

No. _____

In the Supreme Court of the United States

ADEMOLA ADEBAYO,

Petitioner,

Versus

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether the Eleventh Circuit entered a decision that strengthens the circuit split created by Federal Rule of Appellate Procedure 36, which allows a minority of circuit courts to issue unexplained judgments, violates the Due Process and Equal Protection clauses of the Fifth and Fourteenth Amendments to the United States Constitution by denying meaningful appellate review to a class of litigants based solely on the random accident of geography?

PARTIES TO THE PROCEEDING

All the parties to this proceeding are named in the caption.

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PETITION FOR WRIT OF CERTIORARI

Ademola Adebayo respectfully petitions for a writ of certiorari to review the opinion of the United States Court of Appeals for the Eleventh Circuit entered in this matter on February 12, 2021, affirming the judgment of the United States District Court for Southern District of Florida, Miami Division.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is unpublished and appears at *United States v. Adebayo*, 836 Fed. Appx. 852 (11th Cir. 2021). It is attached as **Appendix A**.

The judgment of the United States District Court for the Southern District of Florida, Miami Division, is unpublished and is attached at **Appendix C**.

JURISDICTION

The court of appeals entered its order on February 12, 2021. Pursuant to Federal Rule of Appellate Procedure 35 and 11th Circuit Rule 35, a timely petition for rehearing and rehearing *en banc* was filed on March 15, 2021. Ultimately, the United States Court of Appeals for the Eleventh Circuit denied the petition on April 21, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves Rule 36 of the Federal Rules of Appellate Procedure (hereinafter "FRAP 36"). FED. R. APP. P. 36. FRAP 36(b) provides that a judgment is entered even when it is "rendered without an opinion, as the court instructs." Id. This case deals with this federal rule and the local circuit rules that allow courts of appeals to enter judgments without opinions.

STATEMENT OF THE CASE

A. Statement of jurisdiction in the lower courts, in accordance with this Court's Rule 14(1)(g)(ii), and suggestion of justification for consideration, as suggested under Rule 10.

The Petitioner, Ademola Adebayo, faced federal criminal charges in the district court under 18 U.S.C. § 3231, which grants exclusive original jurisdiction to district courts over offenses against the laws of the United States. The district court entered judgment on March 20, 2019. Mr. Adebayo filed a timely notice of appeal thereafter. The Eleventh Circuit exercised jurisdiction over Mr. Adebayo's appeal under 28 U.S.C. § 1291, which authorizes review of final judgments of the district courts, and 18 U.S.C. § 3742(a), which authorizes review of sentences.

This case concerns a serious circuit split that allows some circuits to enter judgments with or without opinions, as the courts deem appropriate. While eight of the thirteen circuits provide an explanation for their decisions, five circuits allow entry of judgments without opinions. procedural choice has caused a functional split among the circuits such that litigants' access to the judicial system in general, and capacity to seek meaningful review to this Court in particular differs widely based on the random accident of geography.

Ironically, the Eleventh Circuit is supposed to fall within the thirteen circuits that require an explanation for their decisions. However, in affirming the judgment entered by the district court in Mr. Adebayo's case, the Eleventh Circuit strengthened the circuit split by failing to provide any written explanation for its decision.

Mr. Adebayo is not the first to petition this Court to resolve the functional split among the circuits. However, he is among the few who falls within a circuit that has categorically required a written opinion and now, has been provided with the opposite. This Court's previous decisions to decline review of this issue has now allowed the Eleventh Circuit to change lanes and provides the precedent that other circuits can act similarly moving forward. We respectfully submit that the time has come for the Court to resolve the question of whether the hidden law practice of FRAP 36 cuts against the goals of judicial transparency, accountability, and accuracy, and deprives litigants of their fundamental right of full access to the courts and undermines public confidence in the federal judiciary.

B. Factual Background.

Mr. Adebayo was a pharmacist who had been licensed in Florida since 1994 without sanction. In August of 2016, the Middle District of Florida issued an Indictment for several individuals who were involved in a \$150,000,000 health care fraud conspiracy. The Indictment named Nicholas A. Borgesano, Jr., Bradley Sirkin, Scott D. Piccininni, Edwin Patrick Young, Wayne M. Kreisberg, Matthew N. Sterner, Peter D. Williams, and Joseph DeGregorio as members of the conspiracy and other related charges. It was not until June 21, 2018, after all of the aforementioned individuals had been sentenced, that Mr. Adebayo was separately indicted by a Grand Jury in the Southern District. Mr. Adebayo had been responsible for running the front-of-the-house, retail operation of A to Z Pharmacy, when he was caught up in the scheme perpetrated by these individuals.

At trial, the government presented testimony from various individuals who worked in the pharmacy. These witnesses testified about their duties and responsibilities, as well as their interactions with Mr. Adebayo. It was undisputed by Nicholas Borgesano, Jr. that he was the head of the entire conspiracy. Matthew Sterner started off selling pain creams for Borgesano, but ultimately became involved with “finding the customers.” Dr. Peter Williams was responsible for signing the prescriptions, even though he had not seen the patients whom he was prescribing for. (Doc. 42 at 48). Nicholas Londono was the person responsible for monitoring the billers. (Doc. 42 at 79). Edwin Patrick Young was responsible for actually making the pain creams at A to Z Pharmacy. (Doc. 45 at 76-77). Joseph DeGregoria was in charge of reviewing the paperwork and making sure that Borgesano could pass an inspection, since DeGregoria’s prior employment was with the Florida Department of Health as an investigator of pharmacies. (Doc. 45 at 201). Each of the co-conspirators described the layout of the pharmacy, and explained that Mr. Adebayo was responsible for maintaining the front retail portion of the pharmacy. Meaning, Mr. Adebayo remained up front and actually worked as a pharmacist, serving customers and selling retail. None of the witnesses called who were actually part of the conspiracy could say that Mr. Adebayo was an active member and did acts that furthered the purpose of the conspiracy.

In addition to the co-conspirators, the government presented testimony from several witnesses who offered circumstantial evidence of Mr. Adebayo’s involvement in the conspiracy. For example, Kathryn Chapin, a pharmacy auditor, testified

about her experience with auditing A to Z Pharmacy. Ms. Chapin spoke with somebody who called himself “Ade” about her concerns. All of her communications with this individual were exclusively via telephone; Ms. Chapin never met the individual in person. (Doc. 42 at 146). During the phone calls, “Ade” and Ms. Chapin discussed the various concerns that Ms. Chapin found with the audit, and ultimately, “Ade” thanked her for the opportunity to provide education to make sure that they could process claims appropriately in the future. (Doc. 42 at 164). Special Agent Michael Donovan with the FBI was another witness, who went through numerous government exhibits that highlighted exactly how much money was billed in insurance claims. (Doc. 45 at 274-289). However, Agent Donovan testified that he could not say who signed the documents purportedly signed by Mr. Adebayo. (Doc. 47 at 63). Agent Donovan admitted that his investigation revealed that Mr. Adebayo was the only person who worked in the front retail part of the pharmacy, without the assistance of a technician. (Doc. 47 at 66).

C. Procedural History in the District Court.

On June 21, 2018, a grand jury in the Southern District of Florida returned a five count Indictment, charging Mr. Adebayo with one count of Conspiracy to Commit Health Care Fraud and Wire Fraud (Count One) (Doc. 3 at 7), three counts of Health Care Fraud (Counts Two, Three and Four) (Doc. 3 at 12-14), and one count of Conspiracy to Commit Money Laundering (Count Five) (Doc. 3 at 14).

On January 7, 2019, Mr. Adebayo proceeded to a jury trial before the Honorable Judge Federico A. Moreno. (Doc. 44). Following the government’s case,

trial counsel moved for a judgment of acquittal. Counsel argued that the evidence was insufficient to establish a knowing and willful participation in any conspiracy by Mr. Adebayo, and that there was insufficient evidence to establish the substantive money laundering counts. (Doc. 47 at 85). The district court denied the motion. (Doc. 47 at 86). On the fourth day of trial, after all evidence and testimony was presented, the jury returned a verdict of guilty as charged as to all counts. (Doc. 53).

Thereafter, but prior to his sentencing hearing, Mr. Adebayo filed a Renewed Motion for Judgment of Acquittal and Motion for New Trial. (Doc. 59). Therein, Mr. Adebayo argued that the evidence presented by the government was insufficient to establish the existence of a conspiracy, which included Mr. Adebayo. Specifically, Mr. Adebayo argued that the evidence was insufficient to establish that Mr. Adebayo (1) billed health benefit programs for prescriptions not issued; (2) billed health benefit programs for illegitimate prescriptions; (3) paid kickbacks or bribes for prescriptions or patient information that would be used to submit fraudulent reimbursement claims; (4) dispensed or sought reimbursement for compounded medications, the contents of which were misrepresented; (5) failed to collect co-payments from recipients of compounded medications; (6) signed any documents, including incorporation documents, central fill agreements or provider agreements for Havana Pharmacy; or (7) dispensed, billed or received reimbursement for compound medication prescriptions issued to G.M., L.C. or J.O. (Doc. 59 at 2). Mr. Adebayo also argued that the evidence was insufficient to establish the substantive offenses in

Counts 2, 3 or 4, as there was insufficient evidence to establish the specified unlawful activity, and that the evidence was insufficient to establish Count 5 because the government failed to prove that Mr. Adebayo knowingly and intentionally participated in the specified unlawful activity. (Doc. 59 at 2).

Alternatively, Mr. Adebayo argued that he was entitled to a new trial for several reasons. First, Mr. Adebayo argued that the interests of justice required a new trial because the district court, over the objections of counsel permitted the government to introduce records and documents related to pharmacies without connection of the records to Mr. Adebayo, or any conspiracy involving Mr. Adebayo. (Doc. 59 at 4). Mr. Adebayo further argued that he was entitled to a new trial because the government failed to introduce substantial, competent evidence sufficient to conclude that Mr. Adebayo knowingly and intentionally participated in the production, marketing, distribution, billing, or collection for compound medications at either A to Z Pharmacy or Havana Pharmacy. (Doc. 59 at 4). Lastly, Mr. Adebayo argued he was entitled to a new trial because the evidence was insufficient to conclude that Appellant knowingly and intentionally participated in the conspiracy charged. (Doc. 59 at 4). On February 8, 2019, the district court denied Mr. Adebayo's Motion. (Doc. 64).

On March 19, 2019, Mr. Adebayo proceeded to his sentencing hearing before the Honorable Judge Federico A. Moreno. Mr. Adebayo was ultimately sentenced to 120 months imprisonment as to Counts One, Two, Three, Four and Five, all ordered

to run concurrently, and all to be followed by a concurrent term of three years supervised release. (Doc. 76).

D. Eleventh Circuit's Consideration of the Matter.

On appeal, Mr. Adebayo argued, amongst other things, that the district court erred in denying his motion for judgment of acquittal and motion for new trial when the evidence presented was insufficient to sustain a conviction. A three-judge panel of the Eleventh Circuit entertained the matter at an oral argument on February 11, 2021. Less than twenty-four hours later, the three-judge panel issued its opinion, affirming the district court's judgment and sentence. The entire opinion rendered by the panel was as follows:

Appellant-Defendant Ademola Adebayo appeals his convictions for one count of conspiracy to commit health care fraud and wire fraud in violation of 18 U.S.C. § 1349, three counts of health care fraud in violation of 18 U.S.C. § 1347, and one count of conspiracy to commit money laundering in violation of 18 U.S.C. § 1956(h). He argues that the district court erred in denying his motion for a judgment of acquittal and/or a motion for a new trial. He also appeals the district court's decision to admit certain government exhibits during trial; the district court's application of the special skill and sophisticated means enhancements under sections 3B1.3 and 2B1.1(b)(10) of the Sentencing Guidelines; and the district court's order of restitution. After reviewing the briefs and the record, and with the benefit of oral argument, we conclude that Adebayo's arguments are without merit. We find the district court's rulings to be well-reasoned and affirm as to each issue.

AFFIRMED.

Pet App. A2.

Mr. Adebayo moved for a Petition for Rehearing and Rehearing *En Banc* after the Eleventh Circuit rendered its decision. Mr. Adebayo argued that the panel's decision was contrary to Eleventh Circuit Rule 36-1 [rescinded] because it failed to

state an explanation for its decision, and further contrary to the decisions in *United States v. Willner*, 795 F.3d 1297 (11th Cir. 2015) and *United States v. Mekowulu*, 556 Fed. Appx. 865 (11th Cir. 2014). However, Mr. Adebayo’s petitions were ultimately denied. No judge in regular active service on the Eleventh Circuit panel requested that the Court be polled on rehearing en banc. Pet. App. A4.

REASONS FOR GRANTING THE PETITION

I. FRAP 36(a)(2) Has Created A Circuit Split Whereby Five Circuits Permit Affirmances of District Court Orders or Judgments With No Written Opinion or Explanation, and Eight Circuits Prohibit Appellate Panels from Rendering Decisions Without Guidance to the Litigants.

Federal courts of appeals can affirm a district court’s order or judgment without a written opinion explaining the reasoning of their decision. FRAP 36 provides that a clerk must enter a judgment “after receiving the court’s opinion” or “if a judgment is rendered without an opinion, as the court instructs.” FED. R. APP. P. 36(a)(1), (2). Furthermore, Rule 47 of the Federal Rules of Appellate Procedure authorizes the federal circuits to adopt local rules for the courts of appeals within their jurisdiction. The rule states that “[a] local rule must be consistent with—but not duplicative of—Acts of Congress and rules adopted under 28 U.S.C. §2072 [The Rules Enabling Act].” FED. R. APP. P. 47(a)(1).

Based on these two provisions, five circuits have adopted local rules that allow the courts of appeals to affirm a district court’s order or judgment without a written opinion and no explanation for the rationale of their affirmance. *See* Fed. Cir. R. 36; 5th Cir. R. 47.6; 8th Cir. R. 47; 10th Cir. R. 36.1. On the other hand, seven

circuits have established rules which prevent an appellate panel from rendering a decision without providing at least some guidance as to the reasoning for the decision.

See 1st Cir. R. 36; 4th Cir. R. 36.3; 6th Cir. R. 36; 9th Cir. R. 4.3a; 11th Cir. R. 36-1 (rescinded Aug. 1, 2006); D.C. Cir. R. 36(b).3. The result is a lack of uniformity among the circuits; some promulgate decisions whose suitability for review by this Court can be ascertained, while others, including the Eleventh Circuit in this case, find their grounding in FRAP 36 and effectively make themselves courts of last resort.

A. The 3rd, 5th, 8th, 10th and the Federal Circuit Constitute the Minority of Circuit Courts that Allow Affirmances Without an Opinion or Explanation for Their Ruling.

The Third Circuit encourages its appellate panels to provide explanations for their decisions, but the rule is not mandatory. The local rules of the circuit do not provide guidance on the required substance of a judgment. However, the Internal Operating Procedure states that “[a] judgment order may state that the case is affirmed by reference to the opinion of the district court or decision of the administrative agency and may contain one or more references to cases or other authorities.” 3d Cir. I.O.P. 6.3.2.

The Fifth, Eighth and Federal Circuits rules are all similarly outlined and ultimately mirror the same language. Fifth Circuit Rule 47.6 provides:

The judgment or order appealed may be affirmed or enforced without opinion when the court determines that an opinion would have no precedential value and that any one or more of the following circumstances exists and is dispositive of a matter submitted for decision: (1) that a judgment of the district court is based on findings of fact that are not clearly erroneous; (2) that the evidence in support of a jury verdict is not insufficient; (3) that the order of an administrative agency is supported by substantial evidence on the record as a whole; (4)

in the case of a summary judgment, that no genuine issue of material fact has been properly raised by the appellant; and (5) no reversible error of law appears. In such case, the court may, in its discretion enter either of the following orders: "AFFIRMED" or "ENFORCED".

See, 5th Cir. R. 47.6. The Eighth Circuit uses all the same factors except for (4) regarding summary judgments.

Similarly, Federal Circuit's Rule 36 allows the appellate panel to summarily affirm any trial court opinion in any case, no matter how meritorious, for any reason, without providing any guidance as to its rationale or citation to any authority beyond the rule itself. *See* Fed. Cir. R. 36.

B. The Majority Circuits – 1st, 2nd, 4th, 6th, 9th, 11th and D.C. – Require the Appellate Panels To Provide At Least Some Guidance Regarding the Reasoning of Their Decisions.

In the vast majority of circuits, the rule is opposite. The Ninth Circuit, the largest and the one with the heaviest caseload, allows its panels to enter judgment in only one of three ways: opinion, memoranda or orders. *See* 9th Cir. R. 36-1. Similarly, in the Fourth Circuit, local Rule 36(b) allows the court to enter summary decisions. *See* 4th Cir. R. 36(b). However, the court requires the summary decisions to "identif[y] the decision appealed from, set[] forth the Court's decision and the reason or reasons therefor, and resolve [] any outstanding motions in the case."

See 4th Cir. I.O.P. 36.3.

The First, Second, Sixth and D.C. Circuits also have similar requirements for opinions. Prior to 2006, the Eleventh Circuit permitted affirmances without opinion under Eleventh Circuit Rule 36-1. Prior to 2006, Eleventh Circuit Rule 36-1 read as follows:

Rule 36-1 Affirmance Without Opinion

When the court determines that any of the following circumstances exist:

- (a) judgment of the district court is based on findings of fact that are not clearly erroneous;
- (b) the evidence in support of a jury verdict is sufficient;
- (c) the order of an administrative agency is supported by substantial evidence on the record as a whole;
- (d) summary judgment, directed verdict, or judgment on the pleadings is supported by the record;
- (e) judgment has been entered without an error of law; and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

(11th Cir. R. 36-1 (2002)). However, in 2006, the Court rescinded its own rule and no longer permits its panels to do what the panel in the instant case has done to the Appellant. When the Court was proposing the elimination of the rule, the Court stated: "The rule is proposed to be rescinded, since only a minuscule portion of appeals are currently terminated in this manner." Table of Proposed Revisions to the Eleventh Circuit Rules (Apr. 3, 2006) at 139.

The circuits therefore are split. This lack of uniformity results from the Federal Rules of Appellate Procedure allowing the courts to enter a judgment without an opinion but does not provide any guidance regarding the minimum requirement that is consistent with "the principles of right and justice." *Frazier v. Heebe*, 482 U.S. 641, 645 (1987) (holding that the discretion to adopt local rules is not without limits and must be consistent with the "principles of right and justice").

One of the reasons that judgments without opinion were such a minuscule portion of appeals, was because those types of opinions constitute an extreme form of hidden law. In the context of unpublished opinions, Justice Stevens refers to this

phenomenon as “secret law”, describing the problem as “decision-making without the discipline and accountability that the preparation of opinions requires.” *Cty. of Los Angeles v. Kling*, 474 U.S. 936, 940 (1985) (Stevens, J., dissenting). An opinion is evidence of the court fulfilling its obligation to guide litigants and develop law. As Karl Llewellyn notes, an opinion “serves as a steadyng factor,” to “show how like cases are properly to be decided in the future.” *Id.* Karl N. Llewellyn, The Common Law Tradition: Deciding Appeals 26 (1996).

Hidden judgments not only raise concerns of judicial transparency and risks of judicial error, but also violate litigants’ Due Process and Equal Protection rights under the Fifth and Fourteenth Amendments. Access to the courts is a fundamental right, *Bounds v. Smith*, 430 U.S. 817 (1977) among the key guarantees implicit in the text of the Constitution. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 579-80 (1980).

This obvious division in the federal circuits presents the Court with an important reason to grant certiorari. *See* SUP. CT. R. 10(a).

II. The Circuit Split Regarding FRAP 36 Has Allowed the Eleventh Circuit to Limit Mr. Adebayo’s Chance for Further Review Without Any Accountability

This Court should review the validity of FRAP 36 because the opinion rendered by the Eleventh Circuit in Mr. Adebayo’s case clearly identifies the future risks associated with the circuit split, including the risk of judicial error, lack of transparency, zero accountability for the various courts and ultimately decisions that violate Due Process and Equal Protection.

Since the Eleventh Circuit rescinded its rule that previously allowed for opinions to be rendered without any explanation, it fell within the majority of circuits as identified above. However, the opinion in the instant case, or lack thereof, reveals that this Court's refusal to entertain the issue of the circuit split has allowed the Eleventh Circuit to further muddy the waters. The opinion made in the instant case is the equivalent of a summary affirmation. The panel's opinion was one paragraph in length, spread over two pages, and simply stated:

Appellant-Defendant Ademola Adebayo appeals his convictions for one count of conspiracy to commit health care fraud and wire fraud in violation of 18 U.S.C. § 1349, three counts of health care fraud in violation of 18 U.S.C. § 1347, and one count of conspiracy to commit money laundering in violation of 18 U.S.C. § 1956(h). He argues that the district court erred in denying his motion for a judgment of acquittal and/or a motion for a new trial. He also appeals the district court's decision to admit certain government exhibits during trial; the district court's application of the special skill and sophisticated means enhancements under sections 3B1.3 and 2B1.1(b)(10) of the Sentencing Guidelines; and the district court's order of restitution. After reviewing the briefs and the record, and with the benefit of oral argument, we conclude that Adebayo's arguments are without merit. We find the district court's rulings to be well-reasoned and affirm as to each issue.

AFFIRMED.

Pet. App. A2. Over the course of the last seven months alone, during the year of 2021, the Eleventh Circuit issued 129 unpublished opinions (including Mr. Adebayo's). Out of those opinions, only eighteen were two pages long and equivalent in length to that issued in the instant case. However, all but one of those eighteen opinions addressed appeals being **dismissed** because of either appeal waivers or under *Anders v. California*, 386 U.S. 738 (1967). None of those eighteen opinions involved the

affirmance of actual issues with merit, except for the opinion issued in the instant case.

In an article written by the Honorable Charles R. Wilson, it was documented how opinions are developed in the United States Court of Appeals for the Eleventh Circuit. Hon. Charles R. Wilson, How Opinions Are Developed in the United States Court of Appeals for the Eleventh Circuit, 32 Stetson L. Rev. 247, 266 (2003). Both published and unpublished opinions normally have a similar “structure,” which includes the following subsections: (1) the opening paragraph; (2) the background; (3) the standard of review; (4) the analysis; and (5) the conclusion. *Id.* Of particular importance to the instant issue was the discussion about the type of audience that an opinion has, specifically an unpublished opinion.

The audience of an unpublished opinion likely will be limited to the district court and the lawyers and parties involved, which is an informed audience that is intimately familiar with the facts and the issues in the case. The role of an appellate court in this instance is to tell the audience who won, who lost, and why.

Id. at 266.

The opinion issued in the instant case has no structure, does not have an opening paragraph or opening statement, does not contain any background facts or cite to the standard of review for the three issues. Mr. Adebayo had a four day trial and raised three complex issues on appeal that required intense oral argument. It is submitted that this Court’s previous decisions to decline reviewing the circuit split associated with FRAP 36 is now resulting in circuits, whether they be in the majority or otherwise, to enter opinions without being held accountable. It has allowed circuits

to enter opinions, without any further recourse or review to the defendants/appellants in those cases. That is precisely what happened in the instant case, resulting in several Due Process violations.

This case presents an ideal opportunity to resolve this important and recurring issue. The Eleventh Circuit's decision has highlighted an already existing circuit split, that will only continue to grow. This split needs resolution. It cannot be said that Mr. Adebayo is the first, or last, defendant who will fall under this conflict and suffer as a result. The harsh reality is that if Mr. Adebayo had been convicted in a different circuit, he would not be in the same position as he currently sits. The mere possibility that geography alone could change the outcome of a fundamental and guaranteed right is something that this Court cannot ignore any longer. This Court should grant certiorari to remedy this conflict and set appropriate boundaries in order to ensure that no future violations of similar magnitude take place.

CONCLUSION

For the reasons stated above, Ademola Adebayo, respectfully submits that the petition for a writ of certiorari should be granted.

Respectfully submitted,

Ademola Adebayo, Petitioner

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