IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

CORY R. MAPLES, Petitioner, vs. KIM T. THOMAS, Commissioner of the Alabama Department of Corrections, Respondent.	:	Case No. 5:03-cv-02399-SLB-MHH

BRIEF *AMICUS CURIAE* OF THE CONSTITUTION PROJECT
IN SUPPORT OF PETITIONER CORY R. MAPLES

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STATEMENT OF INTEREST OF THE CONSTITUTION PROJECT

The Constitution Project ("TCP") is an independent, not-for-profit organization that promotes and defends constitutional safeguards and seeks consensus solutions to difficult legal and constitutional issues, such as the right to counsel in criminal trials.[1]

TCP achieves its goals through constructive dialogue across ideological and partisan lines, and through scholarship, activism, and public education efforts. It has earned wide-ranging respect for its expertise and reports, which are designed to make constitutional issues a part of ordinary political debate. As a policy institution, TCP is deeply concerned with the preservation of fundamental constitutional guarantees and ensuring that those guarantees are respected and enforced by all three branches of government. TCP frequently appears as *amicus curiae* before the United States Supreme Court, the federal courts of appeals, the federal district courts, and the highest courts of the various states, to support the protection of constitutional rights. In this case, TCP has filed amicus briefs in support of rehearing en banc in the court of appeals, in support of *certiorari* in the United States Supreme Court, and on the merits in the United States Supreme Court.

TCP's National Right to Counsel Committee ("Committee") is a bipartisan collective of independent experts representing all segments of America's justice system, including former judges, defense attorneys, and prosecutors. Established in 2004, the Committee's mission is to examine, across the country, whether criminal defendants and juveniles charged with delinquency, who are often unable to retain their own lawyers, receive adequate legal

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[1] No counsel for a party or a party to this proceeding authored this brief in whole or in part, and no counsel for a party or party to this proceeding made a monetary contribution intended to fund either the preparation or the submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

representation, consistent with the United States Constitution, the decisions of the Supreme Court, and the rules of the legal profession.

The Committee spent several years examining the ability of state courts to provide adequate counsel to individuals charged in criminal and juvenile delinquency cases who are unable to afford lawyers. In 2009, the Committee issued its seminal report, *Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel*, which included the Committee's findings on the right to counsel nationwide, and based on those findings, made 22 substantive recommendations for reform.[2] As relevant here, the Committee recommended that states provide sufficient funding and oversight to comply with constitutional requirements, and the Committee endorsed litigation seeking prospective relief on behalf of a class of indigent defendants in states failing to comply with those basic requirements. *Id.* at 183-200, 210-13. The Committee also made recommendations for the federal government, criminal justice agencies, bar associations, judges, prosecutors, and defense lawyers to address the indigent defense crisis facing the nation. *Id.* at 200-09. *Justice Denied* has garnered public praise from a wide array of public figures, and it has been cited in a variety of national news publications, state newspapers, and court opinions.[3]

Accordingly, TCP has an interest as *amicus curiae* in this important case regarding the Sixth Amendment right to effective assistance of counsel currently pending before the Court.

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[2] The Constitution Project, Report of the National Right to Counsel Committee, *Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel* (2009) ("*Justice Denied*"), *available at* http://www.constitutionproject.org/pdf/139.pdf.

[3] *See, e.g.*, *State v. A.N.J.*, 225 P.3d 956, 960 (Wash. 2010) (*en banc*); Steven Zeidman, *Indigent Defense: Caseload Standards*, New York Law Journal (Mar. 24, 2010), *available at* http://www.law.com/jsp/nylj/PubArticleNY.jsp?id=1202446663975; Editorial, *The Sorry State of Indigent Defense*, Washington Post (Dec. 9, 2010), available at http://www.washingtonpost.com/wp-dyn/content/article/2010/12/09/AR2010120905650.html.

INTRODUCTION

TCP respectfully submits this brief as *amicus curiae* to provide the Court with a detailed description of the inadequate Alabama indigent defense system that furnished the deficient (and ultimately ineffective) legal defense that failed Cory R. Maples.

At the time of Mr. Maples' trial, Alabama ranked last in the country in terms of attorney compensation for court-appointed capital defense attorneys: $40 per hour for in-court work; $20 per hour for out-of-court work, with a $1,000 out-of-court fee cap. It imposed virtually no eligibility or training requirements on attorneys appointed to represent capital defendants, aside from requiring "five years prior experience in the active practice of criminal law"—a standard that could be easily satisfied by so little as a sporadic series of misdemeanor representations. Further, Alabama had no statewide indigent defense agency or other institution to oversee, facilitate, or offer guidance and resources to the State's under-compensated, over-worked, and often inexperienced court-appointed capital defense lawyers. Even the United States Supreme Court went out of its way in this case, though the issue was not before the Court, to observe that Alabama's indigent defense system "sets low eligibility requirements for lawyers appointed to represent indigent capital defendants at trial" and "undercompensated" counsel. *See Maples v. Thomas*, 132 S. Ct. 912, 917 (2012).

The egregious errors of omission and commission Mr. Maples' counsel committed in the investigation, trial, and penalty phase, as detailed in Mr. Maples' brief, were largely a byproduct of inexperience, under-compensation and lack of supervision, all of which flowed inevitably from the systematic defects of the Alabama indigent defense system. As Mr. Maples' attorneys,

in their words, "confess[ed]" during opening arguments in the penalty phase, they lacked capital murder trial experience and were "stumbling around in the dark."[4]

Unfortunately for Mr. Maples, the imposition of the death penalty was almost certainly caused, at least in material part, by the very system that should have provided him an adequate defense. Alabama's indigent defense system was underfunded and lacked any meaningful quality control, and as a result created "a powerful disincentive for overwhelmed or unprepared lawyers to fully defend a difficult case."[5] TCP submits this brief to highlight the patent deficiencies of that system and its devastating impact on Mr. Maples.

ARGUMENT

I. Alabama's Troubled Indigent Defense System At the Time of Mr. Maples' Trial Contributed to the Constitutional Ineffectiveness of His Counsel

When Mr. Maples stood trial in October 1997, the Alabama indigent defense system was chronically underfunded and poorly regulated. Alabama (A) set only minimal eligibility requirements for defense counsel appointed to represent indigent capital murder defendants; (B) paid court-appointed defense attorneys in capital murder cases the lowest fees in the country at the time; and (C) was one of the few jurisdictions without a uniform, statewide indigent defense system. Given this backdrop, it is no surprise that Mr. Maples' court-appointed attorneys, who had virtually no previous experience defending capital murder cases, gravely mishandled his defense at both the guilt and penalty stages. By the system's very design, they were set up to fail.

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[4] Brief of Petitioner in Response to the District Court's August 23, 2012 Scheduling Order at 22, *Maples v. Thomas*, No. 5:03-cv-02399 (N.D. Ala. filed Nov. 15, 2012) ("Maples Br.") (quoting R. at 3081-82). "R." refers to the Alabama trial court record.

[5] Equal Justice Initiative, *A Report on Alabama's Indigent Defense System: Capital Cases*, at 5 (1997) ("*EJI Report*"), attached hereto as **Exhibit A**.

A. Alabama's Indigent Defense System Imposed No Meaningful Eligibility or Training Requirements on Court-Appointed Capital Defense Attorneys.

Capital murder cases are complex, fact-intensive, time consuming matters governed by a labyrinth of ever-changing state and federal case law. As the American Bar Association stated:

> Effective capital case representation requires substantial specialized training and some experience in the complex laws and procedures that govern a capital case in a given jurisdiction, as well as the resources to conduct a complete and independent investigation in a timely way.[6]

In addition to their legal complexity, capital cases also entail a number of practical demands that place unusually heavy burdens on counsel's time and resources. The ABA's Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases ("ABA Guidelines")[7] elaborate on the numerous practical demands of mounting a capital murder defense, including but not limited to:

- Conducting a full investigation of relevant facts for what are effectively two different trials – the guilt phase and the penalty phase;
- Hiring a professional investigator, mitigation specialist, and others with professional expertise relevant to the case;
- Establishing a special rapport with the client to enable a productive professional relationship;
- Assessing and negotiating a plea that will allow the defendant to serve a lesser sentence;
- Identifying and interviewing prosecution witnesses, and examining their backgrounds;

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[6] American Bar Association, *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Alabama Death Penalty Assessment Report, at* 97 (2006), *available at* http://www.americanbar.org/content/dam/aba/migrated/moratorium/assessmentproject/alabama/report.authcheckdam.pdf.

[7] The ABA Guidelines are available at http://www.americanbar.org/content/dam/aba/migrated/legalservices/downloads/sclaid/deathpenaltyguidelines2003.authcheckdam.pdf. The Supreme Court has "long . . . referred [to the ABA Guidelines] as 'guides to determining what is reasonable.'" *Rompilla v. Beard*, 545 U.S. 374, 387 (2005) (quoting *Wiggins v. Smith*, 539 U.S. 510, 524 (2003)).

- Identifying and interviewing other potential witnesses to challenge the prosecution's version of events;
- Subjecting forensic evidence to independent scrutiny;
- Investigating the defendant's personal history, including criminal history, in order to deny or rebut allegations made by the prosecution in support of the death penalty;
- Investigating affirmative defenses, including self-defense, insanity, and partial defenses, such as lesser-included offense;
- Coordinating and integrating the "presentation during the guilt phase of the trial with the projected strategy for seeking a non-death sentence at the penalty phase";
- Presenting every legal claim that could possibly be meritorious in order to preserve them for post-conviction review;
- Applying sophisticated jury selection techniques;
- Utilizing expert witness services and evidence; and
- Challenging the prosecution's evidence and experts through effective cross-examination.

ABA Guidelines § 1.1, at 5-10 (2003); *see also Pruett v. State*, 574 So. 2d 1342, 1346 (Miss. 1990) (quoting numerous cases and observing that "[c]ounsel must have particular skills for competent representation in a capital case because these cases involve 'extraordinary circumstances and unusual representation'").

Despite all of these demands, in 1997, Alabama had no system in place to ensure that court-appointed capital defense attorneys had the requisite ability and experience to handle the job. Aside from being licensed to practice law in Alabama, the only qualification required of court-appointed capital defense attorneys was to have "no less than five years' prior experience in the active practice of criminal law." Ala. Code § 13A-5-54 (1995). Notably, Alabama did not distinguish among the kinds of criminal law practiced or the frequency of criminal cases handled. Rather, as one report explained, "[a]n attorney who spen[t] five years representing

defendants facing minor criminal charges such as shoplifting or trespassing [would] satisfy Alabama's capital counsel requirement."[8]

Given these lax requirements, defense attorneys like the ones appointed to represent Mr. Maples were not required to focus their practices on criminal defense work, much less on complex capital murder defense proceedings. As set forth in Mr. Maples' brief, the two attorneys appointed to represent him had scant experience representing capital defendants. Maples Br. at 16, 22. One of the attorneys had no capital defense experience whatsoever and the other had only participated in a single, prior capital case. Moreover, neither attorney had ever participated in the penalty phase of a capital murder trial. Maples Br. at 16. Yet, the guilt and penalty phases not only effectively comprise two separate trials requiring "unique preparation and investigation," *EJI Report* at 2, but—as the Supreme Court, Eleventh Circuit, and the ABA have all stressed—also go hand-in-hand and require a coordinated defense. *See, e.g., Florida v. Nixon*, 543 U.S. 175, 192 (2004); *Magill v. Dugger*, 824 F.2d 879, 888 (11th Cir. 1987); ABA Guidelines, § 1.1 at 6; § 10.10.1 at 99 ("[I]t is critical that, well before trial, counsel formulate an integrated defense theory that will be reinforced by its presentation at both the guilt and mitigation stages.").

Mr. Maples' counsel did not try to hide their lack of experience. They even "confess[ed]" their inexperience to the jury, on the record, at the outset of the penalty phase of Mr. Maples' trial:

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[8] ACLU, *Broken Justice: The Death Penalty in Alabama, at* 5 (2005) ("*ACLU Report*"), *available at* http://www.aclualabama.org/WhatWeDo/BrokenJustice_report.pdf; *see also* Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 Yale L.J. 1835, 1871 n.209 (1994) ("Standards for the appointment of counsel, which are defined in terms of number of years in practice and number of trials, do very little to improve the quality of representation since many of the worst lawyers are those who have long taken criminal appointments and would meet the qualifications.").

> Now, I will confess to you as I stand before you in this part of the proceedings that while I've been in capital cases before, I've never been at this part, nor has my client . . . . So we may appear to be stumbling around in the dark as we're proceeding as we attempt to put forth to you a case justifying a life sentence.

(R. at 3080-82).

Mr. Maples' opening brief details the many errors committed by his court-appointed counsel during trial, almost certainly due, in part, to their inexperience, including but not limited to:

- Pursuing contradictory theories during the guilt and penalty phases of the trial;
- Failing to investigate and present a clear intoxication defense during the guilt phase, despite knowing the defendant was using alcohol and drugs for nearly ten hours the day of the shooting;
- Failing to request an intoxication jury instruction, or lesser included offense of manslaughter, even after the State presented considerable evidence of Mr. Maples' intoxication; and
- Failing to investigate and present mitigating evidence to persuade the jury not to issue a death sentence, including Mr. Maples' troubled family history, record of suicidal depression, and past good behavior.

(*See* Maples Br. at 4-6).

As is readily evident from Mr. Maples' brief, Mr. Maples' attorneys lacked the specialized training and experience necessary for providing an effective capital murder defense. *ACLU Report* at 5. As the Eleventh Circuit has stated, "No court should appoint an inexperienced lawyer to represent the defendant in a death penalty case. The risks to defendant, counsel, the judicial system and the community at large are too great." *Tyler v. Kemp*, 755 F.2d 741, 746 (11th Cir. 1985), *overruled in part on other grounds by Peek v. Kemp*, 784 F.2d 1479, 1494 n.15 (11th Cir. 1986). Yet, that is precisely what happened to Mr. Maples, as his attorneys clearly, even admittedly, lacked the specialized training and experience necessary to represent him in a capital case. And as Mr. Maples has explained, the errors of counsel in failing to

investigate, develop, and present Mr. Maples' case at both the guilt and penalty phases are particularly egregious.

B. Alabama's Indigent Defense System Under-Compensated Court-Appointed Capital Defense Attorneys.

Exacerbating the problem of the minimal eligibility threshold for court-appointed counsel was the shockingly low level of compensation afforded to court-appointed counsel in capital cases in 1997. At that time, Alabama's statutory compensation rate for capital cases was the lowest in the nation: $20 per hour for out-of-court work and $40 per hour for in-court advocacy. Ala. Code § 15-12-21 (1995); *EJI Report* at 2, 8. Significantly, Alabama further imposed an absolute statutory fee cap of $1,000 for all out-of-court work even in capital murder cases. Ala. Code § 15-12-21 (1995); *EJI Report* at 2. At an hourly rate of $20, without any time allotted for trial or other court proceedings, court-appointed defense counsel were effectively limited to no more than 50 hours of fully compensated time to thoroughly investigate the facts of the case (including the facts surrounding Mr. Maples' state of intoxication on the evening of the shootings); to interview witnesses; to retain and work with experts (including an expert on intoxication and an expert on the impact of a troubled upbringing); to identify and investigate mitigating factors (including Mr. Maples' serious childhood difficulties); and to prepare for a multi-phase jury trial on a life-or-death matter.

By contrast, during the same time period, Alabama paid private outside counsel regular hourly fees of $85 for representing the State and State employees in civil litigation and ethics matters, with some fees reaching as high as $160 per hour for attorneys with specialized knowledge. *EJI Report* at 4-5. Likewise, attorneys appointed by federal courts in capital cases were paid a minimum rate of $75 per hour in Alabama. *Id.* at 10.

Many courts have observed the link between attorney compensation and quality of representation. *See, e.g., White v. Bd. of Cnty. Comm'rs of Pinellas Cnty.*, 537 So. 2d 1376, 1380 (Fla. 1989) ("The relationship between an attorney's compensation and the quality of his or her representation cannot be ignored."); *Bailey v. State*, 424 S.E.2d 503, 508 (S.C. filed Dec. 7, 1992) ("The link between compensation and the quality of representation remains too clear."). Others have observed that the amount of time an attorney spends on a court-appointed representation is a self-evident byproduct of his or her pay rate. *See, e.g., White*, 537 So. 2d at 1380 ("[T]here is a risk that the attorney may spend fewer hours than required representing the defendant or may prematurely accept a negotiated plea that is not in the best interests of the defendant."); *Jewell v. Maynard*, 383 S.E.2d 536, 544 (W. Va. 1989) ("Inevitably, economic pressure must adversely affect the manner in which at least some cases are conducted."); *Madden v. Twshp. of Delran*, 601 A.2d 211, 219 (N.J. 1992) ("[F]inancial pressures on unpaid counsel can affect their performance."); *see also EJI Report* at 7 ("An attorney's rate of compensation and the quality of his or her work cannot be easily separated.").

Alabama's statutory compensation rates and fee cap were grossly inadequate in light of the rigorous time demands of a capital murder defense. One study of capital murder trials during the relevant period found that "defense attorneys spent an average of 1,480 out-of-court hours preparing a defendant's case,"[9] while another study found that a minimum of 500 hours were required to prepare for *each phase* of a capital murder trial.[10] Applying these estimates, a court-

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[9] *Maples*, 132 S. Ct. at 917 n.1 (citing Subcommittee on Federal Death Penalty Cases, Committee on Defender Services, Judicial Conference of the United States, *Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation*, at 15 (May 1998)).

[10] *EJI Report* at 2 (citing *Panel Discussion: The Death of Fairness? Counsel Competency and Due Process in Death Penalty Cases*, 31 Hous. L. Rev. 1105, 1108 (1994)).

appointed attorney in Alabama would have received the equivalent of $0.68 per hour (for 1,480 out-of-court hours) or $1.00 per hour (for 1,000 out-of-court hours) if he or she devoted the time necessary to prepare adequately for a capital murder defense. By either measure, Alabama's hourly rates and fee cap were "vastly insufficient for the amount of work required to properly represent an inmate's rights." *ACLU Report* at 5.

As a result of this system, Alabama attorneys appointed to represent capital murder defendants in 1997 were left with only two options: cut corners or work for free. Most court-appointed attorneys were undoubtedly ill-equipped to bear the financial strain of defending a capital murder case essentially *pro bono*:

> It would be foolish to ignore the very real possibility that a lawyer may not be capable of properly balancing the obligation to expend the proper amount of time in an appointed criminal matter where the fees involved are nominal, with his personal concerns to earn a decent living by devoting his time to matters wherein he will be reasonably compensated. The indigent client, of course, will be the one to suffer the consequences if the balancing job is not tilted in his favor.

Bailey, 424 S.E.2d at 506. Indeed, at Alabama's rates, it would have been almost impossible for any attorney, including Mr. Maples' counsel, to sustain the level of work required to mount an adequate capital murder defense while still maintaining a separate practice and earning his or her cost of living.

As such, at the time of Mr. Maples' trial, the Alabama capital defense system had a "built-in disincentive for thorough representation," as the Alabama Equal Justice Initiative observed:

> It is a fiction that private attorneys can afford to devote hundreds of uncompensated hours to capital murder cases. . . . Of course, many of these attorneys give as much attention to these cases as they can afford. But the reality is that the system of compensation guarantees that errors will be made or go unrecognized at capital trials as long as defense attorneys are forced to subsidize the defense of persons accused of capital offenses.

EJI Report at 2-3. Even the Alabama Court of Criminal Appeals, three years before Mr. Maples' trial, acknowledged that the $1,000 cap for trial work was outdated and "unreasonable." *May v. State*, 672 So. 2d 1307, 1309 (Ala. Cr. App. 1993).

Consequently, the Alabama indigent defense system almost certainly "ha[d] a chilling effect on the right to counsel by providing a disincentive for attorneys to perform work beyond the $1,000 level, resulting in a conflict of interest between the attorney and client." *Justice Denied* at 64. Although no evidentiary hearing has ever been held to explore the degree to which Alabama's low attorneys' fees and cap hampered Mr. Maples' legal defense, there can be no doubt that Mr. Maples' inexperienced attorneys were financially prevented from dedicating the time necessary to fully investigate and prepare the defense of his case. Indeed, as Mr. Maples' brief explains, Mr. Maples' attorneys failed to interview a number of key witnesses, failed to obtain readily-available pertinent records, failed to coin a coherent strategy throughout trial and to prepare the few witnesses they put on the stand, and even failed to thoroughly interview their own client about critical facts. *See* Maples. Br. at 62-82. As a result, Mr. Maples' attorneys did not investigate or present evidence on the state of Mr. Maples' intoxication on the night of the shootings as well as on several basic mitigating factors, each of which could have prevented his death sentence, including physical and mental abuse by his birth mother; a history of depression and suicide attempts; a past head injury that diminished his mental capacity; and the good moral character he demonstrated by assisting police with the arrest of a local drug dealer. *See* Maples. Br. at 62-82. These glaring mistakes suggest that Mr. Maples' attorneys were unable or unwilling to thoroughly investigate or prepare his defense.

C. Alabama's Indigent Defense System Maintained No State-Wide Agency to Facilitate Court-Appointed Capital Defense Attorneys.

At the time of Mr. Maples' trial, Alabama's 40 judicial circuits applied one of four indigent defense systems: (1) court-appointed counsel, (2) contract counsel, (3) a public defenders' office, or (4) "any alternative method meeting constitutional requirements." Ala. Code § 15-12-1 (1995). What resulted was a hodgepodge of local indigent defense systems with no centralized state agency to oversee the effective administration of indigent defense, train counsel or provide support and expertise to counsel.

Like most Alabama circuits in 1997, the Circuit Court of Morgan County, where Mr. Maples was tried, employed a court-appointed counsel system. As such, Mr. Maples' legal fortunes lay at the mercy of two benefactors: (1) the Circuit Court, to identify and select counsel with sufficient skill and experience to properly defend a capital murder trial; and (2) the selected counsel, to accept and thoroughly defend capital murder cases despite the low statutory pay rate and lack of resources. Too often under this system, attorneys with the necessary skill and experience to properly defend capital murder cases refused to do so because of the unsustainable wages, leaving inexperienced attorneys to accept cases they were ill-equipped and unable to defend, which is precisely what happened in this case. *EJI Report* at 7-8.

With no statewide support system, inexperienced attorneys like the ones appointed to represent Mr. Maples had nowhere to turn to for guidance. This invariably compounded the effects of inexperience and low compensation, which resulted in a failure to investigate and prepare, and thus mount a meaningful and constitutionally effective defense, as outlined in Mr. Maples' brief. *See* Maples Br. at 3-7. In the final analysis, however, this is unacceptable. The Constitution demands that criminal defendants receive the effective assistance of counsel, not

two attorneys stumbling around in the dark. Lack of competent counsel is particularly unacceptable in a capital trial when the defendant may pay for counsel's errors with his life.

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"Considering the restraints placed on attorneys defending capital cases [in Alabama], attorney error in those cases is not surprising." *EJI Report* at 8. As explained by Mr. Maples' brief, Mr. Maples' court-appointed defense counsel committed several egregious errors at both the guilt and sentence stages that whether considered independently, or together, render the representation that Mr. Maples received constitutionally ineffective.

CONCLUSION

For the reasons set forth above, *amicus curiae* The Constitution Project respectfully requests that the Court grant the Petition of Cory R. Maples.

Dated: January 18, 2013

Respectfully submitted,

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