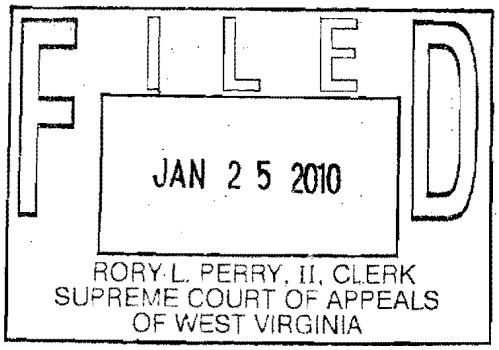
BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS
at
CHARLESTON, WEST VIRGINIA

No. 35225

STATE OF WEST VIRGINIA,
Plaintiff,

v.

DAVID M. MARTIN,
Defendant.



REPLY BRIEF ON BEHALF OF DAVID M. MARTIN

On Appeal from the
Circuit Court of Wood County, West Virginia
The Honorable J.D.Beane, presiding
Wood County Case #07-F-50

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v. **No. 35225**

DAVID M. MARTIN,
Defendant.

REPLY BRIEF
ON BEHALF OF
DAVID M. MARTIN

Now comes the Defendant-below and the Appellant herein, DAVID M. MARTIN (hereafter "Petitioner"), by and through his counsel, MICHELE RUSEN and pursuant to Rule 10 of the Rules of Appellate Procedure for West Virginia hereby files the within *"Reply Brief"* seeking reversal of his sentence and conviction for the offense of breaking and entering rendered in the Wood County Circuit Court, the Honorable J. D. Beane presiding.

The Wood County Circuit Court sentenced the Defendant to a term of not less than one nor more than ten years upon his plea of guilty to the offense of Breaking and Entering. Specifically, DAVID M. MARTIN has appealed the Circuit Court's ruling finding him competent to stand trial; the ruling denying his request for probation; and the State of West Virginia's failure to abide by the terms of the *Plea Agreement* reached in this matter.[1] DAVID M. MARTIN is now incarcerated at Mr. Olive State Penitentiary.

I. Nature of the Proceedings Below

Following his arrest on January 27, 2007, DAVID M. MARTIN was subsequently indicted by the Wood County Grand Jury in March 2007 and was charged with a single count of Breaking and Entering in violation of West Virginia Code §61-3-12. (*Record at 1, 6-11.*) In that indictment, the Defendant was charged with breaking into a building "used and occupied by the Catholic Community Homemaker Services, Inc." located at

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"130-4th Street, Parkersburg, West Virginia. . . with the intent to commit larceny therein." (*Record at 1.*) Attorney Joseph Munoz was appointed to and did represent DAVID M. MARTIN in connection with all proceedings in this matter preceding the within appeal. (*Record at 12.*)

During the twenty months following the Defendant's indictment, a number of hearings were conducted in this matter primarily for the purpose of addressing the issue of DAVID M. MARTIN's questionable competency to stand trial and criminal responsibility. Ultimately, DAVID M. MARTIN pled guilty to the single count indictment pursuant to a *Plea Agreement* reached with the State of West Virginia. *(Record at 55-56.)* Pursuant to this *Plea Agreement*, counsel for the State of West Virginia made a non-binding recommendation that the Defendant receive probation, an agreement that the State of West Virginia failed to honor. (*Id.; Tr. of 12/15/08 at 31-32.)* Accordingly, Judge J. D. Beane sentenced the Defendant to one to ten years in prison, from which the Defendant sought the within appeal. (*Tr. of 12/15/08 at 32-33; Record at 74-76.)*

II. **Statement of the Facts**

On January 28, 2007, DAVID M. MARTIN was arrested by the Parkersburg Police Department after being found inside the Catholic Community Homemaker Services, Inc. (*Record at 14.*) It appears that the Defendant was originally released upon $10,000 recognizance bond immediately following his arrest on January 28, 2007, but was incarcerated following his preliminary hearing on February 6, 2007 after the case was bound over to the Grand Jury. (*Record at 7, 10.*) Following a preliminary hearing on February 6, 2007, the case was bound over the Grand Jury.

Attorney Joseph Munoz filed a "*Motion for a Mental Evaluation*" shortly after the Grand Jury returned its indictment on March 27, 2007 and just after he was appointed to represent DAVID M. MARTIN, on March 12, 2007. (*Tr. Of 4/18/07, 2-3; Record at 27.*) On May 7, 2007, DAVID M. MARTIN appeared for hearing upon this "*Motion for a Mental Evaluation*" via video conferencing from William R. Sharpe

Hospital.[2] (*Tr. 5/7/07; Record at 29.*) The Defendant's *Motion for Mental Evaluation* was granted without objection. (*Id.; Record at 29-30.*) However, at the next hearing on July 13, 2007, the Court was informed that the mental evaluation had been completed, but no report had yet been issued. (*Tr. 7/13/07, 7.*) The Defendant was not present for that hearing.[3] (*Id.*)

On August 24, 2007, DAVID M. MARTIN appeared before Judge Robert A. Waters for further hearing and was informed that the mental evaluation had been completed. (*Tr. 8/24/07, 2.*) The State of West Virginia noted that "[t]he sum and substance of the doctor was that Mr. Martin is both competent to stand trial and was, under the laws of West Virginia criminally responsible at the time of the alleged acts." (*Id.*) Judge Waters stated that "[he hadn't] seen a report from this doctor." (*Id.*) Nevertheless, the Court "set this for trial" on October 2, 2007. (*Id at 3.*)

Not-withstanding the finding that DAVID M. MARTIN was competent and criminally responsible, the Defendant was transported to this hearing from William R. Sharpe Hospital and was transported back to the hospital at the conclusion of this hearing. (*Tr. 8/24/07, 4-7; Record at 42-43.*) As Mr. Munoz explained:

> He voluntarily committed himself a number of months ago. He made bond, I believe it was in early March, and was in the Salvation Army for one or two nights and then went to the hospital and he was committed to Sharpe. He's been there for a number of months now. According to his doctors at Sharp, Doctor Mallack's his name, they foresee discharging him in the near future as long as his behavior stays as it has been recently. *Id.*

The Court returned DAVID M. MARTIN to William R.Sharpe Hospital and noted that DAVID M. MARTIN was homeless, with no place to stay in Wood County. (*Id.*)

What is absent from the August 24, 2007 transcript is any discussion or analysis of the complicated findings made in DAVID MARTIN's evaluation. DAVID MARTIN "met the criteria" for exhibitionism and bi-polar disorder. He had also been diagnosed in the past with schizo-affective disorder, bipolar type. ("*Forensic Psychiatry Report*, p

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[2] According to Attorney Munoz, DAVID M. MARTIN again posted bond on April 18, 2007, and was shortly thereafter "institutionalized at William R. Sharpe Hospital." (*Tr. 5/7/07, 4.*)

[3] Following that hearing, by order of July 31, 2007 the Defendant's case was transferred to Judge Robert A. Waters "due to the fact that counsel for the Defendant, A. Joseph Munoz was with the law firm of William O. Merriman, Jr."[3] (*Record at 44.*)

2.)[4] Further, these "psychotic symptoms were often highly atypical in their nature, quality and character, as well as in the abruptness of their onset and resolution." (*Id.* at 3.) DAVID MARTIN also suffers from polysubstance dependence and antisocial personality disorder. He also fit the description for malingering. (*Id.*) Nevertheless, "at the time of the forensic evaluation" Mr. Martin was found to be competent to stand trial.

By October 2, 2007, this case was transferred back to Judge Beane, and DAVID M. MARTIN had purportedly reached a plea agreement with the State of West Virginia.[5] (*Record at 44-45.*) Counsel for the State noted that since the hearing on August 24, 2007, DAVID M. MARTIN had continued to stay at William R. Sharpe Hospital, and had again been transported from that facility for the hearing before Judge Beane. *(Tr. 10/2/07, 10-11.)* Based on this circumstance, the Court continued the matter pending DAVID M. MARTIN's release from William R. Sharpe Hospital and a determination of whether the Defendant could be discharged from that facility. (*Id. at 14-20.)* Documents sent by William R. Sharpe Hospital to the Court and concerning the Defendant indicated that the physician at the hospital intended to "reinitiate final commitment proceedings" . . . until the Defendant was "stabilized." (*Letter of Nitin Malik, M.D., Record at 49A.)*[6] Dr. Malik confirmed that Mr. Martin suffered from Schizoaffective Disorder, BiPolar Type with Exhibitionism and Personality Disorder. *Id.* Thus, contrary to the State of West Virginia's assertion, this letter did not support a finding that DAVID MARTIN was competent at the time he entered his plea of guilty on May 14, 2008. .

After DAVID M. MARTIN failed to appear for the calling of the docket on January 24, 2008, he was again arrested and taken in to custody. (*Record at 51.*) He appeared on February 27, 2008 at which time "counsel for the Defendant request[ed] that a date be set for a plea to be presented to the Court" and the State "request[ed] a date be set for trial in the event the plea is not accepted." (*Record at 54.)*[7] Trial was set for April 22, 2008; a change of plea was scheduled for March 24, 2008. *(Tr. of 2/27/08,*

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[4] There is a motion pending before this Court to supplement the record with this report.

[5] The case was sent back to Judge Beane's court after A. Joseph Munoz left William O. Merriman's law firm.

[6] This letter was sealed by *Order* of Judge Beane, and counsel has submitted it to this Court as a sealed exhibit.

[7] The Order inaccurately reflects the date of February 27, 2007 instead of February 27, 2008 as doe the Order from the hearing held on May 14, 2008. (Record at 54, 67.)

3-4.) Counsel Munoz requested that Mr. Martin be released on bond again, and advised the Court that DAVID M.MARTIN had been living with his brother in Morgantown. Following lengthy discussion, the Court released the Defendant on bond, with conditions for his monitoring. (*(Tr. of 2/27/08, 13.*)

While no hearings were held on March 24th or April 22nd of 2008, the Defendant appeared on May 14, 2008 and entered a plea of guilty pursuant to a *Plea Agreement* with the State of West Virginia. (*Tr. of 5/14/08; Record at 55-65; 67-68.)*[8] Pursuant to that *Plea Agreement*, DAVID M. MARTIN pled guilty to the single count of Breaking and Entering charged in the indictment, and agreed to make restitution. (*Record at 55-56.*) The State of West Virginia agreed to "a non-binding recommendation of probation." (Id.) Based upon the colloquy between the Court and the Defendant, the Court accepted DAVID M. MARTIN's plea of guilty and referred the matter for a pre-sentence investigation. (*Tr. 5/14/08, 27.*)

On July 17, 2008, DAVID M. MARTIN and counsel Joseph Munoz again appeared before Judge Beane for sentencing. Mr. Munoz addressed the Court as to sentencing:

> I am here today to ask the Court to grant Mr. Martin probation I this matter. I know this is a difficult case, but from my experience with Mr. Martin, he is one of my first felony cases I received. He's, I believe, tried his best to make his appearances. He's tried his best to be contrite before this Court. I think it is obvious from the record and from some of the various pleadings we have had in this case, that he does have some sort of mental conditions that prevent him from acting with normal behavior. I think he is given to certain flights of acting like a child, for whatever reasons, and we're all here left to deal with that.
>
> And I don't think that, in the incident in question, or the incident that he pled to involving the break-in into the Catholic Community Resources, he was there to damage any property. It was a cold day in the wintertime. He went in there for heat and warmth. Now, I don't think there is anything to excuse his behavior. There are other options to do that, besides break into a building, but I think that is what his motivation was.

[8] The May 14, 2008 Order also incorrectly lists the date as May 14, 2007 instead of 2008.

> Again, I really get stuck on Mr. Martin's mental status. I know that he has been evaluated and found competent to stand trial, but there are still some issues there, that I think greatly affect his behavior. *(Tr. 5/18/08, 23.)*

At that point, the Court sent the Defendant to Anthony Correctional Center for a diagnostic evaluation. However, after only two days at the Anthony Center, Mr. Martin was sent back to the Regional Jail because of "mental health issues" which resulted in bizarre behaviors. Warden Teresa McCourt reported that Anthony Center did not "have the capabilities of meeting [DAVID M. MARTIN's] mental health needs which would result in an inaccurate evaluation." (*Exhibit 4 to Petition for Appeal.*) While the State of West Virginia asserts that DAVID MARTIN would have been placed on probation had he undergone this evaluation, once again DAVID MARTIN's mental health issues precluded him from doing so. Thus, sentencing was scheduled for November 26, 2008.

Mr. Martin's sentencing occurred on December 15, 2008. *(Tr. 12/15/08.)* As counsel Munoz pointed out, prison is not the place for someone with the mental problems that DAVID M. MARTIN has. (*Id. at 30.*) Despite the State of West Virginia's agreement to recommend probation, the Assistant Prosecutor stated the following:

> Given the information contained in the presentence report and Mr. Martin's behavior since the time of the initial presentence report, I think it would be difficult for the Court to make a finding that he would be likely to comply with any form of alternative sentence, whether it be probation or house arrest.
>
> I don't believe that, at this point in time, there is a residence available to him, anyway, so that really leaves us with the choices of probation or incarceration in the state penitentiary. <u>I find it hard to believe, based upon the information that I have available to me, that Mr. Martin could comply with the terms and conditions of probation or other alternative sentence.</u> *(Tr. 12/18/08, 31-32.)*

Mr. Munoz did not make an objection to the State of West Virginia's failure to abide by the *Plea Agreement* reached in this matter. The Court then proceeded to sentence the Defendant to a term of not less than one nor more than ten years in the penitentiary, with a credit for 82 days previously served. (*Id. at 33.*) Further, his motions for alternative sentence and for probation were denied. (*Id. at 34.*) The Defendant contends these rulings of the Wood County

Circuit Court which he contends are clearly erroneous, and are not supported by the record and he therefore seeks a reversal of those rulings.

III. Issues Presented and Argument

A. *The Wood County Circuit Court erred in accepting the Defendant's plea of guilty when questions concerning DAVID M. MARTIN's criminal responsibility and competency to stand trial persisted.*

As the State of West Virginia acknowledges, due process mandates that a criminal defendant must be competent to stand trial and criminally responsible before convicted and sentenced for a crime. *Drope v. Missouri*, 420 U.S. 162, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975); *Pate v. Robinson*, 383 U.S. 375,86 S.Ct. 836, 15 L.Ed.2d 815 (1966); *State v. Demastus*, 165 W. Va. 572,270 S.E.2d 649 (1980); *State v. Milam*, 159 W. Va. 691, 226 S.E.2d 433 (1976); *State v. Arnold*, 159 W. Va. 158, 219 S.E.2d 922 (1975), *overruled on other grounds, State v. Demastus, supra; State v. Harrison*, 36 W. Va. 729, 15 S.E. 982 (1892). "To be competent to stand trial, a defendant must exhibit a sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and a rational, as well as factual, understanding of the proceedings against him." Syllabus Point 4, *State ex rel. Williams v. Narick*,164 W. Va. 632, 264 S.E.2d 851 (1980); Syllabus Point 2, *State v. Arnold, supra; see also, Dusky v. United States*, 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960).

"W. Va. Code §§ 27-6A-1 and 27-6A-2 (1980 Replacement Vol.) specify the procedures through which the competence of a defendant to stand trial may be determined. Since the test for mental competency to stand trial and the test for mental competency to plead guilty are the same, the procedures specified in these statutes are also applicable to a determination of a defendant's competence to enter a guilty plea. Generally, the statutes provide for psychiatric or psychological examination of a criminal defendant who is of questionable competence, and for a hearing at which the defendant's competency is determined." *State v. Cheshire*, 170 W.Va. 217, 220, 292 S.E.2d 628, ____ (1982). This includes ordering "a psychiatric or other clinical examination and, after such examination, may further order a period of observation in a mental health facility designated by the director of health. Such a period of observation or examination shall not exceed forty days." *Id.*

In the instant case, there was conflicting evidence before the Court concerning DAVID MARTIN's mental status: (1) a July, 2007 report finding him competent and criminally responsible but nevertheless noting the instability of his mental condition; (2) an October 2, 2007 letter indicating an intent to involuntarily commit him to Sharpe Hospital and (3) a November 20, 2008 letter from Anthony Diagnostic Center describing his deteriorating condition upon his admission for a diagnostic examination. While it is true that the Defendant's trial counsel did not specifically request any additional evaluations, these matters were clearly brought to the attention of the Court.

It is true that Judge Waters found DAVID MARTIN competent to stand trial in August, 2007 based upon the evaluating psychiatrist's report. However, the Defendant's hospitalization at Sharpe Hospital continued for several months, as did the bizarre behaviors at Anthony Center. "Where a criminal defendant has already been afforded a competency hearing pursuant to W. Va. Code §§ 27-6A-1(d) & -2 (1983) and been found mentally competent to stand trial, a trial court need not suspend proceedings for purposes of permitting further psychiatric evaluation or conducting an additional hearing unless it is presented with new evidence casting serious doubt on the validity of the earlier competency finding, or with an intervening change of circumstance that renders the prior determination an unreliable gauge of present mental competency." *Syllabus point 4,* State v. Sanders, 209 W. Va. 367, 549 S.E.2d 40 (2001).

The facts and circumstances reflected within the record of this case present such a scenario. The Petitioner therefore asserts that it was error for the Wood County Circuit Court to accept his guilty plea and sentence him without obtaining an additional mental evaluation.

B. The State of West Virginia breached the Plea Agreement in this case.

Adding to the error in this proceeding was the State of West Virginia's failure to abide by the *Plea Agreement.* Rather than adhering to the agreement that the State of West Virginia would make a non-binding recommendation of probation, the State of West Virginia changed gears on December 15, 2008 and argued against the Defendant receiving probation.

It is a longstanding rule that "[a] prosecuting attorney or his successor is bound to the terms of a plea agreement once the defendant enters a plea of guilty or otherwise

acts to his substantial detriment in reliance thereon." State ex rel. Gray v. McClure, 161 W. Va. 488, 242 S.E.2d (1978). It is also crystal clear from the record in this case that the Assistant Prosecutor who had agreed to recommend probation for the Defendant argued against probation at the sentencing hearing in this matter.

> When a defendant enters into a valid plea agreement with the State that is accepted by the trial court, an enforceable "right" inures to both the State and the defendant not to have the terms of the plea agreement breached by either party. *Syllabus Point 4,* State v. Myers, 204 W. Va. 449, 513 S.E.2d 676 (1998).

The importance of adherence to plea agreements cannot be understated as this Court has recognized:

> Plea bargaining is "an essential component of the administration of justice" *Santobello v. New York*,404 U.S. at 260, 92 S.Ct. at 498, 30 L.Ed.2d at 432... If only the prosecutor and the defendant were bound by a judicially accepted plea agreement and not the judge, it would substantially reduce the advantage of plea bargaining and thereby dilute the incentive for a defendant to plead guilty. . . .
>
> A circuit court not only must insure the agreement is understood by a defendant, but has an equal obligation to satisfy itself that the terms of the agreement are adhered to by both sides, as well as the court itself. To resolve any doubt, we hold today that a circuit court has no authority to vacate or modify, *sua sponte*, a validly accepted guilty plea under Rule 11(e)(1)(C) because of subsequent events that do not impugn the validity of the original plea agreement. *State ex rel. Brewer v. Starcher*, 195 W.Va. 185, 465 S.E.2d 185 (1995).

"The rule we follow . . . is that a prosecuting attorney . . . is bound to the terms of a plea agreement once the defendant enters a plea of guilty or otherwise acts to his substantial detriment in reliance thereon." *See State ex rel. Gray v. McClure*, 161 W. Va. 488, 492, 242 S.E.2d 704, 707 (1978). This Court has further recognized that "[d]ue process concerns arise in the process of enforcing a plea agreement.'" State v. *Myers*,204 W. Va. 449, t 457, 513 S.E.2d 676 at 684 (quoting *State v. Smith*, 207 Wis.2d 258, 558 N.W.2d 379, 385 (1997)). "Permitting the prosecution to breach a plea bargaining agreement has been characterized as `extremely detrimental to the administration of justice if it should be established.'" *Gray*, 161 W. Va. at 491, 242 S.E.2d at 706 (quoting *People v. Siciliano*, 185 Misc. 149, 152, 56 N.Y.S.2d 80, 82

(1945)). Thus, "when a plea rests in any significant degree on a promise or agreement . . . so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Santobello v. New York*, 404 U.S. 257, 262, 92 S.Ct. 495, 499.

The State's violation of the plea agreement was un-remarked upon by the Court or by Defendant's counsel. Nonetheless, "[w]hen a defendant enters into a valid plea agreement with the State that is accepted by the trial court, an enforceable 'right' inures to both the State and the defendant not to have the terms of the plea agreement breached by either party." *Syllabus Pt. 4, State v. Myers*, 204 W.Va. 449, 513 S.E.2d 676 (1998). While the plain error analysis is applicable, this Court has recognized the inherent prejudice in the State violating a provision pertaining to sentencing:

> For the purposes of plain error analysis, when there exists a plea agreement in which the State has promised to remain silent as to specific sentencing matters and the State breaches such agreement by advocating specific matters at a sentencing hearing, prejudice to the defendant is presumed. In this situation, the burden then shifts to the State to prove beyond a reasonable doubt that its breach of the plea agreement did not prejudice the outcome of the proceeding. The mere showing that the trial court would have sentenced a defendant upon the same terms, even without such a breach, will not satisfy the State's burden." Syllabus Pt. 7, *State v. Myers*, 204 W.Va. 449, 513 S.E.2d 676 (1998).

Thus, where a Prosecutor advocated for matters in sentencing after agreeing to stand silent, this Court found the plea agreement to have been breached noting that violating a "sentencing neutrality provision of a plea agreement" seriously affected the fairness, integrity and public reputation of the matter. *State v. Myers*, 204 W.Va. 449, 513 S.E.2d 676 (1998).

The State of West Virginia's breach of the plea agreement in the case at bar is even more egregious given the fact that DAVID M. MARTIN pled guilty "straight-up" to the single count of this indictment. The only inducement offered by the State of West Virginia was its recommendation of probation, albeit a nonbinding one on the Court. The sentence to be imposed by the Court was the question mark in this case. DAVID MARTIN waived all of his constitutional rights in exchange for a recommendation for probation from the State of West Virginia that he did not receive.

As this Court has stated, "there are two possible remedies for a broken plea agreement — specific performance of the plea agreement or permitting the defendant to withdraw his plea." *State ex rel. Brewer v. Starcher*, 195 W.Va. 185, 465 S.E.2d 185 (1995); *See State v. Conley*, 168 W. Va. 694, 285 S.E.2d 454 (1981); *State ex rel. Clancy v. Coiner*, 154 W. Va. 857, 179 S.E.2d 726 (1971). The State of West Virginia's breach in this regard goes to the very heart of the agreement. Without the inducement of the State's recommendation of probation, the Defendant had no absolutely incentive to plead guilty. Thus, the effect of this breach and this error in this case cannot be understated or undone absent a remand of this matter and permission to withdraw his plea of guilty.

IV. **Conclusion and Prayer**

For all of the reasons set forth herein, the Petitioner, DAVID M. MARTIN respectfully prays that this Court enter an *Order* reversing the ruling of the Wood County Circuit Court sentencing DAVID M. MARTIN to prison; that this Court set aside the guilty plea herein; that this matter be remanded to Wood County Circuit Court; and for such further and other relief as this Court may deem appropriate.

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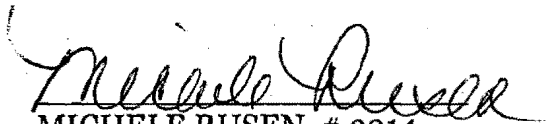
CERTIFICATE OF SERVICE

This 18th day of January, 2010, the undersigned certifies that the enclosed *Appellant's "Reply Brief of David M. Martin"* in case No. 35525, *State of West Virginia v. David M. Martin* was served upon the following person, by mailing, first class mail a true and accurate copy thereof to:

Robert Goldberg
Assistant Attorney General
Office of the Attorney General
State Capitol, Room 26-E
Charleston, WV 25305



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