No. 14-4606

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

JAMES KALBFLESH,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

BRIEF FOR THE UNITED STATES AS APPELLEE

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STATEMENT OF JURISDICTION

This appeal is from a judgment of conviction and sentence under the laws of the United States. The district court had jurisdiction pursuant to 18 U.S.C. 3231. The court sentenced defendant and entered final judgment on July 22, 2014. J.A. 1789-1794. Defendant timely appealed ten days later on August 1, 2014. J.A. 1795. This Court has jurisdiction pursuant to 28 U.S.C. 1291.

STATEMENT OF THE ISSUES

1. Whether pre-indictment delay violated due process.

2. Whether the introduction of statements made by an unavailable co-conspirator to further the conspiracy violated the Confrontation Clause.

STATEMENT OF THE CASE

On March 8, 2008, K.D., an inmate at Roxbury Correctional Institution, hit a correctional officer during the evening shift and gave the officer a bloody nose. J.A. 584, 926. In retaliation, officers on that evening shift beat K.D. J.A. 584, 926. Officers on the overnight shift beat K.D. J.A. 495-496, 599-601, 1016-1017. And officers on the morning shift beat K.D. J.A. 584. All told, after three successive shifts of beatings, officers shattered K.D.'s orbital bone, broke his nose, cracked pieces of his spine, fractured one of his ribs, and caused extensive soft tissue injury. J.A. 1001-1005. The severity and extensiveness of the injuries were typical of those seen "in car wrecks." J.A. 1003.

1. This case involves only one defendant, James Kalbflesh, a correctional officer on the overnight shift. J.A. 489. At the start of the shift, he discussed whether to beat K.D. with six other officers: Jeremy McCusker, Phillip Mayo, Lanny Harris, Raymond Reichert, Walter Steele, and William Kirby. J.A. 492, 597, 715-716, 834-835, 1014. When the group broke without taking action, defendant called McCusker, Mayo, and Harris to round them back up to beat K.D.

J.A. 492-493, 598-599, 836-837. For example, he encouraged McCusker to "wax K.D.'s ass." J.A. 492.

The four officers—defendant, McCusker, Mayo, and Harris—met in the unit where K.D. was being held. J.A. 494, 599, 837. Defendant said that he would beat K.D. first. J.A. 599, 839. McCusker removed his microphone to avoid accidentally broadcasting the beating, and Mayo told the others to avoid hitting K.D. in the face so as not to leave a visible mark. J.A. 495-498, 599-601, 839. Reichert, the unit supervisor, opened the door of K.D.'s cell, and the four descended on K.D. J.A. 495-496, 599-601, 1016-1017. Defendant began by hitting K.D. in the face. J.A. 496, 599, 839, 841. When K.D. tried to protect his face, defendant continued hitting him in the body. J.A. 496. Mayo then laid on top of K.D. while McCusker and Harris joined defendant in punching, kicking, and stomping K.D. J.A. 495-496, 599-601, 1016-1017.

After the beating, the officers dispersed. J.A. 602. Later that night, Mayo, Harris, and Kirby returned to K.D.'s cell to wipe up blood and give K.D. a clean jumpsuit. J.A. 604-605, 719-721, 846. Prison administrators discovered the next morning that K.D. had been beaten, and the State began investigating that afternoon. A few days later, defendant met at a McDonald's restaurant with McCusker, Mayo, Harris, and Reichert, along with Steele, who had witnessed the beating. J.A. 502, 612, 850. The six officers conspired to agree to a false cover

story that none of them had participated in or seen the beating. J.A. 505, 541, 612, 615, 850-851, 855, 1020-1022, 1030.

The false cover story held for more than four years. During that time, they all lied to state investigators; defendant Kalbflesh went so far as to accuse the officers who were on the earlier evening shift, which ultimately was the only shift that state prosecutors charged. J.A. 60, 96, 504-505, 606-607, 614-615, 763, 853-855. After state prosecutors received verdicts of not guilty against two officers from the evening shift in 2009, federal authorities began investigating the case. J.A. 60, 96, 179-180.

2. In September 2012, the United States commenced a grand jury investigation into the beatings of K.D. J.A. 96. McCusker and Steele initially lied to federal investigators when interviewed in early 2013. J.A. 505, 1026. Ultimately, however, the conspiracy unraveled. On February 26, 2013, the United States indicted defendant, McCusker, and Steele, along with Jason Weicht, one of their former supervisors. J.A. 16-28. Mayo pleaded guilty two days later on February 28, 2013; Harris and Steele pleaded guilty in April 2013; and McCusker pleaded guilty in May 2013. J.A. 60-61, 505, 510-511, 615, 855, 1030. Reichert had died in June 2012. J.A. 60. That left defendant and Weicht, who proceeded to trial together.

3. Before trial, on December 16, 2013, the district court held a motions hearing in which it decided a number of matters, two of them pertinent to this appeal. J.A. 171; Supplemental J.A. 1-57.[1]

a. First, defendant moved to dismiss his indictment due to pre-indictment delay. J.A. 44-49. The federal government had indicted defendant just short of the five-year statute of limitations. J.A. 16-28. Defendant argued that the delay "greatly prejudiced Kalbflesh" because, "[a]fter five years, witnesses have moved and a meaningful forensic investigation cannot be done." J.A. 48.

The government countered that defendant failed to prove actual prejudice from the delay and that the delay was justified. J.A. 98-99. The government argued that it had waited for the state prosecutions to play out and then reviewed many thousands of pages of transcripts from the state proceedings. J.A. 99-100; Supplemental J.A. 23. The government also explained that its prosecutors had moved cautiously to avoid tainting the federal investigation with *Garrity*-protected

[1] Defendant's counsel advised the United States that they are in the process of filing a motion for leave to supplement the joint appendix with the transcript from the December 16, 2013, motions hearing, at which the district court ruled from the bench. As of the filing of this appellee brief by the United States, defendant's motion for leave has not been filed. Defendant, however, provided the United States with the prospective supplemental joint appendix, which the United States expects to be filed imminently. The citations in this brief thus correspond to the pagination in the prospective supplemental joint appendix.

compelled statements from the state proceedings.[2] J.A. 99-100. After the first assigned federal prosecutor inadvertently reviewed statements that may have been compelled, the government reassigned the case to a new prosecutor. J.A. 100. The government further argued that the extensive investigative time and effort was necessary to unravel "a complex and cohesive web of conspiracies that involved more than 20 correctional officers, almost all of whom had made false statements * * * over the course of several years." J.A. 100.

The district court denied defendant's motion to dismiss, finding that defendant had failed to offer anything beyond speculation to prove prejudice from the delay. Supplemental J.A. 24-25. The court also found that, even if defendant had suffered prejudice, the delay was justified due to the complex and convoluted nature of the case. Supplemental J.A. 25. The court "credit[ed] completely" the government's explanation of how it investigates and prosecutes a case with such a complex record of "many different defendants, three different shifts of correctional

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[2] In *Garrity* v. *New Jersey*, 385 U.S. 493, 500 (1967), the Supreme Court held that using a law enforcement officer's statement obtained under threat of termination against that officer in a criminal proceeding violates the officer's constitutional right against self-incrimination. Thus, to avoid *Garrity* concerns, the federal government establishes *Garrity* review teams that screen materials "and redact any potentially self-incriminating statements, as well as any material that relied upon such statements," before passing along the materials to the investigation and prosecution teams. *United States* v. *Under Seal* (*In re Grand Jury Doe No. G.J. 2005-2*), 478 F.3d 581, 583 (4th Cir. 2007).

officers involved, the prior administrative proceedings," and also "prior State trials." Supplemental J.A. 25.

Further, the court found that the federal government's initial "choice to defer to the State serves the important interests of allowing the State to be the primary authority investigating and prosecuting a matter like this." Supplemental J.A. 26. The court concluded that the federal government prosecutors' careful approach "justifie[d] the amount of time that they took." Supplemental J.A. 26-27.

b. Second, the government moved to admit statements that Reichert had made in furtherance of the conspiracy surrounding the overnight shift's beating of K.D. J.A. 55-73. Defendant argued that he had "no opportunity to cross-examine or to contest the statements" because Reichert was now deceased. Supplemental J.A. 42. The court granted the motion to admit the statements, finding the statements admissible as "a classic co-conspirator statement" under Federal Rule of Evidence 801(d)(2)(E). Supplemental J.A. 40, 43. The court reasoned that the "principle in the law is that one conspirator speaks for the other." Supplemental J.A. 42.

4. At trial, the government called ten witnesses, including McCusker, Mayo, Harris, and Steele, each of whom testified to witnessing defendant beat K.D. and then conspiring with them to lie about the beating. J.A. 495-498, 599-602, 839-841, 1016-1017. Harris also identified defendant on video unlocking the door for

Harris and McCusker to leave the building with K.D.'s unit a few minutes after the beating. J.A. 843. An FBI agent testified to false statements defendant made to state investigators the day after the beating, in which defendant said he never saw Reichert or any other officer near K.D.'s cell during the time of the beating. J.A. 760-763. Kirby testified to what he saw after being called to help clean up the blood in K.D.'s cell, including how K.D.'s "face was all beat in and you could tell it was all black and blue and way different from the start of the shift." J.A. 720-721. The trauma surgeon chief who attended to K.D. after the beatings testified that the injuries the officers inflicted on K.D. were unusually extreme and extensive, including an orbital blowout fracture that is "a classic punch injury," and spinal fractures that are usually only seen "in car wrecks." J.A. 999-1005.

A jury found defendant guilty of violating 18 U.S.C. 242 for beating K.D., and guilty of violating 18 U.S.C. 241 and 371 for conspiring to commit and cover up the beating. J.A. 1719-1721, 1726-1727. The district court sentenced defendant to three concurrent terms of 60 months' imprisonment. J.A. 1773. The jury acquitted Weicht of conspiring to cover up the beating. J.A. 1727.

SUMMARY OF THE ARGUMENT

Defendant Kalbflesh raises two claims on appeal, both from the pretrial motions hearing. Each lacks merit. First, he contests the pre-indictment delay as a violation of due process. He fails, however, to prove there was any substantial

prejudice from the delay. He makes only speculative and conclusory allegations, which do not satisfy his heavy burden. Even assuming he could prove prejudice, the pre-indictment delay did not violate due process because it was justified by the government's careful and good-faith investigation efforts that followed the State's efforts.

Second, he disputes the introduction of Reichert's statements as a violation of the Confrontation Clause, as Reichert died before trial. Defendant is mistaken. A statement must be testimonial to be excludable under the Confrontation Clause. Each of Reichert's statements introduced at trial was a statement that Reichert made to further the conspiracy with defendant and other officers of beating K.D. and covering up the beating, not to create a record for trial. The statements therefore were not testimonial, and the Confrontation Clause does not apply. In addition, even assuming one or more of Reichert's statements was testimonial, any error was harmless, as the evidence of defendant's connections to the beating and cover-up was overwhelming.

ARGUMENT

I

THE PRE-INDICTMENT DELAY DID NOT VIOLATE DUE PROCESS

Defendant challenges the pre-indictment delay as a violation of due process because a co-conspirator, Raymond Reichert, died before defendant's indictment

and trial. Appellant Br. 5-12. This Court reviews de novo claims that a pre-indictment delay violated Fifth Amendment due process. *United States* v. *Shealey*, 641 F.3d 627, 633 (4th Cir.), cert. denied, 132 S. Ct. 320 (2011).

A. The Court conducts a two-pronged inquiry to evaluate claims of unconstitutional pre-indictment delay. *United States* v. *Uribe-Rios*, 558 F.3d 347, 358 (4th Cir. 2009). First, defendant must prove actual prejudice from the delay. *Ibid.* This is a "heavy burden" that requires defendant to show that he was "meaningfully impaired in his ability to defend" himself "to such an extent that the disposition of the criminal proceeding was likely affected." *Jones* v. *Angelone*, 94 F.3d 900, 907 (4th Cir. 1996). The prejudice must be substantial and cannot be merely speculative. *Shealey*, 641 F.3d at 634; *Jones*, 94 F.3d at 907; *United States* v. *Bartlett*, 794 F.2d 1285, 1289-1290 (4th Cir.), cert. denied, 479 U.S. 934 (1986).

When "the claimed prejudice is the unavailability of a witness," defendant must "demonstrate, *with specificity*, the expected content of that witness' testimony." *Jones*, 94 F.3d at 908 (emphasis added). He "must relate the substance of the testimony" that the unavailable witness would have offered "in sufficient detail to permit a court to assess accurately whether the information is material to the accused's defense." *Bartlett*, 794 F.2d at 1290. "Speculative or conclusory claims alleging 'possible' prejudice as a result of the passage of time are insufficient." *Id.* at 1289-1290.

Even if a defendant meets the heavy burden of proving actual substantial prejudice, this Court then "balance[s] defendant's prejudice against the government's justification for delay." *Howell* v. *Barker*, 904 F.2d 889, 895 (4th Cir.), cert. denied, 498 U.S. 1016 (1990). The question "becomes whether the government's action in prosecuting after substantial delay violates fundamental conceptions of justice or the community's sense of fair play and decency." *Ibid.* (citation and internal quotation marks omitted). Delay due to "a protracted investigation that was nevertheless conducted in good faith" does not violate due process, *Uribe-Rios*, 558 F.3d at 358, because "careful investigation and consideration prior to the bringing of criminal charges is generally a wise policy," *United States* v. *Automated Med. Labs., Inc.*, 770 F.2d 399, 404 (4th Cir. 1985).

B. Defendant fails both prongs of the inquiry. First, he cannot prove actual prejudice. The entirety of defendant's argument about the prejudice the delay caused him centers around the unavailability of Raymond Reichert. Defendant not only argues that he was unable to cross-examine Reichert regarding the statements Reichert made to further the conspiracy, but also that it was "possible" that Reichert "could have confirmed" defendant's innocence. Appellant Br. 10.

Defendant, however, fails to describe, much less demonstrate, with any specificity what Reichert would have said that would have helped prove his innocence. Defendant's assertion that Reichert might have exculpated him is

further belied by the extensive testimony at trial by McCusker, Mayo, Harris, and Steele. All testified to seeing Reichert and defendant conspire together to beat K.D. and then cover up the beating. Defendant merely suggests on appeal that Reichert might have testified to the contrary but provides no factual basis for that suggestion. Such conclusory speculation about "possible" prejudice, and about what an absent individual "could" have said, falls far short of proving actual and substantial prejudice. *Shealey*, 641 F.3d at 634; *Jones*, 94 F.3d at 907; *Bartlett*, 794 F.2d at 1289-1290.

C. Even assuming defendant could prove actual prejudice, the delay was justified by the federal government's complex, careful, and good-faith investigation that advanced, rather than violated, fundamental conceptions of justice. The federal government first allowed the State to investigate and prosecute the case fully.[3] When the extensiveness of the conspiracy stymied state efforts, the federal government stepped in rather than leave unvindicated egregious civil rights violations by law enforcement officers. The government then had to unravel the web of conspiracies involving more than 20 officers over three separate shifts,

[3] Defendant asserts in his opening brief that the FBI agent who testified at trial, Special Agent Alicia Wojtkonski, had interviewed Reichert on March 13, 2008. Appellant Br. 7. Defendant is mistaken. Special Agent Wojtkonski testified at trial that *state* investigators interviewed Reichert on March 13, 2008, but that when she attempted to locate Reichert in 2012 as part of the federal government's investigation, she discovered that he was deceased. J.A. 757, 766.

almost all of whom had made false statements to state investigators for years regarding the beatings of K.D. It also reviewed many thousands of pages from state proceedings and carefully avoided *Garrity* concerns. The government's careful, good-faith investigation to bring the beatings' perpetrators to justice, even if protracted, did not violate due process. See *Uribe-Rios*, 558 F.3d at 358; *Automated Med. Labs.*, 770 F.2d at 404.

In short, defendant cannot prove actual substantial prejudice from the pre-indictment delay. There is no evidence that the delay in any way deprived defendant of a fair trial. Even if there were such evidence, the government's justifications for the delay advanced rather than violated principles of justice.

II

STATEMENTS MADE BY A CO-CONSPIRATOR TO FURTHER THE CONSPIRACY DO NOT IMPLICATE THE CONFRONTATION CLAUSE

Defendant next challenges, as a violation of the Confrontation Clause, the district court's admission of out-of-court statements made by the deceased co-conspirator, Raymond Reichert. Appellant Br. 12-19. This Court reviews claims of an alleged Confrontation Clause violation de novo. *United States* v. *Reed*, 780 F.3d 260, 269 (4th Cir. 2015).

A. The Confrontation Clause of the Sixth Amendment "bars the admission of 'testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and defendant had had a prior opportunity for

cross-examination.'" *United States* v. *Dargan*, 738 F.3d 643, 650 (4th Cir. 2013) (quoting *Crawford* v. *Washington*, 541 U.S. 36, 53-54 (2004)). A "statement must be testimonial to be excludable under the Confrontation Clause." *Ibid.* (citation and internal quotation marks omitted).

Hearsay statements are testimonial if they are made with an eye toward prosecution. The pertinent question is "whether a reasonable person in the declarant's position would have expected his statements to be used at trial—that is, whether the declarant would have expected or intended to bear witness against another in a later proceeding." *Dargan*, 738 F.3d at 650 (citation and internal quotation marks omitted). A "statement made with 'a primary purpose of creating an out-of-court substitute for trial testimony'" is testimonial. *Reed*, 780 F.3d at 269 (quoting *Michigan* v. *Bryant*, 562 U.S. 344 (2011)). But "[i]f a statement's primary purpose is not to create a record for trial, then the Confrontation Clause does not apply." *Ibid.* (citation and internal quotation marks omitted).

In *Crawford*, the Supreme Court recognized that statements made in furtherance of a conspiracy are, "by their nature," not testimonial. 541 U.S. at 56. Indeed, creating a record for trial would contravene the statement's purpose of furthering what is, by definition, a criminal activity. Similarly, in *Dargan*, this Court held that out-of-court statements made by a co-conspirator to a cellmate were not testimonial. 738 F.3d at 650. The Court reasoned that "jailhouse

disclosures to a casual acquaintance were not made with an eye towards trial" because the declarant "had no plausible expectation of bearing witness against anyone." *Id.* at 651 (citation and internal quotation marks omitted).

Alternatively, this Court may dispose of a claim under the Confrontation Clause by assuming error and finding the alleged violation harmless. *Reed*, 780 F.3d at 269. An alleged Confrontation Clause error is harmless if "the beneficiary of the constitutional error can prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Ibid.* (citation omitted).

In *Reed*, one of defendants in that case challenged the government's introduction of an evidence bag with his name on it without having established a chain of custody to show that the cell phone in the bag was his. 780 F.3d at 268-269. This Court "decline[d] to address whether labeling the bag so as to attribute its contents * * * constituted a testimonial statement." *Id.* at 269. Instead, the Court held "that even if the statement was testimonial and there was error, any error was harmless beyond a reasonable doubt." *Ibid.* The Court reasoned that, "even if the bag had not been labeled, the government could still connect the phone to [defendant] based on its data, namely its stored photos and text messages, which demonstrated that he owned and possessed the phone." *Ibid.*

B. Here, Defendant Kalbflesh's claim lacks merit because Reichert's statements were not testimonial. There were at least ten instances where a

statement of Reichert's was introduced at trial. All were statements Reichert made to further the conspiracy to beat K.D. and then cover up the beating. Specifically, Reichert mentioned K.D.'s attack on an officer earlier in the day (J.A. 693); told Harris that K.D. was bragging about the attack on the officer (J.A. 836, 993); asked Harris if officers were going to punish K.D. for the attack (J.A. 836); told Harris to help clean up the blood in K.D.'s cell (J.A. 834-844, 846, 930); and told Kirby to keep quiet about the beating (J.A. 612-613, 732-733). These statements were plainly made to further the conspiracy, not to create a record for trial. Indeed, like many statements made in furtherance of a conspiracy, they inculpate the declarant, Reichert, rather than bear witness against another. The statements therefore were not testimonial, and their introduction did not implicate the Confrontation Clause. See *Crawford*, 541 U.S. at 56; *Reed*, 780 F.3d at 269; *Dargan*, 738 F.3d at 650.

Further, Reichert's statements were not hearsay. The statements did not even mention or reference defendant. They were introduced, not for the truth of the matter being asserted, but to provide context to defendant's actions and the broader conspiracy described by McCusker, Mayo, Harris, and Steele. See *United States* v. *Wills*, 346 F.3d 476, 489-490 (4th Cir. 2003) (affirming against a Confrontation Clause challenge the introduction of out-of-court statements to provide context). Thus, even assuming the statements were testimonial, they were not hearsay, and their introduction did not implicate the Confrontation Clause. See

Crawford, 541 U.S. at 59 n.9 ("The Clause also does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.").

Defendant focuses on the fact that one statement, Reichert's mention of K.D.'s attack on an officer earlier in the day, was introduced at trial through former corrections officer Tanzania Merriweather, who had written a report for state investigators. Appellant Br. 7-8; J.A. 692-693. To the extent Defendant is arguing that Merriweather's report somehow transforms Reichert's declaration into testimonial hearsay, Defendant is mistaken. The testimonial nature of a statement depends on the state of mind of the declarant. *Dargan*, 738 F.3d at 650. As discussed above, Reichert's statement was made to further the conspiracy, not to create a record for trial, and therefore was properly introduced at trial. Merriweather's report itself, although likely testimonial, was not introduced at trial. Rather, she used it once to refresh her recollection (J.A. 693) and otherwise testified, subject to cross-examination, about her personal knowledge of the events surrounding the assault on K.D. J.A. 680-712.

C. Even assuming Reichert's statements were testimonial hearsay, any error was harmless as the direct evidence of defendant's guilt was overwhelming. Reichert's statements did not mention or reference defendant. Rather, they demonstrated Reichert's role in the conspiracy. On the other hand, McCusker, Mayo, Harris, and Steele each testified extensively at trial that defendant beat

K.D., encouraged them to beat K.D., and conspired with them to cover up the beating. Indeed, Harris identified defendant on video unlocking the door for Harris and McCusker to leave K.D.'s building just minutes after the beating, refuting defendant's testimony at trial that he was alone at his post around the time of the beating. Compare J.A. 843, with J.A. 1097, and J.A. 1136-1137. Like the multiple evidentiary connections to the cell phone in *Reed*, 780 F.3d at 269, those four officers repeatedly and directly connected defendant to the beating and conspiracy. The introduction of Reichert's statements, even if erroneous, was harmless beyond a reasonable doubt. See *ibid.*

In short, Reichert made his statements to further the conspiracy, not to create a record for trial. The statements also were introduced for context rather than the truth of the matter being asserted. Thus, the statements were not testimonial hearsay and did not implicate the Confrontation Clause. To the extent a statement was testimonial hearsay, any error in admission was harmless as the evidence of defendant's connections to the beating and conspiracy was overwhelming.

CONCLUSION

This Court should affirm defendant's conviction and sentence.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify, pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), that the attached BRIEF FOR THE UNITED STATES AS APPELLEE:

(1) contains 4038 words; and

(2) complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Word 2007, in 14-point Times New Roman font.

s/ Robert A. Koch
ROBERT A. KOCH
Attorney

Dated: May 4, 2015

CERTIFICATE OF SERVICE

I hereby certify that on May 4, 2015, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS APPELLEE with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system and that eight paper copies were sent to the Clerk of the Court via certified First Class mail.

I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Robert A. Koch
ROBERT A. KOCH
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