

No. _____

In the Supreme Court of the United States

JOSEPH SCOTT DURAN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is a certificate of appealability warranted as to the question whether Stone v. Powell, 428 U.S. 465, 96 S.Ct. 3037 (1976), bars federal habeas corpus review of suppression issues preserved for review under a conditional guilty plea.
2. Is a certificate of appealability warranted as to the question whether, even if Stone v. Powell were extended to bar habeas review of a preserved constitutional issue affecting a defendant's right to withdraw a guilty plea, petitioner received a full and fair appellate hearing of his suppression claims, given the state's failure in its appellate brief to address all of the issues raised and the state appellate court's decision of the case without opinion, affording no assurance of merits review and precluding petitioner from seeking further review under Florida appellate rules.

PARTIES TO THE PROCEEDINGS BELOW

There are no other parties to the proceeding.

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PETITION FOR A WRIT OF CERTIORARI

Joseph Duran respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in case number 12-14131 in that court on February 6, 2013, *Duran v. State of Florida*, which denied petitioner a certificate of appeal from the judgment of the United States District Court for the Southern District of Florida.

OPINIONS BELOW

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit, denying petitioner's motion for Certificate of Appealability, is contained in the Appendix (1a), along with a copy of the Final Judgment and Order Denying Habeas Petition decision denying reconsideration (8a) and the United States Court of Appeals for the Eleventh Circuit's denial of Motion for Reconsideration (11a).

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Part III of the Rules of the Supreme Court of the United States. The decision of the court of appeals was entered on February 6, 2013. This petition is timely filed pursuant to Sup. Ct. R. 13.1. The district court had jurisdiction

pursuant to 18 U.S.C. § 3231 because petitioner was charged with violating federal criminal law. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291, which provides that courts of appeals shall have jurisdiction for review of all final decisions of United States district courts.

PROVISIONS INVOLVED

Petitioner intends to rely upon the following constitutional and statutory provisions:

U.S. Const. amend. V

No person shall be ... deprived of life, liberty, or property, without due process of law

STATEMENT OF THE CASE

A. Course of Proceedings and Statement of Facts.

Procedural background

On March 4, 2008, Duran was arrested by Surfside Police Department officers on charges of driving under the influence and possession of a distribution amount of a controlled substance. On July 23, 2008, Duran moved to suppress the results of field sobriety and related tests as well as

suspected controlled substances and paraphernalia seized in searches conducted both prior and subsequent to his arrest. On September 16, 2008, a hearing was held on Duran's motion to suppress evidence. At the conclusion of that hearing, the trial judge denied the motion. Duran then moved for reconsideration of the ruling, and the trial court denied the motion for reconsideration.

On July 7, 2010, Duran pled no contest to drug possession and intoxicated driving offenses, under an agreement with the State. In accordance with the terms of the agreement, Duran was sentenced to ten (10) years in state prison to be mitigated to a three (3) year sentence following his surrender date. The plea reserved to Duran the right to appeal the denial of his motion to suppress. On direct appeal to Florida's Third District Court of Appeal, Duran's raised multiple issues and arguments regarding the denial of the suppression motion. The state did not respond to all of the arguments raised by Duran, and the court of appeal denied relief without opinion in a *per curiam* decision. *Duran v. Florida*, 81 So.3d 413 (Fla. 3d DCA 2012).

Appellant Duran petitioned for habeas corpus relief under 28 U.S.C. § 2254, asserting that the Florida courts had wrongly decided the claims of constitutional error that he had preserved for review as part of a conditional plea agreement. The district court denied relief, concluding that

because the issue that Duran had preserved as part of his conditional plea related to violation of his Fourth Amendment rights, and because a state appellate court had denied relief to Duran, federal habeas review was barred under *Stone v. Powell*, 428 U.S. 465, 96 S.Ct. 3037 (1976). *See* DE:9 (“Here, the State of Florida provided an opportunity for a full and fair litigation of Duran’s Fourth Amendment claims. *Stone v. Powell*, 428 U.S. 465 (1976); *Peoples v. Campbell*, 377 F.3d 1208, 1224-26 (11th Cir. 2004); *Bradley v. Nagle*, 212 F.3d 559, 564 (11th Cir. 2000). A full and fair consideration includes at least one evidentiary hearing in a trial court and the availability of meaningful appellate review. Here, the state court made explicit findings on matters essential to Duran’s Fourth Amendment arguments.”).

Pertinent Facts

The underlying facts of the case involve the law enforcement response to the discovery that a car apparently driven by Duran had been involved in a crash. Surfside Police Officers Micah Smith and G. Fernandez were on duty and riding together during the early morning hours of March 4, 2008. At approximately 3:28 a.m., they came upon an accident scene. A gold-colored Honda was facing eastbound on the westbound side of 88th Street in Surfside. The Honda had crashed into a parked truck. Officer Smith walked up to the driver’s side door of the Honda while Officer Fernandez

approached from the passenger side. Duran was seated in the driver's seat with his head slumped over against the steering wheel and his foot on the brake. The vehicle was still in gear, and the engine was still running. The front left corner of the Honda was smashed up against the front left corner of the parked truck, *id.*, and was positioned in such a fashion that it was blocking westbound traffic on 88th street.¹

Realizing that Duran was unconscious, Officer Smith tried to awaken him. He shook Duran's shoulders and told him to wake up. Initially, there was no reaction. DE:5-2 at 76. After shaking Duran a few more times, he began to respond. *Id.* Duran was very groggy, and the officers asked him for identification. Duran responded by saying something to the effect that he would produce it. He then began searching his shirt and pants pockets. While Duran was doing this, the officers observed a wallet on the car seat between Duran's legs. Duran apparently did not notice that the wallet was between his legs. After 10-20 seconds had elapsed, Officer Fernandez reached into the vehicle, grabbed the wallet, turned off the engine, put the vehicle in park and ordered Duran to step out of the vehicle. At the time this order was given, Officer Smith did not see any visible signs of

¹ 88th Street in Surfside is a two-lane, two-way street that runs east to west.

injury on Duran.² As required by law, the officers' observations of the crash scene and Duran's statements to and interactions with the officers were incorporated into a traffic crash report.

Since the officers did not witness the accident, they had no knowledge of Duran's driving pattern prior to the collision and no idea as to what could have caused or contributed to the accident. They acknowledged that it could have been the result of many possible circumstances. Thus, at the time Duran was ordered out of the car, the officers' only suspicions that he had been driving under the influence were that there was an accident for which there was no apparent reason, that he could not find his driver's license and that he appeared to be unconscious with his mouth open. *Id.* Neither officer saw any pills, drugs or marijuana in the car, nor did they smell any marijuana. No odor of alcohol was detected.

When Duran got out of his vehicle, he leaned up against the door to keep his balance. Officer Fernandez immediately directed him to the middle

² However, Officer Smith conceded on cross examination that a series of photographs taken at the jail following Duran's arrest showed a curved red mark across his forehead. He also conceded that if an individual were in an accident and his head struck the steering wheel hard enough to render him unconscious, that would certainly be a factor in the person's ability to immediately respond to questioning.

of the road (88th Street) to perform sobriety tests. While speaking to Duran, Officer Fernandez noticed that his speech was mumbled and that he had watery red bloodshot eyes, and a flushed face.³ His request that Duran perform the field sobriety exercises was predicated on the contact that Officer Fernandez had with Duran reflecting that his eyes were red and bloodshot, his speech was mumbled and he appeared to be under the influence of something.

Officer Fernandez then asked Duran if he were willing to perform the exercises, and he responded that he was. *Id.* The officer also asked him whether there was any reason why he could not perform the Horizontal Gaze Nystagmus Test, and Duran responded that there was not. When Officer Fernandez attempted to administer this test, Duran demonstrated a complete inability to focus on the officer's finger, which he was moving from side to side, and he was unable to perform the test.

Duran was then told to perform the walk-and-turn test and was given instructions on how to do it. While he was being given these instructions, he appeared to lose his balance. Duran was unable to walk heel-to-toe as instructed. Specifically, he could not touch heel to toe and he periodically

³ These observations were made only after Fernandez had already ordered Duran out of his vehicle to have him perform the sobriety tests.

stopped walking to regain his balance, raised both arms throughout the procedure and stepped off the line several times. Duran was also unable to perform the one leg stand test.

Based on Officer Fernandez' assessment that Duran was unable to perform the field sobriety exercises to standard, Officer Smith placed him under arrest for driving under the influence. At the time Duran was placed under arrest, Officer Smith did not notice any odor of alcohol. However, his eyes were red or bloodshot and he slurred some of his words. At this point, Officer Smith also ran a check on the Duran vehicle, which revealed that it was a rental car registered to Hertz. Duran was arrested.

Since Duran was the sole operator of the vehicle and because the vehicle was blocking traffic, a decision was made to tow the vehicle premised on Surfside Police Department's operating procedures. The standard written operating procedures authorize the towing of a vehicle if it is disabled due to a malfunction or the operators' inability to drive. State's Exhibit 3. However, "[i]n these situations, the owner, or in his absence, the driver should be provided a reasonable opportunity to arrange for the vehicle's removal or storage." State's Exhibit 3. According to Officer Smith, Duran's being placed under arrest for DUI rendered him incapable of driving the vehicle.

Officer Smith also testified that Surfside Police operating procedures dictate that under these circumstances the entire vehicle is to be inventoried and that the inventory process is to include the opening of all containers whose contents are not clearly visible from the outside of the container. Although Officer Smith was familiar with these requirements at the time Duran was arrested, the actual search of Duran's vehicle was conducted by Officer Alberto Knight.

When Officer Knight arrived on the scene, he saw Duran exiting the driver's side of his vehicle. From his position, which was approximately 12 feet away, Duran appeared jittery and unstable on his feet, and he was swaying. Officer Knight then went to an adjacent apartment complex to try to locate the owner of the red F150 pick-up with which Duran's vehicle had collided.

As Officer Knight returned to the accident scene, Duran was being placed under arrest. According to Officer Knight, Surfside Police Department's standard operating procedures require that, for a vehicle to be towed, the operator should be under arrest or the vehicle should be inoperable, or there are safety reasons for the towing. In this case, Duran's vehicle was to be towed because he was under arrest and the vehicle was creating safety issues because it was in the wrong lane.

Officer Knight also explained that, according to Surfside's written procedures, all areas of the vehicle were to be searched, including the glove compartment, the trunk, and the interior of the vehicle.⁴ In addition, all motor vehicles impounded are to be completely inventoried and their contents documented. The inventory process includes the opening of all containers whose contents are not clearly visible from the outside of the container.

Officer Knight's search of the interior of the vehicle yielded no evidence.⁵ He next searched the trunk and found a black backpack. He picked it up, held it out and asked Duran if it was his. Duran acknowledged that it was. Officer Knight then unzipped the backpack and inside he found a sock which contained a glass pipe. He also found a black metal box and a multicolored metal box. One of the metal boxes was locked and one was not.

According to Officer Knight, the contents of the boxes were not visible from the outside. He first opened the unlocked box and found inside

⁴ Actually, the written procedures do not address the issue of whether the glove compartment or trunk are to be searched (regardless of whether they are locked or unlocked).

⁵ The officers had neither a warrant nor consent from Duran authorizing the search of the vehicle, the trunk or the contents of the trunk.

hundreds of empty clear baggies. Officer Knight then took a key from Duran's key ring that matched the locked box and used the key to unlock the box. The contents of the locked box included 5 small clear plastic baggies of yellow powder (3 grams of suspected methamphetamine), 5 small plastic baggies containing green powder (19 grams of suspected methamphetamine), 7 small clear plastic baggies containing a clear crystal-like substance (24 grams suspected methamphetamine), 2 small clear plastic baggies containing 4 grams of suspected cocaine, 378 suspected ecstasy pills totaling 140 grams and other baggies containing unknown powders. After the search, Knight placed the boxes and their contents back inside the backpack, closed it and placed the backpack in Officer Fernandez' vehicle. He did not make any written notations as to what he saw in the locked box nor did he prepare an inventory or any other documents describing the scope or results of his "inventory search."

REASONS FOR GRANTING THE WRIT

The Court should grant certiorari to resolve the compelling question of whether *Stone v. Powell*, 428 U.S. 465, 96 S.Ct. 3037 (1976), applies to bar habeas review of suppression issues where resolution of the issues will determine the validity of the defendant's basis for entering a plea of guilty. The Eleventh Circuit, in denying a certificate of appealability as to the applicability of *Stone* to the

conditional plea context presented in petitioner's case, failed to perceive the constitutional limits of this Court's decision in *Stone*, as to which, at the least, reasonable jurists might differ, resulting in a deprivation of petitioner's Fourth Amendment and due process protections.

In *Stone v. Powell*, the Supreme Court held that “[w]here the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, the Constitution does not require that a state prisoner be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial.” 428 U.S. at 482, 96 S.Ct. at 3046 (emphasis added). Thus, in the context where a jury has determined the defendant's guilt, after an otherwise fair trial, the federal courts will not review an independent claim of error in the admission of evidence that could be subject to the exclusionary rule. *Stone v. Powell* is, first and foremost, an exclusionary rule decision. *See id.*, 428 U.S. at 483-89, 96 S.Ct. at 3047-49 (holding that the deterrent value of the exclusionary rule would not be meaningfully extended by its use in collateral proceedings following a trial and appeal). *Id.*

However, the Supreme Court has not applied *Stone v. Powell* to habeas cases in which independent constitutional rights are implicated along with Fourth Amendment issues. *See Kimmelman v. Morrison*, 477 U.S. 365, 382-83, 106

S.Ct. 2574, 2587 (1986) (Sixth Amendment error of counsel in failing to preserve defendant's right to present suppression claim was not barred from federal habeas review). This Court has consistently declined to extend *Stone* where due process or other Fifth Amendment rights are implicated. *See Jackson v. Virginia*, 443 U.S. 307, 323, 99 S.Ct. 2781, 2791 (1979) (expressly refusing to extend *Stone* to due-process challenges to the sufficiency of the evidence); *Rose v. Mitchell*, 443 U.S. 545, 559-66, 99 S.Ct. 2993, 3002-04 (1979) (refusing to extend *Stone* to equal protection claim in selection of a grand jury); *Withrow v. Williams*, 507 U.S. 680, 691, 113 S.Ct. 1745, 1753 (1993) (refusing to extend *Stone* to *Miranda* claims raised on habeas; stating that “[p]rophylactic’ though it may be, in protecting a defendant’s Fifth Amendment privilege against self-incrimination, *Miranda* safeguards a fundamental trial right”). *Cf. Reed v. Farley*, 512 U.S. 339, 114 S.Ct. 2291 (1994) (noting that the Court has repeatedly declined to extend the rule in *Stone* beyond its original bounds; deciding Interstate Agreement on Detainer Act speedy trial claim on state grounds); *Withrow*, 507 U.S. at 700, 113 S.Ct. at 1758 (O’Connor, concurring in part and dissenting in part) (“only once has this Court found that the concerns of finality, federalism, and fairness supported” excluding certain types of claims from habeas review).

The Supreme Court has not addressed the question of whether a basis for a conditional plea,

the voluntariness of which is based on the right to review of an erroneous determination of a constitutional issue, is rendered beyond the scope of federal habeas review if the preserved and wrongly-decided issue involves the Fourth Amendment. The conditional plea context is materially distinct from that at issue in *Stone* in that harmlessness of an error or ineffectiveness of a remedy for a preserved issue are not controlling: defendants have the right to condition their pleas on any number of constitutional or jurisdictional claims, not all of which would be dispositive of a trial outcome or even affect the trial result, such as a plea conditioned on issues relating to conditions of confinement. *See generally United States v. Pierre*, 120 F.3d 1153 (11th Cir. 1997) (noting that formal and de facto scope of conditional pleas extends to any pretrial issue, including those unrelated to the determination of guilt or innocence). The basis for the plea is that the defendant will have the right to review of the issue in question, whether or not the issue is one that warrants independent federal concern. It is the technical error in deciding the issue on which the plea is conditioned, not the right to a hearing, that is at stake in a conditional plea.

Consequently, the concerns at issue in *Stone* are not present in this context. The conditional plea issue is not resolved by a determination that the state trial court gave the petitioner a full hearing prior to the plea, but rather only on a determination of whether there was a reliable and accurate

appellate determination of the issue. For absent a meaningful appeal, in which the merits have been reliably and understandably determined by the appellate court, there is no assurance that the fundamental Fifth Amendment right of the defendant to receive what was promised as part of the plea is not illusory. *See Finch v. Vaughn*, 67 F.3d 909, 916 (11th Cir. 1995) (illusory plea bargain violates due process).

Because additional interests are at stake in the conditional plea context, the *Stone* concern for not upsetting trial results when weighed against the diminishing returns of collateral exercise of the exclusionary rule should not be extended to the conditional plea context presented by petitioner's case, contrary to the rationale and import of the Eleventh Circuit's denial of a certificate of appealability in petitioner's case.

Even if *Stone* were properly extended to conditional pleas, the Eleventh Circuit's ruling that the meaningful appellate review process and full appellate consideration outlined in *Stone* were achieved in petitioner Duran's case should be rejected as violative of due process, where the state's answer brief failed to address the entirety of the appellate claims and the court of appeal merely issued a per curiam affirmance without opinion or oral argument.

In *Stone*, two tiers of state court review of the suppression issue insured that the petitioner was afforded meaningful review of his claims. 428 U.S. at 491, 96 S.Ct. at 3051. And the starting point for the review analysis in petitioner's case is the appellate review he bargained for as part of his plea. In that light, petitioner Duran did not receive meaningful and complete review. Petitioner's challenge rests on a right of post-conviction review of suppression issues. In its decision affirming the trial court's ruling, Florida's Third District Court of Appeal simply issued a per curiam affirmance with no statement of reasons, indeed without even stating that it had reached the merits of the constitutional issues and precluding petitioner from seeking further review under Florida appellate rules.

The lack of a decision or even an identification of the issues raised by the petitioner on appeal leaves no assurance of fulfillment of the review to which he was entitled. This concern is further heightened by the fact that the State of Florida, in its answer brief in the state court appeal, failed to address all components of the arguments raised by petitioner. For example, Duran claimed on appeal that the assertion of a police inventory policy as the basis for a search of locked containers (and indeed of a small safe) within the impounded vehicle was vitiated by the officers' failure to comply with the procedural requirements of the inventory policy, including offering the owner or operator of the vehicle an

opportunity to have the vehicle privately removed from the street to avoid impoundment. (Petitioner Duran’s initial brief on appeal: “In this case, the record is devoid of any suggestion that the officers made even a token attempt to comply, in good faith with the governing written directive that “the driver should be provided a reasonable opportunity to arrange for the vehicles removal or storage.”) (quoting State’s Exhibit 3). There is nothing in the record indicating that the courts adequately considered the claim that the State’s reliance on the inventory policy was invalidated by the officers’ failure to even attempt to comply with the policy.

Because the purpose of preservation of the right to appellate review would be rendered a nullity by anything short of full merits consideration of the claims, and because nothing in the record establishes that full merits review of the Fourth Amendment issues was afforded on appeal, the relevant *Stone* concerns – even if the *Stone* doctrine were extended to this context – were not satisfied.

At a minimum, *Stone*’s procedural requirements were not fulfilled in this case. Nor did the federal district court conduct any adequate review of the merits issues. Notably, the district court’s decision mistook entirely the nature of the claim as to the exceeding of the Surfside inventory policy, suggesting that absent any articulated appellate reasoning, no court has in fact afforded petitioner

the meaningful review on which his conditional guilty plea was premised.

The Eleventh Circuit, in denying a certificate of appealability to petitioner Duran, effectively extended the *Stone* rule to the context of a conditional guilty plea, clearly implicating the petitioner's due process rights, along with his Fourth Amendment rights. The court of appeals' reliance, *see* App. 6a, on a decision from the Second Circuit (*Capellan v. Riley*, 975 F.2d 67 (2d Cir. 1992)) in which the appellant did not challenge *Stone's* application to conditional guilty pleas, should not be viewed as foreclosing the question whether *Stone* should be extended in the manner in which the district court extended it in petitioner's case. Notably, in *Capellan*, it appears that there was no conditional plea and hence the preservation of the right of review of the Fourth Amendment issue to which the State of Florida was a party in petitioner's was not a factor in *Capellan*. Nor, given that the *Capellan* court did not address either the conditional plea issue or the issue of whether *Stone* itself is properly limited to cases in which contested (but reliable) evidence was actually introduced at trial, can it be said that any circuit has ever found the *Stone* bar applicable in the conditional plea context.

The fact that the issue raised by petitioner as to *Stone* is one of first impression in every circuit, and that there is no precedent for the proposition that

the *Stone* bar applies in the case of an agreed conditional plea, is itself a strong indication that the Eleventh Circuit's decision merits certiorari review in order to clarify the law in this area. Beyond the first impression nature of the issue, there are also sound reasons not to extend *Stone* to the very different context of a conditional plea. First, contrary to the conclusion of the Eleventh Circuit, there is a substantially different cost-benefit analysis involved in choosing to foreclose federal habeas review of an issue preserved for review in a conditional plea. *See* App. 5a ("Duran failed to present any argument that this cost-benefit analysis changes when the defendant pleads guilty, rather than proceeding to trial. As such, there is no reasonable basis for imposing Duran's proposed limitation on the *Stone*-bar."). The costs identified by the Supreme Court in *Stone* included the adverse impact federal habeas review has on "the necessity of finality in criminal trials," *Stone*, 428 U.S. at 491 n. 31, 96 S.Ct. at 3051 n. 31 (internal quotation and citation omitted), and in affording a "windfall [to] a guilty defendant by application of the rule." *Id.*, 428 U.S. at 490, 96 S.Ct. at 3050. There is no windfall, however, to a defendant who has conditioned the entry of his guilty plea on the right to have a Fourth Amendment claim resolved; nor is justice undermined by validating the defendant's decision to exchange the right to trial for the right to litigate a Fourth Amendment violation.

The costs and mutual benefits of allowing full review of Fourth Amendment claims in this context are not the same as where a trial has been conducted and an adversarial process has proven the defendant's guilt beyond a reasonable doubt to a unanimous jury. Thus, this Court's analysis of costs in *Stone* related directly to those of reversing a trial, not validating a conditional plea: "The costs of applying the exclusionary rule even at trial and on direct review are well known: the focus of the trial, and the attention of the participants therein, are diverted from the ultimate question of guilt or innocence that should be the central concern in a criminal proceeding." *Id.*, 428 U.S. at 489-90, 96 S.Ct. at 3050 (footnote omitted).

The issue of whether *Stone* reaches an area where no federal precedent yet permits it to go is one that warrants the Court's resolution. Duran's habeas petition does not undermine a reliable conviction established at trial through an adversarial testing process; it furthers the purpose of his entry of a guilty plea conditioned on review of the Fourth Amendment claim. *Stone* is an exception, a limited bar to a right of habeas corpus. If the petitioner had conditioned his guilty plea on review of any other matter, including matters of much lesser significance than a constitutional violation, his Fifth Amendment due process rights would have been violated by the erroneous state court determination of the question on which the plea was conditioned and *Stone* would afford no bar

to federal habeas review. To extend *Stone* to the conditional plea in this case, as the Eleventh Circuit has done, creates an unwarranted disparity that risks “generating disrespect for the law and administration of justice,” one of the very goals sought not to be preserved by the Supreme Court by the limited habeas bar announced in *Stone*. 428 U.S. at 491, 96 S.Ct. at 3051.

The compelling issues raised in this case, which involve fundamental procedural and substantive matters impacting on the scope of Fourth Amendment and Due Process rights in the context of review of an issue preserved for review in a conditional plea, merit this Court’s resolution and issuance of a writ of certiorari.

CONCLUSION

Based upon the foregoing petition, the Court should grant a writ of certiorari to the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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