IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2008
No.

THE PEOPLE OF THE STATE OF MICHIGAN,
Petitioner,

vs.

CHRISTOPHER JAMAL ANDERSON WILLIAMS
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE MICHIGAN COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE QUESTION

I.

Do decisions holding that the direction of a verdict of acquittal by a trial judge, taking the case from the jury, based on an erroneous understanding of that which constitutes the elements of the offense, constitutes an acquittal barring retrial, conflict with *United States v. Martin Linen Supply*, and if not, should that case be reconsidered?

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NOW COMES the State of Michigan, by KYM L WORTHY, *Prosecuting Attorney for the County of Wayne*, and TIMOTHY A. BAUGHMAN, *Chief of Research, Training, and Appeals*, and prays that a Writ of Certiorari issue to review the judgment of the Michigan Court of Appeals, entered in this cause on October 23, 2008, leave denied by the Michigan Supreme Court on January 9, 2009.

OPINIONS BELOW

The opinion of the Michigan Court of Appeals is unpublished, and appears as Appendix A. The order of the Michigan Supreme Court denying leave to appeal appears as Appendix B.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 USC §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> ...nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb....

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> ....No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

Respondent was charged with criminal sexual conduct in the third degree under Michigan law, the victim being 13 years at the time of the charged sexual penetration, and 16 years old at the time the event was charged. The preliminary examination was held on February 12, 2006. At the examination the complainant, Jasmine Grady, testified that the sexual penetration, which she testified was consensual, occurred on February 22, 2004, answering the prosecutor's questions as to "what happened" on that date (R,PE 5-10). On cross-examination, she testified that she was certain the date was in fact February 21, 2004 (R,PE 12-13). She said the episode occurred a week after Valentine's Day (R,PE 13). When moving to bind over the prosecutor moved to amend the charges to state the offense occurred on February 21 (R,PE, 32), and the examining magistrate bound over for trial (R,PE 33).

At trial, when asked the date of the event on direct examination, Ms. Dorsey replied that it was February 22, 2004 (R,I, 43). When the prosecutor asked if she was guessing because she was hesitating, Ms. Dorsey replied that she hesitated because she was "thinking to make sure I had the right date" (R,I, 43). When questioned about the discrepancy, she said that before she testified at the examination she had checked the calendar and "thought it was before, like a week before Valentine's Day. Well, it happened after Valentine's Day. My bad" (R,I, 79-80). When asked if she had been sure at that time it was the 21st she answered "no," and said she was taking a guess at that time (R,I, 81).

On brief cross-examination, on this point Ms. Dorsey agreed with defense counsel that if unsure of a date she should answer that she was not sure (R,II,

11-12). Defense counsel concluded this portion of cross by asking "You know regardless of the date you have accused this man of placing his penis in your vagina, correct?" and "And regardless of the date you know that you were thirteen years old when he said that, right?", receiving affirmative answers to both questions (R,II, 13). Counsel later returned to the point, asking the complainant to explain why she had said she was certain that the act happened on the 21st when she testified at the examination (R,II, 79-80). Counsel asked Ms. Dorsey to be "very careful and tell me which one is correct," and she answered "the 22nd (R,II, 81). To the question "why didn't you simply say I don't know the date?" she answered "I don't know" (R,II, 81). On re-direct, Ms. Dorsey said she was not lying at the examination, but mistaken (R,II, 90). On re-cross she again stated she was mistaken and should not have said she was certain of the date at the examination (R,II, 135-136). She was now certain the date was the 22nd (R,II, 136-138).

The trial proceeded with several other prosecution witnesses, and at the close of the prosecution's case the prosecutor moved to amend the information as to date (R,III, 131). Before the court ruled, defense counsel moved for a directed verdict, premising the motion on the discrepancy between the dates (R,III, 135 -ff). Counsel argued that the jury could not find beyond a reasonable doubt based on Ms. Dorsey's testimony that the crime occurred on February 21, 2004, the date charged, and "This is a criminal sexual conduct case. Time is of the essence" (R,III, 136). Because, said counsel, the information did not say "on or about," a directed verdict of acquittal was required (R,III, 137). The prosecution then continued its motion to amend, requesting a "range" as to when the offense was committed of February 14-28, 2004 (R,III, 139-140). The trial judge responded that "This isn't some eight year old little kid whose getting up there and can't remember

dates" (R,III, 140) (the victim was 13 at the time of the offense, which had occurred three years previously). The prosecutor pointed out that statute provides for amendment of the information for "any defect, imperfection, or omission in form or substance, including a variation between the information and the proofs as long as defendant is not prejudiced by the amendment and it does not charge a new crime. This clearly happened in February some time" (R,III, 141).

After a recess the court asked "let's say he had an alibi defense" and the prosecution in that case moved to amend (R,III, 144), and the prosecutor pointed out that there was no alibi in this case (R,III, 145). The trial judge asked defense counsel to respond to an appellate case which said that inconsistences in date go to weight of the testimony (R,III, 147). The thrust of counsel's response was that having alleged a specific date, the prosecution was required to prove the offense occurred on that particular day (R,III, 147-149). All the prosecution had to do, counsel asserted, was charge a range from the beginning (R,III, 149), or use the phrase "on or about" (R,III, 151-152). The only prejudice counsel articulated from the amendment was not prejudice to the presentation of a defense, but that if the motion was *not* granted, "we win here today. If you don't grant this motion you must grant the directed verdict" (R,III, 151). Counsel said "We've been laying on this from day one" (R,III, 153). When the trial judge brought up prejudice from the amendment ("the prejudice to the defendant in preparing a defense," R,III, 155), counsel responded "We about ready to win this case if you don't grant that motion" (R,III, 155) as his declaration of "prejudice." The prosecution argued that even if the amendment was denied the date of the offense was not an element, the

jury would not be instructed the prosecution had to prove the offense occurred on the specific date alleged in the information, and the directed verdict should be denied in any event (R,III, 160-163).

The trial court denied the motion to amend, saying "it's not about credibility. It's not about finding of facts. It's about fairness" (R,III, 166). The court held that "I don't think it's in the interest of justice at this late stage of the game to grant the amendment" (R,III, 168). As to the directed verdict, the court held that "time is absolutely of the essence in a case like this," and granted the motion (R,III, 170). Nothing was ever said about prejudice to the respondent in the presentation of or preparation for his defense.

Petitioner appealed. The Michigan Court of Appeals affirmed, finding that the appeal was barred as further proceedings at trial were precluded by double jeopardy, concluding that the actions of the trial judge constituted an acquittal. That court said "In the case at bar, the trial court denied plaintiff's motion to amend and then acquitted defendant, operating under the erroneous belief that time was an essential element of the CSC charge. It is true that time is not an essential element in CSC cases involving minor victims.. ..However, the trial court's finding that the prosecution had presented insufficient evidence to sustain a conviction—even if technically incorrect—constituted an acquittal on the merits for double jeopardy purposes" (see appendix A). Petitioner's application for leave to appeal to the Michigan Supreme Court was denied on January 9, 2009.

Reasons for Granting the Writ

A. The Misinterpretation of Martin Linen

One thing is clear in this case: no defense wish to have this case determined by the jury was thwarted, the defense seeking—successfully—to avoid a jury resolution of the case by having the trial judge take it from the jury. The case involves no attempt to harass the respondent through repeated prosecutions, as all the petitioner seeks is one full and fair opportunity to have the case decided by a jury.

The trial judge purported to direct a verdict of acquittal because of a variance in the proofs as to the time of the offense of one day, refusing a motion to amend on the mistaken ground that "time was of the essence" with regard to the charge. Though agreeing that the trial judge erred, the Michigan Court of Appeals nonetheless found retrial barred by principles of double jeopardy:

> In the case at bar, the trial court denied plaintiff's motion to amend and then acquitted defendant, operating under the erroneous belief that time was an essential element of the CSC charge. *It is true that time is not an essential element* in CSC cases involving minor victims.. . . However, the trial court's finding that the prosecution had presented insufficient evidence to sustain a conviction—even if technically incorrect—constituted an acquittal on the merits for double jeopardy purposes. (Emphasis supplied, see Appendix A).

Thus, though the Michigan Court of Appeals held that time was not an "essential element of the offense" (it is not an essential element of virtually any offense; the time alleged in the charging document may bring up issues with regard to notice, variance of the proofs, and amendment of the charging documents factual averments, but time would only very rarely be an actual "element" of the offense). The trial of this matter was aborted, then, on defense request, on the conclusion of the trial judge that the prosecution had not presented evidence as to a matter that is not an element of the offense. And yet the Michigan Court of Appeals has found retrial precluded by principles of double jeopardy as expounded by this Court. But this is actually inconsistent with this Court's decision in *United States v. Martin Linen Supply*, 430 US 564 (1977) and confuses the "elements" of a crime with the factual averments made in the charging document, and *Martin Linen* is not concerned with the latter. Because that decision is sometimes (as here) misread as going to the factual averments of the charging document, or as precluding retrial when a purported directed verdict of acquittal is granted by finding proofs insufficient on an "element" which is *not* an element (again, as here), certiorari should be granted to clarify the meaning of *Martin Linen Supply*. Further, the opportunity should be taken to reconsider that decision, as a finding that no reasonable jury could find guilt proven beyond a reasonable doubt should be viewed as a ruling of law terminating the trial, and one sought by the defense, and not an "acquittal" for double-jeopardy purposes.

In *Martin Linen* this Court said that a termination by the trial judge of a trial by way of a purported directed verdict of acquittal (or whatever the label given) constitutes an acquittal for purposes

of double jeopardy only if it is "a resolution, correct or not, of some or all of the *factual elements* of the offense charged." Whether something is an element of an offense is a question of law. Where determined incorrectly—and the Michigan Court of Appeals agreed that the time of the offense is not an element here—and the trial aborted on that basis, the trial has been aborted not on the basis of a "judicial acquittal," barring retrial, but on an error of law. This is a recurring misconstruction of this Court's opinion in *Martin Linen Supply* needing correction by this Court; if not a misconstruction, then *Martin Linen Supply* should be revisited.

Other courts, one on strikingly similar facts, have avoided this error. the Massachusetts Court of Appeals in *Commonwealth v Hosmer*, 727 NE2d 537 (Mass App, 2000). There during the examination of the Commonwealth's first witness the prosecutor moved to amend the to reflect that the offense charged had occurred a day earlier than stated in the charging document. Defense counsel objected, and the judge denied the motion and terminated the trial. The Commonwealth acknowledged on appeal that the judge uttered, "not guilty," as he left the bench, and the District Court docket, by a check mark, recorded a finding of not guilty.

The Court of Appeals agreed that "If there was a finding of not guilty, principles of double jeopardy prevent a retrial of the defendant on the same charge." But, said the court, "[i]n considering 'the exact nature of the action taken by the District Court judge,'. . . we are not bound by labels or checkmarks on a form, but we inquire whether there was a resolution of any of the facts that make up the offense charged. We conclude that the judge dismissed the Commonwealth's complaint, and that this was an

abuse of discretion" for the "date is not an essential ingredient of the offense. . . ."

The court concluded that the trial judge, despite his characterization of his actions as an acquittal, had aborted the trial because "he thought there was a fatal variance between the facts and the complaint and he had determined not to permit an amendment of the complaint. The true nature of the judge's action, therefore, was to dismiss the complaint with prejudice in light of the defense objection," a dismissal the court found inappropriate given that there was "not even a hint of prejudice to the defendant flowing from a one-day change of date in the complaint." *Hosmer*, at 538, 539.

Precisely so here. Defense counsel played a game ("We've been laying on this from day one") which, unfortunately, the trial judge bought into, making an erroneous legal ruling that had nothing to do with a "resolution, correct or not, of some or all of the elements" of the offense charged. The Michigan Court of Appeals erred in finding that though the trial judge was "operating under an erroneous belief that time was an essential element of the charge" the termination of the trial based on a finding of a lack of evidence on that which is *not* an essential element bars retrial under principles of double jeopardy. See also *State v. Saxton,* 724 So.2d 77, 79 (Ala.Cr.App.1998) ("In *Ex parte Wood,* the Alabama Supreme Court held that double jeopardy principles did not bar a re-trial of a defendant whose motion for a judgment of acquittal was granted based on a fatal variance between the indictment and the evidence the State presented").

Where the elements of the offense are misperceived by the trial judge, who finds a lack of evidence on something that is not actually an element, jeopardy should not bar retrial. In *United*

States v Maker, 751 F.2d 614 (CA 3, 1984) the court, pointing to several *post-Martin Linen Supply* decisions (*Carter v. Estelle,* 677 F.2d 427, 452-53 (CA 5, 1982); *United States v. Dahlstrum,* 655 F.2d 971, 974 (CA 9, 1981); *United States v. Moore,* 613 F.2d 1029, 1037 (CA DC,1979); *Sedgwick v. Superior Court for the District of Columbia,* 584 F.2d 1044, 1049 (CA DC, 1978)), found that the "generally understood the test to require an acquittal only when, in terminating the proceeding, the trial court actually resolves in favor of the respondent a factual element necessary for a criminal conviction." 751 F.2d at 622. Thus the appeal of the government in the case before it, the court concluded, was "barred only if the district court's legal determination about the elements of a single scheme conviction is correct." 751 F.2d at 623. Because that ruling was incorrect, the trial court misunderstanding the actual elements of the offense, the government appeal, and retrial, were not precluded by jeopardy.

Similarly, in *State v. Korsen* 69 P.3d 126 (Idaho,2003) the State appealed, and it was alleged that because jeopardy barred a retrial, appeal was not permissible. The court disagreed—citing the test of *Martin Linen Supply* the court found that the lower court "as a result of legal error, determined that the government could not prove a fact that is not necessary to support a conviction," so that what had occurred was not an acquittal, and appeal was thus not barred. 69 P.3d at136.

On the other hand, in *State v Lynch*, 399 A.2d 629 (NJ, 1979) the New Jersey Supreme Court found that jeopardy barred a retrial even though the trial court had "added" an element to the offense, and found the evidence insufficient on this pseudo-element. See also *State v Portock*, 501 A.2d 551 (NY Super. App. Div., 1985)(finding *Maker* on point, but

concluding that in *Lynch* the New Jersey Supreme Court had "parted company" with the *Maker* court's reading of *Martin Linen*).

B. A Determination That No Reasonable Juror Could Find Guilt Beyond a Reasonable Doubt Is a Ruling of Law That May Be Mistaken Either as to its Assessment of the Facts or the Law, or Both.

The prohibition in the federal constitution against double jeopardy was, as is commonly understood, derived from the common-law English pleas of autrefois acquit and autrefois convict. Blackstone stated that

> ...the plea of autrefois acquit, or a former acquittal, is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life, more than once, for the same offence. And hence it is allowed as a consequence, that when a man is once *fairly* found not guilty upon any indictment, or other prosecution, before any court having competent jurisdiction of the offence, he may plead such acquittal in bar of any subsequent accusation for the same crime (emphasis added).

4 Blackstone's Commentaries 335.
Blackstone also observed that the:

> ...plea of autrefois convict, or a former conviction for the same identical crime...is a good plea in bar to an

> indictment. And this depends upon the same principle as the former, that no man out to be twice brought in danger of his life for one and the same crime....
>
> 4 Blackstone's Commentaries at 329-331.

These pleas in bar were a reaction to generations of multiple prosecutions, which were "so commonplace that the only people to escape such a fate were those capable of surviving the tortuous physical battles of trial by ordeal." See "The Double Jeopardy Clause of the Fifth Amendment," 26 Am Crim L Rev 1477, 1479 (1989).

This tradition of the pleas in bar of autrefois acquit and autrefois convict, each of which required a judgment by the jury in a prior proceeding as a necessary prerequisite, was carried over to the legal tradition of the colonists, see e.g. the Massachusetts Body of Liberties of 1641. New Hampshire was the first colony to specifically recognize the jeopardy bar in its post-revolutionary constitution, providing that "No subject shall be liable to be tried, after an acquittal, for the same crime or offence." N.H. Const, art I, sec. 16 (1784). Courts in other states also recognized this form of plea in bar. See 26 Am Crim L Rev at 1480-1481.

This rich history was thus before the First Congress which proposed the Bill of rights, including the double jeopardy prohibition. As originally proposed by Madison, the clause simply stated: "No person shall be subject, except in cases of impeachment, to more than one punishment or *one trial* for the same offence...."(emphasis added). 1 Annals of Cong 434. The original amendments submitted to the House for consideration included an amendment to prohibit a "second trial after

acquittal." The language which evolved prohibiting more than "one trial" was roundly debated, as concern was expressed that this language might prevent a second trial *even where sought by the defendant* on a claim of error after a conviction, whereas the common law was to the contrary. The result was the language now appearing in the Fifth Amendment jeopardy clause, referring, significantly, to *one jeopardy*, rather than *one trial*.

Thus, our jeopardy clause is an amalgam of common law pleas in bar, which required an actual judgment in a prior proceeding before the bar could be effectively pled. As stated by Justice Story at a time very much closer to the ratification of the Bill of Rights, the double jeopardy clause was understood to mean "that a party shall not be tried a second time for the same offense, after he has once been convicted, or acquitted of the offense charged, by the *verdict of a jury, and judgment passed thereon for or against him*" (emphasis added). Story, 3 *Commentaries on the Constitution* (1833) § 1781, p. 659. The historical underpinning of the jeopardy protection, then, with regard to acquittals, is that "the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal, and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." *Green v United States*, 355 US 184 (1957).

The development of the modern doctrine of "judicial acquittals" began with *Fong Foo v United States*, 369 US 141 (1962). There a corporation and two of its employees were brought to trial for conspiracy, as well as a substantive offense. After

seven days of trial, and the promise of many more, and while the fourth government witness was testifying, the district judge directed the jury to return verdicts of acquittal as to all respondents, and a formal judgment of acquittal was entered. The trial judge's action was based on alleged misconduct of the assistant United States Attorney, and a supposed lack of credibility of the witnesses to that point. The government appealed, and the Circuit Court of Appeals reversed, holding that the district court had no authority to grant the directed verdict of acquittal under the circumstances of the case. This Court, though agreeing with the Court of Appeals that the "acquittal was based upon an egregiously erroneous foundation," nonetheless held that the verdict of acquittal was "final and could not be reviewed." In its per curium opinion, which stretches to amount to a page and one half, the Court reached this conclusion without any analysis of whether a "judgment of acquittal" either entered or ordered by the trial judge, rather than reached by the jury through its own deliberations, falls within the protections of the double jeopardy clause as the scope and purpose of that clause are revealed in history.

Fong Foo was followed and elaborated upon in the *Martin Linen Supply*, supra, central to the question here. A judgment of acquittal was entered on defense motion after the jury had been discharged because of an inability to agree. Focusing on the jeopardy interest against the prevention of multiple trials, the Court found jeopardy offended by the prosecution's appeal because a successful government appeal would result in "another trial." 51 L Ed 2d at 650. Though certainly second trials are permissible in some circumstances, continued the Court, this is not so after an acquittal, which the Court then defined as "a resolution, correct or not, of some or all

of the *factual elements* of the offense charged"(in the context of what might be called a "judicial acquittal" by the entry of a directed verdict of acquittal).

The rationale was similar in *Sanabria v United States*, 437 US 54 (1978). After all sides had rested, the trial judge excluded evidence in the case on the ground that the Government had cited the wrong underlying state statute in its indictment, and in the absence of any other evidence of guilt, then, on respondent's motion, entered a "judgment of acquittal." The Government appealed, pointing out that a technical defect in the indictment was correctable under the Federal Rules of Criminal Procedure. The First Circuit held that the proceedings had terminated on grounds *unrelated* to criminal liability of the defendant; this Court, while agreeing that a dismissal on grounds unrelated to criminal culpability is not even a "judicial acquittal" under *Martin Linen Supply*, held that what had occurred was not a dismissal, but an evidentiary ruling, followed by a judicial acquittal, which, under *Martin Linen Supply*, "however erroneous, bars further prosecution on any aspect" of the case. While a defendant seeking a midtrial termination of the proceedings on a "legal" ground thus takes "the risk that an appellate court will reverse the trial court," a defendant who seeks a termination of the trial prior to verdict by seeking a "judicial acquittal" does *not* take the risk that an appellate court will reverse the trial court, said the Court. But why are any protections offered by the double-jeopardy clause in its historical context offended in the latter circumstances (particularly where the judicial acquittal is gained after obtaining an erroneous evidentiary ruling)? The trial has been terminated on the *defendant's* request before a resolution by the jury, just as it has with a dismissal on "legal"

grounds, and in both situations the judge may be wrong, and demonstrably so. Giving the State one full and fair opportunity to present its case for jury resolution should not be viewed as barred by the jeopardy clause, for the ruling that no reasonable juror could find guilt beyond a reasonable doubt is a legal conclusion, not a "true" acquittal.

And it is important to observe that as a matter of history, the development of jeopardy principles did not initially include any power of the court to take a case from the jury and enter a verdict of acquittal, as As that authority developed, initially it was not an authority to take the case from the jury, but rather to *instruct* the jury that its duty was to acquit, the verdict still being delivered by the jury. The jury might disregard such an instruction, and, if it did so, the verdict was subject to reversal–but, of course, on appeal the Government could oppose on the ground that the instruction was unwarranted given the evidence. As the authority to actually direct the jury to a verdict of acquittal evolved to become authority for the court to take the case from the jury before deliberation and verdict, it was characterized as a ruling of *law* that there was no evidence on an element or elements (now, that no reasonable jury could find guilt beyond a reasonable doubt given the proofs). The judge must take the evidence in the light most favorable to the prosecution, taking that evidence as true, and drawing all inferences reasonably inferable in favor of guilt. See "Directions for Directed Verdicts: A Compass for Federal Courts," 55 Minn L Rev 903 (1971); Henderson, "The Background of the Seventh Amendment," 80 Harv L Rev 289 (1966), Westen and Drubel, "Toward A General Theory of Double Jeopardy," 1978 Sup Ct Rev 81 (1978); "Power and duty of court to direct or

advise acquittal in criminal case for insufficiency of evidence," 17 ALR 910.

Westen and Drubel, in "Toward A General Theory of Double Jeopardy," take the view that when a trial judge rules as a matter of law that the evidence and inferences therefrom, viewed in the light most favorable to the government, would not support a finding of guilt beyond a reasonable doubt, that ruling should be "freely reviewable on appeal because, by hypothesis, it does not depend on an assessment of credibility or weight of evidence," those questions by definition being resolved in favor of the Government. Current doctrine "tends to distort the trial process," as a judge may rule in a respondent's favor and shield his ruling from review, by making it before the jury returns a verdict, thereby not only causing an "acquittal" that "might not otherwise occur," but also "guaranteeing that his ruling will never be reviewed." Westen and Drubel, at 155.

C. Conclusion

Martin Linen has caused some vexing problems, being misunderstood by at least Michigan and New Jersey. The double jeopardy clause of the federal constitution should mean the same thing throughout the country. This Court should grant certiorari to make clear that an acquittal does not occur when a judge aborts the trial on the ground that the prosecution could not or did not prove a fact that is *not* necessary to support a conviction.

Petitioner further submits that the protections served by the jeopardy clause, as well as the public interest, would be served by a rule that permitted a review of a directed verdict of acquittal for legal error and a second trial if error were found, as there would be no harassment of the accused, who *sought* the

termination of the trial, and the public interest in the conviction of the guilty would be vindicated.

RELIEF

Wherefore, the Petitioner requests that certiorari be granted.

Respectfully submitted,

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