

FIRST DIVISION  
June 18, 2012

No. 1-10-3195

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
	)	the Circuit Court
Plaintiff-Appellee,	)	of Cook County
	)	
v.	)	
	)	No. 01 CR 18002
	)	
TIMOTHY MALONE,	)	
	)	Honorable
Defendant-Appellant.	)	Kevin M. Sheehan,
	)	Judge Presiding.

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JUSTICE KARNEZIS delivered the judgment of the court.  
Justice Hall and Justice Rochford concurred in the judgment.

**ORDER**

¶ 1 **Held:** The postconviction court's dismissal of defendant's postconviction petition following a third stage evidentiary hearing was not manifestly erroneous.

¶ 2 Defendant appeals from the dismissal of his postconviction petition following a

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third stage evidentiary hearing. On appeal, defendant claims that the postconviction court's judgement dismissing his petition was manifestly erroneous because three separate jurors testified about a deputy sheriff's aggressive efforts to persuade a holdout juror to sign a guilty verdict. Defendant also claims, for the first time on appeal, that the court's ruling was manifestly erroneous because there was substantial evidence proving that a deputy sheriff coerced a verdict by threatening imminent sequestration. For the following reasons, we affirm the judgment of the postconviction court.

¶ 3 BACKGROUND

¶ 4 Defendant was convicted of first degree murder and was sentenced to 56 years' imprisonment. Defendant's conviction was affirmed in *People v. Malone*, No. 1-04-2536 (unpublished order pursuant to Supreme Court Rule 23) and following a supervisory order from our supreme court *People v. Malone*, No. 103455 (November 29, 2006), again in *People v. Malone*, No. 1-04-2536 (January 26, 2007) (unpublished order pursuant to Supreme Court Rule 23). The facts of the case are not relevant to the disposition of this appeal.

¶ 5 On December 21, 2007, defendant, represented by the Office of the State Appellate Defender (OSAD), filed a petition for postconviction relief alleging that Cook County Sheriff's Deputy James Williams made statements to defendant's deliberating jury about the evidence and about defendant's guilt and that this violated defendant's right to an impartial jury and denied him the right to confront the witnesses against him. Defendant attached his own affidavit as well as affidavits from Assistant Public Defender Dawn Sheikh, jurors Twitchy Siddiqui, Bryan Shaw, Casey Henson, and J.B.

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Dean and Investigator Edward Torres. After the State filed a motion on February 8, 2008, questioning the propriety of defendant's representation by the OSAD, the trial court struck the representation by OSAD and allowed private counsel from the Exoneration Project to enter an appearance on defendant's behalf. The postconviction petition was docketed for second-stage proceedings.

¶ 6 Private counsel for the Exoneration Project filed a supplemental petition on defendant's behalf on October 21, 2008. The petition incorporated the issue previously raised in the initial petition and added an additional claim of ineffective assistance of counsel for failing to investigate and call two alibi witnesses. The State filed a motion to dismiss defendant's original and supplemental petitions on April 23, 2009, and private counsel filed a response on June 12, 2009. The postconviction court heard arguments on the motion to dismiss on July 1, 2009, and August 27, 2009, and granted the State's motion with respect to defendant's ineffective assistance of counsel claim. The court ruled that defendant had made the requisite showing for a third stage evidentiary hearing on his claim that Deputy Williams improperly communicated with defendant's deliberating jury.

¶ 7 The evidentiary hearing commenced on May 13, 2010. Defendant called Assistant Public Defender Dawn Sheikh. She testified that she was the second chair for defendant's murder trial and was in the courtroom during both days of jury deliberations. She had no contact with the jurors. The second day of deliberations, Friday, June 11, 2004, the jury had not yet reached a verdict. The jury was not sequestered on the second day and she did not ask for a curative instruction because

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she was not yet aware of any issues that would require such an instruction. Later, she had a conversation with Deputy Williams and following that conversation she contacted people in her office as well as the OSAD to advise them as to the content of the conversation she had with Deputy Williams. The content of that conversation was not admitted at the hearing.

¶ 8 Defendant next called Casey Henson, who served on the jury for defendant's murder trial. The jury deliberated for two days, June 10 and June 11, 2004, and was sequestered for the first night. On the second day, which was a Friday, the jury discussed being sequestered again and that discussion was prompted by everyone wanting to go home. Henson did not recall if the deputy told him that the jury would be sequestered.

¶ 9 Henson testified that there were verbal arguments in the jury room on the second day of deliberations and that the deputy entered the jury room at the end of the verbal argument and calmed down the two female jurors who were arguing. Henson also testified that the deputy spoke to the jury about the evidence. "I remember him talking about the evidence. There was like an evidence box and we should just, he was telling us, the jury, that we should just, everything is in, the evidence is there, everything is in there, everything that we need to know in there and just to look into it." After the deputy made those comments to the jury, the jury deliberated for a "relatively short" time, about thirty minutes to an hour, before they reached a verdict of guilty.

¶ 10 Juror Brian Shaw testified that he also served on defendant's jury. There were times when the deputy entered the jury room during deliberations. On one occasion, on

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the last day of deliberations, which was a Friday, the deputy had a conversation with one of the jurors. The deputy was talking about the case and told a female juror, "He's guilty. What more do you need?" This occurred late in the day. The deputy had spoken about sequestering the jury for the weekend, but the jury reached a verdict shortly after the deputy spoke to the juror.

¶ 11 Juror Twitchy Siddiqui testified that she deliberated as part of defendant's jury on Thursday and Friday. On Friday, there was a lot of hostility in the jury room. The deputy came into the room and said, "Everybody know [sic] he is guilty. The judge know [sic] he is guilty, his lawyer know [sic] he is guilty, the guy that got killed lawyer's know [sic] he's guilty and I know he's guilty, so you all need to make the right decision." The deputy also said, "There is a dead body and somebody have [sic] to pay." The deputy gave a "whole rundown scenario of the case" and gave a "speech about how, exactly how they had said in court, they were saying in court it happened, how the car came up, how the shooting started, and then it was about the stacks and some rims, and that we know." The deputy then said, "You guys need to hurry up, because the judge has already told us to sequester you guys again." Siddiqui testified that there was more than one conversation with the deputy: the first took place in the early evening on Friday and the second took place right about 10 to 15 minutes before the verdict was reached.

¶ 12 Siddiqui testified on cross-examination that there were two male and one female deputies working. One of the male deputies entered the room in response to a question from a juror. After the jury reached a verdict, the jury was brought out into the

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jury box and the verdict was read. Each individual juror was then asked if that was their verdict and Siddiqui answered that it was. Siddiqui testified that she did not alert the judge, defense attorney or State's attorney about the conversations with the deputy. Although she told her family members, she did not officially tell anyone about the conversations with the deputy until she spoke with an investigator from the OSAD. Siddiqui stated that she signed an affidavit that was not prepared in her presence. She also stated that the jury had been sequestered for one night and she knew there was a possibility that they would be sequestered for a second night.

¶ 13 Siddiqui testified on redirect examination that she did not tell the judge about the conversations with the deputy because she was scared and "the sheriff had been saying that the judge knew, everybody knew and they was [sic] all on the same side, that he was guilty, and that we should do the same thing so." Siddiqui testified that she did not tell the State's attorney about the conversations "because they had like—there was like a lot of pressure and everybody was angry with me inside the room. So I was just really, really just kind of scared. Then I was kind of sick, so I don't know."

Regarding the affidavit, Siddiqui testified that she met with the investigator from OSAD twice. On the second visit, the investigator brought her an affidavit, which she signed.

¶ 14 Following Siddiqui's testimony, the hearing was commenced and continued. On July 1, 2010, defendant rested. The State called jury foreperson Joyce Castor as a witness.

¶ 15 Castor testified that deliberations began on Thursday, June 10, 2004, and that the jury had contact with one deputy on that day. The deputy did not discuss the case

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with the jury. The jury was sequestered for the night because they did not reach a verdict.

¶ 16 The next day, the jury was still deliberating. Close to dinner time there was a disagreement and a female juror threw water in Castor's face. There was commotion and the door opened and the deputy came in and told the jury that "we needed to calm down and get back to the reason that we were there" and then quickly left. All of the jurors, except for one, were in agreement so they went over the information again. At that point, the juror who had thrown water in Castor's face changed her vote to guilty. This occurred about an hour after the deputy left. They signed the verdict form and were taken into the courtroom where the verdict was read and the jury polled.

¶ 17 Castor testified that the deputy did not comment on the defendant's guilt. Castor testified that the deputy did not state that "everybody knows he's guilty" or "the judge knows he's guilty" or that "his lawyer knows he's guilty" or "the guy that got killed [sic] lawyer knows he's guilty" or the State "knows he's guilty." Castor testified that she did not hear the deputy say "you need to make the right decision" or "there is a dead body, somebody has to pay." She further testified that she never heard the deputy describe the evidence or tell the jury to hurry up. As the foreperson of the jury, Castor testified that if the deputy had attempted to influence the jury or if he was talking about the case, she would have alerted the judge or someone else.

¶ 18 Castor testified that the juror who threw water on her indicated that she was not comfortable making a judgment against an individual. Castor was "taken back because the instruction was when we were picked that one of the reasons for being picked would

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be that we could make a judgment call on the information or the evidence that was given to us." Castor also testified that she was unaware that the woman who threw water on her was one of the jurors alleging that the deputy made improper comments to the jury during deliberations. Castor further stated that the deputy did not tell the jurors that they would be sequestered again if they did not reach a decision that day.

¶ 19 Karen Keane testified that she served on defendant's jury. The deputy delivered questions that the jury had written down to the judge. The deputy did not discuss the facts of the case with the jury on June 10, 2004. The jury was sequestered that night. On Friday early evening, June 11, 2004, after the verdict form was signed, and while the jury was still in the jury room, "one of the jurors stood up and started making accusations about the other jurors and swearing at the foreman and calling her inappropriate names and had a glass of water in her hand and whipped the water in her face and all over her upper body." The deputy heard the commotion that ensued and came into the room. The deputy asked if they had come to a verdict and they said yes. The deputy then "tried to calm us down by saying that we had done our job and that we would be called back into the courtroom and that it was a tough week but we should leave our personal feelings behind and there was no necessary bad mouthing and just that we better be careful what people say to each other."

¶ 20 Keane testified that she never heard the deputy say that "everybody knows he's guilty" or "the judge knows he's guilty" or that "his lawyer knows he's guilty" or "the guy that got killed [sic] lawyer knows he's guilty" or the State "knows he's guilty." Keane testified that she did not hear the deputy say "you need to make the right decision" or

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"there is a dead body, somebody has to pay." Keane also testified that the deputy never told the jury to hurry up or describe the evidence of the case. Keane testified that those phrases sounded familiar because there was a juror who was saying almost those exact words during deliberations. The juror was directing those statements at Twitchy Siddiqui, the juror who "ended up accusing the foreman and the rest of us of putting pressure on her, swearing and the one who threw water at the foreman." Siddiqui was accusing the other jurors of "wanting to hurry up to get out of there, make a decision so we could leave."

¶ 21 On cross-examination, Keane again stated the incident with the juror throwing water on the foreperson occurred after the verdict was signed. The jury had several questions over the two days of deliberations and had to ring a bell or knock on the door if they needed a deputy. Law students and an investigator who worked for defendant came to Keane's house on October 20, 2009. During that conversation, Keane told the law students and investigator that she didn't think the deputy did anything wrong. Keane testified that she did not tell them that the deputy explained the evidence in the case if the jury had questions. She also testified that she did not say that the deputy came into the jury room on Friday and told the jury that they would be sequestered again Friday night. Keane clarified that the deputy came in after the verdict was signed and told the jury that they could have been sequestered again had they not come to a verdict.

¶ 22 Deputy James Williams of the Cook County Sheriff's Department testified that he worked in the courtroom during defendant's trial. The jurors are instructed that while

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deliberating they are to write their questions on a piece of paper and knock on the door if they have any questions for the judge. They are also instructed to push an alarm-type button on the wall when they reach a verdict.

¶ 23 On June 10, 2004, during the first day of deliberations, the jury knocked on the door and passed a note. Deputy Williams informed Judge Darcy of the note. Deputy Williams could not recall if the jury sent additional notes that day. Deputy Williams testified that he did not discuss the facts of the case with the jury when he retrieved the note. The jury did not reach a verdict on June 10, 2004, so the jurors were sequestered. There was a verbal altercation on the bus ride to the hotel between the jury foreperson and juror Twitchy Siddiqui which was resolved by moving one of the jurors to the front of the bus.

¶ 24 The jury resumed deliberations on June 11, 2004. Judge Darcy had his probation call that morning. Deputy Williams testified that he went into the jury room to retrieve a note and gave the note to Judge Darcy. He went into the jury room again later because the jurors were arguing and they could be heard inside the courtroom. Deputy Williams told the jurors that they needed to "keep it down" and then left the jury room.

¶ 25 Deputy Williams testified that the jury reached a verdict in the early afternoon on June 11, 2004. After they sounded the buzzer, Deputy Williams went into the jury room to disengage the buzzer. As he opened the door, he saw juror Twitchy Siddiqui throw a glass of water into the foreperson's face. At that point Deputy Williams told them "they were going to have to cut this out because both of them could wind up being arrested

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for it."

¶ 26 Deputy Williams testified that neither he nor any other deputies in his presence went into the jury room and said "he's guilty" "everybody knows he's guilty" or "the judge knows he's guilty" or that "his lawyer knows he's guilty" or "the guy that got killed [sic] lawyer knows he's guilty" or the State "knows he's guilty." Deputy Williams testified that he did not say "you need to make the right decision" or "there is a dead body, somebody has to pay." Deputy Williams further testified that he never told the jurors that they needed to hurry up or commented on the evidence in the case.

¶ 27 On cross-examination, Deputy Williams testified that there were two altercations in the jury room on June 11, 2004. The first was an argument and he went into the jury room to quiet the jury. The second was when he went in the jury room to disengage the buzzer and saw one juror throw water on another. Approximately 10 minutes elapsed between the two. Deputy Williams believed that the jury activated the buzzer about 3:00 or 3:30 p.m.

¶ 28 Deputy Williams also testified that it was his job to ensure the safety of the jury and to inform the judge if a severe problem exists with the jury. Deputy Williams did not believe that the altercations between the jurors were serious enough to warrant informing Judge Darcy. At no time did Deputy Williams pull juror Siddiqui aside and talk to her separate from the other jurors. The State rested.

¶ 29 Defendant called Elliot Slosar in rebuttal. Slosar testified that he is an investigator for the Exoneration Project and spoke with juror Karen Keane in her home on October 9, 2009. Keane told Slosar and two law students that the deputy came into

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the jury room on the final day of deliberations and told them that they would be sequestered if they could not reach a verdict. Keane also told Slosar that the deputy came into the room and explained some of the evidence and some of the law to them and told them that everyone knew that he was guilty, and that they must reach that verdict.

¶ 30 On cross-examination, Slosar admitted that when he interviewed juror Keane, that neither he nor the law students recorded the conversation, took any notes or wrote any reports. Slosar did not ask Keane to sign an affidavit or to be deposed. After speaking with Keane, Slosar told his supervising attorney about the conversations. Slosar testified that he often does not document interviews with witnesses that he considers favorable.

¶ 31 Arguments were heard from the parties on October 14, 2010. On October 21, 2010, the court denied the petitioner's request for postconviction relief and dismissed the petition concluding that there "was no improper communication between Deputy Williams and the jury, and therefore no prejudice occurred." The court found the testimony of jurors Joyce Castor and Karen Keane and Deputy James Williams credible as they were "consistent and unimpeached." Likewise, the court found the testimony of Brian Shaw and Twitchy Siddiqui less than credible in light of all of the evidence. The court further stated that it believed Twitchy Siddiqui to have "a deep-seated bias and motive to testify falsely, this from a person who assaulted another juror and indicated she did not want to abide by her oath in the jury room." The court reasoned that if Deputy Williams had made the statements alleged by Siddiqui then "every juror in that

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room, would or should recollect what having been said. That is not the case here. And make some effort to contact the judge regarding these types of improper communication. Not one of the 12 jurors in this case did that." It is from this order that defendant now appeals.

¶ 32

#### ANALYSIS

¶ 33 Defendant first claims that the court improperly dismissed his postconviction petition where he established that Deputy Williams improperly attempted to persuade a holdout juror to sign a guilty verdict.

¶ 34 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2008)), allows a criminal defendant a procedure for determining whether he was convicted in substantial violation of his constitutional rights. 725 ILCS 5/122-1(a) (West 2008); *People v. Edwards*, 197 Ill. 2d 239, 243-44 (2001). Where defendant is not sentenced to death, the Act sets forth a three-stage process for adjudicating a defendant's request for collateral relief. *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996).

¶ 35 At the first stage, the circuit court must determine whether the petition before it alleges the " 'gist of a constitutional claim.' " *Edwards*, 197 Ill. 2d at 244, quoting *Gaultney*, 174 Ill. 2d at 418 . Taking all well-pleaded facts as true, the court must determine whether the petition alleges a constitutional infirmity that, if proven, would demonstrate a deprivation of petitioner's constitutional rights. 725 ILCS 5/122-2.1(a) (West 2008); *People v. Coleman*, 183 Ill. 2d 366, 385 (1998). If the trial court determines that a petitioner has stated the "gist of a constitutional claim," the petition is advanced to the second stage and counsel is appointed, if necessary, in accordance

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with sections 122-4 through 122-6 of the Act. 725 ILCS 5/122-2.1(b) (West 2008).

¶ 36 At the second stage, the State is required to either answer the postconviction petition or move to dismiss. 725 ILCS 5/122-5 (West 2008). As the State in this case moved for dismissal, the trial court was required to rule on the legal sufficiency of the allegations contained in the petition, taking all well-pleaded facts as true. *People v. Ward*, 187 Ill. 2d 249, 255 (1999).

¶ 37 Throughout the third stage of a postconviction proceeding, the defendant bears the burden of making a substantial showing of a constitutional violation. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). If the issues presented at a third-stage evidentiary hearing are based on pure questions of law, we apply a *de novo* standard of review, except when the judge presiding over the proceedings had some special familiarity with the trial or sentencing of the defendant and that had some bearing on the disposition of the postconviction petition. *Pendleton*, 223 Ill. 2d at 473. When the issues presented at a third-stage evidentiary hearing involve questions of fact and when credibility determinations are involved, this court will not reverse the decision of the trial court unless it is manifestly erroneous. *Pendleton*, 223 Ill. 2d at 473. Manifest error is error that is “clearly evident, plain and indisputable.” *Morgan*, 212 Ill. 2d at 155.

¶ 38 The court is in the best position to assess the credibility of the witnesses, to resolve any inconsistencies or conflicts in their testimony, to assess the proper weight to be given to their testimony and to draw reasonable inferences from all of the evidence. *People v. Cochran*, 323 Ill. App. 3d 669, 679 (2001). This case came down

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to the credibility of the witnesses. The court found that, based on the credibility of the witnesses, "there was no improper communication between Deputy Williams and the Malone jury and, therefore, no prejudice occurred." The court found Castor, Keane and Deputy Williams to be more credible than defendant's witnesses. The court further found that the State's witnesses "made sense in light of the totality of the circumstances presented." In addition, the court stressed that Keane and Castor never heard any statements attributed to Deputy Williams by Siddiqui. As the court noted, if Deputy Williams had made such statements "every juror in that room, would or should recollect that having been said. That is not the case here." The court also took into account that neither foreperson Castor, who indicated that she would have come forward and told the judge or someone else if she had heard such statements, nor any other juror came forward to report any of the statements made by Deputy Williams.

¶ 39 With respect to defendant's witnesses, the court had serious credibility issues with juror Twitchy Siddiqui. The court noted that Siddiqui was polled following the rendering of the verdict.

"She said nothing about any pressure or conversations from the deputy. She did not tell anyone until the State Appellate Defender began investigating. She signed an affidavit three years and four months later after the verdict, October 22, '07. The affidavit was not prepared contemporaneously with her interview. It was not written by her. It was drafted and then brought back to her to sign.

\* \* \*

Ms. Sadiqui [sic] is the more vociferous juror in this case, and the Court can tell by the deliberations that were had in this case, that there is a credibility issue with Ms. Sadiqui [sic]. This Court sees a clear axe [sic] to grind. It's clear she did not want to sign a guilty verdict; that was clear from the affidavits and testimony of the individual. She by all accounts, it's not disputed, threw water in the face of the jury foreman, and she indicated she did not want to sit in judgment of someone else, which violated her oath as a juror."

The court further found that the testimony of Henson and Shaw did not corroborate Siddiqui's testimony.

¶ 40 Similarly, the court discounted the testimony of rebuttal witness Elliott Slosar stating "[t]he Court does not believe a word Mr. Slosar said." Furthermore, the court stated that Slosar's explanation as to why he did not take notes of the conversation with juror Keane "belies credibility in this Court's eyes." The court found that with respect to Slosar's testimony, "[h]e proves quite the opposite, that Ms. Keane did not give the version Mr. Slosar claims in his woefully inadequate attempt to provide impeachment evidence of Ms. Keane."

¶ 41 The postconviction court was in the best position to determine the credibility of the witnesses and to determine the proper weight to be afforded the witnesses' testimony. Based on the record before us and the trial court's findings, we cannot say that the trial court's decision to dismiss defendant's postconviction petition following a

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third-stage evidentiary hearing was manifestly erroneous.

¶ 42 Defendant attempts to assert a freestanding claim on appeal from the dismissal of his postconviction petition that Deputy Williams coerced a verdict by threatening imminent sequestration. A review of defendant's initial postconviction petition, as well as the supplemental petition filed by current counsel, establishes that defendant never raised the issue as a separate claim before the postconviction court. Although there was testimony regarding whether or not Deputy Williams told the jury they would be sequestered if they did not reach a verdict, this issue was not addressed squarely by the postconviction court because it was not raised as an independent issue. We cannot now consider an issue raised for the first time on appeal from the denial of a postconviction petition. *People v. Jones*, 213 Ill. 2d 498, 508 (2004).

¶ 43 Nevertheless, the court was presented with testimony about whether jurors knew they would be sequestered and what Deputy Williams told them about the possibility of being sequestered on Friday, June 11, 2004. While the issue was not squarely before the court, the court made a blanket finding that there was "no improper communication between Deputy Williams and the Malone jury and, therefore, no prejudice occurred." The court's finding encompasses all of the communications between Deputy Williams and the jury and therefore disposes of defendant's current claim.

¶ 44 **CONCLUSION**

¶ 45 For the foregoing reasons, we affirm the judgment of the court.

¶ 46 Affirmed.

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