IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

NOS. PD-0244-19, PD-0245-19

THE STATE OF TEXAS

v.

ERLINDA LUJAN, Appellee

ON STATE'S PETITION FOR DISCRETIONARY REVIEW
FROM THE EIGHTH COURT OF APPEALS
EL PASO COUNTY

KELLER, P.J., filed a dissenting opinion in which MCCLURE, J., joined.

In an electronically recorded interview at the police station, a murder suspect volunteered to show detectives where the victim's body was buried. The detectives continued to question the suspect in the car while traveling to find the body, and this questioning, which began six minutes or less after the video in the interview room stopped, was also electronically recorded. The issue addressed by the court of appeals and the parties was whether, under the factors articulated in *Bible*

v. State,[1] the questioning in the car was part of the same oral interrogation under the Texas confession statute, Article 38.22[2] and under *Miranda v. Arizona*.[3] The Court and the concurring opinions want to address different issues, and they wish to limit or overrule *Bible*, but the viability of *Bible* is not before us. Neither the parties nor the court of appeals questioned whether the *Bible* factors apply in this case. The dispute has been solely how the case is resolved under *Bible*. *Bible* is binding precedent and we should continue to adhere to it. But if the Court wants to question the continued scope or viability of the *Bible* factors, it should order briefing from the parties before resolving the issue on its own.

I. BACKGROUND

Focusing on the trial court's Finding 30, the court of appeals looked to *Bible* and discussed the four factors outlined in that case on the question of whether a subsequent interview was a continuation of a prior one.[4] Concluding that the four factors were not a checklist, the appellate court found significant two other circumstances relied upon by the trial court: (1) that the interview was in a different setting (car versus the interview room), and (2) that one of the detectives said at the end of the first recording, "When we come back, we can continue, if you like."[5]

After analyzing this case under the *Bible* factors and its two additional factors, the court of

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[1] 162 S.W.3d 234 (Tex. Crim. App. 2005).

[2] TEX. CODE CRIM. PROC. art. 38.22.

[3] 384 U.S. 436 (1966).

[4] *State v. Lujan*, Nos. 08-17-00035-CR & 08-17-00036-CR, 2018 WL 4660185 & 2018 WL 4659578 , *7-8 (Tex. App.—El Paso September 28, 2018) (not designated for publication).

[5] *Id.*

appeals concluded that the trial court "did not abuse its discretion in finding that the second interview was not a continuation of the first."[6] Pointing out that the second recording did not begin with "any sort of *Miranda* or Article 38.22 warnings," the court of appeals affirmed the trial court's conclusion that the second recording was excludable.[7]

II. ANALYSIS

A. The Court and the concurrences address issues that were not addressed by the parties or by the court of appeals.

The court of appeals's holding turned solely on whether, under *Bible*, the questioning in the car was part of the same interrogation as the earlier questioning at the station for the purpose of *Miranda* and Art. 38.22. The appellate court's analysis of whether the two sessions were part of the same interrogation was designed to assess whether the warnings were given, not with whether the waiver of those warnings was effective.

In *Miranda v. Arizona*, the Supreme Court created a prophylactic rule designed to safeguard the right against self-incrimination in the custodial setting.[8] Under this prophylactic rule, a statement made by a person under custodial interrogation would generally be inadmissible unless, prior to questioning, the suspect was "warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed."[9] To the extent that caselaw also requires a knowing, intelligent, and

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[6] *Id.* at *9.

[7] *Id.*

[8] *J.D.B. v. North Carolina*, 564 U.S. 261, 269 (2011) (discussing *Miranda*).

[9] *Id.* (quoting *Miranda*, 384 U.S. at 444).

voluntary waiver of rights under *Miranda*, those are not implicated by the court of appeals's decision. Article 38.22 codifies and adds slightly to the *Miranda* warnings,[10] and Section 3(a) of that article also imposes requirements that are not constitutionally mandated for oral confessions. Section 3(a)(2) is the only provision in dispute here, and it requires that:

> (2) prior to the statement but during the recording the accused is given the warning in Subsection (a) of Section 2 above and the accused knowingly, intelligently, and voluntarily waives any rights set out in the warning.[11]

This provision encompasses two requirements: the first half of the provision requires that warnings be given before the interrogation and on the recording while the second half requires that the accused knowingly, intelligently, and voluntarily waive his rights.[12] The court of appeals's analysis addressed only the requirement in the first half of the provision, whether the warnings were in fact given in the manner dictated by the statute.

The Court concludes that an effective waiver of her rights did not occur because Appellee was misled by the police into believing that her statements in the car would not be used against her. But that issue is not before us because it was never resolved by the court of appeals. The court of appeals simply held that the warnings were not given because the questioning in the car was not a continuation of the initial interview at the stationhouse. If the court of appeals's holding is correct, there is no need to address the issue of waiver. If the court of appeals's holding is incorrect, then the issue of waiver should be addressed on remand.

The Court says that the facts of *Bible* are so idiosyncratic that its four-factor continuation-of-

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[10] TEX. CODE CRIM. PROC. art. 38.22, § 2(a).

[11] *Id.* art. 38.22, § 3(a)(2).

[12] *Id.*

interview discussion is largely irrelevant here. But the reason the factors are irrelevant to the Court's analysis is that it resolves the case on an issue (waiver) that the four-factor test was never meant to apply to.

Judge Newell's concurrence expresses uncertainty about the controlling rationale in *Bible* and suggests that we should revisit the viability or scope of the continuation analysis in *Bible.* It is true that *Bible* articulated two rationales for rejecting Bible's claim:

> Under these circumstances, we find that the two sessions were part of a single interview for the purpose of Article 38.22 and *Miranda*. But even if they were not considered part of the same interview, we would find that Trooper Whitmore's conduct under the circumstances was sufficient to constitute the administration of a "fully effective equivalent" to the required warnings and was sufficient to satisfy *Miranda*.[13]

Because the continuation holding appears first, it would seem to be the primary holding of the Court, and thus be binding precedent. Or if the continuation and equivalency holdings are both alternative holdings—instead of being a primary holding and an alternative holding—then it would follow that both are binding precedent. Although this Court has previously suggested that an alternative holding "could be viewed as mere *dicta*,"[14] we have never explicitly held that,[15] and our sister court—the Texas Supreme Court—has held that alternative holdings are binding.[16] What one

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[13] 162 S.W.3d at 242.

[14] *Brooks v. State*, 957 S.W.2d 30, 33 (Tex. Crim. App. 1997) (saying that alternative holding in an earlier case "could be viewed as mere dicta," that the prior case "cited no authority for this alternative holding" and gave sparse reasoning for it, and in any event, the alternative holding in that the prior case and other cases like it "did not survive our decisions in *Sharp* and *Rosales*").

[15] *See Duran v. State*, 492 S.W.3d 741, 754 n.1 (Tex. Crim. App. 2016) (Yeary, J., concurring and dissenting) ("So far as I know, this Court has yet to fashion a rule—one way or the other—with respect to the precedential value of alternative holdings.").

[16] *Ross v. St. Luke's Episcopal Hospital*, 462 S.W.3d 496, 502 (Tex. 2015).

cannot say is that *both* alternative holdings are *dicta*. Either the first holding is binding or both are.

As for reviewing the viability or scope of the continuation analysis in *Bible*, that issue is not addressed by the court of appeals or by the parties. *Bible* settled that issue in a reasoned opinion, after evaluating caselaw, and we should not be so quick to retreat from its holding. But if we are to consider retreating from its holding, we should obtain input from the parties.

Judge Yeary's concurrence agrees with me that waiver is not an issue in this case and concedes that the *Bible* factors might apply in the *Miranda* context. But that concurrence contends that a different rule should apply to Article 38.22. As will be explained later, the holding in *Bible* applied in both the *Miranda* and Article 38.22 contexts. To hold otherwise would require abrogating part of *Bible*, which is binding precedent. The only reason given by the concurrence for doing that is that the statute supports the concurrence's construction.

As outlined above, Article 38.22, § 3(a)(2) speaks to both a "statement" and a "recording." Judge Yeary's conclusion that each separate electronic recording must contain warnings might be a possible way to construe the statute, but I think it is also possible to construe "statement" as broader than "recording" so as to allow multiple recordings to attach to a single statement and warnings to be on the first of those recordings. With the issue being at least arguable, we should not revisit the holding in *Bible*. But if we were inclined to revisit that holding, we should obtain input from the parties. Neither the court of appeals nor the parties have suggested that *Miranda* and Article 38.22 should be treated differently for the purpose of determining whether two recordings could be part of the same statement, nor have they suggested that we abrogate the holding in *Bible* with respect to the statute.

B. A *de novo* and objective standard of review applies to the continuation issue.

As with suppression claims in general,[17] a bifurcated standard of review applies to a trial court's ruling on a *Miranda*-violation claim: the appellate court must afford almost total deference the trial judge's rulings on questions of historical fact and on application-of-law-to-fact questions that turn upon credibility and demeanor while reviewing *de novo* the trial court's rulings on application-of-law-to-fact questions that do not turn upon credibility and demeanor.[18] We have expressly held the same standard to be applicable to a section of Article 38.22 that is not at issue here,[19] and it logically follows that the warnings aspect of the statute before us is subject to this standard of review as well.[20]

In addition, *Miranda* claims "involve an objective assessment of police behavior."[21] I would further conclude that the part of Article 38.22 before us—the first half of § 3(a)(2)—is solely directed at police overreaching and thus involves an objective *Miranda*-type assessment. In *Oursbourn v. State*, we indicated that § 6 of Article 38.22 can involve "sweeping inquiries into the state of mind of a criminal defendant who has confessed," and that § 6 can apply to the question of whether an accused knowingly, intelligently, and voluntarily waived his rights.[22] But by singling out § 6 as allowing consideration of the accused's state of mind, *Oursbourn* implicitly suggested that

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[17] *Lopez v. State*, 610 S.W.3d 487, 494 (Tex. Crim. App. 2020).

[18] *Alford v. State*, 358 S.W.3d 647, 652-53 (Tex. Crim. App. 2012) (citing *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App.1997)).

[19] *Lopez*, 610 S.W.3d at 494.

[20] *See Alford*, 358 S.W.3d at 649, 652-53 (discussing the standard in connection with warnings claim under Article 38.22, § 3(a)(2)).

[21] *Oursbourn v. State*, 259 S.W.3d 159, 171 (Tex. Crim. App. 2008).

[22] *Id.* at 172.

other portions of Article 38.22 are based solely on police overreaching rather than the suspect's state of mind.[23] Moreover, the whole point of a recording is to provide an objective record—to eliminate as much as possible any dispute about whether the police followed the proper procedures. Accordingly, whether the warnings were actually given and on the recording should be viewed from an objective standpoint.

C. Under a *Bible* analysis, the questioning in the car was part of the same interrogation as the prior questioning at the station.

In *Bible*, we confronted a claim that an electronically recorded oral statement was obtained in violation of Article 38.22 because some of the required warnings were not made prior to the statement and on the recording—including some warnings that were required not just by the statute, but by *Miranda* itself.[24] We addressed whether the recording could be deemed a continuation of an earlier recorded interview at which the proper warnings were made.[25] For guidance, we looked at two of our prior cases addressing the issue in the *Miranda* context and a court of appeals case addressing the issue under the statute.[26]

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[23] *See id.* ("Article 38.22 is aimed at protecting suspects from police overreaching. But Section 6 of that article may also be construed as protecting people from themselves because the focus is upon whether the defendant voluntarily made the statement.").

[24] 162 S.W.3d at 241.

[25] *Id.* at 241-42.

[26] *Id.* (discussing *Franks v. State*, 712 S.W.2d 858 (Tex. App.—Houston [1st Dist.] 1986, pet. ref'd); *Ex parte Bagley*, 509 S.W.2d 332 (Tex. Crim. App. 1974); *Jones v. State,* 119 S.W.3d 766 (Tex. Crim. App. 2003)).

We first considered a court of appeals case,[27] *Franks v. State*, that addressed the claim that the police had failed to comply with Article 38.22, § 3(a).[28] In that case, there were two tape recordings.[29] Warnings appeared at the beginning of the first recording, which commenced at 11:53 a.m. and continued until 12:30 p.m.[30] Officers then paused their interrogation to talk to other witnesses.[31] The second recording started at 4:02 p.m. and continued until 4:23 p.m.[32] The earlier warnings were not reiterated during this recording, but the defendant was reminded that he had been advised earlier of his constitutional rights, and he acknowledged that he had been so warned.[33] We observed that the court of appeals held that "the second phase of the interrogation was merely a continuation of the interrogation process, and that under the circumstances presented, there was not such a 'break' in the interrogation proceeding as to require the giving of new warnings."[34]

We next turned to one of our *Miranda* cases, *Ex parte Bagley*, where the defendant was given all of the required *Miranda* warnings before signing a written confession but was orally interrogated six to eight hours later, after the officer had talked to the co-defendant.[35] Although he was given oral

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[27] *Id.* at 241 (discussing *Franks*).

[28] 712 S.W.2d at 860.

[29] *Bible*, 162 S.W.3d at 241 (citing *Franks*, *supra* at 860).

[30] *Id*. (citing *Franks*, *supra* at 860-61).

[31] *Id.* (citing *Franks*, *supra* at 860).

[32] *Id.* (citing *Franks*, *supra*).

[33] *Id.* (citing *Franks*, *supra* at 860-61).

[34] *Id.* (quoting *Franks*, *supra* at 861).

[35] *Id.* at 242 (citing *Bagley*, 509 S.W.2d at 336-37).

warnings, the defendant contended that they did not sufficiently comply with *Miranda.*[36] We held that the oral warnings did in fact comply with *Miranda*, but we also found that the warning given six to eight hours earlier was sufficient to satisfy *Miranda*'s requirements.[37]

Last, we discussed a more recent *Miranda* case, *Jones v. State*, where we addressed whether warnings given two days before the complained-of statement were sufficient.[38] In *Jones* we distinguished *Bagley* and, in doing so, discussed the four factors that we ultimately addressed in Bible's case and that were ultimately addressed by the court of appeals in Appellee's case.[39] The four factors in *Jones* all weighed against the State: (1) the passage of time (two days) was significant, (2) the interrogation was conducted by a different person, (3) the interrogation related to a different offense, and (4) the second interrogating officer never reminded the defendant of the earlier warnings (never asked if the defendant had received any earlier warnings, remembered those warnings, or wished to waive or invoke them).[40] A review of *Jones* reveals that the offenses were not just "different"—they were unrelated (extraneous murders).[41] The Court in *Jones* remarked that the "'the mere passage of time' does not, by itself, automatically obviate prior *Miranda* warnings" and said that its conclusion might have been different if the interrogation had been by the same officer about

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[36] *Id.* (citing *Bagley*, *supra* at 334-35).

[37] *Id.* (citing *Bagley*, *supra* at 337-38).

[38] *Id.* (citing *Jones*, 119 S.W.3d at 773 n.13 (Court's op.), 795 (Keller, P.J., concurring)).

[39] *See id.* (citing *Jones*, *supra* at 773 n.13).

[40] *Id.* (citing *Jones*, *supra*).

[41] *Jones*, *supra*.

the same crime.[42]

Turning to the facts before it, the *Bible* court pointed out that the second recording began less than three hours after the beginning of the first recording.[43] The Court pointed out that different officers conducted the questioning during each session but that both were present during both sessions.[44] The Court acknowledged that each session did focus on a different set of crimes.[45] Finally, the court pointed to the fact that the interrogator in the second session reminded the defendant of his earlier waiver of rights, secured his acknowledgment that he had previously been given warnings, briefly reminded him of some of those warnings (his right to silence, to terminate the interview, and to counsel), and secured his assent to continue the interview.[46] Under these circumstances, we concluded that the two sessions were part of a single interview under Article 38.22 and *Miranda*.[47]

In the present case, the court of appeals concluded that the passage-of-time factor heavily favored the State, but I would conclude that the court of appeals nevertheless underestimated this factor's weight. At a mere six minutes or less,[48] this time period is far shorter than in the prior cases

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[42] *Id.* ("The cases cited by the concurrence are very appropriate to, and might well be dispositive of, this issue had the interrogation been by Officer Gates about Ms. Bryant's murder.").

[43] 162 S.W.3d at 242.

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] The court of appeals estimated that the time between the end of the first recording and the beginning of the second was six minutes, but it could have been even less, because some discussion continued after the 4:42 p.m. time was mentioned.

discussed—two days in *Jones*, six to eight hours in *Bagley*, less than four hours in *Franks*, and less than three hours in *Bible*. If one accounts for the fact that some of that six minutes or less was spent taking Appellee from the interrogation room to the car, the time period is extremely short. It is hardly a break at all. The trial court found disingenuous an explanation by one of the officers that the break was equivalent to a restroom break, but that credibility choice does not change the amount of time elapsed. The question of whether the passage of time was significant is a legal issue. I would find, as a legal matter, that the passage of time here is not significant. And this factor, by itself, is almost dispositive. Absent an express statement disclaiming the applicability of one or more of the warnings to the questioning in the car, all of the other factors discussed by the court of appeals would have to weigh heavily against the State to make the questioning in the car a separate interrogation, and even in the court of appeals's estimation, they do not.

Moreover, the court of appeals erred in characterizing the identity-of-the-interrogator and identity-of-the-offense factors as "neutral." Both factors weighed at least moderately in the State's favor. Importantly, *Bible* pointed out that, though different officers in its case interrogated in the different sessions, both were present in both sessions.[49] We did not expressly say who this comment favored,[50] but it appears to be at least somewhat favorable to the State. In any event, this factor more obviously favors the State in the present case. Not only were both officers present during the two sessions, but both *participated* in the questioning. The fact that one officer took the lead in the first session and the other took the lead in the second session mitigates the favorability of the factor some, but that factor still weighed at least moderately in the State's favor.

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[49] *See supra* at n.44 and accompanying text.

[50] *See id.*

The identity-of-the-offense factor also at least moderately favored the State. For starters, the murder was the focus of both sessions. The session in the car also involved additional offenses not explored at the police station, but the focus of the second interview was still the murder. Moreover, this was not a case like *Jones* or *Bible* where the different offenses in each session were unrelated. All of the extraneous offenses admitted to by Appellee were factually related to the narrative that Appellee was telling about the murder. And most of the time, the extraneous offenses were introduced through volunteered information that was not directly responsive to the question. And when questions were specifically asked about extraneous offenses, they were follow-ups on information that she had already provided, or in one case—when Appellee was asked if they got high when they dumped the body—a reasonable surmise from the history she had already been feeding them. I do not see how an interrogated person's decision to nonresponsively volunteer her participation in an extraneous offense can somehow be a factor weighing in favor of deciding that a second session constitutes a separate interview. Nor do I see how a detective's decision to follow up on leads handed to him on a silver platter can be much, if any, evidence that a separate interview is occurring.

That leaves the warnings-reminder factor, and there was no reference to or reminder about the earlier warnings. So this factor does weigh heavily against the State. But it is the only one that does so.

The court of appeals discussed two other factors, and I see them as legitimate considerations, but in the present case, they weigh only slightly against the State. The first of these factors was that the sessions occurred in different settings. The first session occurred at the police station in an interview room and the second session occurred in the car. Occurring at different locations is

potentially a basis for differentiating interviews. But in this case, the different locations were related, and they were caused by Appellee herself. Appellee practically begged the detectives to let her help them find the body, so they moved her to the car to do so. This relatedness seriously undercuts the weight of this "location" factor.

The second additional factor pointed to by the court of appeals was the comment by one of the detectives at the end of the first recording that, "When we come back, we can continue, if you like." The court of appeals construed this statement to mean that the interview had been suspended, to resume only after they returned from their trip to locate the body. I agree that this inference can be drawn, but it is a weak one. The detective might simply have meant, regardless of what happens in the car, that they could continue to talk more in the interview room when they got back, which, ultimately, they did. The statement was not an affirmative indication that the questioning in the car was somehow exempt from the Article 38.22 warnings. At worst, it might have given rise to an inference of such an exemption by negative implication, and as is often the case with negative implications,[51] that inference is weak. The detectives made no other statements that even remotely suggested that the questioning in the car was not part of the interrogation, and no effort was made to minimize the significance of the questioning in the car.[52]

Moreover, Article 38.22 requires *two* warnings to be given that a statement will be used

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[51] *See State v. Hill*, 499 S.W.3d 853, 865-66 & n.29 (Tex. Crim. App. 2016) (courts employ the negative-implication canon of statutory construction "with great caution" because the "the force of any negative implication . . . depends on context.") (ellipsis in *Hill*); *Chase v. State*, 448 S.W.3d 6, 14-15 (Tex. Crim. App. 2014) (same).

[52] While it is true that the detectives did not tell Appellee that they were recording the interrogation in the car, "Article 38.22 permits surreptitious recording of an accused." *Tigner v. State*, 928 S.W.2d 540, 546 (Tex. Crim. App. 1996).

against the suspect, and Appellee was given both. A reasonable person, having been given both of these warnings, would not think that the suspension of an interview means that continuing to talk informally to the officers will somehow have no consequences.

And Appellee was given three other "right to silence" warnings in conformity with Article 38.22's requirements: that she had a right (1) to remain silent, (2) to not make any statement at all, and (3) to terminate the interview at any time. A reasonable person having been given these warnings would know that he would not have to speak, even informally, to police officers.

The balance of factors, including those in *Bible* and those added by the court of appeals, weighs heavily in favor of construing the first and second recordings as being part of the same oral interrogation. That conclusion is almost dictated by the mere the fact that the questioning in the car began on the heels of the questioning at the station house. Add to that the fact that the sessions were essentially about the same offense and conducted by the same people.

In its findings, the trial court suggested that it balanced the factors based partly on demeanor, but this is not an issue that turns on demeanor. This issue turns on what a reasonable person would think given the conduct of the detectives; it is an application-of-law-to-fact question subject to *de novo* review. As the court of appeals observed, Appellee made comments in the second recording that suggested her awareness that her statements were going to "fuck up [her] whole life." In the first recording, she indicated she that if she helped the officers find the body she might "go to jail for it." The court of appeals suggested that it could discount those admissions because they were within the trial court's purview to disregard based on demeanor. Even assuming that to be the case, Appellee's comments were nevertheless a good illustration of what a reasonable person would think: that divulging incriminating facts after being told that "any statement you make may be used against you"

would result in those facts being used against the person. And the trial court's conclusion that the detectives were intending to circumvent the protections of *Miranda* are irrelevant to this analysis. Appellee was warned at the outset of initial questioning, and the only issue here is whether, from a reasonable person perspective, those warnings carried over to the questioning that occurred in the car. They did.

Given the totality of the circumstances, I would conclude that the initial recording at the station house and the recording in the car were part of the same oral interrogation under Article 38.22 and *Miranda*. The trial court erred in concluding otherwise, and the court of appeals erred in upholding the trial court's conclusion. Because there was not such a break in the interrogation as to require the giving of new warnings, the warnings given at the start of the first recording were still effective during the questioning that occurred in the detectives' car. We should therefore reverse the judgment of the court of appeals with respect to its holding that affirms the trial court's order suppressing the second recording and remand the case to the court of appeals for further proceedings.

Because no one has argued that we should retreat from the continuation holding in *Bible*, and I see no substantial reasons for doing so on our own, I would simply resolve this case under *Bible* and remand to the court of appeals. But if the continued viability or scope of the continuation holding in *Bible* is to be reexamined, I would do so with briefing from the parties.

I respectfully dissent.

Delivered: September 15, 2021

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