IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 17-0454

STATE OF MONTANA,

Plaintiff and Appellee,

v.

CHARLES GEOFFREY SANTORO,

Defendant and Appellant.

OPENING BRIEF OF APPELLANT

On Appeal from the Montana Ninth Judicial District Court,
Toole County, the Honorable James A. Haynes, Presiding

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Issue one: Did Appellant's trial counsel provide ineffective assistance by failing to serve a compulsory subpoena upon a crucial defense witness?

Issue two: Did the District Court illegally order restitution in an amount not recoverable in a civil action by failing to offset prior payments through Appellant's insurance?

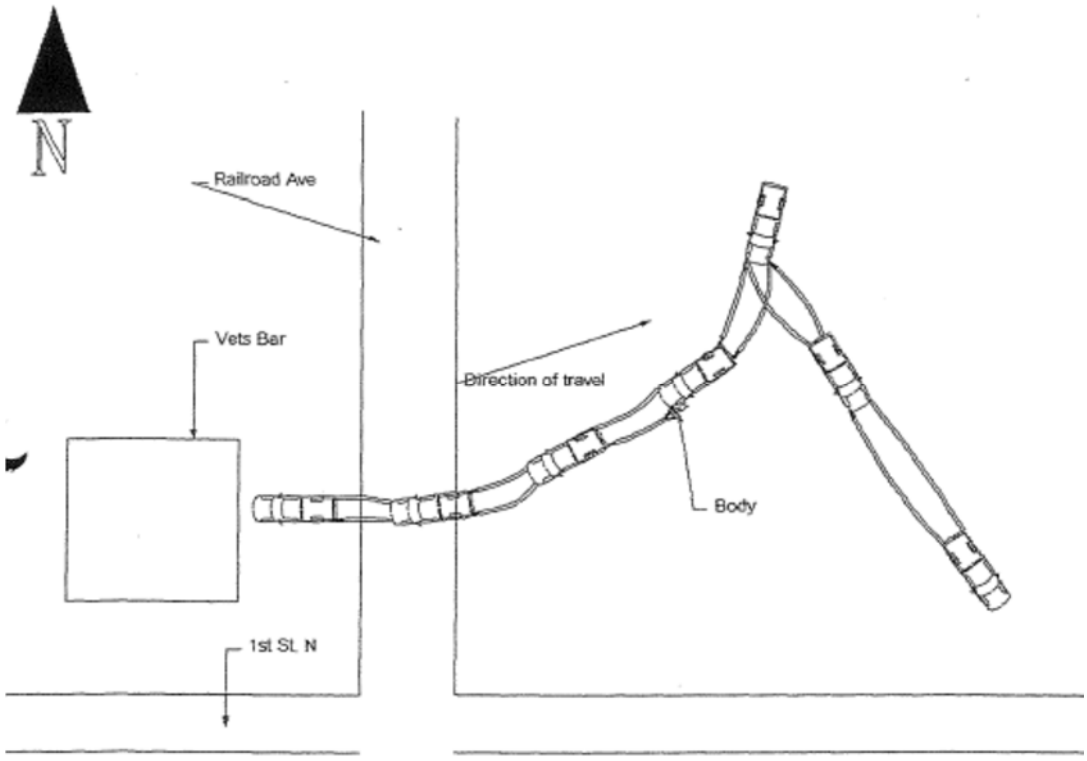
STATEMENT OF THE CASE

Charged with negligent homicide and two counts of criminal endangerment (D.C. Doc. 3), Charles Geoffrey Santoro ("Geoff") had a bona fide justifiable use of force defense. Justin Levi Rowell ("Levi") had attacked Geoff while Geoff was in his truck with the engine running. (Trial at 387, 652.) When Geoff tried to escape by driving away, Levi got swept under the vehicle and died. (Trial at 666.) Tiffany Rowell and Justin Gallup were also injured. (Trial at 281, 359.) At trial, the State carried the burden to prove beyond a reasonable doubt that Geoff did not cause Levi's death in the valid exercise of self-defense. (D.C. Doc. 205, Instructs. 27–31 (instructing on justifiable use of force).)

Bearing acutely on the self-defense claim was a factual dispute concerning the precise mechanism of Levi's death. The defense's position was that, as Geoff drove his truck in reverse to escape Levi attacking him, Levi died from going under the driver's side wheel. (Trial at 781–86.) The State's position was that, after the truck had already knocked Levi to the ground and Levi lay prone there, Geoff put the truck in drive and killed Levi by running him over again in forward motion. (Trial at 754–56, 799–800, 803, 805.)

Montana Highway Patrol Trooper Christopher J. Garza responded to the scene and conducted the crash-scene investigation, including interviewing witnesses and taking measurements of the tire tracks, Levi's body, and other relevant features. (Trial at 288, 339, 630; D.C. Doc. 203, Ex. CC ("Garza Report") (admission denied (Trial at 633)).) In his report, Trooper Garza concluded Levi was run over once, in reverse: "J. Rowell hit the ground and was run over by the driver's side tire of the pickup. J. Rowell came to rest in an empty lot and was later pronounced dead there. After running over J. Rowell, Santoro put the vehicle in drive and left the scene." (Garza Report at 80.) Trooper Garza's report included a chart with the crash scene measurements

(Garza Report at 82–84) and a diagram based on those measurements, exhibited below.



(Garza Report at 81.) As exhibited, the diagram depicts how Levi went under the driver's side wheel of the reversing truck and how Geoff turned away from Levi's body when he put the truck in drive. Trooper Garza, interviewed pretrial, explained his report reflected "what the evidence at the scene told us." (D.C. Doc. 108, Ex. W.) "I can't speak to what the witness thought, all I know is when I arrived on the scene that that's where the body was at and that's where the tracks were at. So

when we did total station and I measured out my scene that is what I measured." (D.C. Doc. 108, Ex. W.)

Although the State did not remove Trooper Garza from its list of potential witnesses (D.C. Docs. 3, 115 162), the State gave substantial indications before trial that it would not call Trooper Garza to testify. Two months in advance of trial, the clerk of court issued the State's witness subpoenas. The State subpoenaed nearly 40 witnesses but did not subpoena Trooper Garza. (D.C. Docs. 155, 173.) The State had not included Trooper Garza in its prior subpoenas either. (D.C. Docs. 75, 76, 103, 106.) Also, in pretrial motions, the State eschewed Trooper Garza's report and instead alleged Geoff drove over Levi in forward motion. (D.C. Doc. 107 at 6–7, 12.) Geoff relied on Trooper Garza's report and pretrial interview to rebut that allegation. (D.C. Doc. 108 at 10–11.)

Eleven days before trial, defense counsel had the clerk of court issue the defense's subpoenas. The subpoenas included one for Trooper Garza, as well as many for witnesses that, unlike Trooper Garza, the State had already subpoenaed. (D.C. Doc. 179.) But when the defense's investigator tried to serve Trooper Garza, the defense learned Trooper

Garza had moved to Washington State. Despite being told he was in Washington State, the defense was "given no address, no way to get in touch with him." (Trial at 642.)

One way to get in touch with Trooper Garza would have been to contact the State, which had Trooper Garza's contact information. As the prosecutor explained, "Trooper Garza was very easy to find, very easy to find. We've had contact with him. Nobody asked us. He's at the same number we've always had, and Montana Highway Patrol told us where he was." (Trial at 645.) But defense counsel "never once contacted" the State regarding Trooper Garza. (Trial at 645.) And defense counsel did not pursue an out-of-state witness subpoena for Trooper Garza. (Trial at 639–40.)

At trial, when the State called only witnesses it had subpoenaed, defense counsel was not prepared to call Trooper Garza for the defense. Defense counsel had "suspected" that because "Trooper Garza was actually on the state's witness list . . . , they might be able to get him to be here and he would be here." (Trial at 640.) But defense counsel had, again, not contacted the State to verify whether his supposition was accurate. (Trial at 645.)

The night the State rested its case, the defense finally contacted Trooper Garza. (Trial at 642.) The defense "tried to get him to come" from Washington State to the Shelby courthouse for trial the next day. (Trial at 639.) But the defense couldn't "compel him to come across state line here by a Montana subpoena, and he declined to come, and he indicated that he would not be available even by telephone . . . because he works [a] seven-to-seven shift over there . . . ." (Trial at 639.) Defense counsel did not contact the State or the District Court about a continuance to secure Trooper Garza's testimony. (Trial at 645–46.)

Instead, the next morning, defense counsel called to the stand Sergeant Kurkowski of the Toole County Sheriff's Office. (Trial at 620.) Sergeant Kurkowski had worked on the case, and he testified that he recognized Trooper Garza's report from it having been shared with him. (Trial at 630, 632.) But he did not and could not testify as to the Highway Patrol's policies with such reports. (*See* Trial at 629–32.)

When defense counsel moved to introduce the report through Sergeant Kurkowski's testimony, the State objected because the report was hearsay. (Trial at 632–33.) Defense counsel argued the report could come in through the business records exception under Mont. R.

Evid. 803(6) or the residual hearsay exception under Mont. R. Evid. 803(24). (Trial at 632.) Defense counsel argued that Trooper Garza was not available and recounted the story behind his absence and defense counsel's inactions. (Trial at 638–40, 642–44.)

The District Court rejected the applicability of the invoked hearsay exceptions. "It's well known to those of us that have practiced criminal law that those reports do not come in as an exception to the hearsay rule." (Trial at 641.) The District Court further noted that the residual exception rarely applies, and, in this case, the circumstances did not guarantee the trustworthiness of the report without cross-examining Trooper Garza. (Trial at 641–42.)

Regarding defense counsel's claim that Trooper Garza was unavailable, the District Court noted that defense counsel did not "even come close to even establishing he's unavailable." (Trial at 641.) The court continued:

> In terms of your trial preparation, who you subpoena, how you subpoena them, how you tell them they're still under subpoena, that's all your business.
>
> In terms of your investigator, . . . whether he got hold of Washington Highway Patrolman Garza last night, last week, two months ago, two years ago, that is how you went about preparing for this case, and that's your business. I'm not interested in having [the defense investigator] get on the

> stand and tell me that he had a conversation and he concluded last night that Highway Patrolman Garza was unavailable.
>
> From the Court's perspective, [Trooper Garza is] a public employee. He's easy to find. It's easy even, in fact, to get out-of-state subpoenas issued through out-of-state courts.
>
> So, for whatever reasons, Highway Patrolman Garza is not here. Whatever reason he's absent is not something the Court is going to try to resolve now.
>
> Further, I tend to look at it as a surprise move that this concern about representative Garza's absence somehow came up at the last minute, really, in the middle of trial, last night, and you want to basically justify his absence through one of your own investigators versus having called the other attorney and said, You know, I've got a problem here. We might need a continuance or something to solve the problem. I can't find Washington Highway Patrolman Garza, a public employee, who seems like he should be able to be found. Can you help me, use the resources of the Montana attorney general's office, help me find someone in our sister state of Washington?
>
> So I really think it's a molehill out of an anthill. It's a small thing. But he's not unavailable.

(Trial at 645–46.) Without Trooper Garza's testimony or report, Geoff's defense introduced no forensic evidence to support its position that Geoff ran over Levi only in reverse. (*See* Trial at 543–672.)

In closing arguments, the parties contested how Levi died. Going first, the State argued Geoff ran over Levi both in reverse and going forward. (Trial at 754–56.) The defense countered that Levi was run over just once, in reverse. The defense's argument, however, relied

wholly on defense counsel's own extrapolations from pictures of the crash scene. (Trial at 775, 782, 786.)

In rebuttal, the prosecutor attacked the defense's argument as a "fantasy that was just projected to you." (Trial at 800.) The prosecutor posited that with the defense's theory, "the defense wants you confused about things that aren't confusing at all, at all." (Trial at 803.) The prosecutor told the jury that Levi was run over twice and that the defense's depiction of the crash scene to the contrary was "not true." (Trial at 799.) The prosecutor warned the jury not to "let the defense's theories confuse you, because that's all they have, is confusion." (Trial at 800.) And the prosecutor laid out the factual dispute's significance: "Whatever excuse he's given for going backward, he's got no reasonable or rational explanation for why he went forward." (Trial at 805.)

Without the defense presenting any evidence directly supporting its theory and rebutting the State's, the jury convicted on all counts. (Trial at 820.)

Defense counsel subsequently moved for a new trial. (D.C. Doc. 209.) Citing no legal authority, defense counsel argued the State abdicated its "duty" to call Trooper Garza to testify. (D.C. Doc. 209 at

2.) The District Court rejected the claim because the State has no such duty. (D.C. Doc. 212 at 5.)

Geoff obtained new counsel for his sentencing hearing. (Sentencing at 2.) As part of sentencing, Justin Gallup requested $57,640 in restitution, and Tiffany Rowell (Levi's wife) requested $859,788.37 on behalf of her, her children, and Levi's estate. (D.C. Doc. 213 at 12; D.C. Doc. 296, State's Sentencing Exs. 1, 2.) During cross-examination, both Tiffany and Justin acknowledged they had each already received $25,000 through Geoff's vehicle insurance. (Sentencing at 24–25, 35.)

The State objected to the defense's questions about the payouts from Geoff's insurance. The State cited *State v. Fenner*, 2014 MT 131, 375 Mont. 131, 325 P.3d 691, in which this Court determined a sentencing court should not offset restitution by amounts the victim receives through the victim's own insurance. (Sentencing at 21–22.) Geoff responded that this "case is distinct from that case." (Sentencing at 24.) In *Fenner*, "the victim's insurance company is actually paying out" while in this case "the defendant's insurance actually paid out to the victim." (Sentencing at 23.) Defense counsel continued,

> And I think that circumstance, if we were in a civil case, the victim would not be able to recover the amount that the defendant's insurance company has already paid to her. I don't think she would actually be suffering a pecuniary loss if his insurance company had already paid her, and she wouldn't be able to recover that in a civil action if his insurance company had already paid her, and it would be a civil defense in a civil action.

(Sentencing at 23–24.)

At the end of the hearing, defense counsel focused his arguments on the appropriate term of imprisonment and did not again mention restitution. (Sentencing at 261–69.) In pronouncing its judgment, the District Court summarily imposed the requested restitution amounts without mentioning or offsetting the $50,000 total that Geoff's insurance carrier had already compensated Tiffany and Justin. (Sentencing at 292; D.C. Doc. 299 (attached as App. A) at 3.) Geoff timely appeals. (D.C. Doc. 307.)

STATEMENT OF THE FACTS

Geoff is a U.S. Army combat veteran from Operation Enduring Freedom in Afghanistan. (Trial at 659–60; Sentencing at 48.) After his service, he returned to Montana, working in oil fields. (Trial at 648.) One evening, he and his colleague Richard Potter went to the Veterans of Foreign Wars Club ("Vets' Bar") in Sunburst. (Trial at 649.)

Someone at the bar suggested Geoff was homosexual as he and Richard were talking about how Geoff was good at sucking out oil pits. (Trial at 650.) In turn, Geoff responded immaturely (e.g., "I love pussy"), though it was general and not directed at anyone. (Trial at 274, 304, 650.) He was asked to leave, and he did. (Trial at 651.) On his way out, he commented on how the only veteran in the Vets' Bar was being asked to go. (Trial at 651.) Levi Rowell was sitting at the bar with his wife Tiffany and his friend Justin Gallup. Levi responded by saying Geoff wasn't a veteran. (Trial at 275, 651.)

After Geoff and Richard exited, Geoff threw his beer bottle on the sidewalk in frustration. (Trial at 384, 651, 662.) Geoff went over to his truck. A shotgun lay there from recreational shooting earlier in the day. (Trial at 652.) Geoff put the shotgun away in the back. (Trial at 384–85, 652.) He and Richard got in the truck to leave. Geoff turned the ignition and buckled his seat belt. (Trial at 652; *but see* Trial at 398 (Richard testifying he was not sure whether Geoff fastened his seatbelt).)

From inside the bar, Levi had heard the beer bottle shatter. He mistook the sound as Geoff damaging Levi and Tiffany's vehicle, which

was parked next to Geoff's. (Trial at 275.) Levi was angry and very intoxicated. He had drunk a six pack before he got to the bar, then drank more beers and shots at the bar.[1] (Trial at 268, 343.) He got up to pursue Geoff. Tiffany and Justin stopped him at the door. (Trial at 276, 287–290, 307, 343, 353.) But Levi persisted, and they eventually relented, thinking maybe Geoff had already driven off. (Trial at 277, 307, 353.)

When Levi exited, Geoff was in his truck with the engine running. (Trial at 277, 280.) Levi went toward the truck, yelling. (Trial at 355–56.) Accounts conflict about whether Geoff's driver's side door was still open or whether it was closed and Levi opened it. (Trial at 277, 398, 652.) Either way, Levi got into the frame of the door, yelling at Geoff, inches away from him. (Trial at 356, 387.) Justin came behind Levi and grabbed ahold of his shoulder, trying to hold him back. (Trial at 356.) Tiffany came behind Justin and told Levi they should go back inside. (Trial at 359.) At that point, it was a tense situation, but

[1] Levi's blood-alcohol content was .239 GM/100ML. (Trial at 513, 517.)

according to Richard in the passenger seat, it was not life or death. (Trial at 387.)

But Geoff and Richard both consistently testified that Levi then did something else: Levi reached into the vehicle and grabbed Geoff by the neck, choking him. (Trial at 387, 398, 652.) No one disputed Geoff and Richard on this point, except to say they couldn't see Levi's hands or couldn't see inside the cab. (Trial at 357–58, 371.)

Things were getting serious. Geoff was fastened to his seat, in an enclosed compartment, with Levi blocking the door. (Trial at 387, 398, 652.) He was trying to get Levi off of his neck but couldn't. (Trial at 388.) Geoff didn't have a weapon. (Trial at 384–85, 652.) He couldn't drive forward because the bar was immediately in front of him. (Trial at 372.) In basic training, Geoff had experienced being choked out. (Trial at 669–70.) He recognized that he was starting to go under from Levi throttling his neck. (Trial at 652–53.) Geoff felt the only way out of the situation was to drive backwards. He pushed out the words "fuck this" and gassed the truck in reverse. (Trial at 667.)

The reversing truck's open door caught Levi, as well as Justin and Tiffany. Levi got pulled back for a distance before falling under the

truck's front-left tire. (Trial at 666.) Justin and Tiffany, more to the outside of the door, were cast aside. (Trial at 281, 359.) Geoff felt a bump as he reversed and turned the steering wheel to the right. (Trial at 666.) Once Geoff reversed the truck parallel with the bar and near a gravel pile, he put the truck in forward gear and turned to the left as he drove away. (Trial at 671–72; Garza Report at 80–81; Def. Ex. Q (admitted Trial at 493).)

At trial, almost as if synchronized, several of the State's witnesses changed their accounts to suggest Geoff hit Levi again in forward motion. Billy Jean Scarbrough, for instance, admitted that a lot of dust obscured what was happening, so she "didn't see, really, where Levi landed or anything." (Trial at 335–36.) She told law enforcement after the incident that she saw the truck buck up as it went forward but did not see it run over Levi. (Trial at 336, 341.) But at trial, she tried to claim she had seen Levi "basically laying in front of the truck, and then Geoff put the truck in drive and drove over him." (Trial at 336.) She then admitted that she did not actually see that, she just thought she saw the truck buck up. (Trial at 341.) "I guess I didn't see the body. I saw the bump up, yes. I guess that would be it." (Trial at 341.)

Similarly, Sandra Owens also tried claiming at trial that she was outside to see Geoff run over Levi twice—once in reverse and once in drive. (Trial at 309–10.) But in her interview with law enforcement shortly after the incident, she had admitted that all she saw when she went outside was Geoff driving away and Justin and Levi on the ground. (Trial at 319–20.)

Tiffany also claimed at trial that she saw Levi in Geoff's headlights before Geoff put the truck in drive and ran over Levi. (Trial at 278.) But Tiffany was interviewed twice by Trooper Garza as part of his crash scene investigation. Trooper Garza's report included several references to Tiffany's account of what happened that night. Yet, the report included no claim from her that she saw Geoff run over Levi in forward motion. (Garza Report 77–80.) Nonetheless, defense counsel failed to impeach Tiffany on her story at trial, saying he would "come back to that in a moment," but never returning to the matter. (Trial at 287.)[2]

[2] Tiffany was the trial's first witness, and defense counsel at the time seemed at a loss about how to impeach a witness. He asked the court how it wanted him to do it. "I want you to follow the rules, sir," the court replied. (Trial at 289.)

As far as the medical examination of Levi's body, it concluded he died from "blunt force injuries of the trunk" but was inconclusive as to whether he was run over once or twice. (Trial at 514, 516.)

Geoff surrendered a couple hours after the incident. He was wound up and drunk and made statements at the station that later made him feel sick and that he regretted (e.g., "I hope the fucker is dead, hope he's fucking dead . . ."). (Trial at 654.) Before law enforcement picked him up, he also stopped at an open field and shot his shotgun in the air three times in frustration about what had happened. (Trial at 392.) At trial, the State dwelled on the statements and the shotgun. (Trial at 241, 244, 245, 384–85, 387, 392, 396, 426, 428–29, 525–26, 531, 557–58, 564, 663–64, 670, 671, 758, 763, 766, 806.)

At the county jail after the incident, Geoff's neck exhibited discoloration. The discoloration was concentrated but exhibited the natural progression of bruising, changing color over time. (Trial at 418–22, 434.) The bruising was deep enough to still be visible eleven days after the incident. (Trial at 422.)

Trooper Garza and the Montana Highway Patrol responded to the Vets' Bar shortly after the incident, marking the tire tracks and taking

measurements. (Trial at 466.) Instead of relying on those measurements and the Highway Patrol's work at trial, however, the State relied on the aforementioned eyewitness accounts and photos of the scene. (Trial at 494.) Without Trooper Garza's testimony, defense counsel countered the State's argument that Levi was run over in forward motion exclusively through defense counsel's own interpretation of the crash scene photos. (Trial at 775, 782, 786.)

STANDARDS OF REVIEW

Ineffective assistance of counsel is a mixed question of law and fact that this Court decides de novo. *State v. Weber*, 2016 MT 138, ¶ 11, 383 Mont. 506, 373 P.3d 26.

A criminal sentence is "defined and constrained by statute," *State v. Ruiz*, 2005 MT 117, ¶ 12, 327 Mont. 109, 112 P.3d 1001, and reviewed for legality, *State v. Burch*, 2008 MT 118, ¶ 12, 342 Mont. 499, 182 P.3d 66. Because a "sentence is not legal if it does not fall within statutory parameters," a criminal restitution order is not legal to the extent it exceeds the parameters of Montana's criminal restitution statutes. *State v. Coluccio*, 2009 MT 273, ¶ 34, 352 Mont. 122, 214 P.3d 1282, *partially overruled on other grounds by State v. Kirn*, 2012 MT 69, ¶ 8 n.

1, 364 Mont. 356, 274 P.3d 746. Whether a statute authorizes a particular sentence is a question of law reviewed de novo. *State v. Seals*, 2007 MT 71, ¶ 7, 336 Mont. 416, 156 P.3d 15. This Court reviews whether a sentence "is illegal or exceeds statutory mandates[] even if no objection is made at the time of sentencing." *State v. Lenihan*, 184 Mont. 338, 343, 602 P.2d 997, 1000 (1979).

SUMMARY OF ARGUMENT

The State bore a heavy burden. It had to prove beyond a reasonable doubt that Geoff did not reasonably believe that to avoid substantial bodily injury he needed to perform the conduct that caused Levi's death. Under that standard, it was essential to pinpoint the specific conduct that killed Levi. Defense counsel failed to give the jury crucial evidence supporting the defense's position on that matter.

The State presented evolving witness accounts that Geoff caused Levi's death by running him over a second time, in forward motion, while Levi was already incapacitated and prone on the ground. If that was true, Geoff's self-defense claim was toast. But it was not true. Trooper Garza conducted the official Montana Highway Patrol crash-scene investigation and concluded Levi was run over just once, in

reverse, as Geoff sought to escape the confrontation. "That's what the evidence at the scene told us." (D.C. Doc. 108, Ex. W.)

Yet defense counsel failed to get Trooper Garza's conclusion to the jury. The proper way to introduce this forensic evidence would have been through having Trooper Garza testify. That would have merely required serving a compulsory subpoena. But defense counsel failed to complete that basic matter of trial preparation. And once having failed to properly prepare for trial, there was no mitigating the harm. Defense counsel neither requested a continuance to secure Trooper Garza's testimony nor presented adequate grounds to admit the crash-scene investigation report without Trooper Garza's testimony.

Without Trooper Garza's testimony, Geoff was deprived of an effective defense. Rather than relying on compelling forensic evidence, defense counsel grounded the defense's argument solely on defense counsel's own personal interpretation of ambiguous crash-scene photos. With only the State introducing evidence directly supporting its position, it is no wonder the jury convicted.

Had the forensic evidence been presented, there is a reasonable probability the jury would have deliberated and acquitted (or at least

hung) upon the question of Geoff's justification for reversing his truck away from Levi strangling him. Instead, the jury deliberated upon a foregone conclusion: Geoff's lack of justification for driving forward over an already incapacitated Levi. Whereas Geoff would have had a strong defense if his counsel would have gotten all the evidence to the jury, his counsel's deficient performance deprived him of an effective defense. This ineffective assistance of counsel requires a new homicide trial.[3]

The Court should also remand for the District Court to offset its restitution award by $50,000. Criminal restitution is limited to losses recoverable in a civil action. In a civil action, Tiffany and Justin would not be able to double recover $25,000 in damages that each had already recovered through Geoff's automobile insurance. As other courts have held, a payment from a defendant's insurance carrier to a victim differs from a payment made by a victim's insurance carrier. The former requires an offset in a restitution award whereas the latter does not. By failing to offset the restitution award by funds the injured parties

[3] Geoff does not challenge the criminal endangerment convictions. The prejudicial effect that defense counsel's deficient performance had upon the negligent homicide charge is clear. The effect upon the criminal endangerment charges is less clear.

already received through Geoff's insurance, the District Court exceeded statutory parameters.

ARGUMENT

I. Trial Counsel Provided Ineffective Assistance by Failing to Secure Trooper Garza's Testimony.

The accused has a constitutional right to the effective assistance of counsel. S*trickland v. Washington*, 466 U.S. 668, 686 (1984) (citing U.S. Const. amends. VI, XIV); *Weber*, ¶ 21 (citing Mont. Const. art. II, § 24). The right is violated when counsel provides (1) deficient performance that (2) prejudices the defense. S*trickland*, 466 U.S. at 687; *Weber*, ¶ 21. The ultimate focus of this inquiry "must be on the fundamental fairness of the proceeding whose result is being challenged." *Strickland*, 466 U.S. at 696. This Court reviews ineffective assistance claims on direct appeal when either the record establishes the reasons for counsel's performance, or counsel's actions or inactions lack plausible justification. *Weber*, ¶ 22.

A. No plausible justification exists for defense counsel's deficient trial preparation and failure to serve a compulsory subpoena on Trooper Garza.

Counsel's performance is judged against an objective standard of reasonableness. *Strickland*, 466 U.S. at 688. There is a presumption that counsel's strategic decisions are reasonable. *Strickland*, 466 U.S.

at 689. Acts or omissions that cannot be deemed strategic, on the other hand, do not receive a presumption of reasonableness. *Jones v. Calloway*, 842 F.3d 454, 464 (7th Cir. 2016); *Young v. Washington* 747 F.Supp.2d 1213, 1218 (W.D. Wash. 2010); *see Strickland*, 466 U.S. at 689 (equating reasonable assistance with strategic assistance).

"As a general matter, a defense attorney's failure to present a material exculpatory witness of which he is aware qualifies as deficient performance." *Jones*, 842 F.3d at 464. For instance, in *Weber*, ¶¶ 25, 30, this Court reversed because counsel failed to effectively introduce otherwise admissible evidence that was important to the defense's trial strategy. Sister courts have also found deficient performance and reversed in such circumstances. *See Jones*, 842 F.3d at 466 (finding ineffective assistance where counsel did not present the testimony of a co-defendant who admitted to the crime with which the defendant was charged); *Jacobs v. Horn*, 395 F.3d 92, 104 (3d Cir. 2005) (concluding counsel was ineffective for "failing to investigate and discover evidence to support the defense he pursued"); *New Jersey v. Pierre*, 127 A.3d 1260, 1273, 1276–77 (N.J. 2015) (concluding the defendant received ineffective assistance when counsel declined to pursue or present

evidence that was consistent with the alibi defense); *Michigan v. Armstrong*, 806 N.W.2d 676, 681–82 (Mich. 2011) (finding ineffective assistance where counsel failed to secure the admission of important impeachment records because he did not lay the proper foundation).

Here, a necessary component of Geoff's self-defense trial strategy was to establish that he caused Levi's death through conduct that he reasonably believed was necessary to avoid his own substantial injury. Section 45-3-102, MCA (defining justifiable use of force); *see* § 45-2-201, MCA (stating the general requirement of a causal relationship between conduct and result). The defense thus argued that (1) Geoff reasonably thought it was necessary to drive in reverse to escape the substantial danger of Levi choking him unconsciousness, and (2) Levi was killed in the course of that justified conduct.

The State sought to undermine the self-defense claim by severing Geoff's plausibly justified actions from the actual cause of Levi's death. The State's argument was that Geoff, after reversing, killed Levi by running him over again in forward motion while Levi was already prone on the ground. A jury would not conclude Geoff was reasonable to believe that driving forward over Levi at that point was necessary for

self-defense. As the prosecutor put it, "Whatever excuse he's given for going backward, he's got no reasonable or rational explanation for why he went forward." (Trial at 805.)

In this context, defense counsel's failure to secure Trooper Garza's testimony fell below an objective standard of reasonableness. Defense counsel failed "to present a material exculpatory witness of which he [was] aware." *Jones*, 842 F.3d at 464. The record on this matter is extensive, shows that the failure was not a strategic decision, and rules out any plausible justification for the deficient performance.

The records show that defense counsel was aware of Trooper Garza's importance to this case. Trooper Garza was at the center of the case from the beginning. Shortly after the incident at the Vets' Bar, Trooper Garza arrived at the scene, investigated, interviewed witnesses, took measurements, drew conclusions, and filed the crash-scene investigation report. (Garza Report.) Defense counsel knew all of this. Defense counsel had Trooper Garza's report and had the defense's investigator interview Trooper Garza before trial. (Trial at 633; D.C. Doc. 108, Ex. W.) Defense counsel got an in-state subpoena for Trooper Garza. (D.C. Doc. 179.) When the State in pretrial motions previewed

its claim that Geoff ran over Levi as he drove forward, defense counsel relied on Trooper Garza's report and pretrial interview testimony to rebut the allegation. (D.C. Docs. 107 at 6–7, 12, 108 at 10–11.)

Trooper Garza was an exculpatory witness for the defense. His investigation concluded that Levi fell under the front-left tire of Geoff's truck as the truck reversed. Geoff then "put the vehicle in drive and left the scene." (Garza Report at 80.) Although the report recounted Billy Jean Scarbrough's statement to police that she saw the truck buck up after it started in forward motion, Trooper Garza did not attribute the bump to Geoff running over Levi.[4] (Garza Report at 80.) In fact, after plotting out the crash scene's coordinates, Trooper Garza's diagram of the incident shows Geoff's truck turning away from Levi's body when driving in forward motion. (Garza Report at 81 (supra pg. 3).) As Trooper Garza matter-of-factly put it in a pretrial interview, his conclusion was "what the evidence at the scene told us." "[W]hen I arrived on the scene that that's where the body was at and that's where

[4] The bump Billy Jean reported was likely due to the truck traveling through a gravel pile. (Trial at 782.)

the tracks were at. So when we did total station and I measured out my scene that is what I measured." (D.C. Doc. 108, Ex. W.)

Trooper Garza's conclusion on this matter would have been material, admissible, and compelling. Trooper Garza had personal knowledge of what the crash scene looked like. As a highway patrolman trained in how to investigate crashes, he would have been qualified to offer an expert opinion about what the evidence at the scene said about the incident. *See State v. Sharbono*, 175 Mont. 373, 382–83, 563 P.2d 61, 67 (1977) (concluding an officer who conducted the crash-scene investigation was qualified to offer an opinion about how the crash occurred).

The record reveals that defense counsel failed to present Trooper Garza's testimony to the jury because counsel failed to perform a basic function of trial preparation: Serving a compulsory subpoena. That defense counsel will do what is necessary to serve a compulsory subpoena upon a favorable, material witness is an assumed part of effective representation. Indeed, in cases in which courts have determined counsel was ineffective for failing to present a witness, there is never a question as to whether defense counsel could have

secured the witness's testimony through serving a subpoena. *See, e.g.*, *Jones*, 842 F.3d at 465; *Pierre*, 127 A.3d at 583. That's because serving a subpoena that will compel a witness to testify is not complicated. It is a matter of simply (1) locating the witness and (2) procuring a subpoena from a court with jurisdiction. But in this case, the record reveals that counsel did not locate Trooper Garza or pursue a compulsory subpoena with due diligence.

Upon learning Trooper Garza was in Washington State but without being told where, defense counsel did not respond competently. Defense counsel "suspected" the State had Trooper Garza's contact info because he "suspected" the State would be able to offer his testimony despite not subpoenaing him. (Trial at 640.) And the State did in fact have Trooper Garza's contact info. But defense counsel did not reach out to the State. (Trial at 644–45.) The State and the District Court were accurate in their dual observations that Trooper Garza was "easy to find." (Trial at 645, 646.) Defense counsel simply failed to do what was necessary to find him.

Defense counsel likewise did not pursue a subpoena for Trooper Garza from a court with jurisdiction. While defense counsel obtained a

subpoena for Trooper Garza from the Ninth Judicial District Clerk of Court, such subpoenas only work for in-state witnesses. *See* § 46-15-101(1), MCA. When defense counsel learned upon first attempting to serve Trooper Garza that he was in Washington State, defense counsel should have become aware that the defense's initial subpoena, even if served, would no longer compel Trooper Garza to testify.

To compel Trooper Garza to testify, the defense would need to pursue a subpoena for a material, out-of-state witness. Montana Code Annotated § 46-15-113(1) authorizes a Montana court to issue a certificate for the appearance of a material, out-of-state witness if the witness's state has laws providing that its inhabitants may be subpoenaed for out-of-state proceedings. In Washington State, Trooper Garza met these requirements. He was a material witness, and Washington law authorizes Washington courts to compel Washingtonians to attend Montana proceedings. *See* Wash. Rev. Code Ann. § 10.55.060. As the District Court commented, "It's easy even, in fact, to get out-of-state subpoenas issued through out-of-state courts." (Trial at 645–46.) Further, there is no indication that Trooper Garza

would have disobeyed such a subpoena. Defense counsel simply failed to locate Trooper Garza and pursue a compulsory subpoena.

Finally, the damage from the failure to serve Trooper Garza with a compulsory subpoena went unmitigated. The District Court observed that defense counsel could have sought a continuance in order to secure Trooper Garza's testimony. (Trial at 645–46.) Defense counsel never sought such a continuance. (Trial at 645–46.)

Defense counsel also did not lay plausible grounds for admitting Trooper Garza's report without Trooper Garza's testimony. Defense counsel attempted to argue the business records exception. (Trial at 632.) A requirement of the business records exception is to present the testimony of a custodian or other qualified witness to speak about the applicable business's record keeping practices. Mont. R. Evid. 803(6). Defense counsel attempted to introduce the report through a Toole County sergeant who was not a part of the Montana Highway Patrol. (Trial at 629–32.) Defense counsel thus failed to present the testimony of a witness qualified to speak about the Montana Highway Patrol's record keeping practices. Defense counsel also invoked Mont R. Evid. 803(24)'s residual hearsay exception. Counsel's entire basis for that

exception was that Trooper Garza was unavailable. Yet without a subpoena having been served, the District Court correctly observed that Trooper Garza was "not unavailable" under the rules of evidence.[5] *See* Mont. R. Evid. 804 (defining unavailability).

In *Weber*, this Court determined that the failure to present exculpatory evidence qualified as deficient performance for which there was no plausible justification. The defense's trial strategy in *Weber* was to lower a felony theft charge to a misdemeanor by showing the stolen item (a lab tool) was worth less than $1,500. *Weber*, ¶ 4. A business record showed the tool was worth precisely $1,500 when purchased several years prior, so use had likely depreciated the tool below $1,500 by the time of the offense. *Weber*, ¶ 6. Defense counsel had several plausible paths to get the record admitted. *Weber*, ¶ 24. But defense counsel failed at that task because he had not adequately prepared for trial by learning who authored the record. *Weber*, ¶ 25. Defense counsel also failed to lay a proper foundation for the report's admission

[5] While defense counsel made an unavailability argument and invoked the residual exception in Mont. R. Evid. 803(27), Mont. R. Evid. 803 does not provide hearsay exceptions specifically for unavailable witnesses. Mont R. Evid. 804, on the other hand, does and contains its own residual exception in subsection (b)(5).

even after trying repeatedly at trial. *Weber*, ¶ 24. Trial counsel's performance "reflect[ed] a failure to properly investigate the facts of Weber's case and to prepare for the admission of evidence." *Weber*, ¶ 25. The Court concluded there was no plausible justification for the failure. *Weber*, ¶ 27.

Defense counsel here provided similarly deficient assistance without plausible justification. As in *Weber*, defense counsel here attempted but failed to get crucial evidence admitted at trial. This common fact pattern of attempting but failing to get evidence admitted establishes that the evidence's lack of admission was not a strategic decision. The presumption of reasonableness for strategic decisions accordingly does not attach to counsel's performance in this context. *Jones*, 842 F.3d at 464; *Young*, 747 F.Supp.2d at 1218.

The failure to prepare for trial by serving a compulsory subpoena on Trooper Garza defies plausible justification and was deficient. Just as counsel in *Weber* failed to "prepare for the admission of evidence" by learning the author of an important record, *Weber*, ¶ 25, defense counsel here failed to prepare for the admission of evidence by securing an important witness's testimony. Defense counsel did not contact the

State, did not seek an out-of-state subpoena, and did not seek a continuance. As with the failure in *Weber*, the failure here was deficient and is reviewable on direct appeal.

B. The failure to secure Trooper Garza's testimony undermined the fairness of the trial.

Counsel's errors warrant reversal if there is "reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Strickland*, 466 U.S. at 695. In other words, if the errors "undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. Assessing prejudice thus requires examining counsel's errors in relation to the totality of the evidence adduced at trial. In that context, some errors will have "an isolated, trivial effect," whereas others "will have a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture." *Strickland*, 466 U.S. at 695–96. The latter types of errors require reversal. "Numerous lower courts have found prejudice in cases where attorney error resulted in a significantly skewed 'evidentiary picture,' leaving the defendant with no effective defense." *Young*, 747 F.Supp.2d at 1221 (quoting *Strickland* and citing cases).

The effect of the failure to serve a compulsory subpoena on Trooper Garza skewed this trial's evidentiary picture and left Geoff without an effective defense. At trial, the fact of how Levi was killed represented a fork in the road for the jury. Down the first path, the jury would determine whether Geoff was justified to back up his vehicle in light of evidence that Levi was choking Geoff to the brink of unconsciousness. Down the second path, the jury would determine whether Geoff was justified to run his vehicle over Levi while Levi was incapacitated and prone on the ground. Down the first path, the State would struggle to overcome its heavy burden to show Geoff did not justifiably act in self-defense. Down the second path, the State would have no difficulty meeting that burden. Or, as the State put it, "Whatever excuse he's given for going backward, he's got no reasonable or rational explanation for why he went forward." (Trial at 805.)

Without Trooper Garza's testimony, Geoff was left without an effective defense to prevent the jury from traveling the second path, deciding the case there, and not deliberating upon the other, much closer question. While defense counsel argued Geoff ran Levi over in reverse only, defense counsel had gotten nothing admitted at trial to

directly support his argument. (Trial at 782, 786.) By contrast, to support its argument that Geoff ran over Levi in forward motion, the State introduced testimony from three eyewitness. (Trial at 278, 309, 336.) In closing argument, the State was thus able to hammer the defense. The defense's argument that Levi was run over only in reverse was a "fantasy that was just projected to you," "not true," meant to "confuse you," and unsubstantiated against the testimony of the eyewitnesses. (Trial at 799, 800, 803.)

By contrast, had Trooper Garza testified, there is a reasonable probability the jury would have decided this case by deliberating upon grounds more favorable to the defense and would have concluded the State had not met its heavy burden. Trooper Garza's report and pretrial interview testimony evince that he would have testified that, despite the evolving eyewitness accounts, "what the evidence at the scene told us" was that Levi was run over only as Geoff reversed. (D.C. Doc. 108, Ex. W.) That type of testimony from a person trained in investigating crash scenes is compelling. It would have changed the evidentiary picture, giving the defense substantial support for its argument that Levi was run over only in reverse. The prosecutor could

not reasonably have told the jury that the defense's argument was a fantasy when the jury knew that forensic evidence directly supported the defense's argument.

Defense counsel's failure to secure Trooper Garza's testimony undermined the fundamental fairness of Geoff's homicide trial. The jury deliberated upon a substantially incomplete evidentiary picture. That incomplete picture undermines confidence in the jury's verdict on the homicide charge. With Trooper Garza's testimony, there would have been a reasonable probability of a different outcome. Because Geoff received deficient and prejudicial performance from his trial counsel, this Court should remand for a new negligent homicide trial.

II. When Ordering Restitution, the District Court Illegally Failed to Offset Compensatory Payments Already Made through Geoff's Insurance.

Criminal restitution inhabits a unique space in the law. It is a civil remedy "engraft[ed]" onto criminal proceedings. *State v. Jent*, 2013 MT 93, ¶ 12, 369 Mont. 468, 299 P.3d 332. A "procedural shortcut," if you will. *Jent*, ¶ 12. It permits parties injured by a criminal offense to use the criminal justice system to obtain the relief that would be

available to them by filing a civil action, but without having to file a civil action. *Jent*, ¶ 12.

The law thus entitles injured parties at a criminal sentencing hearing to restitution for "pecuniary loss," but pecuniary loss is defined to include only those "special damages . . . that a person could recover against the offender in a civil action." Section 46-18-243(1)(a), MCA. Because "[r]estitution is not a criminal punishment, but is a civil remedy administered by the courts for the convenience of victims," a court may not order restitution for damages not recoverable in a civil action. *State v. McClelland*, 2015 MT 281, ¶ 10, 381 Mont. 164, 357 P.3d 906. The criminal restitution statutes do not authorize such an award, *see* § 46-18-243(1)(a), and such an award is illegal, *see Coluccio*, ¶ 34.

In a civil action, an injured party is not entitled to unjust enrichment, a windfall, or double recovery. A plaintiff gets "a single recovery for a single injury." *Schuff v. A.T. Klemens & Son*, 2000 MT 357, ¶ 89, 303 Mont. 274, 16 P.3d 1002. That the plaintiff has already received payment is an affirmative defense. Mont. R. Civ. P. 8(c)(1). Indeed, "[a]ny voluntarily partial payment" made before "entry of a

judgment in an action for damages for personal injuries, including death," must be "treated as a credit against such judgment and shall be deductible from the amount of such judgment." Section 26-1-706, MCA. Similarly, "[i]n an action arising from bodily injury or death when the total awarded against all defendants is in excess of $50,000 and the plaintiff will be fully compensated for the plaintiff's damages," a court must reduce the plaintiff's recovery "by any amount paid or payable from a collateral source that does not have a subrogation right." Section 27-1-308(1), MCA. That may include payments made through "automobile accident insurance." Section 27-1-307(1)(b), MCA.

Under the District Court's restitution order, Justin Gallup and Tiffany Rowell each double recover $25,000. Before Geoff's sentencing hearing occurred, Geoff's automobile insurance paid $25,000 to Justin and Tiffany each as partial compensation for their pecuniary losses. (Sentencing at 24, 25, 35.) Because the District Court did not offset these payments in the restitution order (App. A at 3), Justin and Tiffany are set to receive the same $25,000 payments again from Geoff.

The windfalls run afoul of the law. The prior payments by Geoff's insurance provide Geoff a defense against having to make the same

payments again. Mont. R. Civ. P. 8(c)(1). The partial payments act as a "credit" and are "deductible from the amount" that Justin and Tiffany are due and that Geoff must pay going forward. Section 26-1-706. The payments qualify for offset because they are from a "collateral source that does not have a subrogation right." Section 27-1-308(1). Because criminal restitution may be ordered only for losses recoverable in a civil action, § 46-18-243(1)(a), the District Court's criminal restitution order exceeds statutory authority.

Moreover, this case is distinct from *Fenner*, the case the State invoked at the sentencing hearing. (Sentencing at 21–22.) In *Fenner*, this Court correctly determined a defendant "is not entitled to benefit from an offset based on the insurance pay-out *of his victim*." *Fenner*, ¶ 10 (emphasis supplied). The Court reasoned that the "fact that [the injured party] insured himself for medical expenses was due to good fortune and foresight; it should not benefit his attacker rather than himself or his insurance company." *Fenner*, ¶ 12. A defendant accordingly should "not benefit from an offset based on the insurance of the injured party." *Fenner*, ¶ 12.

But as Geoff pointed out at the sentencing hearing, this case does not concern prior payments through the injured party's insurance, it concerns prior payments through the *defendant's* insurance. (Sentencing at 23–24.) That distinction separates prior payments that must be offset in a restitution award from those that need not.

In *Fenner*, this Court favorably cited California caselaw recognizing that payments by an injured party's insurance carrier do not require offset. *Fenner*, ¶ 10 (citing *California v. Hove*, 91 Cal. Rptr. 2d 128 (Cal. App. 4th Dist. 1999)). But California caselaw also distinguishes between those sorts of payments and payments made by a defendant's insurance carrier. The differences between the two are manifest:

> (1) the defendant procured the insurance, and unlike the other third party sources, its payments to the victim are not fortuitous but precisely what the defendant bargained for; (2) the defendant paid premiums to maintain the policy in force; (3) the defendant has a contractual right to have the payments made by his insurance company to the victim, on his behalf; and (4) the defendant's insurance company has no right of indemnity or subrogation against the defendant.

California v. Bernal, 123 Cal. Rptr. 2d 622, 631–32 (Cal. App. 2d Dist. 2002) (discussing and differentiating *Hove*). Other courts reason and hold similarly. For instance, in *Illinois v. Roop*, 658 N.E.2d 469, 470

(Ill. App. 3d Dist. 1995), the court concluded that cases, like *Fenner*, "where recovery came from the victims' insurance" are "inapposite to the instant case where the victim recovered from insurance paid for by the defendant." *See also New York v. Crossley*, 512 N.Y.S.2d 756, 757 (N.Y. Dist. Ct. 1987) (concluding a payment "by defendant's insurance carrier should be offset against the total amount of restitution due this victim").

For similar reasons, *Fenner* is inapposite here. First, whereas in *Fenner* the injured party receiving payments through her own insurance was fortuitous to the defendant, *Fenner*, ¶¶ 10, 12, here, those payments were precisely what Geoff bargained and paid for and were made on Geoff's behalf and through Geoff's insurance. The prior payments thus qualified for offset under § 26-1-706 and provided an affirmative defense under Mont. R. Civ. P. 8(c)(2). Also, whereas in *Fenner* the insurance carrier would have a subrogation right to practically ensure the injured party would not recover twice, *Fenner*, ¶ 12, the insurer carrier here would lack such a subrogation right to prevent double recovery. The payments thus qualified for offset under § 27-1-308(1) because they were from a "collateral source that does not

have a subrogation right." Finally, whereas in *Fenner* the sentencing court ordered restitution only for amounts qualifying as "pecuniary loss," *Fenner*, ¶¶ 12–13, the District Court here ordered restitution for amounts that did not qualify as "pecuniary loss" because they were not recoverable in a civil action. Section 46-18-243(1)(a).

By nonetheless failing to offset the prior payments in this case, the District Court exceeded its authority under § 46-18-243(1)(a). The Court should reverse and remand for the District Court to bring its restitution award into compliance with the law by decreasing it by the amounts the injured parties already recovered through Geoff's insurance.

CONCLUSION

Trial counsel's failure to serve a compulsory subpoena on Trooper Garza left Geoff without an effective defense against the homicide charge. That failure does not satisfy the constitutional promise of effective representation. This Court should remand for a new negligent homicide trial. The Court should also remand for the District Court to correct its restitution award by offsetting prior payments made through Geoff's insurance.

Respectfully submitted this 8th day of November, 2018.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Century Schoolbook text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 8,601, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

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APPENDIX

CERTIFICATE OF SERVICE

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