No. 11-1042

In the Supreme Court of the United States

CHRIS J. KOKENIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals applied the wrong legal standard in finding harmless the district court's erroneous belief that evidence of petitioner's good faith must come from his own testimony.

2. Whether the district court erred in sentencing petitioner in part on the basis of relevant conduct underlying counts on which he had been acquitted.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is reported at 662 F.3d 919. The memorandum opinion of the district court (Pet. App. 23a-27a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 23, 2011. The petition for a writ of certiorari was filed on February 21, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on eight counts of willfully filing false tax returns, in violation of 26 U.S.C. 7206(1). Petitioner was sentenced to 71 months of imprisonment, to be followed

by one year of supervised release. Judgment 1-3. The court of appeals affirmed. Pet. App. 1a-22a.

1. a. Petitioner was president and a shareholder of two family-owned entities, Delta Oil Corporation and Delta Energy Corporation, which derived revenue from the sale of oil and natural gas and from the sale of working interests in their natural gas drilling projects. Pet. App. 2a-3a; Gov't C.A. Br. 4.

During the time period relevant here (1996-2000), Delta Oil and Delta Energy sold portions of their interests in drilling projects in northern Michigan to Roemer-Swanson Energy Corporation and Whiting Petroleum Corporation. Those sales were memorialized in standard written contracts, entitled "Purchase and Sale Agreements." Pursuant to those contracts, Roemer-Swanson and Whiting Petroleum paid several million dollars to Delta Oil, which then transferred a substantial portion of those funds to Delta Energy. Pet. App. 3a-5a; Gov't C.A. Br. 4-5.

Upon receipt of funds for each transaction, Orlando Mondero, the bookkeeper for Delta Oil and Delta Energy, recorded the transaction as a sale in the accounting records of Delta Energy. At the end of the tax year, Mondero prepared a draft tax return for Delta Energy and showed it to petitioner. Petitioner directed Mondero to prepare a new draft that did not report income from those transactions. After a new draft was prepared removing the income, petitioner signed the tax return and Mondero mailed it to the Internal Revenue Service (IRS). That course of conduct repeated itself after each sale to Roemer-Swanson and Whiting Petroleum. Pet. App. 2a-6a; Gov't C.A. Br. 6-8.

By those means, petitioner underreported Delta Energy's income by more than seven million dollars. Be-

cause Delta Energy was an S corporation (under Subchapter S of Chapter 1 of the Internal Revenue Code), its income is not taxed at the corporate level; the individual shareholders of the corporation must report the income and pay tax on their individual returns. Accordingly, as a result of the manipulation of the transactions with Roemer-Swanson and Whiting Petroleum, petitioner underreported his own income and corresponding tax liability. Gov't C.A. Br. 8 & n.5.

b. Petitioner also directed his staff to pay his personal expenses with company funds. Checks written on the Delta Energy account were used to pay petitioner's real estate tax bills, invoices from a high-end home builder for landscaping and remodeling petitioner's home, and real estate commissions that he owed to that homebuilder. All those personal expenses were falsely recorded on Delta Energy's books as expenses of the company. Claiming personal expenses as business expenses had the effect of reducing Delta Energy's income and, in turn, reducing petitioner's taxable income. Pet. App. 9a-11a; Gov't C.A. Br. 9-10.

2. a. In December 2007, a grand jury returned an indictment charging petitioner with multiple criminal tax offenses. During the ensuing jury trial, petitioner did not dispute that he had told Mondero to reverse the sales transactions involving Roemer-Swanson and Whiting Petroleum or that his personal expenses were deducted as business expenses. Nor did petitioner dispute that false documentation relating to the transactions at issue was provided to the IRS, although he pointed out that the IRS did not receive any of the false documents directly from him. Petitioner challenged Mondero's truthfulness and argued that the government failed to

prove that petitioner committed the offenses willfully. Pet. App. 11a-12a; Gov't C.A. Br. 10-11.

Petitioner sought to adduce testimony from five witnesses concerning primarily the operation of the tax laws and the drilling industry. Petitioner argued that the testimony would establish that he had a good-faith belief that the funds from the transactions at issue were not taxable income but rather could be treated as a liability. The district court precluded or limited the testimony, however, because it found that the testimony "lacked entirely the essential underpinning of what [petitioner] himself believed." Pet. App. 26a. The district court determined that the testimony was not probative of petitioner's state of mind and could confuse and mislead the jury. The district court also refused to give a separate jury instruction on the good-faith defense because it found that petitioner had failed to present any evidence supporting such a defense. *Id.* at 12a-17a; Gov't C.A. Br. 11-13, 17.

In September 2010, after a six-day trial, the jury found petitioner guilty on four counts of willfully filing false income tax returns for Delta Energy and four counts of willfully filing false individual income tax returns, all in violation of 26 U.S.C. 7206(1). The jury found petitioner not guilty on the charges that he had caused false tax returns to be filed on behalf of his two sisters, co-owners of Delta Energy. The district court denied petitioner's motion for a new trial based on the exclusion of evidence offered in support of his good-faith defense. Pet. App. 23a-27a; Gov't C.A. Br. 2-3, 11-13.

b. After including in the total tax loss the loss from the acquitted counts,[1] the final Presentence Investigation Report (PSR) calculated an offense level of 25 and a corresponding Guidelines sentencing range of 57 to 71 months of imprisonment. PSR 6, 13. The district court agreed with that calculation and sentenced petitioner at the high-end of the Guidelines' range: 71 months of imprisonment. Pet. 7; Pet. App. 22a; Gov't C.A. Br. 3, 42-43.

3. The court of appeals affirmed petitioner's convictions and sentence. Pet. App. 1a-22a.

The court of appeals first rejected petitioner's argument that the district court erred by precluding him from offering certain testimony that he claimed supported a good-faith defense. The court determined that the proposed testimony was properly excluded because petitioner failed to connect it to his own state of mind. Pet. App. 12a-17a.

The court of appeals acknowledged that the district court "erred in thinking that evidence of [petitioner's] state of mind had to come from [petitioner's] own testimony." Pet. App. 18a-19a. But the court of appeals deemed that error harmless. It reasoned that (1) petitioner had not offered any admissible evidence of good faith warranting a separate jury instruction on the good-faith defense; and, in any event, (2) the district court's instruction on willfulness "necessarily encompassed" petitioner's good-faith defense. *Id.* at 17a-21a. The court of appeals further determined that "[t]he evidence of [petitioner's] guilt * * * was overwhelming" and

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[1] The tax loss from the counts of conviction was $893,392, and the tax loss from the acquitted counts was $1,752,595. Pet. 7.

that the district court's error thus did not affect petitioner's "substantial rights." *Id.* at 21a-22a.

Invoking binding circuit precedent, the court of appeals also rejected petitioner's argument that the district court's consideration of acquitted conduct in determining his sentence violated his constitutional rights. Pet. App. 22a (citing *United States* v. *Black*, 625 F.3d 386, 394 (7th Cir. 2010), cert. denied, 131 S. Ct. 2932 (2011)).

ARGUMENT

1. Petitioner contends (Pet. 9-16) that the court of appeals erred in finding harmless the district court's erroneous belief that evidence of petitioner's good faith must come from his own testimony because the court of appeals did not explicitly apply the "harmless beyond a reasonable doubt" standard. The court's analysis demonstrates that the error was harmless under any standard: As the court of appeals determined (Pet. App. 19a-21a), petitioner offered no admissible evidence of his good faith. In any event, the district court's jury charge on willfulness adequately permitted consideration of a good-faith defense. Petitioner's fact-specific claim does not warrant further review.

a. The court of appeals deemed erroneous the district court's belief that "evidence of [petitioner's] state of mind had to come from [petitioner's] own testimony." Pet. App. 18a. The court of appeals explained that "[a]lthough a defendant's own testimony might be the best evidence of that defendant's good faith, a defendant can offer evidence of good faith in other ways. For example, circumstantial evidence may tend to show good faith and hearsay statements of the defendant may suggest a defendant's belief." *Id.* at 19a. As the court of appeals

determined, however, "[petitioner's] claim that the district court wouldn't allow him to present evidence of good faith unless he testified is wrong. He simply didn't offer any evidence relevant to his good faith." *Ibid.* In addition, the court held that the jury instructions on willfulness subsumed a good-faith defense, requiring the government to negate good faith beyond a reasonable doubt. See pp. 9-10, *infra*. For those reasons, the court of appeals correctly concluded that the district court's error was harmless. That conclusion warrants no further review.

Petitioner contends (Pet. 10-13) the court of appeals should have considered whether the error was "harmless beyond a reasonable doubt" under *Chapman* v. *California*, 386 U.S. 18, 24 (1967), which applies that test to constitutional errors. The court of appeals, however, did not decline to apply that standard; rather, it stated that "the district court's mis-impression that [petitioner] could not assert good faith unless he himself testified was harmless because it did not affect his 'substantial rights.' Fed. R. Crim. P. 52(a)." Pet. App. 21a. The "substantial rights" standard encompasses the "beyond a reasonable doubt" test when it applies. See *Neder* v. *United States*, 527 U.S. 1, 7 (1999). And the court's conclusion that the record contained no admissible evidence of good faith and provided "overwhelming" proof of guilt readily satisfies the beyond-the-reasonable-doubt standard.[2]

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[2] Petitioner's assertion of a constitutional violation is also doubtful. His claim (Pet. 10) that the district court essentially "required [him] to waive his Fifth Amendment rights" lacks merit. If petitioner's testimony was a means by which he could lay a foundation for his good-faith defense, petitioner's Fifth Amendment rights would not be violated simply because he had to choose between not testifying and laying that

b. Petitioner disagrees with the evidentiary determination of the court of appeals that he had no admissible evidence of good faith. Specifically, petitioner points (Pet. 6-7, 13-16) to the proposed testimony of various witnesses that, *inter alia*, certain funds for oil and gas production do not necessarily constitute taxable income. But none of that testimony analyzed the particular transactions at issue in this case or tied the experts' tax theories in the abstract to petitioner's state of mind. See Pet. App. 12a-16a. Indeed, there was no evidence that petitioner actually believed his conduct was lawful under the tax laws. The mere existence of a theory, without evidence of petitioner's awareness of that theory or of petitioner's belief in the lawfulness of his conduct, does not provide relevant evidence to establish good faith. See, *e.g.*, *United States* v. *Ingredient Tech. Corp.*, 698 F.2d 88, 97 (2d Cir. 1983).[3] In addition, the court of ap-

foundation. See *Williams* v. *Florida*, 399 U.S. 78, 84 (1970) ("That the defendant faces * * * a dilemma demanding a choice between complete silence and presenting a defense has never been thought an invasion of the privilege against compelled self-incrimination."). And here, since petitioner had no admissible evidence of good faith, the district court's requirement that he testify in order to present a good-faith defense did not have the effect of barring an otherwise valid theory of defense.

[3] In *Ingredient Tech. Corp.*, the Second Circuit affirmed the district court's exclusion of defense expert testimony designed to negate willfulness by establishing the lack of clarity on the relevant tax issue. 698 F.2d at 96-97. In doing so, the Second Circuit distinguished the Fifth Circuit's decision in *United States* v. *Garber*, 607 F.2d 92 (1979), which had permitted such testimony, on the ground that unlike in *Garber*, "there was no evidence that [defendant] or anyone else at [the company] genuinely thought that what they were doing was lawful and proper." 698 F.2d at 97. This case is distinguishable from *Garber* on the same ground: petitioner here failed to proffer any evidence that he personally thought his tax reporting was lawful.

peals determined that petitioner's pool-of-capital tax theory, even if admitted and accepted, "would not have precluded his convictions," because the theory did not offer "any explanation as to how claiming his personal expenses as business expenses could have comported with good faith." Pet. App. 19a-20a. The court of appeals thus correctly found no abuse of discretion in the district court's exclusion of the proposed testimony as irrelevant under Federal Rule of Evidence 402, and as confusing and misleading under Federal Rule of Evidence 403. Pet. App. 12a-17a; Gov't C.A. Br. 18-31. Those factbound determinations do not warrant further review.[4]

c. Petitioner does not appear to challenge the district court's refusal to provide a separate jury instruction on petitioner's good-faith defense. See Pet. 10. In any event, as the court of appeals held (Pet. App. 20a-21a), the existing jury charge already "necessarily encompassed" petitioner's requested good-faith instruction. Petitioner's offenses of conviction required that he acted "willfully" in filing false income tax returns. 26 U.S.C. 7206(1). In *Cheek* v. *United States*, 498 U.S. 192 (1991), this Court held that "[w]illfulness * * * in criminal tax cases[] requires the Government to prove that the law imposed a duty on the defendant, that the defendant knew of this duty, and that he voluntarily and intentionally violated that duty." *Id.* at 201. The Court further explained that "carrying this burden requires negating a defendant's claim of ignorance of the law or a claim that because of a misunderstanding of the law,

[4] As the court of appeals noted, the district court left the door open for petitioner to offer testimony from one of his experts (Timothy Brock) in order to "tee up" his ability to assert a good-faith defense. But petitioner did not call Brock to testify. Pet. App. 15a-16a.

he had a good-faith belief that he was not violating any of the provisions of the tax laws." *Id.* at 202. See also *United States* v. *Pomponio*, 429 U.S. 10, 12 (1976) (per curiam) (stating in the context of a criminal tax case that "willfulness * * * connotes a voluntary, intentional violation of a known legal duty").

Here, the jury was instructed that the willfulness element required a finding that petitioner voluntarily and intentionally violated a known legal duty not to prepare or file materially false or fraudulent tax returns. Pet. App. 20a-21a. That instruction precluded conviction if the jury found that petitioner acted based on a good-faith misunderstanding of the law, because "one cannot be aware that the law imposes a duty upon him and yet be ignorant of it, misunderstand the law, or believe that the duty does not exist." *Cheek*, 498 U.S. at 202. As this Court has explained, where "[t]he trial judge * * * adequately instructed the jury on willfulness," "[a]n additional instruction on good faith was unnecessary." *Pomponio*, 429 U.S. at 13.

Petitioner suggests (Pet. 10) that the district court's refusal to allow him to argue good faith "might just as well have precluded [him] from arguing lack of willfulness." But he cites nothing to indicate that the court prohibited him from contesting the willfulness element of the offense. Nor does he contest that the jury had to find willfulness beyond a reasonable doubt in order to convict. As with his good-faith claim, petitioner's challenge fails because of lack of admissible evidentiary support for his theory.[5]

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[5] In accordance with *Pomponio* and *Cheek*, all the courts of appeals, with the lone exception of the Tenth Circuit, have held that it is not reversible error for a district court to refuse to give a separate instruction on good faith if the other instructions adequately convey the requisite

2. Petitioner contends (Pet. 17-24) that the district court violated his Sixth Amendment rights by sentencing him in part based on conduct underlying counts on which he had been acquitted. That contention does not warrant further review.

a. The district court did not err in considering acquitted conduct in imposing sentence. In *United States* v. *Watts*, 519 U.S. 148 (1997) (per curiam), this Court held that "a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence." *Id.* at 157. The Court noted that "under the pre-Guidelines sentencing regime, it was 'well established that a sen-

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mens rea to establish willfulness. See *United States* v. *Nivica*, 887 F.2d 1110, 1124 (1st Cir. 1989), cert. denied, 494 U.S. 1005 (1990); *United States* v. *Evangelista*, 122 F.3d 112, 118 (2d Cir. 1997), cert. denied, 522 U.S. 1114 (1998); *United States* v. *Gross*, 961 F.2d 1097, 1103 (3d Cir.), cert. denied, 506 U.S. 965 (1992); *United States* v. *Mancuso*, 42 F.3d 836, 847 (4th Cir. 1994); *United States* v. *Storm*, 36 F.3d 1289, 1294 (5th Cir. 1994), cert. denied, 514 U.S. 1084 (1995); *United States* v. *Sassak*, 881 F.2d 276, 280 (6th Cir. 1989); *United States* v. *Verkuilen*, 690 F.2d 648, 655-656 (7th Cir. 1982); *United States* v. *Ervasti*, 201 F.3d 1029, 1041 (8th Cir. 2000); *United States* v. *Dorotich*, 900 F.2d 192, 193-194 (9th Cir. 1990); *United States* v. *Walker*, 26 F.3d 108, 110 (11th Cir. 1994); *United States* v. *Gambler*, 662 F.2d 834, 837 (D.C. Cir. 1981); but see *United States* v. *Harting*, 879 F.2d 765, 770 (10th Cir. 1989).

This Court has repeatedly denied review in cases raising that issue. See, *e.g.*, *Bidegary* v. *United States*, 537 U.S. 1171 (2003) (No. 02-621); *Lewis* v. *United States*, 534 U.S. 814 (2001) (No. 00-1605); *Bates* v. *United States*, 520 U.S. 1253 (1997) (No. 96-7731); *Von Hoff* v. *United States*, 520 U.S. 1253 (1997) (No. 96-6518); *Gross* v. *United States*, 506 U.S. 965 (1992) (No. 92-205); *Green* v. *United States*, 474 U.S. 925 (1985) (No. 84-2032). Especially given the absence of any record evidence of good faith (see pp. 8-9, *supra*), there is no reason for a different result here.

tencing judge may take into account facts introduced at trial relating to other charges, even ones of which the defendant has been acquitted,'" *id.* at 152 (citation omitted), and that "[t]he Guidelines did not alter this aspect of the sentencing court's discretion," *ibid.* Although *Watts* specifically addressed a challenge to consideration of acquitted conduct based on double jeopardy principles, its clear import is that sentencing courts may take acquitted conduct into account at sentencing without offending the Constitution. See *id.* at 157.

This Court's decisions in *United States* v. *Booker*, 543 U.S. 220 (2005), and subsequent cases, confirm that a judge may constitutionally base the defendant's sentence, within the statutory maximum, on conduct that was not found by the jury. That is true whether the conduct was not charged at all or whether it formed the basis of charges on which the jury did not find the defendant guilty beyond a reasonable doubt. As the Court explained in *Booker*:

> We have never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range. * * * For when a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant.

Id. at 233 (citations omitted).

This Court reaffirmed in *Cunningham* v. *California*, 549 U.S. 270 (2007), that "there was no disagreement among the Justices" in *Booker* that judicial fact-finding under the Sentencing Guidelines "would not implicate the Sixth Amendment" if the Guidelines were advisory. *Id.* at 285. And in *Rita* v. *United States*, 551 U.S. 338

(2007), the Court again confirmed that its "Sixth Amendment cases do not automatically forbid a sentencing court to take account of factual matters not determined by a jury and to increase the sentence in consequence." *Id.* at 350-353; see *id.* at 354-355 (noting *Booker*'s recognition that fact-finding by federal judges in application of the Guidelines would not implicate the constitutional issues confronted in that case if the Guidelines were not "binding") (quoting *Booker*, 543 U.S. at 233).

In discussing the type of information that the sentencing court could consider under an advisory Guidelines regime, *Booker* made no distinction between acquitted conduct and other relevant conduct. See, *e.g.*, 543 U.S. at 252 (emphasizing the need to consider all relevant conduct to achieve "the sentencing statute's basic aim of ensuring similar sentences for those who have committed similar crimes in similar ways"). To the contrary, after emphasizing the judge's "broad discretion in imposing a sentence within a statutory range," *id.* at 233, *Booker* cited *Watts* for the proposition that "a sentencing judge could rely for sentencing purposes upon a fact that a jury had found *unproved* (beyond a reasonable doubt)," *id.* at 251. As the Court recognized in *Watts*, such consideration is not unfair to a defendant because "consideration of information about the defendant's character and conduct at sentencing does not result in 'punishment' for any offense other than the one of which the defendant was convicted." 519 U.S. at 155 (quoting *Witte* v. *United States*, 515 U.S. 389, 401 (1995)). The rationale of *Watts*—that an acquittal establishes only that certain facts were not proved beyond a reasonable doubt, while facts may be considered at sentencing without satisfying that standard of proof— remains fully valid after *Booker*.

b. As petitioner acknowledges (Pet. 18), there is no conflict among the courts of appeals on this issue. Since *Booker*, every court of appeals with criminal jurisdiction has held that a district court may consider acquitted conduct at sentencing. See *United States* v. *Gobbi*, 471 F.3d 302, 314 (1st Cir. 2006); *United States* v. *Vaughn*, 430 F.3d 518, 525-527 (2d Cir. 2005), cert. denied, 547 U.S. 1060 (2006); *United States* v. *Jimenez*, 513 F.3d 62, 88 (3d Cir.), cert. denied, 553 U.S. 1034 (2008); *United States* v. *Ashworth*, 247 Fed. Appx. 409, 409-411 (4th Cir. 2007) (per curiam), cert. denied, 552 U.S. 1297 (2008); *United States* v. *Farias*, 469 F.3d 393, 399 & n.17 (5th Cir. 2006), cert. denied, 549 U.S. 1272 (2007); *United States* v. *White*, 551 F.3d 381, 386 (6th Cir. 2008) (en banc), cert. denied, 129 S. Ct. 2071 (2009); *United States* v. *Hurn*, 496 F.3d 784, 788 (7th Cir. 2007), cert. denied, 552 U.S. 1295 (2008); *United States* v. *High Elk,* 442 F.3d 622, 626 (8th Cir. 2006); *United States* v. *Mercado*, 474 F.3d 654, 656-658 (9th Cir. 2007), cert. denied, 552 U.S. 1297 (2008); *United States* v. *Magallanez*, 408 F.3d 672, 683-685 (10th Cir.), cert. denied, 546 U.S. 955 (2005); *United States* v. *Duncan*, 400 F.3d 1297, 1304-1305 (11th Cir.), cert. denied, 546 U.S. 940 (2005); *United States* v. *Dorcely*, 454 F.3d 366, 371 (D.C. Cir.), cert. denied, 549 U.S. 1055 (2006).

This Court has repeatedly denied petitions for certiorari raising this issue, including those filed after the Court's decisions in *Rita*, *supra*, and *Gall* v. *United States*, 552 U.S. 38 (2007). See, *e.g.*, *Toepfer* v. *United States*, 555 U.S. 1136 (2009) (No. 08-469); *Morris* v. *United States*, 553 U.S. 1065 (2008) (No. 07-1094); *Freeman* v. *United States*, 552 U.S. 1301 (2008) (No. 07-9368); *Douglas* v. *United States*, 552 U.S. 1314 (2008) (No. 07-8765); *Ashworth* v. *United States*, 552

U.S. 1297 (2008) (No. 07-8076); *Wemmering* v. *United States*, 552 U.S. 1297 (2008) (No. 07-7739); *Smith* v. *United States*, 552 U.S. 1297 (2008) (No. 07-7432); *Mercado* v. *United States*, 552 U.S. 1297 (2008) (No. 07-5810); *Hurn* v. *United States*, 552 U.S. 1295 (2008) (No. 07-605); *Edwards* v. *United States*, 549 U.S. 1283 (2007) (No. 06-8430); *Dorcely* v. *United States*, 549 U.S. 1055 (2006) (No. 06-547); *Lynch* v. *United States*, 549 U.S. 836 (2006) (No. 05-10945); *Armstrong* v. *United States*, 549 U.S. 819 (2006) (No. 05-1548). There is no reason for a different result in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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