents of the entire video, the trial judge stated he "[did not] know what [e]ffect it will or might have on these children" and that the question would be one for the jury. Trial Tr. 378, ll. 17-22.

In its closing argument, the State made the following remarks about the video:

> . . . Trust me, if you want to take pictures of your, you know, children or grandchildren running around naked and, you know, doing cute things, you know, **I think we've all got those naked kid pictures** that your parents might throw up during your, I don't know, rehearsal dinner. . . . [O]ne thing I will agree with the Defense is

> that video is the case. Clearly it is. That video along with the testimony of those children that lived through that video is the entire case.
>
> . . .
>
> One of the things that [defense counsel does] is he breaks down, "Well, if you take it out of context, then like the pictures that you've seen, if you take it out of context then, of course, you know it looks bad, you know, a snapshot of what's going on with this video." Ladies and gentlemen, that video lasted for two minutes and 30 seconds. In two minutes and 30 seconds I was able to pull off still shots showing nipple stimulation . . . and a child who is either seven or eight years old touching himself in such a manner that all of you can look and determine whether or not you believe that he came up with that himself . . . .
>
> . . .
>
> . . . So, yeah, I'm not asking you to take things out of context. I'm asking you to put it in context. **I'm not telling you to look at those individual pictures and make your decision. I'm saying look at the entire video and use your common sense because the video as a whole is what makes it sexual.** The video as a whole is what's going to make you all agree beyond a reasonable doubt that these parents . . . made a conscious, intentional, maybe reckless decision to videotape those children in a performance that includes sexual activity . . . .

Trial Tr, 449, l. 13—Trial Tr. 454, l. 8 (emphasis added).

At the conclusion of the trial, the jury found Petitioner guilty as charged. Trial Tr. 478, l. 11 – Trial Tr. 479, l. 20. For the charges of unlawful conduct, Judge Cottingham sentenced Petitioner to concurrent two year sentences. Trial Tr. 493, l. 24 – Trial Tr. 494, l. 4. For the charges of sexual exploitation, he sentenced Petitioner to concurrent three year sentences. Trial Tr. 494, ll. 4-20. He ordered the three year sentences to run consecutive to the two year sentences. Trial Tr. 494, ll. 4-20.

Petitioner timely appealed to the South Carolina Court of Appeals arguing that the trial court erred in denying Appellant's motion to suppress the computer evidence because Appellant had a reasonable expectation of privacy in the files on her personal computer and because both Chief Douglas and Investigator Hanna watched the video file without first obtaining a warrant when no warrant exception applied. Final Brief of Appellant in S.C. Ct. App. (Apr. 7, 2014). After oral arguments, the court issued a published opinion affirming Petitioner's convictions. Opinion No. 5351 (S.C. Ct. App. Sept. 2, 2015); 414 S.C. 416, 778 S.E.2d 483 (Ct. App. 2015). The court held that the trial judge properly denied the motion to suppress the video for three reasons. First, Petitioner had no privacy interest in the file due to the "sexually suggestive still image of the child in a bra."[1] Second, the plain view doctrine applied because the cover image "gave the appearance that the video file's content included a nude minor engaging in inappropriate sexual behavior." Third, law enforcement would have inevitably discovered the video file's contents because the cover image provided probable cause, and Investigator Hanna testified that it was "standard procedure to obtain a search warrant when he discovered images of child pornography." *Id.*

Petitioner filed a petition for rehearing arguing that under *Walter v. United States*, 447 U.S. 649 (1980), Petitioner had a reasonable privacy expectation in the video file on the computer; that the trial record contained no arguments, findings, or support for the Court's ruling that the cover image of the naked child made the conclusion forgone that the video's contents were illicit; and that the inevitable discovery doctrine did not apply simply because probable cause would have supported

[1] The State never included the still image in the record on appeal.

a warrant to open the video file. Petition for Rehearing in S.C. Ct. App. (Sep. 11, 2015). The court summarily denied the petition for rehearing. S.C. Ct. App. Order Denying Petition for Rehearing (Nov. 25, 2015).

Petitioner timely appealed to the South Carolina Supreme Court arguing that the trial court erred in denying Appellant's motion to suppress the video file because Petitioner had a reasonable expectation of privacy in the files on her personal computer and because both Chief Douglas and Investigator Hanna watched the video file without first obtaining a warrant when no warrant exception applied. Final Brief of Petitioner in S.C. Sup. Ct. (July 18, 2016). After oral arguments, the court issued a published opinion affirming Petitioner's convictions. Opinion No. 27860 (S.C. Sup. Ct. Jan. 23, 2019). First, the court held that the plain view doctrine applied because the cover image on the video file "was of a young boy, approximately ten or eleven years old, wearing nothing but a pink bra. This suggests the video from which the image was taken more than likely contained child pornography." Second, the court held that the inevitable discovery doctrine applied because a state statute required David Marsh to report the image to law enforcement[2] and because "when asked whether this was a matter in which Marsh

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[2] Any retail or wholesale film processor or photo finisher who is requested to develop film, and any computer technician working with a computer who views an image of a child younger than eighteen years of age or appearing to be younger than eighteen years of age who is engaging in sexual conduct, sexual performance, or a sexually explicit posture must report the name and address of the individual requesting the development of the film, or of the owner or person in possession of the computer to law enforcement officials in the state and county or municipality from which the film was originally forwarded. Compliance with this section does not give rise to any civil liability on the part of anyone making the report.

would have felt he had to report, Marsh responded, 'Yes, it's required of all PC techs.'" *Id.*

Petitioner filed a petition for rehearing arguing that the plain view doctrine did not apply because the record did not support the conclusion that Chief Douglas made an immediate and reasonable determination that the cover image was contraband, and even had he made such a determination, he would only have been authorized to seize the video file, not open and play it. Second, Petitioner argued that the inevitable discovery doctrine did not apply because the record did not support the conclusion that absent Chief Douglas's instructions to Marsh, Marsh would have played the video himself for Chief Douglas or reported the video to another law enforcement causing a warrant to issue. Petition for Rehearing in S.C. Sup. Ct. (Feb. 7, 2019). The court summarily denied the petition for rehearing. S.C. Sup. Ct. Order Denying Petition for Rehearing (Mar. 27, 2019).

S.C. Code Ann. § 16-3-850 (2015).

ARGUMENT FOR ALLOWANCE OF THE WRIT

I. Whether the Supreme Court of South Carolina erred in applying a standard of "more likely than not" in concluding that evidence was subject to seizure under the Fourth Amendment's plain view doctrine.

The Court should allow the writ to clarify how lower courts should apply the standard for seizure of evidence under the plain view doctrine. In *Texas v. Brown*, 460 U.S. 730, 742 (1983), *abrogated on other grounds by Horton v. California*, 496 U.S. 128 (1990), the Court stated, "We think this statement of the rule . . . requiring probable cause for seizure in the ordinary case, is consistent with the Fourth Amendment and we reaffirm it here." In *Horton v. California*, 496 U.S. 128, 129 (1990), the Court held that the object's incriminating character must be "immediately apparent." In *Minnesota v. Dickerson*, 508 U.S. 366, 378 (1993), the Court determined that the doctrine did not apply based on an examination of the entire record in consideration of the point of view of the seizing authority. *See also Crouch v. U.S.*, 454 U.S. 952, 955 (1981) ("[T]his Court has not had occasion to develop the limits of the concept 'immediately apparent.' . . . [A] number of Courts of Appeals have held that a plain-view seizure of certain documents is permissible even though their incriminating nature is not apparent absent some reading of their contents.").

In this case, the South Carolina Supreme Court neither applied a standard of probable cause nor determined that the incriminating nature of the evidence was immediately apparent from the seizing officer's point of view based on a review of the entire record. The court did not cite to any statute defining child pornography,

nor did it analyze the cover image, which the State had never included in the record on appeal. The court made no analysis except to say that the plain view doctrine applied because the cover image on the video file "was of a young boy, approximately ten or eleven years old, wearing nothing but a pink bra. This suggests the video from which the image was taken more than likely contained child pornography." This South Carolina Supreme Court's failure to apply the proper standard echoed the previous error of the South Carolina Court of Appeals, which summarily stated that the cover image was sexually suggestive and "gave the appearance that the video file's content included a nude minor engaging in inappropriate sexual behavior." As Petitioner explained in subsequent filings in both courts, the full record is replete with evidence contravening these conclusions, from Chief Douglas's testimony that the cover image merely concerned him to the trial judge's admission that he did not know what effect the video could have on the children's wellbeing to the State's argument in closing that only the video as a whole supported a sexual quality rather than any single still image.

II. Whether, after applying the plain view doctrine to a video file labeled with the image of a boy wearing a bra, the Supreme Court of South Carolina erred in holding that the doctrine justified playing the video file without a warrant.

The Court should allow the writ in order to explain that the plain view doctrine does not allow warrantless searches of cell phones, tablets, and computers merely because an incriminating image appears on the screen. In *Minnesota v. Dickerson*, 508 U.S. 366, 375 (1993), this Court stated that plain-view evidence yields "no invasion of a legitimate expectation of privacy and thus no 'search' within the

meaning of the Fourth Amendment—or at least no search independent of the initial intrusion that gave officers their vantage point." This language emphasizes that an invasion of a legitimate privacy expectation does occur when a subsequent search is made *independent* of the intrusion giving the initial vantage point.

As explained in *Walter v. United States*, 447 U.S. 649 (1980), a subsequent, independent search is impermissible under the plain view doctrine. That case involved illicit films individually packaged in boxes with labels indicating the films contained obscene matter. This Court held that when FBI agents lawfully seized boxes of film having obscene pictures on the labels, which provided probable cause that the film could not lawfully be traded in interstate commerce, the Fourth Amendment nonetheless required the agents to obtain a search warrant before opening and viewing the film. *Id.* at 657. The boxes were packaged and mistakenly delivered to a third party, which opened the packages, found the boxes therein containing suggestive drawings and explicit descriptions of the contents, and unsuccessfully attempted to examine the film by holding it up to the light. *Id.* at 652. The Court affirmed that "it has been settled that an officer's authority to possess a package is distinct from his authority examine its contents." *Id.* at 654. Therefore, "notwithstanding that the nature of the contents of these films was indicated by descriptive material on their individual containers, we are nevertheless persuaded that the unauthorized exhibition of the films constituted an unreasonable invasion of their owner's constitutionally protected interest in privacy." *Id.* The Court also stated the particular principle that "[w]hen the contents of the package are books or other materials arguably protected by the First

Amendment, and when the basis for the seizure is disapproval of the message contained therein, it is especially important that this requirement [for a warrant] be scrupulously observed." *Id.* at 654-55. It explained the FBI did nothing wrong by seizing the boxes or examining them to the extent that the third party had already exposed them; however, "[t]he projection of the films was a significant expansion of the search that had been conducted previously by a private party and therefore must be characterized as a separate search. That search was not support by any exigency, or by a warrant even though one could have easily been obtained." *Id.* at 657.

In this case, the cover image is analogous to the label on a film box. The video file underneath the cover-image "label" constituted an additional, independent privacy interest. Chief Douglas's playing of the video file was therefore a subsequent search independent of his initial viewing of the cover image. This additional search was not supported by any exigency or by a warrant even though one could have easily been obtained.

Moreover, even though the doctrine generally validates the seizure of evidence in plain view, the doctrine is not without limitations, and one in particular has special importance when applied to cell phones, tablets, and computers. In the recent case of *Collins v. Virginia*, this Court reiterated that authorities cannot seize plain view evidence on private property if intrusion into the property is not independently justified:

> The Court already has declined to expand the scope of other exceptions to the warrant requirement to permit warrantless entry into the home. The reasoning behind

> those decisions applies equally well in this context. For instance, under the plain-view doctrine, "any valid warrantless seizure of incriminating evidence" requires that the officer "have a lawful right of access to the object itself." *Horton v. California*, 496 U.S. 128, 136–137, 110 S.Ct. 2301, 110 L.Ed.2d 112 (1990); *see also id.*, at 137, n. 7, 110 S.Ct. 2301 (" '[E]ven where the object is contraband, this Court has repeatedly stated and enforced the basic rule that the police may not enter and make a warrantless seizure' "); *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 354, 97 S.Ct. 619, 50 L.Ed.2d 530 (1977) ("It is one thing to seize without a warrant property resting in an open area . . . , and it is quite another thing to effect a warrantless seizure of property . . . situated on private premises to which access is not otherwise available for the seizing officer"). A plain-view seizure thus cannot be justified if it is effectuated "by unlawful trespass." *Soldal v. Cook County*, 506 U.S. 56, 66, 113 S.Ct. 538, 121 L.Ed.2d 450 (1992). Had Officer Rhodes seen illegal drugs through the window of Collins' house, for example, assuming no other warrant exception applied, he could not have entered the house to seize them without first obtaining a warrant.

Collins v. Virginia, 138 S. Ct. 1663, 201 L.Ed.2d 9 (2018).

In this case, the manipulating of windows on the computer and the playing of the video file constituted a seizure. As explained in *Collins*, the file was located on premises—the laptop computer—to which Chief Douglas had no valid access. Thus, the law does not allow warrantless searches of cell phones, tablets, and computers merely because an incriminating image appears on the screen.

III. Whether the South Carolina Supreme Court erred in applying the inevitable discovery doctrine without considering the entire record and without determining that the video file would actually be discovered through the issuance of a warrant.

The Court should allow the writ to explain that in applying the inevitable discovery doctrine, lower courts must carefully examine the entire record and determine that the evidence would actually be lawfully discovered through a warrant or warrant exception. In *Nix v. Williams*, 467 U.S. 431, 444 (1984), the Court held that "illegally obtained information may nevertheless be admissible if the prosecution can establish by a preponderance of the evidence that the information would have ultimately been discovered by lawful means." The Court then engaged in a lengthy and detailed review of the record in concluding that the evidence in question would have been found absent the misconduct by law enforcement. *Id.* at 448-50.

In this case, the South Carolina Court of Appeals erroneously concluded that law enforcement would have inevitably discovered the contents of the video file because the cover image provided probable cause and because Investigator Hanna testified that it was "standard procedure to obtain a search warrant when he discovered images of child pornography." The South Carolina Supreme Court summarily noted that Marsh was required to report the cover image under South Carolina code section 16-3-850 and that Marsh testified that he would have reported the video after watching it.

The record as a whole does not support the conclusion that absent Chief Douglas's instructions to Marsh to play the video, Marsh would have played the video himself or reported the video to another law enforcement entity causing a warrant to

issue. First, the only information in the record as to the cause of Marsh's playing the video was Marsh's own statements that he played it "upon request of Ron" because "[Ron] wanted to see." Second, Marsh made no statements in the record that he would have reported the video to law enforcement based solely on his viewing the cover image. At trial, after reviewing the six printed still frames with the jury, he testified that based on "that kind of information . . . and what [he was] doing," he would have reported. Third, even had Marsh reported the video to separate law enforcement, as discussed previously the record does not indicate that more likely than not, other law enforcement would have sought a warrant and a magistrate would have issued one. Again, the State did not include the cover image into the record on appeal. Nowhere does the record state that the cover image showed the child's genitals or even below his waist. The trial judge and assistant solicitor's own comments disprove that the cover image created probable cause of any violation of law. Accordingly, both the South Carolina Court of Appeals and the South Carolina Supreme Court misunderstood and misapplied the inevitable discovery doctrine.

Respectfully submitted,

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