IN THE

Supreme Court of Virginia

RECORD NO. 110523

E. C.,

Appellant,

v.

VIRGINIA DEPARTMENT OF JUVENILE JUSTICE,

Appellee.

REPLY BRIEF OF APPELLANT

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INTRODUCTION

On Friday, October 14, 2011, during the time that this case has been pending in this Court, the Petitioner, Edgar Lee Coker, attended a high school football game at his alma mater, Orange High School.[1] After having been released from Hanover Juvenile Correctional Center in February of 2009, Edgar had sought permission to enroll at Orange High School. He enrolled, achieved success on the Orange High School track team as a student, and successfully graduated in May 2010.[2] Since his graduation, Edgar has attended many sporting events at Orange High School, as any former student/athlete would do, and has also visited the school for administrative reasons. He was never informed that his permission to be present at Orange High School had been revoked upon his graduation, or that there was any problem with him attending games or visiting the school. Nevertheless, on October 14, he was arrested by a Deputy Garcia

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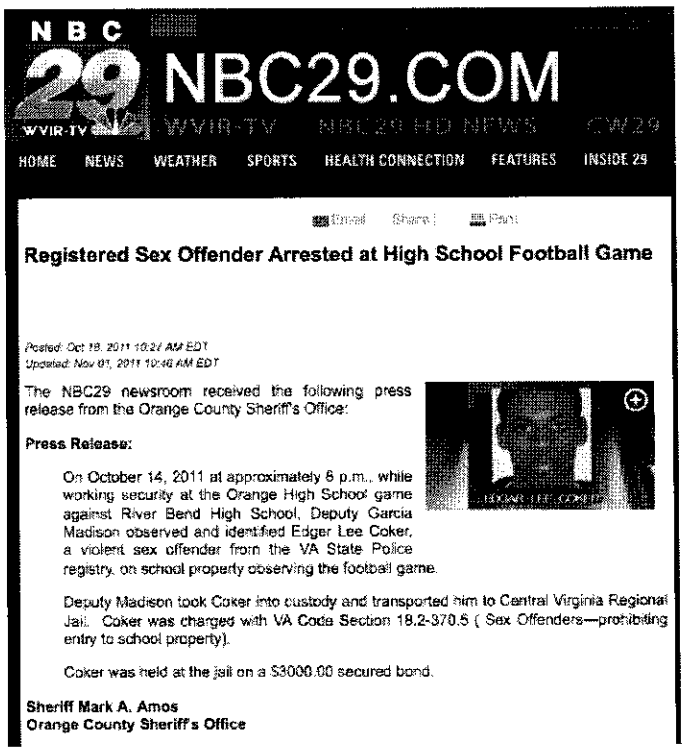
[1] In his prior briefing in this Court and the lower court, in an effort to protect his privacy as an alleged juvenile offender, Edgar Coker was identified only as "E.C.," his initials. The events described herein have made it abundantly clear that so long as his convictions remain undisturbed and he continues to be listed on Virginia's Sex Offender Registry, attempting to shield Edgar's identity is not only futile, but also counterproductive to his efforts to bring the truth about his wrongful convictions to light. Therefore, Edgar and his family have directed counsel to use his actual name in future briefing and argument.

[2] *See* Jackson, Coker, relays win Region II, Orange County Review (Feb. 25, 2010) at B1.

Madison, handcuffed, taken to jail, and charged with the Class Six felony of being a sex offender on school grounds. *See* Virginia Case Information, Orange County District Court, Case No. GC11006089-00 (available at http://www.courts.state.va.us/caseinfo/home.html).

Edgar spent five hours in jail before bail was posted. The following Monday, October 17, 2011, Orange County Sheriff Mark Amos issued a press release stating that a violent sex offender had been arrested at a high school football game. Local media outlets posted the press release, including Edgar's full name and his photograph from the Sex Offender Registry.



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Registered Sex Offender Arrested at High School Football Game

Posted: Oct 18, 2011 10:24 AM EDT
Updated: Nov 01, 2011 10:46 AM EDT

The NBC29 newsroom received the following press release from the Orange County Sheriff's Office:

Press Release:

On October 14, 2011 at approximately 8 p.m., while working security at the Orange High School game against River Bend High School, Deputy Garcia Madison observed and identified Edgar Lee Coker, a violent sex offender from the VA State Police registry, on school property observing the football game.

Deputy Madison took Coker into custody and transported him to Central Virginia Regional Jail. Coker was charged with VA Code Section 18.2-370.5 (Sex Offenders—prohibiting entry to school property).

Coker was held at the jail on a $3000.00 secured bond.

Sheriff Mark A. Amos
Orange County Sheriff's Office

Comments that were immediately left by viewers of the NBC29 website included the following threats against Edgar:[3]

sad but true
Burnpass, VA
4 hrs ago #1 | Judge it! | Report Abuse | Reply »
Can't do nothing after you do a dirty deed, & that's the whole point , what a scum & fool, back to jail for some "real fun "

Maybe
Palmyra, VA
4 hrs ago #2 | Judge it! | Report Abuse | Reply »
Why isn't he in jail? Oh, wait, then we'd just be paying for 4 squares and roof over his head. There is a permanent solution to this problem.

The Respondent asks this Court to hold that Edgar's case is non-justiciable and moot because there is no effectual relief that Virginia courts can provide. Resp. Br. at 25. The Respondent is wrong. This Court has repeatedly invoked its power to set aside convictions in habeas corpus proceedings. *See infra* at 13-14 (citing cases in which this Court has set aside convictions in habeas proceedings). If Edgar is able to prove that his guilty plea was obtained unlawfully, a Virginia habeas court can and must vacate his delinquency adjudication. This would enable Edgar to have his name removed from the Sex Offender Registry and would protect him from, among other things, future public humiliation and death threats such as he recently experienced in Orange County. The multitude of restrictions and legal consequences that Edgar will otherwise face for the rest of his life

[3] These images were taken from the NBC29 website, which also includes a rebuttal statement from The Innocence Project, and are available at http://www.nbc29.com/story/15720398/registered-sex-offender-arrested-at-high-school-football-game.

would be removed. Thus, it is clear that Edgar continues to have a "substantial stake in the judgment of conviction which survives the satisfaction of the sentence imposed on him" (*Carafas v. LaVallee*, 391 U.S. 234, 237 (1968)) and it is equally clear that the Virginia courts can provide "effectual relief" by setting his convictions aside. *Hankins v. Town of Virginia Beach*, 182 Va. 642, 644, 29 S.E.2d 831, 832 (1944).[4]

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[4] In his Statement of Facts, the Respondent levels an odd accusation at Edgar Coker, stating that he "appears to have manipulated the timing of his release from parole." Resp. Br. at 4 n.2. The Respondent also made this accusation in the lower court, but the court made no factual findings regarding this issue. Moreover, the Respondent fails to explain how Edgar could have *any authority whatsoever* over his parole status. Edgar and his counsel reasonably relied upon information provided by his parole officers that he would be on parole until September 2009 at the earliest. When Edgar abruptly learned in August 2009 that the parole office intended to deviate from its standard procedures and terminate Edgar's parole earlier than it had previously informed him, counsel contacted the Director of Probation/Parole for the 16th District, Martha Carroll, and informed her that they were preparing a habeas petition. Carroll agreed to temporarily postpone termination of Edgar's parole. *See* JA 315-16 (Affidavit of Deirdre M. Enright). Obviously, at all times, the decision of whether or not to terminate Edgar's parole was in the hands of one party: the Director. Edgar could neither release himself from parole nor require the Director to keep him on parole any longer than the Director wished to.

The Respondent's reliance upon *White v. Commonwealth*, 37 Va. App. 658, 666-667, 561 S.E.2d 12, 16 (2002) is misplaced. In *White*, the defendant was barred from invoking speedy trial protections where he remained in custody only because he refused to endorse a standard recognizance bond. Thus, the defendant in *White* essentially had power over the keys to the jail. In the instant case, Edgar Coker obviously did not have power over his own parole—he merely asked the person who did have that power to exercise her discretion, and she chose to do so.

AOE 1: THE CIRCUIT COURT ERRED IN HOLDING THAT IT LACKED JURISDICTION TO CONSIDER E.C.'S PROPERLY FILED PETITION FOR A WRIT OF HABEAS CORPUS.

The entire jurisdictional dispute in this case boils down to a single paragraph in the Respondent's Brief:

> At the time the trial court entered the order contested by the petitioner, he was not a prisoner, and was under **no** form of detention. This lack of detention rendered the trial court without jurisdiction.

Resp. Br. at 8 (emphasis in original). This paragraph makes clear that the Respondent is asking the right question (i.e., whether the petitioner is detained), but he is asking it at the wrong time. In the Respondent's view, the question of detention—and therefore jurisdiction—is addressed "at the time the trial court entered the order." This is a nonsensical approach. If it were correct, then no habeas court would be able to determine whether or not it had subject matter jurisdiction until some future, unknown date when the court would hear a case and enter its final order.[5] The proper and existing approach is to determine whether the petitioner is detained at the

[5] In addition to being contrary to all relevant precedent, the Respondent's approach would create a horribly inefficient habeas process. A Virginia court would presumably proceed on habeas petitions that were filed while the petitioner was detained, by reviewing briefs, conducting discovery, and holding evidentiary hearings, only to find in the event of a subsequent release of the petitioner that the court did not have jurisdiction. Principles of judicial economy thus confirm that subject matter jurisdiction must be determined at the initiation of proceedings.

time a habeas proceeding is instituted by filing. *See* Opening Br. at 7-12. This is entirely consistent with the well-recognized rules that subject matter jurisdiction "depends upon the state of things at the time of action brought" and, "after vesting, it cannot be ousted by subsequent events." *Najera v. Chesapeake Div. of Soc. Services*, 48 Va. App. 237, 242-43, 629 S.E.2d 721, 723 (2006) (citing *Mollan v. Torrance,* 9 Wheat. 537, 22 U.S. 537, 539 (1824)).

In this case, Edgar Coker was no longer on parole by the time the trial court entered its order, but he *was* detained on parole when he filed his habeas petition. This is undisputed. Therefore, jurisdiction had already attached by the time he was released from parole. The Respondent fails to cite even a single case in which a court has been divested of subject matter jurisdiction that existed when legal proceedings were instituted by filing.

Throughout his Brief, the Respondent relies primarily on this Court's decision in *Blair v. Peyton*, 210 Va. 416, 171 S.E.2d 690 (1970). The Respondent contends that *Blair* is "controlling" (Resp. Br. at 13) and criticizes the Petitioner for having "not addressed the holding of *Blair* at all on brief." Resp. Br. at 11. The Respondent misreads *Blair*, however, and grossly mischaracterizes that decision through selective quotation. Despite the fact that the *Blair* opinion is only five paragraphs long, and that the

Respondent includes three of those five paragraphs in a block quote (Resp. Br. at 9-10), he somehow manages to omit the one paragraph that obviously distinguishes *Blair* from this case and the line of cases invoked in Coker's Opening Brief:

> In his petition for a writ of habeas corpus, the petitioner attacked the validity of the two convictions of armed robbery entered against him on February 20, 1950, by the Corporation Court of the City of Norfolk. **At the time he filed his petition, the petitioner had fully served the sentences imposed as a result of the convictions.** The petitioner was, at the time he filed his petition, servicing sentences imposed upon him on December 22, 1950, by the Circuit Court of Culpeper County, which he began serving following the termination of the Norfolk sentences.

Id. at 691 (emphasis added). The petitioner in *Blair* had convictions stemming from charges in both Norfolk and Culpeper. Blair's habeas petition challenged his Norfolk convictions, *for which he had already served his complete sentences when he filed his petition.* The fact that Blair was imprisoned on the Culpeper convictions when he filed his petition was not enough to establish jurisdiction over completely separate convictions in Norfolk that had already been completely served.

Blair is irrelevant because, unlike the petitioner in that case, Edgar Coker was still detained on the challenged convictions when he filed his habeas petition. In fact, contrary to the Respondent's misreading of *Blair*, no lower court has ever interpreted that decision to divest a court of subject

matter jurisdiction that existed at the time of filing. Instead, the lower courts have correctly looked to this Court's decisions in *Moore v. Peyton*, 211 Va. 119, 176 S.E.2d 427 (1970) and *Laing v. Commonwealth*, 205 Va. 511, 137 S.E.2d 896 (1964) to recognize that subject matter jurisdiction attaches at the time of filing a habeas petition and that once the petition is properly filed, the court retains jurisdiction until the matter has been fully adjudicated. *See* Op. Br. at 8-10 (discussing relevant circuit court decisions).[6]

<u>AOE 2</u>: THE CIRCUIT COURT ERRED IN HOLDING THAT THE REQUIREMENT OF SEX OFFENDER REGISTRATION DOES NOT CONSTITUTE DETENTION, CONFINEMENT, OR CUSTODY FOR PURPOSES OF FILING A PETITION FOR A WRIT OF HABEAS CORPUS.

Undersigned counsel again emphasize that jurisdiction exists in this case by virtue of the fact that Edgar Coker was on parole when he filed his habeas petition. *See supra* at AOE1. If this Court agrees, then it is unnecessary to address the claim that sex offender registration constitutes detention sufficient to invoke the writ of habeas corpus. In fact, as described herein, the ongoing expansion of sex offender laws in Virginia

[6] Further supporting Coker's position, this Court held in another habeas case that the lower court had jurisdiction to consider a habeas challenge to four burglary convictions arising from the same trial despite the fact that the petitioner had fully served his sentences on three of the four convictions. *Morris v. Superintendent of Va. State Penitentiary*, 212 Va. 656, 657, 187 S.E.2d 200, 201 (1972).

and elsewhere and the evolving body of law regarding registration schemes counsel in favor of withholding judgment on this question of first impression in Virginia, provided that the Court finds jurisdiction based upon the arguments set forth in AOE1, *supra*. If, on the other hand, the Court finds that the jurisdiction that existed when Edgar Coker filed his petition was divested by his release from parole, then counsel submits this secondary argument.

In interpreting section 8.01-654, the Court is "guided by the principle of statutory construction that remedial statutes are to be construed liberally." *Carroll v. Johnson*, 278 Va. 683, 693, 685 S.E.2d 647, 652 (2009). Despite the numerous impairments to Edgar's rights, freedom, and movement, the Respondent contends that he is not detained under the meaning of the statute, and would instead have the court narrowly interpret detained as meaning "imprisoned." Resp. Br. at 7. It is hardly novel, however, that "detention" may include other forms of restraint. *See Scott v. Chichester*, 107 Va. 933, 60 S.E. 95, 96 (1908) (recognizing parolee as partially confined "while physically out of jail" but "morally and actually under the restraint of his parole and under the orders of the jailer").

Many of the cases cited by the Respondent involve state registration schemes that are far less onerous than Virginia's. For example, in

Williamson v. Gregoire, 151 F.3d 1180, 1184 (9th Cir. 1998), the court noted that Washington state only required annual registration, which did not need to be in-person, and did not restrict the offender's movement: "[T]he law neither targets Williamson's movement in order to impose special requirements, nor does it demand his physical presence at any time or place . . . Williamson cannot say that there is anywhere that the sex offender law prevents him from going." *Id.* Similarly, the Wisconsin registry statute analyzed in *Virsnieks v. Smith*, 521 F.3d 707 (7th Cir. 2008) did not require the submission of a DNA sample or the level of contact with police that the Virginia statute does. Wis. Stat. Ann. § 301.45. The *Virsnieks* court characterized the statute as placing minimal restrictions on movement, and repeatedly referenced the lack of an in-person registration requirement. *Virsnieks*, 521 F.3d at 719-20.

In contrast, Virginia offenders are subject to provisions that mandate their physical presence at some locations and forbid it at others. *See e.g.* Va. Code §§ 18.2-370.2, -370.5. Clearly the minimal restrictions of states like Washington and Wisconsin are different from Virginia's requirements, which require in-person registration (Va. Code § 9.1-903(B)); electronic registration within 30 minutes of a change in internet usage (Va. Code § 9.1-903(G)); frequent re-registration (and police verification) (Va. Code

Ann. § 9.1-904); and seizure of the offender's DNA (Va. Code § 9.1-903). Unlike many jurisdictions, Virginia also posts personal information for all registrants, including juveniles, on the internet. *See* Op. Br. at 37. This information includes the offender's complete name, photograph, address, and even a map to the offender's home.[7]

At least one jurisdiction has recently found that the expansion of its registration scheme required it to reevaluate its prior decisions. In *State v. Williams*, 952 N.E.2d 1108, 1110-11 (Oh. 2011), the court noted that Ohio's "current laws are more complicated and restrictive" than the sex offender registration statutes that had previously been at issue. The court found that the statutory scheme it had previously characterized as "remedial" had changed "dramatically." *Id.* at 1112. Specifically, the court pointed out that:

> In general, sex offenders are required to register more often and for a longer period of time. They are required to register *in person* and in several different places. Furthermore, all the registration requirements apply *without regard to the future dangerousness* of the sex offender. Instead, registration

[7] Interestingly, in recently promulgated guidelines pursuant to the federal Sex Offender Registration and Notification Act (42 U.S.C. § 16911), the U.S. Attorney General noted resistance in many jurisdictions to requiring public disclosure of juvenile offender information. Hence, the Attorney General created a discretionary exemption from "public Web site disclosure information concerning sex offenders required to register on the basis of juvenile delinquency adjudications." Supp. Guidelines for Sex Offender Registration and Notification, 76 Fed. Reg. 1630 (proposed Jan. 11, 2011). This further illustrates that Virginia's registration scheme is more onerous than those of many other jurisdictions.

> requirements and other requirements are based solely on the fact of a conviction. Based on these significant changes to the statutory scheme governing sex offenders, we are no longer convinced that R.C. Chapter 2950 is remedial, even though some elements of it remain remedial.

Id. at 1113. (emphases added, citations omitted). Noting that the "stigma attached to sex offenders is significant, and the potential exists for ostracism and harassment," the Ohio Supreme Court said that it could no longer "continue to label these proceedings as civil in nature. These *restraints on liberty* are the consequences of specific criminal convictions and should be recognized as *part of the punishment* that is imposed as a result of the offender's actions." *Id.* at 1112 (emphases added).

If the Court finds it necessary to reach this claim, it should evaluate the entire scheme of requirements and restrictions that Virginia has imposed upon Edgar Coker as a sex offender. *See* Op. Br. at 22, 34-38. An honest appraisal of those restrictions compels the conclusion that Edgar Coker continued to be "detained" within the meaning of section 8.01-654 even after he was released from parole.

<u>AOE 3</u>: THE CIRCUIT COURT ERRED IN DISMISSING E.C.'S PETITION FOR A WRIT OF HABEAS CORPUS AS MOOT.

According to the Respondent, a petitioner's release from detention not only divests the habeas court of jurisdiction, but also renders the case moot because, in his view, the *only* relief a Virginia habeas court can

provide is release from detention. Resp. Br. at 27-28. The Respondent derives this view from what he claims is the "plain language" of Virginia's habeas statute. Resp. Br. at 25, 27. However, the plain language of Virginia's habeas statute says nothing about the relief that a Virginia court can provide. The relevant portion of the statute states:

> The writ of habeas corpus ad subjiciendum shall be granted forthwith by the Supreme Court or any circuit court, to any person who shall apply for the same by petition, showing by affidavits or other evidence probable cause to believe that he is detained without lawful authority.

Va. Code § 8.01-651(A)(1). Thus, while it is true that the statute does require a showing of unlawful detention in order to invoke the writ (which the Petitioner has never disputed), the statute says nothing about the scope of relief that can be provided.

Taken at face value, the Respondent's view that "the *sole* remedy under the Virginia statute is release from ***custody***" (Resp. Br. at 24 (emphases in original)) would mean that the most a habeas court could ever do is order the release of the petitioner while leaving his conviction(s) intact. But this view is irreconcilable with the decisions of this Court that routinely *set aside convictions* in habeas proceedings and remand the

cases for new trials.[8] *See, e.g.*, *West v. Director of Dept. of Corr.*, 273 Va. 56, 66, 639 S.E.2d 190, 197 (2007); *Jackson v. Washington*, 270 Va. 269, 280, 619 S.E.2d 92, 98 (2005); *Green v. Young*, 264 Va. 604, 613, 571 S.E.2d 135, 140-41 (2002); *Moreno v. Baskerville*, 249 Va. 16, 20, 452 S.E.2d 653, 655 (1995); *Ford v. Peyton*, 209 Va. 203, 205, 163 S.E.2d 314, 316 (1968); *Jones v. Peyton*, 208 Va. 378, 381, 158 S.E.2d 179, 181 (1967); *Burley v. Peyton*, 206 Va. 546, 549, 145 S.E.2d 175, 177 (1965); *Whitley v. Cunningham*, 205 Va. 251, 258, 135 S.E.2d 823, 829 (1964).

Because this Court can grant effectual relief by setting aside the criminal judgment in this case, the only remaining question is whether or not this case continues to present a live case or controversy. The Respondent suggests that the "federal standard of mootness" does not apply (Resp. Br. at 26-29), but neither proposes any other standard nor addresses the prior decisions of this Court that specifically invoke the Article III case or controversy requirement in assessing whether or not a case is moot. *See, e.g.*, *Hankins*, 182 Va. at 643-44, 29 S.E.2d at 832 (1944) (*citing Mills v. Green*, 159 U.S. 651 (1895)); *Potts v. Mathieson*

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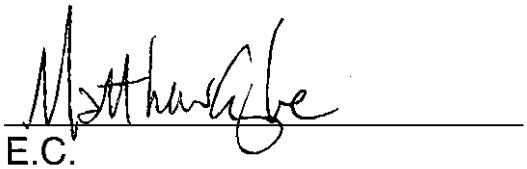
[8] Indeed, this Court has made it a pre-requisite for plaintiffs seeking legal malpractice damages against their criminal defense attorneys to first demonstrate that their "convictions were set aside in post-conviction proceedings." *Adkins v. Dixon*, 253 Va. 275, 277, 482 S.E.2d 797, 798-99 (1997). This shows the absurdity of the Respondent's assertion that habeas courts are powerless to set aside illegally obtained convictions.

Alkali Works, 165 Va. 196, 225, 181 S.E. 521, 533 (1935) (*quoting Mills*, 159 U.S. at 653); *Wallerstein v. Brander*, 136 Va. 543, 118 S.E. 224, 225 (1923) (*citing Mills*, 159 U.S. at 651); *Thomas, Andrews & Co. v. Norton*, 110 Va. 147, 147, 65 S.E. 466, 467 (1909) (citing *Little v. Bowers*, 134 U.S. 547, 557 (1890)); *Franklin v. Peers*, 95 Va. 602, 602, 29 S.E. 321, 321 (1898) (*citing Mills*, 159 U.S. at 651).

These decisions make clear that a case is not moot so long as the petitioner maintains a "substantial stake in the judgment of conviction which survives the satisfaction of the sentence imposed on him" (*Carafas*, 391 U.S. at 237) and "relief can be afforded." *Franklin*, 95 Va. at 602, 29 S.E. at 321. The Petitioner has already set forth at length the myriad injuries he will continue to suffer unless and until his conviction is set aside. Op. Br. at 34-38. The Respondent does not dispute any of those injuries. Moreover, Edgar's recent arrest in Orange County proves that his liberties continue to be severely curtailed by his convictions. Apparently, Edgar cannot even attend a high school football game without risking arrest, felony prosecution, and publicity that generates death threats against him. It is callous and unrealistic to pretend that these restrictions are insufficient to give Edgar a substantial stake in the outcome of this habeas case. For these reasons, the Court should find this case to be justiciable.

Respectfully submitted,



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RULE 5:26(h) CERTIFICATE

I certify that this Reply Brief complies with the requirements of Rule 5:26, is presented in Arial size 14 font, and does not exceed 15 pages. I further certify that a true copy of the foregoing Reply Brief was served via hand-delivery to

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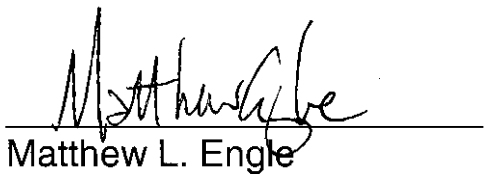
on this 7th day of November, 2011.



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