CASE NO. ________ (CAPITAL CASE)

IN THE SUPREME COURT OF THE UNITED STATES

CHARLES RUSSELL RHINES,
Petitioner,

v.

DARIN YOUNG, WARDEN, SOUTH DAKOTA STATE PENITENTIARY,
Respondent.

On Petition for a Writ of Certiorari to
The United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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Dated: November 1, 2019

QUESTION PRESENTED

CAPITAL CASE

In 18 U.S.C. § 3599, Congress created a right for indigent death-sentenced state prisoners to obtain legal and expert services, including services in support of requests for clemency, and a framework for federal courts to apply in deciding whether a prisoner is entitled to such assistance. In *Ayestas v. Davis*, 138 S. Ct. 1080, 1088 (2018), this Court rejected a novel "substantial need" test for expert services that was "more demanding" than the one required by § 3599's text.

Petitioner is an indigent death-sentenced prisoner in South Dakota. In support of his request for gubernatorial clemency, he seeks to present psychiatric and neuropsychological experts to attest to his significant cognitive and psychiatric impairments. However, in the absence of a court order, state corrections officials have for years refused to permit his experts to evaluate Petitioner in person.

Petitioner moved the federal court, pursuant to its authority under § 3599, to issue an order granting Petitioner the right "to obtain" those expert services. The district court ruled that it lacked jurisdiction to issue such an order. On appeal, rather than ruling on the scope of a federal district court's power to issue orders in aid of its jurisdiction under § 3599, the Eighth Circuit adopted a novel exhaustion requirement, holding that Petitioner had not exhausted potentially available clemency remedies from the Governor and dismissing the appeal.

This case presents the question:

Must indigent death-sentenced state prisoners exhaust state remedies before a federal court may authorize access to expert services under 18 U.S.C. § 3599(f)?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Charles Russell Rhines respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The October 25, 2019, opinion of the U.S. Court of Appeals for the Eighth Circuit is published and appears in the Appendix at App. 001-003.[1]

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The Eighth Circuit dismissed Mr. Rhines's appeal on October 25, 2019, and issued both a judgment and a mandate that same day. App. 004–005.

[1] "App." refers to the appendix to this petition for certiorari. Mr. Rhines also cites the Appendix and Addendum to the earlier Eighth Circuit appellate briefing as "CTA App." and "CTA Add."

RELEVANT STATUTORY AND CONSTITUTIONAL PROVISIONS

Title 18 United States Code § 3599(a)(2) provides:

In any post conviction proceeding under section 2254 or 2255 of title 28, United States Code, seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with subsections (b) through (f).

Section 3599(e) provides, in part:

Unless replaced by similarly qualified counsel upon the attorney's own motion or upon motion of the defendant, each attorney so appointed shall represent the defendant throughout every subsequent stage of available judicial proceedings . . . and all available post-conviction process . . . and shall also represent the defendant in such competency proceedings and proceedings for executive or other clemency as may be available to the defendant.

Section 3599(f) provides, in part:

Upon a finding that investigative, expert, or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or the sentence, the court may authorize the defendant's attorneys to obtain such services on behalf of the defendant and, if so authorized, shall order the payment of fees and expenses therefor under subsection (g).

STATEMENT OF THE CASE

Charles Russell Rhines is a death-sentenced prisoner at the South Dakota State Penitentiary. A state trial judge has scheduled his execution for the week beginning November 3, 2019.

In 2017, while Mr. Rhines's federal habeas appeal was pending in the Court of Appeals for the Eighth Circuit, he began preparations for a possible clemency petition to the Governor of South Dakota. A state statute impeded the investigation, as it also had impeded investigation during earlier federal habeas proceedings in the district court.[2] Under the statute "[n]o other person may be allowed access to the defendant without an order of the trial court except . . . the defendant's counsel" and other parties not related to these proceedings. S.D. Codified Laws § 23A-27A-31.1.

Although Mr. Rhines has been previously evaluated by mental health experts, he has never received neuropsychological testing, nor an evaluation by a psychiatrist who had the benefit of a complete and thorough background investigation. App. 007. Accordingly, his counsel retained two mental health experts (a forensic psychiatrist and a neuropsychologist) and attempted to arrange appointments for them to enter the South Dakota State Penitentiary to evaluate him.

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[2] In 2016, attorneys who were then representing Mr. Rhines in the federal habeas proceedings had moved unsuccessfully for an order from the district court allowing a neuropsychologist to test and evaluate Mr. Rhines. App. 036–041; App. 054.

The Department of Corrections, citing section 27A-31.1, would not admit the experts into the prison to evaluate Mr. Rhines without a court order. Mr. Rhines then moved the trial court to grant access to his experts in preparation for a clemency application, should one become necessary. The state court denied the motion. *See* App. 087–090. Mr. Rhines filed a notice of appeal, but the state moved to dismiss on the ground that the order was not appealable. The South Dakota Supreme Court dismissed the appeal in January 2018. *See* App. 091.

Mr. Rhines then turned to the federal courts, where an appeal from the denial of habeas relief was pending in the Eighth Circuit.[3] He began with a motion in the district court.

Mr. Rhines is represented by two federal defender offices appointed and funded pursuant to 18 U.S.C. § 3599. App. 122, 123. In February 2018, federal counsel moved the district court for an order to allow a forensic psychiatrist and a neuropsychologist to meet with Mr. Rhines and evaluate him. Counsel relied on 18 U.S.C. § 3599, the All Writs Act, 18 U.S.C. § 1651(a), and the Due Process Clause. *See* App. 010, 012. Counsel supported the application with a letter-report by the

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[3] Proceedings on Mr. Rhines's other appeals came to an end while the appeal of the expert access issue was pending in the Eighth Circuit. The Eighth Circuit affirmed the denial of his federal habeas petition, and denied a certificate of appealability regarding a claim and newly admissible evidence that at least one sentencing juror relied on stereotyping and animus on the basis of Mr. Rhines's sexual orientation to vote for death instead of life imprisonment, in August and September, 2018. App. 061, 119. Rehearing and rehearing en banc were denied in September and October 2018. App. 120, 121. This Court denied certiorari on both matters in June 2019. *Rhines v. Young*, 139 S. Ct. 1567, 2019 WL 826425, 2019 WL 826426 (2019).

forensic psychiatrist based on a review of Mr. Rhines's records, previous expert reports, and an annotated social history.

That expert concluded that "there is clear evidence that there are additional, differential diagnostic options that require further investigation by way of both a psychiatric and neuropsychological evaluation." App. 030. He noted evidence that Mr. Rhines suffered from a pattern of symptoms seen in children suffering from Autism Spectrum Disorder, that he had suffered traumatic experiences—including a brutal rape by four other soldiers—after enlisting in the Army at age seventeen, that he had endured further stress associated with having been a closeted gay man in the military, and that he had been exposed to toxins known to have a negative impact on brain development. App. 031–032.

The district court denied the motion on jurisdictional grounds. *See* App. 111 ("[A]uthorizing a federally appointed and funded counsel's representation under § 3599 does not give this court authority to supervise or control a state's clemency process. Thus, . . . § 3599's authorization for representation alone does not require this court to order respondent to produce Rhines for an evaluation . . . .").

Mr. Rhines timely appealed to the Eighth Circuit. App. 116. Briefing was complete in November 2018. *See Rhines v. Young*, No. 18-2376

While Mr. Rhines continued to litigate the issue of obtaining expert services that required evaluations at the prison, he sent a clemency application without the expert evaluations to the the Board of Pardons and Parole in November 2018.

The South Dakota Constitution, Article IV, Section 3, grants the Governor the authority to grant or deny executive clemency applications. In addition, S.D.

Codified Laws § 24-14-1 gives the Governor discretion to delegate to the Board of Pardons and Paroles the power to hear the applications and make non-binding recommendations. The Board recommended denying Mr. Rhines's November 2018 application in December 2018. App. 131. Mr. Rhines then requested a decision from Governor Daugaard, App. 132, but the Governor left office on January 5, 2019, without issuing one. Current Governor Kristi Noem then took office.[4]

Mr. Rhines's § 3599 appeal remained pending in the Eighth Circuit during this time. The State sought a death warrant, and the state court issued a warrant that set Mr. Rhines's execution for the week beginning November 3 to November 9, 2019. App. 134.

The Eighth Circuit heard oral argument in September 2019, and issued its decision on October 25, 2019.[5] *Rhines v. Young*, No. 18-2376, 2019 WL 5485274, at *1 (8th Cir. Oct. 25, 2019) (per curiam); App. 001. It dismissed Mr. Rhines's appeal and concluded: "At the present time, with South Dakota clemency proceedings commenced and the time for granting or denying imminent, the issues raised by Rhines in this appeal are either moot or have not been fully exhausted." *Id.* at *1; App. 003. Judge Kelly concurred, writing that "[b]ased on the record before [the

[4] Mr. Rhines has not received a formal denial of clemency from Governor Noem, and the Governor has not received a clemency application with Mr. Rhines's experts' complete assessments.

[5] An action seeking declaratory and injunctive relief pertaining to Mr. Rhines's statutory right to choose the method of execution in effect at the time of his sentencing was filed in the state Circuit Court for the Second Judicial Circuit and is now pending in the South Dakota Supreme Court. *See Rhines v. Leidholt et. al.*, 49 Civ. No. 19-002940 (2d Cir. Minnehaha Cty.).

court], . . . it appears that Rhines has not fully exhausted his clemency-based remedies." *Id.* at *1; App. 003.

Mr. Rhines now files this petition for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

This case presented the Eighth Circuit with a straightforward question regarding a district court's power to authorize an indigent death-sentenced state prisoner's attorneys "to obtain [expert] services" in accordance with 18 U.S.C. § 3599. Instead of answering the question, the Eighth Circuit grafted a novel and threshold requirement onto the statute: A § 3599 applicant now must exhaust potentially available state remedies before a federal court can decide whether to "authorize" the applicant "to obtain . . . services" that are "reasonably necessary for the representation." 18 U.S.C. § 3599. This new exhaustion requirement has no basis in the text of the statute. It imposes a "more demanding" standard than what the statute requires of both federal courts and § 3599 applicants, as did the Fifth Circuit's consideration of procedural default and the novel test this Court rejected in *Ayestas v. Davis*, 138 S. Ct. 1080, 1088 (2018).

The Eighth Circuit also indicated that this case might be moot, but it identified no specific reason for that indication. In fact, there are no mootness concerns: Mr. Rhines still has an opportunity to present information to the Governor of South Dakota before his execution date; the Governor alone has the power to grant any form of clemency; and Mr. Rhines is still seeking to exercise his right under § 3599 "to obtain" expert services in aid of clemency.

I. Section 3599 creates a framework for federal courts to decide whether expert services are "reasonably necessary for the representation of" indigent state prisoners sentenced to death and permits courts to authorize the prisoners' attorneys "to obtain such services."

Federal courts "may authorize" indigent capitally sentenced state prisoners "to obtain [expert] services" that are "reasonably necessary for the representation . . . in connection with issues relating to . . . the sentence," including executive clemency. *See* 18 U.S.C. § 3599(f); *Harbison v. Bell*, 556 U.S. 180, 194 (2009); Guide to Judiciary Policy, Vol. 7, Defender Services, Part A, Guidelines for Administering the CJA and Related Statutes, Chapter 6: Federal Death Penalty and Capital Habeas Corpus Representations, http://www.uscourts.gov/sites/default/files/vol07a-ch06.pdf and http://www.uscourts.gov/rules-policies/judiciary-policies/cja-guidelines/chapter-6-ss-680-clemency.

In particular, § 3599 requires that a court make "a finding that . . . expert . . . services are reasonably necessary for the representation of the defendant." 18 U.S.C. § 3599(f). If a court makes that finding, "the court may authorize the defendant's attorneys *to obtain* such services." *Id.* (emphasis added). Also, "if so authorized, [the court] shall order the payment of fees and expenses therefor under subsection (g)." *Id.* (emphasis added).

This Court recently interpreted § 3599 and rejected a circuit's creation of a novel test that differed from the one required by the statute's text. In *Ayestas v. Davis*, 138 S. Ct. 1080 (2018), the Court was "concerned . . . with services provided by experts, investigators, and the like." *Id.* at 1092. "Such services must be

'reasonably necessary for the representation of the [applicant]' in order to be eligible for funding." *Id.* (quoting § 3599(f)).

Although the statute uses the term "reasonably necessary," the Fifth Circuit held "that a § 3599(f) funding applicant cannot show that investigative services are 'reasonably necessary' unless the applicant can show that he has a 'substantial need' for those services." *Id.* at 1088 (quotation marks and citation omitted). This Court acknowledged that "[t]he difference between 'reasonably necessary' and 'substantially need[ed]' may be small." *Id.* But the size of the difference did not stop the Court from rejecting the Fifth Circuit's "arguably more demanding" test. *Id.* Moreover, the Fifth Circuit's introduction of procedural default doctrine to "doom[]" requests for funding to investigate further "exacerbated the problem" of the Fifth Circuit's statutory interpretation, and thus warranted this Court's intervention. *Id.* at 1093.

II. In contravention of *Ayestas*, the Eighth Circuit has created a novel, atextual, and "more demanding" exhaustion-of-state-remedies requirement as a precursor to a federal court's application of § 3599.

Mr. Rhines appealed to the Eighth Circuit as a § 3599 applicant seeking authorization "to obtain [expert] services" from psychiatric and neuropsychological experts to evaluate Mr. Rhines to reach professional diagnoses in aid of his petition for executive clemency. *Cf.* § 3599(e) (referring to "proceedings for executive or other clemency as may be available to the defendant").

Mr. Rhines sought to exercise his rights under § 3599. Specifically, he argued that expert services were "reasonably necessary" for his clemency proceedings and that the psychiatric and neuropsychological experts he had retained should be

allowed to meet with him "to obtain such [expert] services." App. 012-013, 015. The State, however, invoked a state law requiring a court order before such experts would be allowed to see him. *See* S.D. Codified Laws § 23A-27A-31.1. With his experts barred from accessing him, Mr. Rhines's statutory right "to obtain [expert] services" would be hollow as to any experts who require in-person examinations before reaching professional opinions, just as his § 3599 right to counsel would be frustrated if state authorities refused to permit him to meet with his attorneys. Either way, the power of a federal court to authorize legal representation and enable appointed counsel "to obtain such services" would be frustrated.[6]

This case thus presented to the Eighth Circuit an important question regarding the nature of Mr. Rhines's rights to expert assistance under § 3599. Rather than deciding that question, the Eighth Circuit grafted a novel exhaustion requirement onto the provisions of § 3599, and dismissed Mr. Rhines's appeal for not satisfying it. The Eighth Circuit did not address whether the district court had the authority to grant the § 3599 motion. Instead, it relied on the fact that Mr. Rhines, as a § 3599 applicant, had not "fully exhausted" the issues with regard to state executive clemency proceedings. *Rhines*, No. 18-2376, 2019 WL 5485274, at *1; App. 003. The court posited that "[t]he Governor may consider any and all evidence she deems necessary to make her final decision, including the absence of relevant expert evaluations and tests," *id.* at *1; App. 002. By this reasoning,

[6] *See, e.g.*, 18 U.S.C. § 3599; 28 U.S.C. § 1651(a); *United States v. N.Y. Tel. Co.*, 434 U.S. 159, 172 (1977); *Harris v. Nelson*, 394 U.S. 286, 299 (1969); *United States v. Hayman*, 342 U.S. 205, 220–22 (1952).

because a governor could grant clemency based on a state's frustration of any number of federal statutory rights, the federal courts have no means to effectuate such rights.

Judge Kelly concurred and focused on the exhaustion requirement the panel had created. Instead of addressing whether the district court had authority to ensure that a § 3599 applicant's attorneys be able "to obtain [expert] services" in aid of clemency in this case, Judge Kelly agreed with the majority that there was a threshold exhaustion requirement: "Based on the record before [the court], however, it appears that Rhines has not fully exhausted his clemency-based remedies." *Rhines*, No. 18-2376, 2019 WL 5485274, at *1 (Kelly, J., concurring); App. 003. Judge Kelly concluded by stressing that "[i]t . . . appears that Rhines still has an opportunity to seek and obtain relief by means of the State's statutory and/or constitutional framework." *Id.* at *2 (Kelly, J., concurring); App. 003.

Just as the Fifth Circuit created a "substantial need" test on top of the "reasonably necessary for the representation" requirement in the text of § 3599, the Eighth Circuit has created an "exhaustion-of-state-remedies" requirement on top of the textual requirements in § 3599, implicating both the "reasonably-necessary-for-the-representation" requirement and the meaning of the phrase "may authorize . . . attorneys to obtain such services." *Cf. Ayestas*, 138 S. Ct. at 1092–93. The Eighth Circuit's additional exhaustion requirement undoubtedly is "more demanding" than the test provided in § 3599 itself. In fact, it is similar to the Fifth Circuit's requirement that a § 3599 applicant overcome the obstacle of procedural default

before a district court "may authorize the [applicant]'s attorneys to obtain such services." *See id.* at 1094.

To be meaningful in practice, and thus to honor Congressional intent, access to § 3599 services must *precede* the exhaustion of available clemency remedies. After all, to require that a § 3599 applicant—who seeks the benefits of § 3599 to *aid* her in state proceedings—first exhaust the remedies available in those proceedings mirrors the circular logic this Court rejected in *Ayestas*. *See Ayestas*, 138 S. Ct. at 1094 ("To be clear, a funding applicant must not be expected to *prove* that he will be able to win relief if given the services he seeks.").

This Court has rejected similar reasoning with regard to § 3599's predecessor statute as well: "Requiring an indigent capital petitioner to proceed without counsel in order to obtain counsel thus would expose him to the substantial risk that his habeas claims never would be heard on the merits." *McFarland v. Scott*, 512 U.S. 849, 856 (1994); *see also id.* at 860 (O'Connor, J., concurring in part and dissenting in part) ("For such services[, including expert services,] to be meaningful in the habeas context, they also must be available prior to the filing of a first habeas petition."). In the same manner, to allow the Eighth Circuit to impose a novel exhaustion-of-state-remedies requirement before a petitioner can secure authorization "to obtain" expert services that are "reasonably necessary," whether in connection with clemency or other forms of relief, would deprive § 3599 of Congress's intended meaning and impact.

Moreover, because § 3599(f) makes no distinction between clemency applicants and habeas petitioners, the Eighth Circuit's exhaustion requirement

could affect all § 3599 applicants, not merely those seeking to obtain services for clemency. Nothing in the Eighth Circuit's opinion suggests that its new exhaustion requirement would be limited to clemency petitioners or clemency-related remedies. Clemency proceedings, by their nature, might involve different issues than habeas proceedings,[7] but the same requirements of § 3599(f) apply to both.

Even before *Ayestas*, courts applied the same framework to § 3599 applicants seeking clemency as to applicants seeking other forms of relief. *See, e.g.*, *Matthews v. White*, 807 F.3d 756, 760 (6th Cir. 2015) (indicating that "the petitioner must show that the requested services are reasonably necessary to provide the Governor and Board of Pardons and Paroles the information they need" (quoting *Brown v. Stephens*, 762 F.3d 454, 460 (5th Cir. 2014)*, abrogated by Ayestas*, 138 S. Ct. at 1093)); *Wilkins v. Davis*, 832 F.3d 547, 556–57 (5th Cir. 2016) (holding that the expert services requested to prepare for clemency proceedings were not "reasonably necessary"). Accordingly, the Eighth Circuit's novel exhaustion requirement could have broad application outside the clemency context.

Because the Eighth Circuit failed to address the question presented—regarding the meaning of § 3599 and the federal courts' power to authorize an applicant's attorney "to obtain" expert services which are "reasonably necessary" to

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[7] "'Clemency is deeply rooted in our Anglo–American tradition of law, and is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted.'" *Harbison*, 556 U.S. at 192 (2009) (quoting *Herrera v. Collins*, 506 U.S. 390, 411–412 (1993)). "Far from regarding clemency as a matter of mercy alone, [this Court] ha[s] called it 'the fail safe in our criminal justice system.'" *Id.* (quoting *Herrera*, 506 U.S. at 415) (footnote omitted).

executive clemency proceedings—and instead grafted a novel exhaustion requirement onto § 3599, this Court should grant certiorari.

III. There was no impediment for the Eighth Circuit to address whether Mr. Rhines made a sufficient showing for a federal remedy under § 3599 "to obtain" expert services.

The Eighth Circuit's suggestion that this litgation is moot because "clemency proceedings commenced and the time for granting or denying imminent" was also mistaken. App. 003. Mr. Rhines continues to have a "requisite personal interest," *see Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000), in obtaining services from psychiatric and neuropsychological experts, which would provide him with a meaningful benefit from his federal statutory right to the assistance of experts during state clemency proceedings.

The Eighth Circuit observed that the "South Dakota Board of Pardons and Paroles denied Rhines's petition for clemency in December 2018," and that the state court has issued a warrant for Rhines's execution during the first week of November, *Rhines*, 2019 WL 5485274, at *1; App. 002, but these circumstances are irrelevant to mootness. Regardless of the Board's *non-binding recommendation,* Mr. Rhines still seeks to submit current mental health opinions to the Governor, who has yet to issue a formal decision on any clemency application. And the Governor, alone, has the ultimate authority to decide whether and when to grant clemency. *See* S.D. Codified Laws § 24-14-1; S.D. Codified Laws § 24-14-5. Nor has Mr. Rhines delayed his efforts to obtain expert access, having made persistent efforts to obtain such access for years. *See supra* Statement of the Case.

Finally, the Eighth Circuit's suggestion that Mr. Rhines has not identified any "impediments to Rhines's asking the Governor to allow him access to his mental health experts," *Rhines*, 2019 WL 5485274, at *2 (Kelly, J. concurring); *see also id.* at *1 (noting that "South Dakota law grants the Governor broad constitutional and statutory clemency authority"), is also incorrect. While the Governor may conduct an investigation, *see* S.D. Codified Laws § 23A-27A-19, South Dakota law bars Mr. Rhines's experts from entering the prison "without an order of the trial court," S.D. Codified Laws § 23A-27A-31.1. Thus, the Governor does not have the power to issue an order to allow Mr. Rhines access to his psychiatric and neuropsychological experts. Indeed, South Dakota conceded this limitation on the Governor's power at oral argument. *See Rhines v. Young*, 18-2376, Oral Argument on September 26, 2019, at 24:50 (explaining that the Governor cannot issue such an order and that the only remedy is to obtain a court order).

Mr. Rhines made an ample showing that the psychiatric and neuropsychological experts to whom he has requested access are reasonably necessary for representation during his clemency proceedings. He has offered evidence of childhood disorders and trauma that require further evaluation and supported his § 3599 motion with an expert report that concluded that "there is clear evidence that there are additional, differential diagnostic options that require further investigation by way of both a psychiatric and neuropsychological evaluation." *See supra* Statement of the Case.

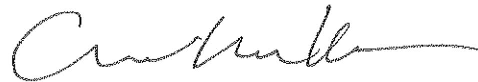
In spite of Mr. Rhines's efforts, the federal courts have declined to consider his motion or recognize their authority to grant the relief he seeks. This Court

therefore should grant a writ of certiorari to address the Eighth Circuit's interpretation of § 3599, and to ensure that Mr. Rhines can obtain services from the psychiatrist and neuropsychologist retained in connection with his effort to obtain clemency.

CONCLUSION

For the reasons discussed above, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,



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