IN THE

COURT OF APPEALS OF VIRGINIA

RECORD NOS. 0289 & 0290-22-3

BRIAN DAVID HILL,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

BRIEF OF THE COMMONWEALTH

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Page

Statutes

Other Authorities

Rules

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STATEMENT OF THE CASE

These cases arise from two final judgments of the Circuit Court for the City of Martinsville. Brian David Hill was convicted of misdemeanor indecent exposure in 2018 and sentenced to 30 days in jail. (R. 72). In 2022, Hill filed two motions seeking a "judgment of acquittal," a new trial, or a writ of actual innocence. (R. 1330–1538, 1539–1747).[1] The trial court dismissed both for lack of jurisdiction.

[1] All citations to the record are to the record contained in case number 0289-22-3. With the exception of the final orders in each case, all cited documents are

In 16 assignments of error across two appeals,[2] Hill contends that the trial court erred in holding that it lacked jurisdiction. The trial court was correct. Pursuant to Rule 1:1, the trial court was divested of jurisdiction long before Hill filed his motion. Furthermore, circuit courts have no jurisdiction to adjudicate petitions for a writ of actual innocence. Moreover, Hill failed to properly invoke any exception to Rule 1:1. Therefore, the trial court lacked jurisdiction to adjudicate Hill's motions and this Court should affirm.

STATEMENT OF FACTS

On September 21, 2018, Sergeant Jones of the Martinsville Police Department responded to a report of a naked white male running from Church Street to Hooker Street. (R. 73). As other officers responded to Hooker Street, Sergeant Jones looked for the individual on the Dick and Willie Trail. (R. 73). Sergeant Jones encountered Hill, who was completely naked except for his shoes and socks. (R. 73). Hill fled down the Dick and Willie trail, over a bank, and into an adjacent creek. (R. 73).

After being detained, Hill claimed that a "black male in a hoodie made him get naked and take pictures of himself." (R. 73). He was later transported to the

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contained in the record in both cases. However, as the records are not ordered the same, the Commonwealth cites to only the record in case number 0289-22-3 to attempt to alleviate any confusion.

[2] Alongside this brief, the Commonwealth has filed a motion to consolidate Hill's two appeals.

hospital due to complaints of knee pain. (R. 73). While there, Hill gave another officer permission to view his camera roll and told them that he was alone when he took the photos of himself. (R. 73). There were several photographs of Hill naked around the city on his camera roll. (R. 73). Hill was later medically and psychologically cleared and released from the hospital. (R. 73). He was subsequently arrested for indecent exposure. (R. 73).

On September 21, 2018, Hill was arrested for public obscenity in violation of Code § 18.2-387. (R. 71). On December 21, 2018, after pleading not guilty, Hill was tried by the General District Court and found guilty as charged. (R. 72). On December 26, 2018, Hill timely appealed his GDC conviction for a trial *de novo* in the Circuit Court for the City of Martinsville. (R. 72).

On November 11, 2019, Hill filed a motion with the Circuit Court to "withdraw [his] [a]ppeal of the December 21, 2018 General District Court finding of guilty." (R. 490). Hill clarified that he was not "waiv[ing] his right to collaterally attack/challenge his conviction in General District Court" or his right to file a petition for a writ of actual innocence. (R. 490). Hill explained that he believed his "only chance to preserve his legal innocence [wa]s to withdraw his appeal in the Circuit Court, and just find another way to get a fair bench hearing to be found legally innocent of his state charge." (R. 497). Therefore, he continued, he "has now accepted the fact that he will lose [on appeal] and so it is time to withdraw his

appeal." (R. 499). The court granted Hill's motion and entered a final order re-instating the judgment of the GDC. (R. 501).

Two weeks later, Hill filed a "Motion to Vacate Fraudulent Begotten Judgment." (R. 503–29). In it, Hill contended that the trial court "lacked jurisdiction to put [him] in a position to withdraw[] [his] appeal after [he] had filed the *pro se* motion to dismiss based upon his legal innocence as a matter of law." (R. 503). He contended that he "never signed any papers agreeing to automatically enter in a plea of guilty and was not advised by his lawyers that withdrawing the appeal would automatically enter in a plea of guilty." (R. 503). Hill also contended that fraud had been perpetrated on the Circuit Court because he had served his motion to dismiss, a petition for writ of habeas corpus, and his motion to withdraw his appeal on the Commonwealth's Attorney. (R. 504–05). Hill contended it was fraud upon the court to affirm his conviction in light of his motion to dismiss. (R. 504–05, 507). In the motion, Hill did not assert that the trial court erred in granting his *pro se* motion to withdraw his appeal. (*See* R. 505). The trial court denied the motion on November 25, 2019. (R. 530).

Hill noted two appeals of that order. (*See* R. 531–32). Both appeals were dismissed by this Court. *Brian Hill v. Commonwealth*, Rec. Nos. 0128-20-3 & 0129-20-3 (Va. Ct. App. July 31, 2020).

Over the next year, Hill challenged his conviction in the trial court four more times on similar grounds. Each time the trial court denied his motion and Hill appealed to this Court. Each time, this Court rejected Hill's arguments. *Hill v. Commonwealth*, Rec. Nos. 0578-20-3, 0657-20-3, 1294-20-3, and 1295-20-3.

On January 20, 2021, Hill filed the instant "Motion for Judgment of Acquittal . . ." in the Circuit Court. (R. 1330–1538). Broadly speaking, Hill's contentions can be categorized in one of three categories. First, Hill contends that on the day of the incident he was suffering from carbon monoxide poisoning, which would tend to negate his intent. (R. 1359–60). Second, Hill contended that the Commonwealth committed *Brady*[3] violations because it purportedly destroyed body camera footage of his arrest and vials of his blood that were drawn at the hospital, which could have supported his theory of innocence. (R. 1345, 1359–60). Lastly, Hill notes that newly enacted Code § 19.2-271.6 would allow presentation of evidence that he suffers from autism spectrum disorder and obsessive-compulsive disorder to argue he lacked the requisite intent. (R. 1333–35).

Based on those claims, Hill sought two remedies. First, he asked the Circuit Court to impose sanctions on the Commonwealth's Attorney. Second, Hill asserted that he was entitled to either a judgment acquitting him of his indecent exposure conviction, a new trial, or a writ of actual innocence. (R. 1330, 1371–72).

[3] *Brady v. Maryland*, 373 U.S. 83 (1963).

On February 10, 2021, the Circuit Court denied Hill's motion. The Circuit Court interpreted Hill's motion as a petition for a writ of actual innocence. (Rec. No. 0290-22-2, R. 7).[4] It then held that it lacked subject matter jurisdiction over petitions for actual innocence and directed Hill to file it in this Court because this Court has original jurisdiction for non-biological petitions for a writ of actual innocence. (Rec. No. 0290-22-2, R. 7).

On February 11, 2021, Hill filed a nearly identical motion. The only pertinent difference in the text of the motions is that any mention of a "writ of actual innocence" was replaced with a request for a new trial. (*Compare* R. 1330–74 *with* R. 1539–83). The motion otherwise asserted the same claims and requested the same remedies.

On February 22, 2021, the Circuit Court denied Hill's second motion. The circuit court again determined that it lacked jurisdiction to entertain the motion. However, it did not specify in its order that it interpreted the motion as a petition for a writ of actual innocence. (R. 7).

[4] This order does not appear in the Record for case number 0289-22-3.

STANDARD OF REVIEW

Challenges to subject matter jurisdiction present questions of law that this Court reviews *de novo*. *Gray v. Binder*, 294 Va. 268, 275, 805 S.E.2d 768, 771 (2017) (citing *Glasser & Glasser, PLC v. Jack Bays, Inc.*, 285 Va. 358, 369, 741 S.E.2d 599, 604 (2013)). The applicability of Rule 1:1 is also reviewed *de novo*. *Martinez v. Commonwealth*, 71 Va. App. 318, 326, 836 S.E.2d 1, 4 (2019) (citing *Commonwealth v. Morris*, 281 Va. 70, 76–77, 705 S.E.2d 503, 505 (2011)).

ARGUMENT

I. The trial court lacked jurisdiction over Hill's motions.

The trial court properly determined that it lacked subject matter jurisdiction to hear the merits of Hill's motions and correctly dismissed Hill's motions. Pursuant to Rule 1:1, the trial court was divested of jurisdiction over Hill's case 21 days after the final order was entered in the underlying criminal case. Accordingly, his demands for a new trial, judgment of acquittal, and sanctions were properly dismissed for lack of jurisdiction. Moreover, to the extent that Hill's request for a "judgment of acquittal" could be construed as a petition for a writ of actual innocence, circuit courts have no jurisdiction to adjudicate them. Lastly, to the extent Hill's motion can be interpreted as a claim pursuant to Code § 8.01-428(D), Hill failed to properly raise it as an independent action. Furthermore, Hill also failed to allege a *prima facie* case of *extrinsic* fraud under that provision. Accordingly, the

trial court correctly determined it lacked subject matter jurisdiction and dismissed Hill's motions.

A. Rule 1:1 divested the trial court of subject matter jurisdiction.

Pursuant to Rule 1:1, "[a]ll final judgments, orders, and decrees, irrespective of terms of court, shall remain under the control of the trial court and subject to be modified, vacated, or suspended for twenty-one days after the date of entry, and no longer." After the expiration of this 21-day period, a trial court loses subject matter jurisdiction over the case. *Dixon v. Pugh*, 244 Va. 539, 543, 423 S.E.2d 169, 171 (1992).

The Circuit Court entered the final order in this case—the order granting Hill's motion to withdraw his appeal to circuit court and re-instate the judgment of the General District Court—on November 11, 2019. Thus, the timeframe specified by Rule 1:1 had long since expired and the trial court was divested of jurisdiction over Hill's case. *Id*. Accordingly, the trial court had no jurisdiction to entertain Hill's motion. *See, e.g.*, *James v. James*, 263 Va. 474, 482–84, 562 S.E.2d 133, 138–39 (2002) (holding that the expiration of Rule 1:1's 21-day window divests a trial court of jurisdiction to consider sanctions); *Lewis v. Commonwealth*, 18 Va. App. 5, 9, 441 S.E.2d 47, 49 (1994) (holding that Rule 1:1 divests the trial court of jurisdiction to hear a motion for a new trial after 21 days).

B. The circuit court had no jurisdiction to entertain a petition for a writ of actual innocence.

As a part of his motion, Hill demands a "judgment of acquittal" based on his submission of new evidence. There is no free-standing jurisdiction to enter a "judgment of acquittal" once the 21-day window in Rule 1:1 expires. Accordingly, the trial court interpreted Hill's *pro se* motion as a petition for a write of actual innocence—the only comparable analog to Hill's claim.

To the extent that Hill's request could be considered a petition for a writ of actual innocence, the circuit court did not err in holding that it lacked jurisdiction over petition for actual innocence. Original jurisdiction for petitions for a writ of actual innocence based on non-biological evidence lies with this Court. *Phillips v. Commonwealth*, 69 Va. App. 555, 562, 820 S.E.2d 892, 896 (2018); Code § 19.2-327.10. Moreover, the General Assembly explicitly limited the availability of a writ of actual innocence to only those convicted of felony offenses. *Hill v. Commonwealth*, Rec. No. 0173-22-3, at 2 (Va. Ct. App. March 1, 2022) (slip op.) (quoting Code § 19.2-327.10) (dismissing Hill's petition for a writ of actual innocence filed in this Court). Therefore, the trial court correctly determined that it lacked jurisdiction to entertain Hill's request for a "judgment of acquittal" or a writ of actual innocence.

C. Hill failed to properly plead an independent action under Code § 8.01-428(D).

Hill's *pro se* motion arguably invokes Code § 8.01-428, which is a statutory exception to Rule 1:1. Although not yet determined by this Court, the Commonwealth assumes—for purposes of this brief and without conceding—that Code § 8.01-428(D), which permits a party to move to set aside a judgment for fraud upon the court, also applies in criminal cases.[5] *See Wilson v. Commonwealth*, 108 Va. Cir. 97, 101–02 (Fairfax Cir. Ct. Apr. 20, 2021) (Ortiz, J.) (holding that Code § 8.01-428(D) applies in criminal proceedings); *see also Lamb v. Commonwealth*, 222 Va. 161, 165, 279 S.E.2d 389, 392 (1981) (holding that Code § 8.01-428(B) applies in criminal cases and noting that the text of Code § 8.01-428 does not limit its applicability to civil cases as its statutory predecessors did).

Hill's claim that his conviction was procured by fraud upon the trial court ostensibly falls within the general framework of a motion under Code § 8.01-428(D). However, Hill has failed to properly plead a claim under Code § 8.01-428(D).

[5] Pursuant to Code § 8.01-428(B), trial courts may also utilize *nunc pro tunc* orders to correct clerical errors within the record beyond the timeframe of Rule 1:1. *Jefferson v. Commonwealth*, 298 Va. 473, 476–77, 840 S.E.2d 329, 332 (2020). Hill does not allege any scrivener's error and, therefore, subsection (B) is not at issue in this case.

1. Hill's failure to file an independent action is fatal.

Code § 8.01-428(D) preserves "the power of the court to entertain at any time an *independent action* to relieve a party from any judgment or proceeding." (emphasis added). However, "[t]his provision[6] cannot form the basis for setting aside" a judgment on the defendant's motion. *Basile v. American Filter Service, Inc.*, 231 Va. 34, 37, 340 S.E.2d 800, 802 (1986); *accord Sauder v. Ferguson*, 289 Va. 449, 459 n.5, 771 S.E.2d 664, 670 n.5 (2015). Code § 8.01-428(D) "has been construed narrowly in the interest of finality of judgments and certainty of results." *Basile*, 231 Va. at 37, 340 S.E.2d at 802. Therefore, Hill "may invoke this provision . . . only by instituting an 'independent action,' not by a motion filed as part of the cause in which the judgment order was entered." *Id*.

Thus, to the extent Hill attempts to invoke Code § 8.01-428(D), Hill could only properly do so by instigating a new, independent action. However, Hill did not file a new, independent action. Instead, he attempted to make his claim via motion—exactly what precedent prohibits. *Id*.

Much as a person cannot make a 'motion for a writ of habeas corpus,' Hill cannot file a motion alleging fraud under Code § 8.01-428(D). *Id*. In both circumstances, a new, independent civil action at law is required. Therefore, Hill's

[6] When *Basile* was decided current-subsection (D) was codified as subsection (C). In 1993, the General Assembly added current-subsection (C) and moved the relevant provision to subsection (D). 1993 Va. Acts 1951.

contentions that his criminal conviction is based upon fraud are not cognizable as filed and the trial court correctly dismissed Hill's motion for lack of subject matter jurisdiction. *Id*.

2. Hill's failure to allege extrinsic fraud is fatal.

Even if Hill were able to raise a fraud claim under Code § 8.01-428(D) via a motion, he fails to allege facts sufficient to establish a *prima facie* claim. "Generally, a judgment or decree rendered by a court having jurisdiction over the parties and subject matter must be challenged by direct appeal and cannot be attacked collaterally." *Peet v. Peet*, 16 Va. App. 323, 327, 429 S.E.2d 487, 490 (1993). The exception is judgements that are void *ab initio* and can be challenged at any time. *Id*.

A judgment obtained by extrinsic fraud is void *ab initio* and can, therefore, be challenged at any time pursuant to Code § 8.01-428(D). *Id*. However, "a judgment obtained by 'intrinsic fraud' is merely voidable and can be challenged only by direct appeal or by a direct attack in an independent proceeding." *Id*. Accordingly, even if Hill could present his fraud claim by motion, that claim would only be cognizable if it established a *prima facie* showing of *extrinsic* fraud.

Extrinsic fraud is "conduct which prevents a fair submission of the controversy to the court." *Id*. (quoting *Jones v. Willard*, 224 Va. 602, 607, 299 S.E.2d 504, 508 (1983). Extrinsic fraud includes: "[k]eeping the unsuccessful party

away from the court by a false promise of a compromise, or purposely keeping him in ignorance of the suit; or where an attorney fraudulently pretends to represent a party[] and connives at his defeat." *McClung v. Folks*, 126 Va. 259, 279, 101 S.E. 345, 348 (1919); *accord F.E. v. G.F.M.*, 35 Va. App. 648, 660, 547 S.E.2d 531, 537 (2001). In such circumstances, the fraud perpetrated "prevents the court or non-defrauding party from discovering the fraud through the regular adversarial process." *F.E.*, 35 Va. App. at 660, 547 S.E.2d at 537 (quoting *Peet*, 16 Va. App. at 327, 429 S.E.2d at 490). "Extrinsic fraud, therefore, is 'fraud that . . . deprives a person of the opportunity to be heard.'" *Id*. (quoting *Hagy v. Pruitt*, 339 S.C. 425, 431, 529 S.E.2d 714, 717 (S.C. 2000).

Intrinsic fraud, on the other hand, "includes perjury, use of forged documents, or other means of obscuring facts presented before the court and whose truth or falsity as to the issues being litigated are passed upon by the trier of fact." *Peet*, 16 Va. App. at 327, 429 S.E.2d at 490. "A collateral attack on a judgment procured by intrinsic fraud has been deemed not warranted because the parties have the opportunity at trial through cross-examination and impeachment to ferret out and expose false information presented to the trier of fact." *Id*.

Here, Hill alleges that the Commonwealth committed fraud during his trial by purportedly destroying body camera footage of his arrest and vials of his blood that

were drawn at the hospital. Even *if* those allegations were accurate,[7] they do not allege extrinsic fraud. Rather, those actions would constitute *intrinsic* fraud because they would be a means of obscuring the facts presented to the trier of fact. *Id*.; *see also Rock v. Commonwealth*, Rec. No. 1119-21-2, 2022 WL 4828702, 2022 Va. App. LEXIS 481, at *8 (Va. Ct. App. Oct. 4, 2022) ("Appellant's allegations of prosecutorial misconduct and perjured testimony demonstrate, at most, intrinsic fraud as they are 'means of obscuring facts presented before the court.'") (quoting *Peet*, 16 Va. App. at 327, 429 S.E.2d at 490).[8] Therefore, Hill's allegations are insufficient to establish the necessary *prima facie* case of *extrinsic* fraud.

D. Hill's cited authority is of no import.

In his motion, Hill cited three authorities he contends authorize the filing of his motion: Code § 19.2-271.6, Rule 3A:15, and *Schlup v. Delo*, 513 U.S. 298, 327–28 (1995). Hill's reliance is misplaced. None of those authorities establish a valid procedure for Hill to present his claims nor grant the trial court subject matter jurisdiction to adjudicate them.

[7] The Commonwealth does not concede that Hill's allegations are accurate. However, it accepts Hill's allegations as pleaded for the sole purpose of testing whether they establish the requisite *prima facie* claim of extrinsic fraud.

[8] Although not binding authority, unpublished opinions may be cited as persuasive authority. *See* Rule 5A:1(f) ("The citation of judicial opinions . . . that are not officially reported . . . is permitted as informative, but shall not be received as binding authority.").

Rule 3A:15 does not set forth a procedural device that Hill can utilize. Rule 3A:15 sets forth the applicable rules for motions to strike the evidence and motions to set aside a verdict. It dictates that a court must enter a judgment of acquittal or order a new trial if it grants either motion. Accordingly, it does speak to two procedural devices. However, the rule specifically states that motions to strike the evidence may be filed *during trial* and that motions to set aside a verdict must be filed within the 21-day time period dictated by Rule 1:1. Rule 3A:15(a) & (b). Accordingly, the time for Hill to file either motion to challenge his 2018 conviction has long passed.

Hill's other two authorities simply do not set forth any procedural device at all. Code § 19.2-271.6, effective as of July 1, 2021, now authorizes criminal defendants to introduce, *during trial,* evidence of their mental condition at the time of the offense. Code § 19.2-271.6 does not contain a provision authorizing a convicted defendant to seek a judgment of acquittal, new trial, or writ of actual innocence. Therefore, to the extent it has any relevance,[9] it could only be relevant to a merits decision *after* Hill identifies a proper procedural vehicle to present his claims.

[9] While not necessary to determine at this stage of litigation, the Commonwealth does not concede that Code § 19.2-271.6 applies retroactively to vacate orders that are final pursuant to Rule 1:1.

Schlup, on the other hand has no bearing on Hill's claims at all. *Schlup* addressed the narrow question of which legal standard applied when determining if a second or successive federal habeas petition claiming actual innocence satisfied former 28 U.S.C. § 2254's requirement that a second petition "implicate[] a fundamental miscarriage of justice." *Schlupp v. Delo*, 513 U.S. 298, 315 (1995). This narrow, federal habeas decision interpreting a federal habeas statute has no bearing on Hill's non-habeas motion filed in state court. [10]

E. Hill's remaining arguments fail to address the subject matter jurisdiction of the trial court.

On brief, Hill makes several arguments which fail to address the jurisdictional ruling of the trial court. Hill argues, for example, that the trial court's determination that it lacked jurisdiction was in error because it "wrongfully ignored all of the new evidence," thereby violating his due process rights. (Appellant's Br. Rec. No. 0289-

[10] Moreover, much of *Schlup* was effectively abrogated by the passage of the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996 and its amendments to 28 U.S.C. §§ 2254 & 2255. *Hazel v. United States*, 303 F.Supp.2d 753, 759 n.8 (2004). The portion of *Schlup* that remains good law is its creation of an "'actual innocence' gateway" for *federal habeas petitions* that can "overcome" the specific procedural bars of AEDPA. *McQuiggan v. Perkins*, 569 U.S. 383, 386 (2013). Importantly, *Schlup did not* recognize a free-standing habeas claim for actual innocence. *Schlup*, 513 U.S. at 313–14. Rather, under *Schlup*, petitioners may have their procedural defaults *under AEDPA* excused and proceed to a merits decision if they "show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." *McQuiggan*, 569 U.S. at 399 (quoting *Schlup*, 513, U.S. at 327). Even where a prisoner meets that high bar, however, it only enables them to present their otherwise defaulted habeas claims—it does not automatically entitle them to relief.

22-3, at 14). Hill also asserts that the jurisdictional ruling was in error because it creates a "fundamental 'miscarriage of justice.'" (Appellant's Br. Rec. No. 0289-22-3, at 11; 49). Hill further contends that the jurisdictional ruling was wrong because he did not waive his right to collaterally attack his conviction on the "ground of actual innocence" when he withdrew his direct appeal. (Appellant's Br. Rec. No. 0289-22-3, at 21–22). Lastly, Hill asserts that the jurisdictional ruling was in error because the trial court did not assess sanctions against the Commonwealth's Attorney. (Appellant's Br. Rec. No. 0289-22-3, at 23–25; 52–54).

None of these arguments address the subject matter jurisdiction of the trial court to hear his motion. Furthermore, none of these arguments identify a valid procedure under which the trial court could have obtained jurisdiction. Rather, they address the underlying merits of Hill's accusations. However, the underlying merits of those accusations cannot create subject matter jurisdiction where it does not exist. Accordingly, these arguments have no bearing on the trial court's determination that it lacked subject matter jurisdiction to entertain Hill's motion.

CONCLUSION

The trial court was correct in holding that it lacked subject matter jurisdiction to adjudicate Hill's motion. Therefore, the Commonwealth asks that this Court dismiss Hill's appeals. *See Minor v. Commonwealth*, 66 Va. App. 728, 738, 791 S.E.2d 757, 761 (2016) (this Court has "jurisdiction to consider [an] appeal only if the trial court had jurisdiction to entertain the underlying motion.").

Respectfully submitted,

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CERTIFICATE OF TRANSMISSION AND SERVICE

On October 28, 2022, this brief was filed electronically with the Court of Appeals of Virginia through VACES and a copy was mailed to Brian David Hill, appellant, *pro se*, at 310 Forest Street, Apartment 2, Martinsville, Virginia 24112.

In accordance with Rule 5A:4(d), I certify that this document contains 4,067 words, in compliance with Rules 5A:19(a) and 5A:21(g).

The Commonwealth asks that this Court dispense with oral argument pursuant to Virginia Code § 17.1-403 because this appeal is wholly without merit. However, the Commonwealth does not waive oral argument and remains ready to present oral argument if this Court reaches the conclusion that further argument would aid the decisional process.

/s/
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