

ORIGINAL

STATE OF SOUTH CAROLINA
In The Supreme Court

On Writ of Certiorari to the Court of Appeals
Appeal from Dorchester County
Court of General Sessions
Honorable Maite Murphy, Circuit Court Judge

RECEIVED

MAR 08 2017

S.C. SUPREME COURT

Appellate Case No. 2017-001277

THE STATE,RESPONDENT,

v.

MICHAEL GENTILE, PETITIONER.

BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

The Court of Appeals properly affirmed the trial judge's denial of Petitioner's motion to quash the indictment for lewd act upon a child under sixteen where the indictment was not unconstitutionally overbroad because Petitioner knew the State was planning to obtain indictments covering the period between January 1, 2010, and September 1, 2012, and the time rame was reasonable under the circumstances.

STATEMENT OF THE CASE

On March 7, 2013, the Dorchester County Grand Jury indicted Petitioner for criminal sexual conduct (CSC) with a minor, first-degree, occurring on or about January 1, 2009 (2012-GS-18-1480). On June 4, 2015, the Dorchester Grand Jury issued an amended indictment for the CSC with a minor charge, covering an expanded time frame of January 1, 2010, and September 1, 2012. That same day, the grand jury also issued an indictment for lewd act upon a child under sixteen involving the same time period (2015-GS-18-0598).¹

On June 15, 2015, Petitioner proceeded to trial before the Honorable Maite Murphy. Pierce Wehman, Esquire, and John Loy, Esquire, represented Petitioner; and Assistant Solicitors Kyle Ward, Esquire, and Sheila Mims, Esquire, represented the State. During pretrial motions, Counsel moved to quash the indictments, arguing the time period listed in the indictments was so broad Petitioner was unable to avail himself of an alibi or other defense to the State's allegations. The trial judge denied the motion.

The main trial began the following day, June 16, 2015. Petitioner was convicted of the lewd act charge as indicted, but acquitted of the CSC with a minor charge. The trial judge sentenced Petitioner to fifteen years' incarceration, suspended upon the service of fourteen years and four years' probation. The trial judge also ordered Petitioner receive sexual assault counseling and treatment and that he register as a sex offender.

Petitioner filed a timely Notice of Appeal and the direct appeal perfected. On March 8, 2017, the South Carolina Court of Appeals affirmed the conviction and sentence in an unpublished opinion. State v. Gentile, Op. No. 2017-UP-108 (S.C. Ct. App. filed March 8,

¹ Petitioner was indicted under S.C. Code Ann. § 16-15-140, a provision which was applicable for the time period alleged in the indictments but was subsequently repealed. Act No. 255, 2012 S.C. Acts 2061. The substantive offense proscribed by the statute was reclassified as third-degree CSC with a minor under S.C. Code Ann. § 16-3-655(C). Act. No. 255, 2012 S.C. Acts. 2032

2017). Petitioner's timely petition for rehearing was denied on May 1, 2017. Petitioner then filed a petition for a writ of certiorari in the Supreme Court, and the petition was granted on January 12, 2018. Petitioner filed his brief on February 12, 2018. The Brief of Respondent follows.

STATEMENT OF FACTS

Victim's mother ("Mother"), began dating Petitioner in May 2010. Shortly thereafter, he moved in with Mother, Victim, and Victim's brother ("Brother") into their two-bedroom, one-bath apartment. At that time, Mother worked from 9:00 a.m. to 6:00 p.m., during which time Petitioner would watch the kids. When Petitioner moved in, Victim was seven years' old. (R.p.63, line 6–R.p.65, line 2).

On the night of August 31, 2012, while Victim was nine years' old, Mother found Victim's phone on the couch, and decided to go through it. During her search of the phone, she discovered unsettling material² which caused her to contact the police. Shortly thereafter, Victim was interviewed at the Dorchester County Children's Center by forensic interviewer Helen Boyle. (R.p.65, line 15–R.p.67, line 2; R.p.91, lines 4–10).

On March 7, 2013, the Dorchester County Grand Jury indicted Petitioner for CSC with a minor, first-degree, taking place on or around January 1, 2009. On June 4, 2015, eleven days before trial, the State obtained an amended indictment for the CSC with a minor, first-degree, and a new indictment for lewd act upon a child under sixteen. The time frame listed in both indictments was between January 1, 2010, and September 1, 2012. (R.p.16, lines 9–16; R.p.199–R.p.204).

During pretrial motions, Counsel moved to quash Petitioner's indictments. Counsel argued the indictments violated South Carolina law, complaining that the thirty-three month period covered by the indictments was so broad that it was impossible, even with enough

² The "unsettling material" was not presented at trial. During the June 15, 2015 hearing, however, the parties informed the trial judge that the material involved a text message exchange between the Victim and Petitioner in which Victim sent Petitioner a picture with her shirt pulled up, exposing her breasts. Due to various issues with the text message exchange and the photo, such as authenticating who actually sent the messages and whether Petitioner ever accessed the picture, the trial judge found the probative value of the texts and picture did not outweigh their prejudicial effect and prevented the State from introducing them at trial. (R.p 21, line 2–R.p.40, line 25)

preparation time, to present any alibi defense. Counsel noted that Petitioner worked as a truck driver and spent “long periods of time” traveling at the time of the assaults, and if the indictments covered a narrower period Petitioner may have been able to provide alibi evidence. (R.p.14, line 25–R.p.17, line 4; R.p.17, lines 11–20)

Counsel also argued the indictments violated federal law because the vague time period in the indictments violated Petitioner’s due process rights because he was unaware of the exact incident for which he was being tried, preventing him from being sufficiently able to protect himself from further prosecution for allegations of similar misconduct occurring during that time frame. (R.p.20, lines 3–14).

However, Counsel conceded that she was well-aware of thirty-three month time frame well before trial, and that the basis of her motion was not that the time frame of the indictments was expanded shortly before trial; he admitted to having “candid conversations” which made him well-aware the State would use the thirty-three month time frame in the indictments. (R.p.17, lines 5–10).

In response, the State argued Victim was unable to give specific dates as to when the abuse occurred, knowing only that she was “seven or eight years old” when the abuse began and that the time period used in the indictments covered the period between the dates Mother first began dating Petitioner (at which time Victim was approximately seven or eight years old) and the discovery of the abuse during Victim’s forensic interview. (R.p.17, line 22–R.p.19, line 6).

The trial judge denied Counsel’s motion, finding the thirty-three month period was not overly broad. The trial judge noted the indictments had sufficient certainty and particularity to apprise Petitioner of: (1) the elements of the offenses with which he was charged; and (2) what he is called upon to know and answer so that he may plead accordingly. The trial judge also

found the indictments were sufficient to enable the court to know which judgment to pronounce. (R.p.19, lines 10–23; R.p.20, lines 21–24).

Victim, who was twelve at the time of trial, testified Petitioner inappropriately touched her on various places of her body on numerous occasions while he lived with her and her family. However, she had trouble recalling the exact dates of when the touching occurred. Helen Boyle, the forensic interviewer who met with Victim testified the latter reported numerous incidents of abuse involving various forms of touching, all of which occurred with Petitioner. (R.p.70, line, 20–R.p.84, line 4; R.p.87, line 8–R.p.124, line 9)

ARGUMENT

The Court of Appeals properly affirmed the trial judge's denial of Petitioner's motion to quash the indictment for lewd act upon a child under sixteen where the indictment was not unconstitutionally overbroad because Petitioner knew the State was planning to obtain indictments covering the period between January 1, 2010, and September 1, 2012, and the time frame was reasonable under the circumstances.

Petitioner argues the trial judge erred in denying his motion to quash the indictment, arguing his state and federal constitutional rights were violated by the State's use of the lewd act indictment. He contends the thirty-three month time frame listed in the lewd act indictment was overbroad and vague, considering: (1) the indictment was obtained only eleven days prior to trial; (2) the indictment covered a thirty-three month time frame; (3) Petitioner's original CSC with a minor indictment, obtained twenty-seven months prior to his trial, only pertained to events occurring on or about January 1, 2009; and (4) the State failed to show "special circumstances" warranting the expanded time frame in the indictment. The State disagrees with Petitioner's allegations of error: (1) Petitioner was informed well-before even the June 4, 2015 indictments that Petitioner would be tried for sexual assaults occurring between January 1, 2010, and September 1, 2012; (2) the thirty-three month time frame contained in the indictment was justified by the circumstances of the case; and (3) Petitioner was not unfairly prejudiced by the thirty-three month time frame.

The indictment is a notice document, and any challenge to the sufficiency of an indictment must be made before the jury is sworn. See State v. Gentry, 363 S.C. 93, 102, 610 S.E.2d 494, 500 (2005).

If the objection is timely made, the circuit court should judge the sufficiency of the indictment by determining whether (1) the offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce, and the defendant

to know what he is called upon to answer and whether he may plead an acquittal or conviction thereon; and (2) whether it apprises the defendant of the elements of the offense that is intended to be charged.

Id. at 102–03; 610 S.E.2d at 500 (citing S.C. Code Ann. § 17–19–20 (2003); State v. Wilkes, 353 S.C. 462, 578 S.E.2d 717 (2003)).

Further, in determining whether an indictment is sufficient, the trial court must look at the indictment with a practical eye in view of all the surrounding circumstances. State v. Wade, 306 S.C. 79, 83, 409 S.E.2d 780, 782 (1991); State v. Tumbleston, 376 S.C. 90, 97, 654 S.E.2d 849, 853 (Ct. App. 2007), cert. denied, November 7, 2008 (citing, inter alia, State v. Means, 367 S.C. 374, 383, 626 S.E.2d 348, 353–54 (2006)). An indictment generally passes legal muster when it charges the crime substantially in the language of the statute prohibiting the crime or so plainly that the nature of the offense charged may be easily understood. Tumbleston, 376 S.C. at 98, 654 S.E.2d at 853 (citing State v. Reddick, 348 S.C. 631, 635, 560 S.E.2d 441, 443 (Ct. App. 2002)).

“Where time is not an essential element of the offense, the indictment need not specifically charge the precise time the offense allegedly occurred.” State v. Nicholson, 366 S.C. 568, 574, 623 S.E.2d 100, 103 (Ct. App. 2005) (quoting State v. Wingo, 304 S.C. 173, 175, 403 S.E.2d 322, 323 (Ct. App. 1991)). A two-prong test exists for determining the sufficiency of an indictment involving a purportedly overbroad time period: (1) whether time is a material element of the offense; and (2) whether the time period covered by the indictment occurred prior to the return of the indictment by the grand jury. Tumbleston, 376 S.C. 90, 98–99, 654 S.E.2d 849, 853–854.

“Time is not a material element of . . . committing a lewd act on a minor.” Id. at 101, 654 S.E.2d at 855; see also, S.C. Code Ann. § 16–15–140 (2015) (“It is unlawful for a person over

the age of fourteen years to willfully and lewdly commit or attempt a lewd or lascivious act upon or with the body, or its parts, of a child under the age of sixteen years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of the person or of the child.”).

Initially, the State notes that any arguments Petitioner makes regarding an inability to defend himself based on the State “surprising” him with the expanded time frame in the June 4, 2015 indictments is not preserved for review. Counsel failed to contest the indictments on that basis during the pretrial hearing; in fact, Counsel admitted they had “candid conversations” with solicitors well-before trial during which they were told the State would use the expanded time frame in the indictments. Accordingly such argument is not preserved. See State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693–94 (2003) (stating an appealing party to preserve an issue for appellate review, it must have raised the issue and the grounds supporting it to the trial judge; a party may not argue one ground at trial and an alternate ground on appeal). Moreover, even if the argument was preserved, Counsel’s admissions prove they had sufficient time to investigate the expanded time frame and possible defenses.

Further, Petitioner’s arguments regarding the State’s failure to demonstrate “special circumstances” justifying the thirty-three month time frame in the lewd act indictment were not raised during the pretrial hearing, and are not preserved for appellate review. Even if this argument was preserved, Petitioner’s argument mischaracterizes South Carolina law; the State submits this language implies Petitioner’s indictments were out of the ordinary or in violation of state law. However, no “special circumstances” standard exists under South Carolina law; rather, a trial court must consider whether the circumstances of each individual case warrant an extended time frame in an indictment. In Wade, this Court stated it was “inappropriate” to create

a per se rule of insufficiency in an indictment because it contained a two-year time frame for the charged offense. The Court found that under the facts of the case, the time span stated for Wade's first-degree CSC with a minor indictment was narrowed as much as possible under the circumstances, given the young age of the victim and that children often have "little concept of dates and time." The Court justified its position by noting that in certain scenarios, although there is proof positive that a person committed a crime, that same person could be unindictable. The Court also noted:

[Wade]'s logic that a two year indictment period is overbroad because one cannot possibly account for his whereabouts during that span is a slippery slope. In most situations, an individual could not account for his whereabouts on every day during a one year, six month, one month, or even shorter span.

Wade, 306 S.C. at 84, 409 S.E.2d at 783.

Similarly, in Tumbleston, the Court of Appeals found indictments for first-degree CSC with a minor and lewd act upon a minor covering a three-year period between 2001 and 2004 were warranted based upon the facts of the case, noting "the stealth and repetitive nature of the alleged conduct compels identification of the broader time period. The victim is a young child, whom one cannot reasonable expect to recall the exact dates of the sexual abuse." Tumbleston, 376 S.C. at 101-02, 654 S.E.2d at 855.

However, in State v. Baker, 411 S.C. 583, 769 S.E.2d 860 (2015), a two-justice plurality³ of this Court found a trial judge erred in failing to quash indictments against the defendant which

³ Notably, because the decision in Baker was a plurality decision, the portion of the decision reached on the narrowest ground constituted the precedential portion of that decision. See Marks v. United States, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . .'"). In Baker, Justice Pleicones's concurrence **in result only** constituted the narrowest ground upon which the plurality's decision was reached. See Baker, 411 S.C. at 592, 769 S.E.2d at 865 (reversing Baker's case after two justices specified particular reasons why they believed reversal was appropriate while a single justice agreed reversal was appropriate but joined in the result only without

were amended two weeks before trial to expand the time frame for the alleged offenses from the summer months of three years to a continuous six-year period.⁴ Examining the indictments “with a practical eye in view of all the surrounding circumstances,” the plurality found the defendant was prejudiced because “he was undoubtedly taken by surprise and significantly limited in his ability to combat the charges against him.” *Id.* at 589–90, 769 S.E.2d at 864. The plurality noted the new indictments were “unconstitutionally overbroad and vague, in violation of the defendant’s due process rights, because they lacked specificity as to when the alleged acts occurred.” The plurality also noted: (1) the defendant was taken by surprise by the last-minute amendment of the charges; (2) there was no way for the defendant to know whether he could plead an acquittal; (3) the defendant was given only two weeks to complete the task of developing a defense for a continuous, six-year period; and (4) defendant had prepared a defense based on the original indictments, but due to the State’s belated presentation of the new indictments, was unable to obtain additional evidence to defend against the expanded time frame, such as employment records for the period before 2000, which had been destroyed at some point prior to the State obtaining the amended indictments. *Id.* at 591–92, 769 S.E.2d at 864–65. This Court put special emphasis on the defendant’s ability to craft an alibi. The Court stated the defendant’s “only complete defense would be that of an alibi,” noting a successful alibi must necessarily cover the entire time period alleged in the indictment, and it was “unable to discern how any defendant could effectively defend himself against a six-year time frame.” *Id.* at 591, 769 S.E.2d at 864. However, by way of footnote, the plurality emphasized its decision did not

specifying any grounds as to why he believed the case should be reversed). Thus, the decision in *Baker* has no precedential value beyond the peculiar facts of that particular case.

⁴ *Baker* involved the State obtaining four amended indictments against the defendant, two weeks prior to trial, based on new allegations by the victims. The indictments, which were for committing lewd acts upon a minor, originally covered events occurring between May 1, 2002 until September 1, 2002, May 1, 2003 until September 1, 2003; and June 1, 2004 until June 20, 2004. The amended indictments alleged the lewd acts occurred between June 1, 1998 and September 1, 2004.

preclude the State from reindicting Baker, so long as it limited the time frame in the indictments to the summer months 1998 through 2004, the periods in which the abuse likely occurred. Id. at 602, 769 S.E.2d at 870.

In the instant case, there was no need for the State to prove the lewd act occurred at a specific time or date. See S.C. Code Ann. §§ 16-3-655, 16-15-140 (2015); Tumbleston, 376 S.C. at 99, 654 S.E.2d at 854 (stating time is not a material element of either CSC with a minor or committing lewd act on a minor, and finding indictments which stated the charged crimes occurred “on or between 2001 and June 2004” was sufficient). Petitioner does not dispute the indictments issued in his case included the relevant language from the statutes defining the offenses with which he was charged.

Under those circumstances, the indictments were sufficient to provide Petitioner with notice that apprised him of the elements of the charged offenses, allowed him to decide whether to plead guilty or stand trial, and enabled the trial judge to know what judgment to pronounce in the event Petitioner was convicted. See Edwards v. State, 372 S.C. 493, 496, 642 S.E.2d 738, 739 (2007) (“[A]n indictment is a notice document. The primary purposes of an indictment are to put the defendant on notice of what he is called upon to answer, *i.e.*, to apprise him of the elements of the offense and to allow him to decide whether to plead guilty or stand trial, and to enable the circuit court to know what judgment to pronounce if the defendant is convicted.”); see also State v. Jacobs, 238 S.C. 234, 243, 119 S.E.2d 735, 739-740 (1961) (“An indictment is ordinarily sufficient if it is in the language of the statute.”).

Moreover, time was not an element of charged offenses of first-degree CSC with a minor or lewd act upon a child. See State v. Thompson, 305 S.C. 496, 501, 409 S.E.2d 420, 423 (Ct. App. 1991) (“The specific date and time is not an element of the offense of first degree [CSC].”).

In light of that fact, the solicitor was **not** required to identify the specific date and time each of the charged crimes occurred with exactitude for the indictments to be constitutionally sufficient. See State v. Wingo, 304 S.C. 173, 175, 403 S.E.2d 322, 323 (Ct. App. 1991) (“Where time is not an essential element of the offense, the indictment need not specifically charge the precise time the offense allegedly occurred. . . . Here, both indictments sufficiently notified Wingo of the offenses with which he was charged since time is not a material element of either the offense of first degree [CSC] or the offense of contributing to the delinquency of a minor and since the indictments allege the commission of the offenses during periods that preceded the date of the indictments.”); see also United States v. Kimberlin, 18 F.3d 1156, 1159 (4th Cir. 1994) (“‘Where a particular date is not a substantive element of the crime charged, strict chronological specificity or accuracy is not required.’ ” (citation omitted)). Instead, the solicitor was only required to fully apprise Petitioner of the information available to the State regarding the time, place, and date of the crimes, and she did just that to the best of her abilities in Petitioner’s case. See State v. Wilcox, 808 P.2d 1028, 1033 (Utah 1991) (“[W]e have recognized that there are notice problems, especially as to the date, place, and time inherent in prosecutions based on the testimony of very young victims. . . . If we were to hold that in all such circumstances, no offense could be charged because the alleged victim is too young to testify with certainty concerning the times, dates, or places where the abuse occurred, we would leave the youngest most vulnerable children with no legal protection. An abuser could escape prosecution merely by claiming that the child’s inability to remember the exact dates and places of the abuse impaired the abuser’s ability to prepare an alibi defense. In frank recognition of this fact, we have been less vigorous in requiring specificity as to time and place when young children are involved than would usually be the case where an adult is involved. . . . We have suggested that

so long as the elements of the crimes are covered by the factual allegations and the defendant is fully apprised of the State's information regarding the time, place, and date of the crimes, any lack of factual specificity goes not to the constitutional adequacy of notice, but to the credibility of the State's case." (emphasis added)); see also S.C. Code Ann. § 17-19-20 ("Every indictment shall be deemed and judged sufficient and good in law which, in addition to allegations as to time and place, as required by law, charges the crime substantially in the language of the common law or of the statute prohibiting the crime or so plainly that the nature of the offense charged may be easily understood and, if the offense be a statutory offense, that the offense be alleged to be contrary to the statute in such case made and provided.").

Petitioner's case is clearly distinguishable from Baker and parallels Wade and Tumbleston. Contrary to Petitioner's assertion, the State's timespan was relatively narrow; the majority of the indictment's time frame consisted of the period during which Petitioner lived with the Victim and her family; the period during which, based on the Victim's statements, the assault occurred. However, due to the Victim's young age, she had difficulty remembering when exactly she was assaulted. See, e.g., Wade, 306 S.C. at 84, 409 S.E.2d at 783 (noting an eight-year-old victim, due to her age, had difficulty pinpointing the exact date when she was sexually assaulted). Admittedly, the lewd act indictment did include a period of several months before Petitioner lived with the Victim. However, the inclusion of those months did not prejudice Petitioner: he did not know Victim and her family during that time and thus could demonstrate he could not have assaulted her prior to May 2010.

Indeed, unlike the defendant in Baker, Petitioner cannot demonstrate he suffered any prejudice from the new indictment. The State informed counsel well-before trial that it sought to prosecute Petitioner using the expanded time frame and presented him with all the evidence in its

possession. Additionally, Petitioner failed to present any evidence the State's use of the expanded time frame impacted his defense strategy; in fact, trial counsel exploited Victim's uncertainty about the assaults to attack her credibility and successfully defend against the first-degree CSC with a minor charge. See State v. Cozza, 858 P.2d 270, 275 (Wash. Ct. App. 1993) (“[W]hether single or multiple incidents of sexual contact are charged, a defendant has no due process right to a reasonable opportunity to raise an alibi defense. Although our ruling does not allow the defendant to use the child's inability to recall dates as a sword to escape a trial, he or she can use the long time frame to attack the credibility of the child witness. In addition, the defendant may also deny the conduct, or offer innocent explanations for the child's sexual knowledge. Moreover, the requirement that the defendant be proved guilty beyond a reasonable doubt adequately protects the defendant's rights. The trier of fact hears both that the child witness cannot specify a date and that the defendant is thereby precluded from raising an alibi defense. Both are considered in the deliberations that require guilt to be found beyond a reasonable doubt.” (citations omitted)); State v. Brim, 789 N.W.2d 80, 84 (S.D. 2010) (“The lack of precise dates of the abuse did not deprive Brim of his defense. . . . Brim's defense was a complete denial of any sexual act occurring during the entire period of time covered by the indictment.”)

Petitioner's situation is a far cry from that of Baker, in which the defendant presented the trial court with concrete examples of evidence he was unable to obtain because he was surprised with amended indictments encompassing a six-year time period; here, Petitioner informed the trial judge he “might” have alibi evidence through work records if the State could narrow the time frame to “one day or [] two day[s] or [a] week . . . ,” but notably failed to dispute he lived with Victim's family and was often alone with her, and sometimes her brother, during the

relevant time period, making it was impossible for Petitioner to provide an alibi defense for those situations. Moreover, Petitioner failed to even allege the indictments impacted any actual theory or evidence he had prepared for trial.

As in Wade and Tumbleston, the time frame of Petitioner's indictments was reasonable based upon the Victim's age and the State's ability to narrow the time frame of the assaults beyond the period during which Petitioner lived with her. Accordingly, the trial judge did not did not err in refusing to quash Petitioner's lewd act indictment. Petitioner's conviction and sentences should be affirmed.

CONCLUSION


For all the foregoing reasons, it is respectfully submitted that the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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MICHAEL GENTILE, PETITIONER.

PROOF OF SERVICE

I, Angela Bennett, certify that I have served the within Brief of Respondent on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Kathrine H. Hudgins, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211-1589

I further certify that all parties required by Rule to be served have been served.
This 8th day of March, 2018.



ANGELA BENNETT
Administrative Coordinator

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