

APPENDICES

A.APPENDIX: Brooks v. Jordan, 2020 U.S.App.LEXIS

18078; Case No. 20-5075

B.APPENDIX: 2019 U.S.DIST.LEXIS 217455; 5:18-

CV-196-TBR

C.APPENDIX: 2018 Ky.LEXIS 578; 2018-SC-389-D

D.APPENDIX: 2018 Ky.App.Unpub.LEXIS 269;

Kentucky Court of Appeals No. 2017-CA-493-MR

E.APPENDIX: Brooks v. Com., 97CR00284-002

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

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Clerk

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Filed: October 09, 2020

Mr. Jason Lamont Brooks
Luther Luckett Correctional Complex
P.O. Box 6
LaGrange, KY 40031

Re: Case No. 20-5075, *Jason Brooks v. Amy Robey*
Originating Case No.: 5:18-cv-00196

Dear Mr. Brooks,

The Court issued the enclosed Order today in this case.

Sincerely yours,

s/Beverly L. Harris
En Banc Coordinator
Direct Dial No. 513-564-7077

Enclosure

No. 20-5075

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JASON LAMONT BROOKS,

Petitioner-Appellant,

v.

SCOTT JORDAN, Warden,

Respondent-Appellee.

FILED
Jun 08, 2020
DEBORAH S. HUNT, Clerk

ORDER

Before: SUTTON, Circuit Judge.

Jason Lamont Brooks, a Kentucky prisoner proceeding pro se, appeals the district court's judgment denying his petition for a writ of habeas corpus filed under 28 U.S.C. § 2254. Brooks has filed an application for a certificate of appealability ("COA"). *See* Fed. R. App. P. 22(b). He has also filed a motion to proceed in forma pauperis on appeal, *see* Fed. R. App. P. 24(a)(5), and a motion for appointment of counsel.

In October 1997, the McCracken County (Kentucky) Grand Jury indicted Brooks on one count each of capital murder and first-degree robbery. Brooks was a juvenile at the time of the commission of the offenses. Brooks pleaded guilty to both charges pursuant to an agreement with the Commonwealth and, in accordance with the terms of that agreement, received a sentence of life imprisonment with parole eligibility after twelve years. The trial court entered Brooks's judgment of conviction and sentence on December 21, 1998, and Brooks did not appeal. After serving twelve years in prison, Brooks met with the parole board in 2009, which denied him parole. *See Brooks v. Commonwealth*, No. 2019-CA-000563-MR, 2020 WL 1231698, at *1 (Ky. Ct. App. Mar. 13, 2020). According to Brooks, the parole board deferred his next parole hearing until 2021.

Brooks thereafter filed several unsuccessful state post-conviction motions. Specifically, in April 2015, Brooks filed a "Motion for Resentencing" under Rule 60.02 of the Kentucky Rules of

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Civil Procedure and Rule 10.26 of the Kentucky Rules of Criminal Procedure, alleging that his sentence was illegal. The trial court denied that motion and Brooks did not appeal.

In January 2017, Brooks filed a “Motion to Vacate, Set Aside or Correct Sentence” under Rule 11.42(10)(b) of the Kentucky Rules of Criminal Procedure, arguing that his sentence should be set aside because he had not been afforded a meaningful opportunity to be released on parole. Brooks’s motion relied on the United States Supreme Court’s decisions in *Graham v. Florida*, 560 U.S. 48 (2010); *Miller v. Alabama*, 567 U.S. 460 (2012); and *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016). The trial court denied Brooks’s motion, and the Kentucky Court of Appeals affirmed. *Brooks v. Commonwealth*, No. 2017-CA-000493-MR, 2018 WL 2078011, at *3 (Ky. Ct. App. May 4, 2018).

In November 2018—approximately one month before Brooks initiated this federal habeas proceeding—Brooks filed another Rule 60.02 motion, in which he relied on the same three Supreme Court decisions to argue that the final judgment in his case was void for lack of a meaningful sentencing procedure. The trial court denied that motion and the Kentucky Court of Appeals affirmed. *Brooks*, 2020 WL 1231698, at *3.

In December 2018, Brooks filed a § 2254 petition, which he later amended, arguing that his life sentence violates his Eighth Amendment right to be free from cruel and unusual punishment. Upon preliminary review, the magistrate judge ordered Brooks to show cause why his petition should not be denied as untimely. Brooks complied with the show-cause order, but the magistrate judge rejected Brooks’s timeliness arguments and recommended that the district court deny the habeas petition as untimely. Over Brooks’s objections, the district court adopted the magistrate judge’s report and recommendation, denied Brooks’s habeas petition, and declined to issue a COA.

Brooks now seeks a COA from this court on his Eighth Amendment claim. A COA may issue “only if the applicant has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2); *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). Where, as here, the district court denies a habeas petition on procedural grounds, the petitioner must show “at least,

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that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

The Antiterrorism and Effective Death Penalty Act (“AEDPA”) imposes a one-year statute of limitations on § 2254 petitions. 28 U.S.C. § 2244(d)(1). Generally, the limitations period begins to run on the date on which the petitioner’s judgment of conviction becomes “final by the conclusion of direct review or the expiration of the time for seeking such review.” § 2244(d)(1)(A). The trial court sentenced Brooks on December 21, 1998, after which Brooks had thirty days to file a notice of appeal. *See* Ky. R. Crim. P. 12.04(3). Brooks did not appeal, and his conviction and sentence became final on January 20, 1999. The limitations period under § 2244(d)(1) began running the following day and expired one year later, on January 21, 2000. Brooks did not file his habeas petition until December 2018, long after the expiration of the limitations period. Moreover, Brooks was not entitled to statutory tolling under 28 U.S.C. § 2244(d)(2) because he did not file his state post-conviction motions until after AEDPA’s limitations period had already run. *See Vroman v. Brigano*, 346 F.3d 598, 602 (6th Cir. 2003).

Brooks argued that his habeas petition was timely because the one-year limitations period did not commence until the Supreme Court decided *Montgomery*, which rendered *Miller* retroactively applicable to cases on collateral review. Under 28 U.S.C. § 2244(d)(1)(C), the one-year limitations period commences on “the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review.” But under this subsection, the limitations period would have commenced when *Miller* was decided, not when *Montgomery* made *Miller* retroactively applicable to cases on collateral review. *See Dodd v. United States*, 545 U.S. 353, 358-59 (2005). Even if the limitations period did not begin to run until June 25, 2012—the date that *Miller* was decided—the limitations period expired one year later, on June 25, 2013, thus rendering Brooks’s habeas petition untimely as he would still not be entitled to statutory

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tolling. Considering the foregoing, reasonable jurists could not debate the district court's procedural ruling that Brooks's habeas petition was time-barred.

The AEDPA's one-year limitations period is subject to equitable tolling if a petitioner "shows '(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way' and prevented timely filing." *Holland v. Florida*, 560 U.S. 631, 649 (2010) (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)). Brooks did not pursue his rights diligently, as he waited nearly three years after the Supreme Court decided *Miller* to file his first state post-conviction motion challenging his sentence. He also waited over six years after *Miller* was decided to file his federal habeas petition. Brooks argues that his pro-se status is an extraordinary circumstance that prevented him from filing a timely habeas petition. But the fact that Brooks was required to seek federal habeas relief pro se is not an adequate ground for equitable tolling. See *Keeling v. Warden, Lebanon Corr. Inst.*, 673 F.3d 452, 464 (6th Cir. 2012). Brooks's equitable-tolling arguments do not deserve encouragement to proceed further. See *Miller-El*, 537 U.S. at 327.

Finally, a petitioner can overcome a time-bar by showing "that failure to consider [his] claims will result in a fundamental miscarriage of justice," *Coleman v. Thompson*, 501 U.S. 722, 750 (1991), but this requires a petitioner to make a "convincing showing" of actual innocence, *McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013). Brooks did not convincingly show—or even allege—that he was actually innocent of murder or robbery.

Accordingly, Brooks's COA application is **DENIED**, and his motions for pauper status and for appointment of counsel are **DENIED** as moot.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

20-5075

Mr. Jason Lamont Brooks
#138036
Luther Luckett Correctional Complex
P.O. Box 6
LaGrange, KY 40031

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
PADUCAH DIVISION
CIVIL ACTION NO. 5:18-CV-196-TBR-LLK**

JASON LAMONT BROOKS

PETITIONER

V.

SCOTT JORDAN, Warden

RESPONDENT

MEMORANDUM OPINION AND ORDER

This matter is before the Court upon Magistrate Judge King's Findings, Conclusions, and Recommendations ("Recommendations") (DN 19) issued on October 1, 2019. The Magistrate Judge recommends that the Court deny as untimely Mr. Brooks's Petition and amendment to petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 (DN 1; DN 11), deny Petitioner's motion to stay and hold in abeyance (DN 13), and deny a certificate of appealability. Mr. Brooks filed Objections (DN 25) to the Recommendations. Upon review of the Recommendations, Objections, relevant law, and being otherwise sufficiently advised, the Court **HEREBY ADOPTS** the Magistrate's Recommendations (DN 19). The reasoning expressed in the Recommendations is sound and the Court adopts those Recommendations in full. This Opinion merely addresses some of Mr. Brooks's Objections to those Recommendations.

Mr. Brooks's Petition is time barred.¹ In relevant part, 28 U.S.C. § 2244(d)(1) provides:

A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation shall run from the latest of – (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review; . . . [or] (c) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized

¹ For a recitation of the facts, *see* (DN 19).

In this case, the state court has not granted Petitioner the right to file an out-of-time direct appeal. Instead, Petitioner's judgment became final pursuant to 28 U.S.C. § 2244(d)(1) on January 21, 1999 when Petitioner's time to appeal his conviction lapsed. Because Petitioner filed the Petition before this Court on December 28, 2018, his Petitioner is untimely.

Mr. Brooks also objects to Magistrate Judge King's finding that his Petition is time barred pursuant to § 2244(d)(1)(C). § 2244(d)(1)(C) sets the beginning of the one-year period of limitations at "the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." Petitioner's claim is premised upon three related Supreme Court cases: *Graham v. Florida*, 560 U.S. 48 (2010); *Miller v. Alabama*, 567 U.S. 460 (2012); and *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016). Judge King correctly summarizes these three cases as follows:

Graham v. Florida held that the Eighth Amendment bars juvenile offenders from being sentenced to life without the possibility of parole (LWOP) for a non-homicide crime. . . . *Miller v. Alabama* held that mandatory LWOP sentences for juvenile homicide offenders violate the Eighth Amendment. . . . *Montgomery v. Louisiana* held that *Miller* applies retroactively on collateral review because it announced a new substantive rule of constitutional law.

(DN 19 at 2-3) (citations omitted). Petitioner argues that the limitations petition began on January 27, 2016, when *Montgomery* announced that *Miller* applies retroactively. As Judge King correctly identifies, however, the limitations period begins to run when the constitutional right is first recognized and not when the right is announced to be retroactive. In a recent opinion, the District Court for the Eastern District of Michigan explained:

Section 2244(d)(1)(C) indicates that the one-year limitations period can run from "the date on which the constitutional right asserted was *initially recognized* by the

IT IS FURTHER ORDERED, that a Certificate of Appealability is **DENIED** as to each claim asserted in the Petition and amendment thereto.

IT IS SO ORDERED.

The image shows a handwritten signature in black ink that reads "Thomas B. Russell". The signature is written over a circular seal, which is partially obscured by the ink. The seal appears to be the official seal of the United States District Court for the Eastern District of Kentucky, featuring a central emblem surrounded by text.

**Thomas B. Russell, Senior Judge
United States District Court**

December 18, 2019

CC: Jason Lamont Brooks
138036
LUTHER LUCKETT CORRECTIONAL COMPLEX
P.O. Box 6
LaGrange, KY 40031
PRO SE
CC: Counsel of Record

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
PADUCAH DIVISION
CIVIL ACTION NO. 5:18-CV-196-TBR-LLK**

JASON LAMONT BROOKS

PETITIONER

V.

SCOTT JORDAN, Warden

RESPONDENT

JUDGMENT

In accordance with the Order of the Court, it is hereby **ORDERED AND ADJUDGED** as follows:

- (1) Petitioner's petition and amendment to petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 (DN 1; DN 11) are **DISMISSED** with prejudice, and judgment is entered in favor of respondent;
- (2) A Certificate of Appealability is **DENIED**; and
- (3) This is a **FINAL** judgment and the matter is **STRICKEN** from the active docket of the Court.

IT IS SO ORDERED.



**Thomas B. Russell, Senior Judge
United States District Court**

December 18, 2019

CC: Jason Lamont Brooks
138036
LUTHER LUCKETT CORRECTIONAL COMPLEX
P.O. Box 6
LaGrange, KY 40031
PRO SE
CC: Counsel of Record

Supreme Court of Kentucky

2018-SC-000389-D
(2017-CA-000493)

JASON LAMONT BROOKS

MOVANT

V.

McCRACKEN CIRCUIT COURT
1997-CR-00284

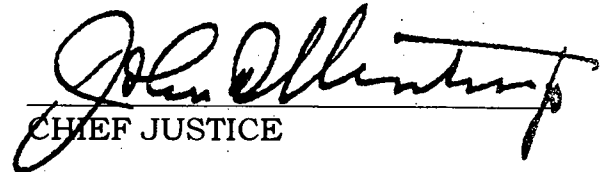
COMMONWEALTH OF KENTUCKY

RESPONDENT

ORDER DENYING DISCRETIONARY REVIEW

The motion for review of the decision of the Court of Appeals is
denied.

ENTERED: December 5, 2018.


CHIEF JUSTICE

Commonwealth of Kentucky
Court of Appeals

NO. 2017-CA-000493-MR

JASON LAMONT BROOKS

APPELLANT

v. APPEAL FROM MCCracken CIRCUIT COURT
HONORABLE CRAIG Z. CLYMER, JUDGE
ACTION NO. 97-CR-00284-002

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

BEFORE: CLAYTON, JOHNSON, AND NICKELL, JUDGES.

JOHNSON, JUDGE: Jason Lamont Brooks (“Brooks”), appearing *pro se*, brings this appeal from the trial court’s Order Denying Movant’s Motion to Vacate, Set Aside, or Correct Judgment Pursuant to Kentucky Rules of Criminal Procedure (“RCr”) 11.42(10)(b) on February 13, 2017, subsequently amended to include Findings of Fact and Conclusions of Law on February 28, 2017, pursuant to

Brooks' Motion to Amend. After reviewing the record in conjunction with the applicable legal authorities, we AFFIRM the McCracken Circuit Court.

BACKGROUND

On October 24, 1997, Brooks and a co-defendant were indicted for Murder (Capital Offense)¹ and Robbery, First-Degree² by a McCracken County Grand Jury. Brooks, a juvenile at the time of the offense, was transferred as a youthful offender to circuit court on December 19, 1997, based on a district court probable cause hearing.³ Brooks pleaded guilty to Murder, First-Degree and Robbery, First-Degree on October 19, 1998, to a sentence of Life Imprisonment with parole eligibility after 12 years, per his agreement with the Commonwealth. The Final Judgment/Sentence of Imprisonment was entered on December 21, 1998, reflecting the Life Sentence but guaranteeing Brooks a parole hearing after 12 years' incarceration.

After serving the 12 years, Brooks met with the parole board on July 22, 2009. The Board denied Brooks parole.

On April 6, 2015, Brooks filed a Motion for Resentencing Pursuant to Kentucky Rules of Civil Procedure ("CR") 60.02 and RCr 10.26, alleging illegality

¹ Kentucky Revised Statutes ("KRS") 507.020.

² KRS 515.020.

³ See KRS 635.020(4).

of his sentence. The trial court entered an Order Denying Brooks' motion on April 28, 2015.

Brooks next filed a Motion to Vacate, Set Aside or Correct Sentence, Pursuant to RCr. 11.42(10)(b) on January 23, 2017. The Commonwealth's Response to Movant's Motion to Vacate, Set Aside or Correct Judgment Pursuant to RCr. 11.42(10)(b) was filed on January 26, 2017, Brooks filed his Reply to the Commonwealth on February 7, 2017, and the trial court denied Brooks' motion on February 13, 2017. The court issued Findings of Fact and Conclusions of Law, pursuant to Brooks' motion, on February 28, 2017.

Brooks' appeal to us followed, alleging that he has not and will not be afforded a meaningful opportunity to be released from his life sentence⁴ based on his "demonstrated maturity and rehabilitation" and that the trial court erred by denying Brooks' RCr 11.42 motion without appointing counsel and conducting an evidentiary hearing.

STANDARD OF REVIEW

In a motion brought under RCr 11.42, the movant has the burden of establishing convincingly that he or she was deprived of some substantial right which would justify the extraordinary relief provided by [a] post-conviction proceeding. . . . A reviewing court must always defer to the determination of facts and witness credibility made by the circuit judge. An RCr 11.42 motion is limited to

⁴ With first parole opportunity after 12 years in the penitentiary.

issues that were not and could not be raised on direct appeal.

Skaggs v. Commonwealth, 488 S.W.3d 10, 14 (Ky. App. 2016) (internal citations and quotations omitted).

As to the standard of review concerning the necessity of an evidentiary hearing, an evidentiary hearing is only required “if there is a material issue of fact that cannot be conclusively resolved, *i.e.*, conclusively proved or disproved, by an examination of the record.” *Fraser v. Commonwealth*, 59 S.W.3d 448, 452 (Ky. 2001).

ANALYSIS

Brooks’ first argument on appeal, that “he has not and will not be afforded a meaningful opportunity to be released upon (sic) his life sentence based on demonstrated maturity and rehabilitation” is without merit because the Board conducted its review of Brooks’ parole eligibility and set his next Board hearing date pursuant to established Kentucky law. Brooks cites to a spate of recent United States Supreme Court cases modifying life without the possibility of parole sentences for juvenile offenders. However, Brooks is not facing such a circumstance.

Brooks has already faced the Board once and has another Board hearing in his future. KRS 439.340 states, in relevant part:

(1) The board may release on parole persons confined in any adult state penal or correctional institution of Kentucky . . . eligible for parole. . . . As soon as practicable after his or her admission to an adult state penal or correctional institution . . . and at such intervals thereafter as it may determine, the Department of Corrections shall obtain all pertinent information regarding each prisoner, except those not eligible for parole. The information shall include the results of his or her most recent risk and needs assessment, his or her criminal record, his or her conduct, employment, and the reports of physical and mental examinations that have been made. . . .

(2) Before granting the parole of any prisoner, the board shall consider the pertinent information regarding the prisoner, including the results of his or her most recent risk and needs assessment, and shall have him or her appear before it for interview and hearing. . . . A parole shall be ordered only for the best interest of society and not as an award of clemency, and it shall not be considered a reduction of sentence or pardon. A prisoner shall be placed on parole only when . . . the board believes he or she is able and willing to fulfill the obligations of a law abiding citizen.

....

(14) If the parole board does not grant parole to a prisoner . . . [n]o deferment shall exceed ten (10) years, except for life sentences.

Brooks was granted the opportunity to have his hearing before the Board after serving 12 years per his agreed-upon sentence. There is no allegation that Brooks was not permitted to present to the Board mitigating factors such as his age at the time of the offense and the personal growth that he has experienced since

his incarceration. Despite Brooks' recounting in his brief of the Board's reasoning for denial, "seriousness [of the crime], violence involved, life taken, and crime involved firearm/deadly weapon or instrument," we are unable to consider that because it was not made a part of the official court record or included as an exhibit in Brooks' Brief and are similarly unable to consider Brooks' contention that the Board set his second parole hearing 144 months after his first.⁵ We can only find that there are no allegations in the record that the Board made any ruling in contravention of KRS 439.340.⁶ If the Board did in fact set Brooks' next parole hearing for 144 months after his first, such a ruling is legal pursuant to KRS 439.340(14)(b). Based on this analysis, we find that Brooks has not been denied any "substantial right" owed to him. As our Kentucky Supreme Court has stated:

The Corrections Cabinet has developed a thorough procedural structure whereby the Board reviews inmates' histories to determine parole eligibility. . . . While the statute and regulations entitle [Appellant] to review, even a finding that certain relevant criteria have been met does not require the Board to release him prior to the expiration of his sentence. Nothing in the statute or the regulations mandates the granting of parole in the first instance, and nothing therein diminishes the discretionary nature of the Board's authority in such matters.

⁵ Brooks admits in his Brief that he neglected to file the Board's report and it is found nowhere else in the record now before us.

⁶ Even were we to take Brooks' assertions concerning his hearing before the Board as fact, there would be no violation of KRS 439.340.

Belcher v. Kentucky Parole Bd., 917 S.W.2d 584, 586 (Ky. 1996) (internal citation omitted). In other words, the Board would be within its legal rights to deny Brooks parole at his purported next hearing in 2021 and continue denying him parole for the remainder of his natural life, despite any “meaningful changes” he may or may not make. Brooks bargained for a life sentence and whether he remains in prison for the rest of his life or is eventually given his freedom by the Board will be purely at the Board’s discretion.

Brooks’ second argument on appeal, that he was wrongfully denied the appointment of counsel and an evidentiary hearing, is likewise without merit since the trial judge rightfully concluded the allegations in Brooks’ motion could be resolved on the face of the record. As the Kentucky Supreme Court has stated in *Fraser v. Commonwealth*, 59 S.W.3d 448, 452-53 (Ky. 2001):

[T]he trial judge shall determine whether the allegations in the motion can be resolved on the face of the record, in which event an evidentiary hearing is not required. A hearing is required if there is a material issue of fact that cannot be conclusively resolved, *i.e.*, conclusively proved or disproved, by an examination of the record.

...

If an evidentiary hearing is required, counsel must be appointed to represent movant if he/she is indigent and specifically requests such appointment in writing.

...

If an evidentiary hearing is not required, counsel need not be appointed, because appointed counsel would [be] confined to the record.

(Internal citations and quotations omitted.) Since all of Brooks' contentions were properly denied via an examination of the existing record, there was no error in the trial court's refusal to appoint counsel or hold an evidentiary hearing.

CONCLUSION

Based upon the following, the McCracken Circuit Court is
AFFIRMED.

ALL CONCUR.

BRIEF FOR APPELLANT:

Jason Lamont Brooks, *pro se*
LaGrange, Kentucky

BRIEF FOR APPELLEE:

Andy Beshear
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Todd D. Ferguson
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