IN THE SUPREME COURT OF FLORIDA

GREGORY D. ROLLE,
Petitioner,
v.
STATE OF FLORIDA,
Respondent.

Case No. 65,570

ANSWER BRIEF OF RESPONDENT

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PRELIMINARY STATEMENT

Petitioner was the defendant in the Criminal Division of the Circuit Court for the Seventeenth Judicial Circuit, in and for Broward County, Florida, and the appellant in the Fourth District Court of Appeal. Respondent was the prosecution and the appellee in those courts, respectively. The parties will be referred to as they appear before this Court.

At the time of the writing of this brief, petitioner's motion to supplement the record in this case with the transcript and record of his direct appeal is pending. Respondent has not opposed that motion. Thus, in order to present the facts of the case respondent will refer to the record on appeal of the direct appeal in the Fourth District. In this brief the following symbols will be used:

"R"	Record on appeal in 4DCA Case No. 82-288;
"A"	Respondent's appendix to this brief.

All emphasis in this brief is supplied by respondent, unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Respondent accepts petitioner's statement of the case and facts to the extent that it presents an accurate, non-argumentative recitation of proceedings in the trial and appellate courts, with the following additions and/or clarifications:

FACTS RELATING TO GUILT AS PRESENTED BY RESPONDENT ON DIRECT APPEAL.

The state's first witness was James E. Williams, a Canadian citizen living in Riviera Beach (R 148). Williams knew the victim of the murder, Guy Gohier, who was another Canadian, for about four years. The victim stayed with Williams in Riviera Beach after his arrival in the state from Canada from January 10 until January 14, the day before his body was found (R 150). The victim was driving a pickup truck with a vacation trailer connected to it (R 151), and said that he would be in Florida for approximately one month (R 162). In fact, he had three hundred dollars ($300) of Canadian currency on him, and went to the bank and obtained five hundred dollars ($500) in cash through his Master Charge while staying with Williams (R 163-164).

The next day, Carolyn Knight, a custodian at the Collins Elementary School, found the truck and house trailer in the field of the school the next morning at approximately 7:00 a.m. (R 166). Dania Police Officer Matthew Tobias was

called to the school, and in the cab of the truck found the victim clothed in only a T-shirt, undershorts and dark socks in the midst of copious amounts of blood (R 172-173).

Charlie Lee Wright, the state's chief witness, opened his testimony on direct with the facts that he had been convicted of petty larceny around 1967, had pled guilty to a robbery in Miami in 1969, had incurred various traffic offenses and had a burglary charge pending against him at the time of trial (R 194-195). However, he stated that no promises were made from the state with respect to the burglary charge (R 196). He had acted as a confidential informant for the Dania police for approximately ten years, and at times was paid for those services (R 198-199).

Wright testified that on January 14, 1981, petitioner and Pamela Adderly had been living at his home for approximately six to seven months (R 204). Angela Bradley was also staying at his home; she was a prostitute hiding from her pimp (R 205). On the evening of January 14, petitioner and Adderly left the house together and returned at approximately 11:00 p.m. or later (R 206). They said that they would take care of the rent money which they owed Wright (R 208), and went into their room where they were shooting coke (R 208-209). Wright asked them how they got the money for the coke, and their response was not to worry about it, they got it. They stayed for

twenty to twenty-five minutes at most, when Adderly went out the back door not saying where she was going (R 209). Wright heard a car door slam and then petitioner went out the front door. Wright saw petitioner standing near a truck with a white man in it approximately fifty yards away at the Dania Bar (R 210). The white man was heavy set with a beard, and the truck had a camper attached to the rear. Petitioner spoke with the driver, identified as the victim of the murder, for about thirty minutes when Adderly and petitioner returned to Wright's house (R 213). They shot coke in their room again for approximately twenty minutes, and then returned to the truck with the white man (R 214). Petitioner took a pistol with him from one of the bags in his room, and Wright stated that he had seen petitioner with a .22 automatic pistol with a pearl handle before. As he left, petitioner said that he would pay Wright the money that he owed him when he returned (R 215).

Wright saw Adderly and petitioner drive off in the truck, with petitioner seated on the right side near the window and Adderly in the middle while the victim drove (R 218). [Wright identified a photograph of the truck and a photograph of the victim as the vehicle and person he had seen that night (R 222).] Adderly and petitioner were gone for approximately one hour, and returned out of breath.

Adderly was carrying a brown paper bag and a knife which was like an Indian knife with a leather case. The blade of the knife was approximately seven to eight and one half inches long (R 223-224). Petitioner still had the gun, and had a three-quarter-inch thick wad of twenty dollar bills in his hand. He gave Wright one hundred dollars and then he and Adderly went back into the bedroom to shoot coke (R 224-228). Wright joined them, snorting coke while they shot it for a couple of hours (R 230-231).

Adderly and petitioner told Wright that they had "robbed this dude and took his money" (R 231). At around daylight Wright left and walked down the street by Sweets Bar where a friend of his told him, "you better get those people out of your house. They is going to kill somebody." (R 232). Because of that statement, and after seeing the camper trailer near the elementary school with a lot of police cars around it, Wright came back home and questioned petitioner and Adderly about it because they had previously only said that they robbed the man. However, at this point petitioner said "that he had to do it so there wouldn't be no witnesses," and that "he had to do it. He said that he is a thoroughbred." The term "thoroughbred" is a street word meaning that he is a "tough person." (R 236-241, 249). Adderly and petitioner left Wright's house at approximately noon (R 239).

Adderly had been wearing a gray jacket which Wright had loaned her, but she did not take it with her when she left (R 239-240). Wright contacted the police later that same day, and gave them the jacket. When they asked if he could find a gun at his home, he checked further and found the tennis shoe; hours later the police gave him two hundred dollars (R 241-244).

On cross-examination, Wright testified further concerning his prior convictions and the charge pending against him at the time of trial (R 265-266). He denied that he was ever a dope addict (R 273, 279-280), and maintained that he never owned a gun (R 304). With the one hundred dollars petitioner gave him, he bought twenty dollars worth of cocaine and paid his rent with the remainder (R 307). He volunteered the information about this case to the police because "my father is a preacher and, 'Thou shalt not kill.' I was brought up in the church." (R 310).

Dania Police Detective Charles E. Edel took a taped statement from petitioner after his rights were read to him and after he acknowledged that he understood his rights in writing (R 325-327). The statement was taped (R 329), and played for the jury (R 331). [The transcript of the taped statement appears at R 1038-1057 of the record, appended to a defense motion.] In the tape, petitioner repeatedly

denied that either he or Adderly had had any involvement with the victim, or his truck or trailer. Petitioner was then confronted with the fact that his and Adderly's fingerprints were found on the truck and in the trailer, and thereafter he admitted that he drove the truck while Adderly "dated" the victim inside the trailer (R 1046-1048). Adderly "pulled a trick" for the victim while petitioner drove at approximately 10:00 p.m. (R 1051, 1055). Petitioner acknowledged that Adderly made her living as a prostitute, and more times than not he would be out in the area with her to make sure that she was not harmed (R 1053). After Adderly and the victim were done, the victim said that he was going to Key West (R 1054).

Forensic pathologist Larry Tate viewed the body at the scene and performed an autopsy later (R 361). The victim received two gunshot wounds, one below the left eye and one in the left ear, and twenty-nine stab wounds in the back (R 370-371). One of the bullets was deformed by the impact with bone, while the other bullet was intact (R 378). The wound to the left ear would be fatal, but Tate was not certain that the left eye wound would have been fatal. The knife wounds were compatible with infliction by the same, single-edged knife, but Tate could not say that for certain to a medical probability (R 382). The stab wounds would have been fatal; in fact, one went all the way through the chest

cavity and almost came out of skin of the front of the chest (R 384-385). Tate could not say whether the gunshots or the stab wounds were inflicted first (R 387).

Earlier in the trial, the prosecutor brought up the problems he was having with obtaining the attendance of Angela Bradley, who had been subpoenaed to appear as a witness. She had not maintained contact with the prosecutor as requested, so he asked that a writ of attachment issue, and that after she is attached that she be held in custody, and that at the conclusion of the trial contempt proceedings be conducted for her failure to appear; defense counsel stated that he had absolutely no objection to the motion (R 252-253). The matter was discussed again later in the trial (R 343-344), and again still later when Ms. Bradley showed up. At that point, due to her reluctance to testify the prosecutor asked that she be called as a court witness subject to cross-examination by both sides (R 352), and after some discussion, and after defense counsel consulted with petitioner and obtained his agreement, the trial judge ruled that Ms. Bradley would testify as a court witness subject to cross-examination by both the state and the defnense (R 353-356). When Ms. Bradley began her testimony, pursuant to agreement reached among counsel and the court, the judge instructed the jury that she was a witness of the court and that both attorneys would have an opportunity to cross-

examine her (R 391). Bradley acknowledged that both she and Adderly were prostitutes, and friends (R 396-398). She maintained that she did not specifically remember the night of January 15, 1981, but did recall the incident of a man being found in a camper trailer at Collins Elementary School (R 398-399). When she was shown a picture of the victim's camper trailer, she said that she did not recall that particular trailer, but did see Adderly get in a trailer which was pulled by a truck on the night before the man was found (R 399-400, 406). The man in the trailer was a white man with a long beard, but Bradley could not state whether the photograph of the victim shown to her was the same man (R 400). On that same night she was at Wright's house to take drugs and to hide from "her man" because he would not let her take drugs (R 401, 418). She heard some conversation between petitioner and Wright about rent money. Petitioner "said something about that he was going to give Charlie his money and something about a gun, something about a gun, but I don't know what it was." (R 402). Bradley denied that she stayed at Wright's house all that night (R 407-408). When examined by defense counsel, she testified that Wright does dope and that she had seen him with a small pistol but had never seen appellant with a gun (R 411). She said that Wright is a "rat" and is known as "the biggest liar around." (R 413-414).

Among the other evidence presented in the state's case was that the blood type of the victim and the blood on the jacket and the sneaker matched (R 445-447). Dania Police Officer Richard Lund testified that Wright had been a reliable informant in prior cases, and that on January 15, 1981 he came to the police station and told Lund about appellant and Adderly, and also gave Lund a sneaker and a jacket (R 451-453). The crime scene technician Mark Kreitz testified that fifty-nine latent fingerprints were found in the victim's truck and trailer, and that no billfold was found (R 461-463). Firearms identification specialist Dennis Grey testified that he examined the bullets removed from the victim and could not tell for sure if they had been fired from the same gun because one of the bullets was mutilated (R 468). He also testified that he could not tell whether either of the bullets was fired from a rifle or a small gun (R 469).

Ellory Richtarcik, the Broward County Cheriff Department's chief fingerprint examiner, took petitioner's and Adderly's fingerprints (R 470-473). The right thumbprint of Adderly was found on the inside screen door of the camper, and the left little finger of petitioner was found on the passenger side of the truck near the rear window (R 474). Of the fifty-nine latent prints which were lifted, only thirty were workable impressions. Of those thirty, twelve were

identified as the victim's, one was Adderly's, one was petitioner's and the remaining sixteen were unidentified (R 484-485, 487).

The defense called several witnesses concerning Wright's reputation for truthfulness. One of those witnesses said that he had a reputation for not telling the truth (R 523), another said that he was "a big liar" (R 529), and another said that he had a reputation for lying (R 539). The first of these witnesses, Allen McIntyre, testified that he gave Wright the jacket which Wright later turned in to the police, but he refused to answer whether the jacket which he gave Wright was stolen (R 526-527).

Against his attorney's advice (R 550), petitioner himself took the stand. Acknowledging that Pemela Adderly was a prostitute (R 554), he described how she began talking with the victim while he stood in a telephone booth trying to act as if he and Adderly were not together. After speaking with the victim for a while, Adderly waved to appellant to approach, and told him that the "guy wants a date." She wanted to rent a room, but the victim did not because he owned a house trailer and it would be a waste of money. The victim wanted to park the trailer on the side of the raod and "have a date in the trailer." Adderly refused for fear that it would attract the attention of the police. It was then agreed that petitioner would drive the truck while Adderly and the victim "dated" in the trailer so that no one would suspect anything,

and that is what was done (R 554-556). When Adderly and the victim were finished, the victim drove off headed for Key West (R 559). Petitioner denied that he and Adderly were living at Wright's house at the time, and claimed that Wright runs a business whereby for a couple of dollars or some cocaine he would allow a person to "use his apartment to get high." (R 560). On cross-examination, petitioner admitted that he lied on his parole form regarding his use of drugs (R 591), and denied being a procurer for Adderly, explaining that she did her business on her own and that he would check to see that she was all right (R 592). He acknowledged that according to his version of the facts even though the victim had never met him before he let petitioner drive his camper (R 598-599). He maintained that he lied to Sergeant Edel in the first portion of his taped statement because of his concern with his parole status, and while he acknowledged that he had reason to lie to Edel then, he maintained that he was not lying at trial (R 600-601, 605).

POINT INVOLVED

WHETHER IN THE CONTEXT OF THIS CASE, IN ORDER TO BE ENTITLED TO AN EVIDENTIARY HEARING UPON A PETITION FOR WRIT OF ERROR CORAM NOBIS PREDICATED UPON THE RECENT DISCOVERY OF ADDITIONAL EVIDENCE, THERE MUST BE A SHOWING THAT THE PETITIONER WOULD HAVE BEEN ENTITLED TO A DISMISSAL OR DIRECTED VERDICT OF ACQUITTAL HAD THE NEW EVIDENCE BEEN CONSIDERED AT THE ORIGINAL TRIAL?

ARGUMENT

IN THE CONTEXT OF THIS CASE, IN ORDER TO BE ENTITLED TO AN EVIDENTIARY HEARING UPON A PETITION FOR WRIT OF ERROR CORAM NOBIS PREDICATED UPON THE RECENT DISCOVERY OF ADDITIONAL EVIDENCE, THERE MUST BE A SHOWING THAT THE PETITIONER WOULD HAVE BEEN ENTITLED TO A DISMISSAL OR DIRECTED VERDICT OF ACQUITTAL HAD THE NEW EVIDENCE BEEN CONSIDERED AT THE ORIGINAL TRIAL.

Both petitioner and respondent have posed the argument in the terms of the question certified by the Fourth District Court of Appeal. Respondent is quite frankly puzzled as to why that question was even certified, for based on well-established precedent, respondent maintains that the answer to the certified question is clearly yes.

Initially, it must be understood that there are various grounds for coram nobis relief, not all of which are at issue in this case. As the certified question states, the issue here is newly-discovered evidence relating to the question of guilt or innocence. Other grounds for the use of the writ include mistake, fraud, duress, or coercion. See Chambers v. State, 117 Fla. 642, 158 So.153, 154-155 (1934); 28 Fla.Jur.2d "Habeas Corpus" §§ 158-162 (1981). The thread which runs commonly among all grounds is that the petition must be based on a showing of some fact which was not presented to the court at the trial on the merits.

Where coram nobis relief is sought to establish the innocence of a convicted defendant, the requirements are clear. In Smith v. State, 400 So.2d 956, 960 (Fla. 1981), this Court reviewed the principles governing a petition for writ of error coram nobis, as follows:

> The alleged facts relied upon must be fully disclosed since the appellate court must be afforded full opportunity to determine whether prima facie grounds are established. Furthermore, the evidence upon which the alleged facts can be proved and the source of the evidence must be asserted. The facts alleged must not have been known by the court, by the party, or by counsel, at the time of trial, and it must be made clear that defendant or his counsel could not have discovered them through the use of due diligence.

The standard governing the sufficiency of a coram nobis petition is presented in Hallman v. State, 371 So.2d 482, 485 (Fla. 1979), where this Court stated:

> The general rule repeatedly employed by this Court to establish the sufficiency of an application for writ of error coram nobis is that the alleged facts must be of such a vital nature that had they been known to the trial court, they conclusively would have prevented the entry of the judgment.

(Emphasis in original.)

It is this latter standard which is at issue in this case, and respondent respectfully suggests that, in the context of this case, where new facts are proposed regarding the issue of guilt, saying that those facts must conclusively have prevented the entry of a judgment is equivalent to saying that

the facts would have entitled petitioner to a judgment of acquittal. This is so because a coram nobis proceeding is aimed at the validity of the judgment, not the verdict. Thus, it differs both in kind and in the standard to be applied from a new trial motion proceeding raising an issue of newly-discovered evidence. In a new trial motion proceeding, the procedural rule itself, Fla.R.Crim.P. 3.600(a)(3), requires that the new evidence must be such that "if introduced at the trial [it] would probably have changed the verdict or finding of the court [in a case tried without a jury]...." In a coram nobis proceeding, the new evidence must conclusively demonstrate that the judgment could not have been entered. The distinction between the standards which apply to a motion for new trial and to a coram nobis proceeding were clearly illustrated and explained by the Third District Court of Appeal in the case of Tafero v. State, 406 So.2d 89 (Fla. 3rd DCA 1981).

In Tafero, the defendant had been convicted for multiple offenses of assault with intent to commit rape, a crime against nature, entering a residence with intent to commit robbery, and robbery. Several years later, he filed a motion under Fla.R.Crim.P. 3.850 and 3.600 claiming that a third party had confessed that he, and not the defendant, had committed the crimes, and that the two victims of the crimes had admitted to another third party that their trial testimony identifying defendant as the perpetrator was perjurious. Id. at 91. Treating the defendant's appeal as a

request for permission to apply to the trial court for a writ of error coram nobis, the third district denied the request. Writing for the court, Judge Pearson explained the following:

> The coram nobis test requires that we envision that Tafero's 1967 trial included the confession of a third party that he, not Tafero was the man called Jessie, and the statement of another witness that Misses C. R. and C. A. B. admitted to him that they knew Tafero was not the perpetrator of the crimes. The most that can be said about this new evidence is that, if believed, it would probably have changed the verdict of the jury. While that is sufficient to satisfy the test for a timely motion for new trial, it is not sufficient under the test for coram nobis. Clearly, since the third party confession and the impeachment testimony would not render the trial testimony of Misses C. A. B. and C. R. insufficient so as to require the trial court to enter a judgment of acquittal in Tafero's favor and, at best, would raise a jury question as to the identity of the perpetrator, the newly discovered evidence would not have conclusively prevented the entry of the 1967 convictions. Therefore, had Tafero's application been made to us, we would have denied him permission to apply to the trial court for a writ of error coram nobis, and now, treating his appeal as such an application, we deny it.

Id. at 93-94 (footnotes omitted.)

Other cases are to similar effect. In Riley v. State, 433 So.2d 976 (Fla. 1983), the defendant alleged as newly discovered evidence the affidavit of an inmate who had formally resided on death row with another inmate who he claimed confessed commission of the murders for which Riley was convicted. In response to the contention that this evidence would conclusively have prevented the entry of the judgment against Riley, this Court stated:

> We have considered the facts now offered as newly discovered evidence in light of the entire record of the trial court proceedings and conclude that the most that can be said about this new evidence is that it may have changed the verdict of the jury. This, however, is not the test enunciated in Hallman. Applying the principles of Hallman, we cannot say that this evidence would conclusively have prevented Riley's convictions for first-degree murder and assault.

Id. at 980 (emphasis in original). Citing the Tafero case, this Court concluded that even with the newly-proposed evidence, the "State's evidence still would have been sufficient to support the jury's verdicts of guilty." Id. In the decision under review herein, the fourth district cited the case of Pike v. State, 103 Fla. 594, 139 So. 196 (1931). In Pike the essential gravamen of the petition was fraud or deception practiced by the state attorney, but the end result was the conclusion that newly discovered evidence that the single witness against the defendant had himself

confessed to the murder would not have prevented the entry of the judgment had it been known. Similarly, in Ashley v. State, 433 So.2d 1263 (Fla. 1st DCA 1983), the defendant's allegations essentially claimed the denial of his constitutional right to obtain witnesses to testify in his favor and to have compulsory process for obtaining such witnesses, and as such was denied without prejudice to the defendant's right to raise that matter by a motion under Fla.R.Crim.P. 3.850. However, the central contention in that case was that newly discovered testimony directly refuted the testimony of the state's primary witness establishing the defendant's guilt. The first district stated that the "newly discovered testimony, even though it directly refutes Daniels' testimony implicating Ashley in the alleged crimes, would not be sufficient to conclusively prevent entry of the judgment; at best, such evidence, if believed, would have changed the verdict of the jury." Id. at 1268 (emphasis in original). The court concluded that while that evidence might have been sufficient in a new trial proceeding, its legal effect was not sufficient to meet the requirements for a writ of error coram nobis. Id.

Respondent submits that the teaching of these cases is that if sufficient evidence to support the judgment remains after the newly-discovered evidence is considered, coram nobis relief cannot be granted. In effect, the new evidence would not have entitled the defendant to a judgment of acquittal. The same standard and result apply in the in-

stant case. Had the testimony of Lawrence Craig Turner been presented at petitioner's trial, it would have been laid side-by-side with the testimony of Charlie Lee Wright, presenting the jury with the classic choice of whom to believe. However, coram nobis will not be granted when only the credibility of witnesses is brought into question. See Snell v. State, 158 Fla. 431, 28 So.2d 863, 866 (1947).

Petitioner relies upon the case of Ex parte Welles 53 So.2d 708 (Fla. 1951), but respondent respectfully maintains that that case does not stand as precedent for the operation of coram nobis relief. In the opinion itself, Justice Terrell did not discuss the facts which were brought to the attention of the court, and relied heavily upon the fact that the prosecuting attorney of Dade County was "so thoroughly convinced that petitioner was unlawfully convicted that he avows that he will nolle prosse the case if the writ of error coram nobis is granted." Id. at 711. The entire discussion in that opinion indicates that it was an exception to the usual rules because of the peculiar circumstances of the case, and that the court acted to remedy an injustice where there was no contention by anyone that the conviction in that case had been correct. The instant case differs entirely. Further, Judge Pearson discussed the Welles opinion in Tafero, 406 So.2d at 94 n.11, noting that it involved a state confession of

error, and concluding that the Hallman and Smith cases "represent an effort to re-establish the rule of finality, permitting only the rarest exceptions." Id. Thus, respondent maintains that Hallman and Smith present the operative rules in this case, and that the decision here is goverened by the results in Tafero and Riley.

Respondent respectfully maintains that there is really no question concerning the governing standard in coram nobis proceedings. Rather, the fourth district was quite obviously uncomfortable with that standard, noting the relative ease with which a defendant can obtain a hearing in the trial court on allegations of ineffective assistance of counsel compared with the difficulty of meeting the coram nobis standard. However, the court need not have been troubled. The question of effective assistance of counsel is never passed upon by a trial court during the trial itself, and with certain exceptions cannot be raised on direct appeal. Thus, factual allegations concerning ineffectiveness more readily result in a hearing pursuant to Fla.R.Crim.P. 3.850 because they involve an issue which has never before been litigated. Not so in a proceeding such as this, where the guilt or innocence of the defendant has already been the central focus of a trial, and where the sufficiency of the evidence supporting guilt can be raised on direct appeal.

Finally, respondent maintains that the correct standard was applied in this case, and the correct result was reached. Had Lawrence Craig Turner testified at the trial, the jury would still have had Charlie Wright's testimony before it. At most, Turner's testimony would have called into question Wright's credibility. Furthermore, respondent has presented the facts of the case as it presented them on direct appeal in its statement of the facts in this brief, and has appended to this brief a copy of its Response to Petition for Leave to File Petition for Writ of Error Coram Nobis which was filed in the fourth district (A 1-7). In that response (A 4-6), respondent argued that Turner's deposition would not have exonerated petitioner. Rather, at most, even if true, it would have established that petitioner was guilty as a principal in the first degree along with Wright. In addition, at trial petitioner testified that he and Pamela Adderly left the victim's camper, and the victim drove off, still alive. Turner's deposition indicates that it was Adderly who stabbed the victim, and Wright who shot him. Thus, the deposition of Turner not only fails to exonerate petitioner, but indicates that he was not truthful in his testimony at trial.

In conclusion, respondent respectfully maintains that, in the circumstances of cases such as this, the answer to the certified question should be yes, and the petition was properly denied by the fourth district.

CONCLUSION

Based on the foregoing argument, respondent respectfully submits that the decision of the Fourth District Court of Appeal in the instant case should be approved.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished this 17th day of September, 1984 by United States Mail to WILLIAM G. CRAWFORD, JR., Hodges, Gossett, McDonald, Gossett & Crawford, P.A., 3595 Sheridan Street, Suite 204, Hollywood, Florida 330211.

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