NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2019

TERRENCE MARSH, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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I. QUESTIONS PRESENTED

Whether the Court violated *Rosemond v. United States*, 572 U.S. 65 (2014), when finding Marsh had advance knowledge of the presence of a firearm in his 18 U.S.C. §924(c) prosecution?

Whether the Court undercut Marsh's Sixth Amendment right to present a defense at trial by refusing to admit Federal Rules of Evidence Rule 804(b)(3) statements against penal interest?

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CASES

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IV. OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit in *United States v. Terrence Marsh*, 815 Fed. Appx. 739, 2020 WL 4593804 (4th Cir. August 11, 2020), is an unpublished opinion and is attached to this Petition as Appendix A.

V. JURISDICTION

The Court of Appeals rendered its opinion on August 11, 2020. Jurisdiction of this Court is invoked under 28 U.S.C. '1254(1). Pursuant to Sup. Ct. R. 13.1, this petition is filed within 90 days of said denial.

VI. RELEVANT CONSTITUTIONAL PROVISIONS

The Fifth Amendment states in relevant part: No person shall . . . be deprived of life, liberty or property, without due process of law.

The Sixth Amendment states in relevant part: "In criminal prosecutions, the accused shall . . . have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

VII. STATEMENT OF THE CASE

A. Investigation and Arrest.

In January 2019, the Three Rivers Task Force located in Fairmont, West Virginia began receiving citizen complaints of drug dealing activity near a residence located on Virginia Avenue. J.A. 161, 168. The task force coupled with the DEA to investigate these allegations. J.A. 168. On January 17, 2019, police conducted a trash pull from 828 Virginia Avenue. J.A. 169. Police found items indicative of drug trafficking, to include plastic bags with powder and marijuana residue, bank deposit receipts, a hotel receipt and three bus tickets. J.A. 169. The bank receipts recorded two cash deposits of $5000 and $2900 into the same account moments apart on January 2, 2019. J.A 174. The bus tickets showed individuals traveling from Detroit, Michigan to the local area. J.A. 172.

Thereafter, the police conducted visual surveillance of the area. J.A. 175. They observed suspects entering an alley adjacent to 828 Virginia Avenue and meeting with stopped vehicles. J.A. 175. Police surveillance took place on January 18, 22, 24 and 30, 2019 with similar results. J.A. 176-177. Police surveillance additionally included vehicle stops. On January 22, 2019, a stopped vehicle and search resulted in the seizure of about a quarter ounce of marijuana. J.A. 183. On the 31st of January the police observed a vehicle stop briefly on Virginia Avenue. J.A. 183. The police pulled the vehicle over after it left the scene. J.A. 183. A canine search was positive, and one passenger indicated the earlier stop was for the purpose of buying oxycodone

pills. J.A. 185.

After the last traffic stop that day, the police applied to the Marion County magistrate court for a search warrant for 828 Virginia Avenue. J.A. 186. Following a knock and announce, the police search team forcibly entered the residence. J.A. 187. Police entered the living room of the residence through the front door and observed a firearm lying on the coffee table. J.A. 188. No one was present within the living room. J.A. 188. One individual later identified as Marsh was found standing near a water heater in a laundry room just off the kitchen area. J.A. 188, 191. Marsh was handcuffed and searched for weapons with negative results. J.A. 189. He had $91 cash on him and no phone. J.A. 200.

In the upstairs area, an individual later identified as Purdue was seen fleeing from a second story window onto the porch roof. J.A. 187. Purdue was pulled back inside by the search team and handcuffed. J.A. Purdue did not have any weapons but $431 was found in his pockets along with a cell phone. J.A. 190, 197. Finally, Mathis was found hiding inside a locked bathroom on the second floor after police broke down the door. J.A. 191. Mathis as well was searched and did not have a weapon on his person. J.A. 191. Mathis had $757 in the green jacket found nearby along with a phone. J.A. 330.No one else was found inside the structure. J.A. 193. Within the living room area, the police located and seized an LG and Coolpad cell phone along with the firearm seen earlier lying on the coffee table. J.A. 205-206; 256-257; 1107-1108. This firearm was identified as a 9 mm semiautomatic Lugar pistol. J.A. 252.

The phones were later found listed in defendant's name. J.A. 531. Defendant's Michigan ID and debit card were on the table and digital scales were located nearby. J.A. 215, 1108.

A green backpack was found along the living room wall which contained identifying documents for Marsh, to include his birth certificate, his social security card and a vehicle title in his name. J.A. 211-212; 1108. Within the backpack was a bus ticket in the name of Jacob Thomas. J.A. 210; 1109. Information on the bus ticket indicated travel from Detroit, Michigan to Pittsburgh, Pennsylvania with an arrival time of January 29, 2019 at 9:00 PM. J.A. 210-211; 1109.

A black Nautica suitcase was also found within the living room. J.A. 216. Zipped inside one pocket of the suitcase the police seized a Ruger 1911 .45 caliber pistol. J.A. 216; 1110. Within the zipped main compartment of the suitcase, the police found a large quantity of drugs to include suspected methamphetamine, marijuana and various pills of oxycodone and hydrocodone. J.A. 217-218; 1011. The methamphetamine weighed approximately 1.8 kilograms with a street value of about $180,000. J.A. 264-265.

In the kitchen by the stove area, the police located a Motorola and Coolpad cellular phone, digital scales, latex gloves, a large sum of cash (between $17,000 and $18,000) and a notebook. J.A. 273-274. The notebook on the countertop was opened to a particular page, and it contained handwritten notes which referenced various slang drug names with numerical calculations. J.A. 274-276. Marsh's signature was

found at the bottom of several pages within the notebook. J.A. 286. The actual notations were determined by the DEA to relate to drug trafficking activities (J.A. 496-497).

While the police were searching the kitchen area, an incoming call was seen and heard on one of the phones. J.A. 500. The police took a screen shot of the call showing "Call from Money Phone….TT…. Mobile (681) 621-8335." J.A. 501; 1118. This cellphone number was later tied to Tyreese Marsh, brother of the defendant. J.A. 513. The incoming call and screen shot were made at 1:47 PM that same afternoon. J.A. 502; 1118.

On the second floor's east bedroom where Purdue had fled onto the outside roof, the police located an LG cell phone, an air mattress, a Grey Adidas backpack, and a Greyhound bus ticket in Purdue's name. J.A. 290-292; 298. The ticket showed Purdue's travel from Detroit on January 26, 2019. J.A. 293. A small baggie containing a powdery substance was also seized from Perdue's bedroom floor. J.A. 302.

Within the west bedroom, the police seized a .22 AR-15 type rifle seen leaning up against the wall. J.A. 304. There were two cellular phones, and a set of digital scales. J.A. 305-306. With the bedroom closest, police found a magazine for the rifle and a deflated air mattress. J.A. 306; 312. Underneath the mattress was a large bag of suspected methamphetamine weighing nearly a pound. J.A. 312-313.

The two cellphones found in the kitchen area of the residence were later tied to the defendant through business records. J.A. 517. One was the same phone which

had received the incoming call. J.A. 526. Forensic searches of these phones showed two text messages sent to defendant's brother Tyreese Marsh on January 30, 2019 and January 31, 2019. J.A. 519. Phone records [using UTC time which is 5 hours ahead of EST] showed the text messages were sent at 12:12 PM EST on January 30th, and 1:25 PM EST on January 31st. J.A. 520-521; 1119-1120. Each text message included information somewhat identical to that contained in the notebook ledger found in the kitchen (J.A. 1119-1120).

During the government's case-in-chief, two expert witnesses testified. An FBI Forensic Examiner of Records testified as to the notebook entries. J.A. 684. These writings were deemed to relate to drug trafficking activities. J.A. 687-694. The second expert, an FBI Document Analyst, testified to a comparison of Marsh's known handwriting and exemplars he provided with the notebook entries. J.A. 714-720. This individual reached a definitive opinion that Marsh wrote the drug ledger information found inside the notebook. J.A. 725.

Finally, a task force officer testified to listening to and saving certain telephone calls made by Marsh to his brother Tyreese Marsh and others while being held at the North Central Regional Jail. J.A. 803-804. Approximately 200 of these calls were recorded onto a DVD. J.A. 805. Of these, the government relied on portions of two separate telephone calls made by Marsh to his brother on February 1, 2019 – the day following the search and seizure at the Virginia Avenue residence. J.A. 813-814. Transcripts of selected portions of the calls are found in the Joint Appendix at 1129-

1133. The government contended Marsh made incriminating statements to his brother, to include Marsh saying he should have "followed my first mind [and] left yesterday morning after I did my count." J.A. 1130. Marsh further stated "I said you can go down here and take this chance of f***ing up your life again." J.A. 1131. Marsh additionally confided to his brother that methamphetamine supposedly stolen earlier in time was actually seized by police from the closet inside Mathis's bedroom. J.A. 1132. Tyrese Marsh warned defendant his conversations "gonna add to they case" and he acknowledged not being able to travel to West Virginia given defendant's "text messages to this phone." J.A. 1132-1133.

B. District Court Proceedings.

Count seven of the indictment charged Marsh, Mathis and Perdue each with aiding and abetting possession of a firearm in furtherance of a drug trafficking crime. J.A. 26. The specific language contained within the charging document was as follows:

> On or about January 31, 2019, in Marion County, in the Northern District of West Virginia, defendants **TERRENCE D. MARSH, NICHOLAS J. MATHIS** and **LARMAR D. PURDUE**, aiding and abetting each other, did knowingly possess a firearm, that is a Ruger, Model SR1911, .45 caliber pistol . . . a SCCY, Model CPX-2. 9mm [L]uger pistol . . . [and] a CBC Mossberg, Model 715T, 22 caliber rifle . . . in furtherance of a drug trafficking crime . . . in violation of Title 18 United States Code, Section 924(c)(1)(A).

J.A. 26.

At the close of the government's case-in-chief, Marsh moved for judgment of acquittal as to the § 924(c) count. J.A. 875-876. Key aspects of the argument in

support of the motion for judgment of acquittal were the specific locations of each weapon upon seizure, and the timing of Marsh's misconduct when taken in the light most favorable to the government. It was Marsh's contention, based on *Rosemond v. United States*, 572 U.S. 65, 134 S.Ct. 1240, 188 L.Ed2d 248 (2014), that the government must prove advance knowledge of the firearms being present before Marsh completed his acts of assistance. J.A. 876-877.

In *Rosemond*, this Court was tasked with deciding how the two requirements of an affirmative act and intent apply in a prosecution for aiding and abetting a §924(c) offense. *Rosemond v. United States*, 134 S.Ct. at 1245. As to the act itself, the Court found it sufficient that Rosemond participated in the drug deal; there is no requirement that Rosemond's actions be directed to the firearm. Id.at 1247. Intent, however, must relate to the firearm. As the Supreme Court stated:

> An active participant in a drug transaction has the intent needed to aid and abet a §924(c) violation when he knows that one of his confederates will carry a gun . . . [T]he §924(c) defendant's knowledge of a firearm must be advance knowledge . . . When an accomplice knows beforehand of a confederate's design to carry a gun, he can attempt to alter that plan or, if unsuccessful, withdraw from the enterprise . . . But when an accomplice knows nothing of a gun until it appears at the scene, he may have already completed his acts of assistance; or even if not, he may at that late point have no realistic opportunity to quit the crime.

Id. at 1249.

The district court granted Marsh's motion for judgment of acquittal in part. Under the *Rosemond* analysis, the district court found insufficient evidence that Marsh ever knew the presence of the Mossberg rifle later seized from the upstairs bedroom of Mathis. J.A. 914. As such, the district court indicated it was "taking the

Mossberg out of the case." J.A. 914. As to the Ruger pistol, later seized from within a separate zippered pocket of the Nautica suitcase, the district court as well found insufficient evidence. Per the district court, "there's no evidence that Mr. Marsh was ever in that suitcase or ever knew what was in the suitcase, and even if he did go into the suitcase to count drugs, there's no evidence that connects him to any knowledge that the firearm was in the suitcase." J.A. 916-917. Therefore, "the Ruger goes out." J.A. 918.

Given the district court's rulings, the only remaining firearm capable of supporting the § 924(c) count was the Luger pistol. That pistol was first observed by the police lying on the coffee table within the living room upon forced entry into the residence. J.A. 188. No one was in the living room at that time. J.A. 188. It was Marsh's position the government could not, without resorting to speculation and conjecture, prove who placed the Lugar pistol on the coffee table or when this event took place. J.A. 913. As such, it was equally plausible Marsh committed all his acts of misconduct without having advance knowledge of the firearm's presence. J.A. 921. For, in the light most favorable to the government, Marsh's acts of misconduct were limited to the following: 1) being physically present within the residence; 2) at some point in time drafting the drug ledger entry found in the kitchen based on his knowledge of drug dealing activity; and 3) texting two drug sales messages to his brother on his cellular phones. Marsh argued these acts of misconduct could very well have been completed before Marsh "knew that the gun was on the coffee table." J.A. 922.

As to the 9mm Lugar, the district court disagreed. It found "when the evidence is viewed in the light most favorable to the government, because the other gun is on the table, close to proximity of pieces of evidence that the Government has been about to establish, satisfactorily, where, the – in the possession and belonged to the defendant. J.A. 918-919. The district court found Marsh "a willful participant" and that "the connection of the gun with the cell phones, with the notebook, and all, that is a much easier circumstantial case for this Court to connect up than the Ruger and the Mossberg. So I am not going to allow the Government to argue that two guns to the jury on the 924(c) count. But Count 7 will carry to the jury, as I've otherwise indicated." J.A. 919.

On May 14, 2019, prior to commencement of Marsh's jury trial, co-defendant Purdue tendered guilty pleas before the district court to all counts contained in the indictment. J.A. 28. As part of the FRCP Rule 11 proceedings, the district court required the government provide witness testimony in support of a factual basis. J.A. 31. The factual basis supporting the prosecution of Purdue was provided on the record through a DEA agent. J.A. 33-47. Purdue, through counsel, did not question the agent. J.A. 47. Purdue, through counsel, did not object to the factual representations made by the agent. J.A. 48. Thereafter, the district court questioned Purdue directly to better understand the scope of his involvement in the drug trafficking conspiracy. J.A. 48-56. As to the particular questions directed toward Purdue, the following transpired:

THE COURT: Okay. Now, based on your guilty pleas, are you agreeing to forfeit – forfeit any ownership or other interest you have in the three firearms that are alleged in the forfeiture allegation, and the $18,540 that is – that was seized during the search?
DEFENDANT PERDUE: Yes, ma'am
THE COURT: All right. Could you tell me what, if any, of that property you had an interest in? Did you have any interest in the cash?
DEFENDANT PERDUE: Yes, ma'am
THE COURT: Was it as testified by the special agent, the money he found in your pocket, or was there another interest?
DEFENDANT PERDUE: Money he found in my pocket.
THE COURT: Okay. So of the $18,540, the stash of cash in the kitchen was not – you had no interest in that?
DEFENDANT PERDUE: No, ma'am
THE COURT: Whose interest – who had the interest in it?
DEFENDANT PERDUE: I guess the owner of the house.
THE COURT: Okay.
DEFENDANT PERDUE: The person who was renting the house.
THE COURT: Are you telling me under oath here while you're pleading guilty you don't know who – who owned that cash?
DEFENDANT PERDUE: Yes, ma'am
THE COURT: Okay. But you are admitting that you conspired to distribute this money? Did you know by – based on the agreement, what your interest – or the drugs, did you know what your interest in the money was?
DEFENDANT PERDUE: (No response.)
THE COURT: You can talk to your lawyer.
(The defendant and Mr. Rollo confer off the record.)
THE COURT: Mr. Rollo, he has to allocate. And I think to – he can't just say the words "to conspire." I just need – and agree. I need to know what that was, if he doesn't know who owns the money.
DEFENDANT PERDUE: It's my money.
THE COURT: It – all of it, or some of it?
DEFENDANT PERDUE: All of it.
THE COURT: All of the $ 18,540 was yours?
THE COURT: And how did you become the owner of that money?
DEFENDANT PERDUE: By selling drugs.
THE COURT: Okay. So was any of that money Mr. Mathis's?
DEFENDANT PERDUE: No, ma'am
THE COURT: Was any of that money Mr. Marsh's
DEFENDANT PERDUE: No, ma'am
THE COURT: All right. Mr. Mathis said he was selling drugs in the house too. Was he?
DEFENDANT PERDUE: Yes.

THE COURT: He was. So under your agreement with him, was he entitled to any of that money?

DEFENDANT PERDUE: Yes, ma'am

THE COURT: All right. But, at the time, you considered it all yours?

DEFENDANT PERDUE: Yes, ma'am

THE COURT: What about the firearms? Were you the owner or possessor of the Ruger?

DEFENDANT PERDUE: No, the Luger 9mm.

THE COURT: The Ruger Pistol, handgun [sic].

DEFENDANT PERDUE: The 9mm

THE COURT: Okay. The 9mm. You owned the Ruger [sic]. Okay. What about the Mossberg

DEFENDANT PERDUE: No, ma'am

THE COURT: Do you know who owned the .45 caliber Ruger?

DEFENDANT PERDUE: No, ma'am

THE COURT: Okay.

J.A. 54-57.

The final pre-trial conference for Marsh took place before the district court July 31, 2019. J.A. 69. Argument was heard by counsel for Marsh and the government as to the admissibility of the statements made by Purdue during his guilty plea hearing. J.A. 83. Counsel for Marsh placed on the record his unsuccessful attempts to call Purdue at trial. J.A. 83. Counsel for Purdue confirmed he would exercise the right to remain silent if served and called at trial. J.A. 85. These representations confirmed the unavailability of Purdue at trial, and brought into play Rule 804(b)(3) of the Federal Rules of Evidence. Marsh moved for the admissibility of the statements made by Purdue at his plea hearing as statements against penal interest. J.A. 86.

In support of the admission of Purdue's statements against penal interest, Marsh relied on the six factor test outlined by the Fourth Circuit Court of Appeals in *United States v. Bumpass*, 60 F.3d 1099 (4th Cir. 1993). J.A. 88-89. In *Bumpass*,

the Court outlined factors used to justify admitting a statement under the rule, to include: 1) whether the declarant had at the time of making the statement pled guilty or was still exposed to prosecution for making the statement; 2) the declarant's motive in making the statement and whether there was reason to lie; 3) whether the declarant repeated the statement and did so consistently; 4) the party or parties to whom the statement was made; 5) the relationship of the declarant with the accused; and 6) the nature and strength of the independent evidence relevant to the conduct in question. Id. at 1102.

Marsh contended the statements made by Purdue at his plea hearing satisfied the requirements of FRE Rule 804(b)(3) and met five of the six *Bumpass* factors. J.A. 89. Other than not repeating the statements consistently, the statements themselves otherwise satisfied the admissibility requirements. Purdue was under oath while in open court addressing the district court during the FRCP Rule 11 plea colloquy. He still faced criminal exposure or a loss of acceptance of responsibility should he lie to the court. Purdue was motivated that the court accept his plea and had no reason to lie as it would jeopardize the process. Notably, the statements were made directly to the court in a formal setting, and Purdue had no close, personal relationship with Marsh. Finally, Purdue's presence within the residence during the search and his close proximity to the contraband provided sufficient corroboration.

Ultimately, the district court refused to admit Purdue's statements. It was the government's contention that Purdue's statements were contradictory. J.A. 102. March argued this goes to the weight, not admissibility of the statements. The district

court, however, relied on a completely different justification for exclusion. The district court claimed Purdue's statements were not against his interest. J.A. 103.

Finally, the district court hinged its ruling on Purdue's having a "propensity to lie" and finding his statements "fall short of corroborating his claim he owned the money." J.A. 106.

C. Appeal to the United States Court of Appeals for the Fourth Circuit.

Marsh appealed to the Fourth Circuit Court of Appeals. In regard to the §924(c) prosecution, the Court held "Marsh had advance knowledge of the gun found on the coffee table and that it was being used to facilitate a drug crime." In addition, the Court affirmed the inadmissibility of statements made by co-defendant Perdue by holding "the district court appropriately weighed each of the factors announced in *Bumpass* and concluded Marsh failed to establish the admissibility of the statements at issue." Appendix A.

VIII. REASONS FOR GRANTING THE WRIT

A. The Fourth Circuit violated *Rosemond v. United States*, 572 U.S. 65 (2014), when finding Marsh had advance knowledge of the presence of a firearm in a 18 U.S.C. §924(c) prosecution.

Marsh disagrees with the circuit court's ruling. This Court in Rosemond stressed the need for a nexus between defendant's advance knowledge of a firearm's presence and the acts of assistance related to the underlying crime. Here, the drug ledger itself and the two cellular phones belonging to Marsh used to send two text messages were found in the kitchen. This was an area separate and apart from the adjacent living room where the Lugar pistol was later seized. Equally important, there is no available evidence, even in the light most favorable to the government, when the pistol was first placed on the coffee table and who might have done so. Any one of the three individuals inside the Virginia Avenue duplex had such opportunity, to include Mathis and Perdue.

Marsh's mere presence is a far cry from the facts in other *Rosemond* related cases where the firearm is either displayed in a defendant's presence or brandished during the criminal venture under an aiding and abetting theory of prosecution. *United States v. Robinson*, 799 F.3d 196 (2nd Cir. 2015)(defendant observed gun while being pointed at hijacking victim by another and ordered it be put away); *Steiner v. United States*, 940 F.3d 1282 (11th Cir. 2019)(defendant actively participated in offense after co-conspirators first fired their guns). Had Marsh committed his acts of assistance without advance knowledge of the Lugar's presence in the adjacent living

room, then the government failed to prove the element of knowledge under the *Rosemond* analysis. The district court erred in failing to grant Marsh's motion for judgment of acquittal as to the last of the three firearms listed against him within the indictment.

B. The Fourth Circuit undercut Marsh's Sixth Amendment right to present a defense at trial by refusing to admit Federal Rules of Evidence Rule 804(b)(3)statements against penal interest?

Here, the circuit court erred because it misapplied the *Bumpass* factors. Purdue took complete blame and ownership of nearly $18,000 in drug proceeds. J.A. 55. Purdue also took an ownership interest in the Lugar pistol found on the coffee table. J.A 56. These statements were clearly against Purdue's interest. Granted, the same statements were relevant to Marsh's defense. However, the district court was incorrect in labeling such statements as "a collateral statement exculpating Mr. Marsh" rather than "a statement against Mr. Purdue's interest." J.A. 103. In fact, the statements were both, and rightly admissible under Rule 804(b)(3) of the Federal Rule of Evidence.

Moreover, Purdue was present in a courtroom, while under oath, and while addressing the district court judge. Purdue was physically present within the residence where the monies were seized. If Purdue admitted a leadership role and took complete ownership of the drug monies and firearm seized, then such statements should have been allowed before Marsh's jury.

Statements made by Purdue at his plea hearing satisfied the requirements of FRE Rule 804(b)(3) and met five of the six *Bumpass* factors. J.A. 89. Other than not repeating the statements consistently, the statements themselves otherwise satisfied the admissibility requirements. Purdue was under oath while in open court addressing the district court during the FRCP Rule 11 plea colloquy. He still faced criminal exposure or a loss of acceptance of responsibility should he lie to the court. Purdue was motivated that the court accept his plea and had no reason to lie as it would jeopardize the process. Notably, the statements were made directly to the court in a formal setting, and Purdue had no close, personal relationship with Marsh. Finally, Purdue's presence within the residence during the search and his close proximity to the contraband provided sufficient corroboration.

The district court ruling here constituted harmful error. At trial, Marsh's theory of defense was that he was merely present while conducting a real estate search of the area to determine if a Detroit business model might work as well in West Virginia. This theory of defense was bolstered and supported by Michael Stubbs, Marsh's business partner in Detroit, Michigan. J.A. 961-976. Purdue's statements against interest further supported this theory of defense. Harmful error occurred given the exclusion of such statements made earlier by Purdue and it violated Marsh's Sixth Amendment right to present his defense.

IX. CONCLUSION

For the reasons stated, the Supreme Court should grant certiorari in this case.

Respectfully submitted,

TERRENCE MARSH

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