THE SUPREME COURT OF FLORIDA

CASE NO. 66,120

EUGENE EDWARD MORRIS,
a/k/a MERCURY MORRIS,
a/k/a EUGENE MORRIS,

Petitioner,

vs

THE STATE OF FLORIDA,

Respondent.

_____/

ON APPEAL FROM THE THIRD DISTRICT COURT OF APPEAL, CASE NO. 83-198

REPLY BRIEF OF PETITIONER, EUGENE "MERCURY" MORRIS

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TABLE OF CONTENTS

TABLE OF CITATIONS

EXPLANATION OF SYMBOLS

The record on Appeal will be referred to by the letter "R"; the transcripts of the trial court proceedings will be referred to by the letters "Tr."; Pre-Trial and Trial Exhibits will be referred to by the letters "Ex." and the Appendix to this Brief will be referred to by the Letters "App.".

REPLY ARGUMENT

I.

EUGENE GOTBAUM'S TESTIMONY WAS ERRONEOUSLY EXCLUDED AT TRIAL.

A. Florida Has Unequivocally Adopted The Objective Test For Entrapment.

This Court has unquestionably set forth the test in Florida for entrapment as a matter of law in Cruz v. State, _____ So.2d _____ (Fla. 1985), 10 F.L.W. 161, Case No. 63,451, while recognizing that only a minority of the United States Supreme Court has favored it and rejecting outright any implication that the subjective and objective tests for entrapment are mutually exclusive. Cruz, supra at 162-163. This Court reaffirmed Cruz in Teague v. State, ___ So.2d ___ (Fla. 1985), 10 F.L.W. 351, Case No. 65,315. The State's suggestion, on pages 29-32, that this Court should abandon Cruz and Teague establishes from the onset lack of credibility of the remainder of the State's argument.

B. The State Has Waived Any Right to Argue That A Discovery Violation Precluded Eugene Gotbaum's Testimony.

The now contention of the State, for the first time, asserting a F.R.Cr.P. 3.220 violation (failure to notice the State of witness Gotbaum prior to trial) is ludicrous. First of all, this argument was not presented to the Third District Court of Appeals and should therefore be deemed waived. (See State's Answer Brief in District Court below at pp.28-34.) Florida First National Bank at Key West v. Fryd Construction Corp., 245 So.2d 883 (Fla. 3d DCA 1971). More importantly, the State never requested a continuance at trial or a recess in order to take the deposition of Gotbaum. The prosecutor suggested that he was

prejudiced because he needed to ask "a lot more questions" than he was able to ask during the trial recess, wherein the Judge permitted him to speak in private to witness Gotbaum. [Tr. 1748] The trial court, under similar circumstances, gave the defense the "opportunity" to depose a new witness for the State, who was not listed as part of the State's pretrial pleadings. The original co-defendant Cord (cocaine supplier) pled guilty after the first day of trial. Defense claimed surprise and prejudice, but was afforded the opportunity, commencing at 6:00 p.m. on the night before his testimony, during trial, to obtain the deposition of Cord. [Tr. 1051-56] It is apparent that the State did not wish to receive "equal" treatment from the trial court and was, therefore, satisfied with the exclusion of Gotbaum's testimony on the basis of "hearsay". Additionally, the State fails to advise this Court that the name "Gene" (Gotbaum) was first mentioned by the State's agent/informant, Donaldson, during his deposition on October 6, 1982. [Ex. 265] Possibly, the State did not pursue efforts to locate Gotbaum, due to the sworn deposition testimony of Donaldson, where originally he testified that Gotbaum was a fictitious person and did not exist. [Ex. 265, 267][1] Thus, solely because the State agent lied under oath to deliberately mislead the defense in its effort to identify and locate Gotbaum, the State seeks advantage herein. The trial of this cause commenced on November 1, 1982. The defense obtained the Affidavit of Gotbaum on November 2, 1982.

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[1] Also see Brinson's deposition, dated October 7, 1982 [R. 452-460, wherein he supplied the last name "Gotbaum"; please also see the subsequent continuing deposition of Donaldson, dated 10/14/82 [Ex. 417, 418, 422].

[Tr. 1940] Under the circumstances, the State having through their agent, Donaldson, mislead the defense as to the location and identity of the witness Gotbaum cannot now claim prejudice when the defense locates the witness by its own efforts. Further, the State has waived any right to so argue. Roberts v. State, 370 So.2d 800 (Fla. 2d DCA 1979); Anderson v. State, 314 So.2d 803 (Fla. 3d DCA 1975).

C. Morris Argued In The District Court Below And In His Initial Brief In This Appeal That Gotbaum's Testimony Was Not Inadmissible Hearsay.

The State erroneously contends, on page 8 of its Brief, that Morris did not "...dispute the trial court's conclusion that the testimony (of Gotbaum) was inadmissible hearsay...". In reply to this contention, the Petitioner respectfully refers the Court to pages 18, 26-27, and 37-38 of his initial brief in this appeal and to pages 37-39 of his initial brief filed in the District Court below, wherein he clearly argues that Gotbaum's testimony was not inadmissible hearsay but rather fell within the state of mind exception to the rule against hearsay and, therefore, was admissible. This oversight should eliminate this Court's attention to further "argument" by the State.

D. The State Of Mind of Police Agent Donaldson Was Always An Issue In This Case.

On page 9 of its Brief, the State, in its cavalier attitude, continues to admit the original design to "set up" the Petitioner in a drug deal, and without reservation states "... that neither Donaldson's intent nor his conduct was ever in dispute...".[2] The State failed miserably in attempting to

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[2] Does the state now additionally admit that their agent,

distinguish this case from Spears v. State, 568 S.W. 2d 4923 (Ark. 1978). There is not any distinction between Spears and this case. A plain reading of Spears indicates that the only reason that court held the informant's state of mind was not inadmissible hearsay was because his state of mind was at issue!

> "The conduct of a government informant in connection with the transaction, and the purpose of his conduct and communications are proper matters for examination and inquiry at trial." Spears, supra at 499, emphasis supplied. (Also see U.S. v. Carcaise, ___F.2d ___, 11th Cir., June 24,1985.)

The State's position is absurd. In a criminal prosecution where the penalty is mandatory incarceration for fifteen years, why shouldn't both the trial judge and the jury know that at all times material to the prosecution, the State's design, plan and purpose was to entrap[3] the defendant?

E. Gotbaum's Statement About Donaldson's Plan to Entrap Morris In a Drug Deal Was Relevant To The Subjective Test For Entrapment.

Both the State's argument and the opinion of the District Court below have erroneously concluded that Donaldson's plan to entrap Morris was not disputed (by the State) at any time during the trial. In fact, the State never admitted to the jury or at trial, by stipulation, argument or otherwise, that it always intended or planned to entrap Morris. This magnanimous admission was made for the first time in the State's Answer Brief (District Court, page 33). The prosecutor's opening and closing argument establishes that the State never admitted to the

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[2] (cont'd) Donaldson gave Morris the original sample of cocaine, that was transferred to undercover agent Brinson on the first day of the meetings? [Tr. 1566]

[3] In this brief, the word "entrap" is used interchangeably with the term "set up".

jury, remotely or by implication, that it was the State's plan to entrap Morris through Donaldson. [Tr. 979-1012; 2062-2093] As presented on page 26 of the Initial Brief filed herein, the District Court below recognized that the conduct of police is a material issue raised by the entrapment defense. Surely, conduct in this sense is broad enough to include a "freely admitted" plan to set up the defendant by a State agent/informant. This is certainly so in light of the jury instruction on entrapment, which was given. [App. 1] The jury might very well have returned not guilty verdicts instead of guilty verdicts on the remaining counts, had the State candidly announced to the jury as it does now to this Court that Donaldson, at all times, was an agent of the State and that the State planned to entrap and set up Morris in the criminal activity of "trafficking", rather than, in accordance with the jury instruction, that the State was merely making a "good faith attempt to detect crime" by investigating Morris? The Petitioner vigorously contends that the proper maxim to be applied is set forth in Donahue v. Albertson's, Inc., ____ So.2d _____, 10 F.L.W. 1377, 1378 Fla. 3d DCA, Case No. 84-651, June 14, 1985:

> "Evidence which presents purely collateral issues which would only serve to confuse and mislead the jury is too remote and should be excluded. Atlantic Coast Line Railroad v. Campbell, 104 Fla. 274, 139 So. 886 (1932). The converse of this rule is embodied in the maxim that evidence which assists in making known the truth upon an issue in question should be admitted. See City of Miami Beach v. New Floridian Hotel, Inc., 324 So.2d 715 (Fla. 3d DCA 1976); see also Steiger v. Massachusetts Casualty Insurance Co., 273 So.2d 4 (Fla. 3d DCA 1973) (plaintiff is entitled to present evidence on the facts that are relevant to his theory of the case). Thus, '(t)he test of inadmissibility is lack of relevancy.' Kapchuck v. Orlan, 332 So.2d 671,672 (Fla. 3d DCA 1976)."

Certainly, Judge Wilkie Ferguson, who dissented from the majority opinion in the District Court below, believes that if the jury had heard about the State's design through Donaldson to entrap Morris, the result below might have been different:

> "If all the facts set out in the majority opinion had been heard by the jury, this case probably would not be here or if so, I would not be dissenting. Evidence crucial to the entrapment defense was withheld from the jury for reasons which find no support in case law or any rational construction of the evidentiary rules. If that evidence had been admitted, as it should have been, the jury might have concluded **as I have**, that this was a text-book case of entrapment..." (Bold Emphasis supplied.)
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> Morris v. State, 9 F.L.W. 1239, 1243-44, Fla. 3d DCA, Case No. 83-198, June 5, 1984.

F. This Court Should Rule Under The Objective Test That Morris Was Entrapped As A Matter Of Law.

In Cruz v. State, supra, this Court reviewed the facts surrounding the investigation of defendant, Cruz, and found that Cruz had been entrapped as a matter of law under the objective test for entrapment, since the police had not targeted any specific ongoing criminal activity prior to luring the defendant into its decoy operation. Here, consistent with Judge Ferguson's "text book" conclusion and based upon the record before this Court, this Court can and should also find that Morris was entrapped as a matter of law under the objective test, especially given the State's present "appellate" admission that at all times it had planned to set up or entrap Morris, through its stipulated agent Donaldson whose conduct is "not in dispute". Judge Ferguson, in his dissent, prior to the publication of the Cruz decision, concluded, based upon all the evidence, including Gotbaum's excluded testimony (Affidavit) as reviewed by Judge Ferguson that as a matter of law Morris was entrapped. What

clearer legal reference exists in our jurisprudence than "... a text book case of entrapment"? Thus, it is not necessary to reach the issue concerning State agent Donaldson's plan to set up Morris, as to whether same could or should have been considered during trial rather than prior to trial. However, in the event this Court does wish to hear argument on "set up evidence", as to whether or not same should have been presented to the jury, the Petitioner will respond thereto.

The State asserts that matters relating to the objective test can only be considered "solely by way of pre-trial motion to dismiss" (See State's Brief at pp. 25-27). In the first place, Morris' pre-trial Motion to Dismiss on the ground of entrapment was made on October 1, 1982 [R. 99-104(a)] and heard on October 22, 1982 [Tr. 542-543] while Morris' counsel did not learn about Donaldson's statement until after the motion was heard and could not locate the witness, Gotbaum, who could testify thereto, until the second day of trial, at which time he obtained the Affidavit. [Tr. 1749; Ex. 1177-79] Surely, the State does not seriously contend that the this Court should not consider crucial evidence that the State planned to "set up" Morris, merely because witness was belatedly discovered, as a direct result of the perjury of the State's agent/informant Donaldson during a pretrial deposition, wherein he stated Gotbaum was "fictitious". In any event, this Court has squarely addressed this very issue in Cruz, quoting Sherman v. U.S., infra, where the Court said:

> "The violation of the principles of justice by the entrapment of the unwary into crime should be dealt with by the court no matter by whom or at what stage of the proceedings the facts are brought to its

attention."[4] Cruz, supra, n.2 at 164, emphasis supplied.

Secondly, the trial court, in denying the Motion to Dismiss, ruled entrapment was an affirmative defense, not properly considered on Motion to Dismiss. [Tr. 625] In this regard, it should also be stressed that even after being made aware of Gotbaum's proposed testimony (to set up Morris), the trial judge denied Morris' renewed Motion to Dismiss on the ground of entrapment at the close of all the evidence. [Tr. 1943] Finally, the trial court denied the defendant's Motion for New Trial, wherein Morris specifically reasserted, in paragraph II(W) and (X) [R. 1700-53], the renewed Motions to Dismiss as a matter of law regarding entrapment. Accordingly, all attempts by Morris to have the trial court itself pass on the issue of entrapment as a matter of law, before, during and after trial, were futile. [Tr. 1943]

Finally, the State's attempt to justify the exclusion of evidence of its plan to set up Morris on the ground that this constituted police intent rather than police conduct flies in the face of this Court's decision in Cruz, wherein the Court, in describing the first prong of its objective test, said:

> "The first prong of this test addresses the problem of police 'virtue testing,' that is, police activity seeking to prosecute crime where no such crime exists but for the police activity engendering the crime. As Justice Roberts wrote in his separate opinion in Sorrells, 'Society is at war with the criminal classes.' 287 U.S. at 453-54. Police must fight this war, not engage in the manufacture of new hostilities." Cruz, supra at 163.

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[4] The same quotation from Sherman, infra, was cited and argued before the trial court, in the Motion to Suppress on grounds of entrapment [R. 97-98a]

Certainly, as fully argued in the Initial Brief, no crime of "trafficking" existed when Morris, a "user", was approached by Donaldson. When the State "believed" Morris did not have the cocaine (large quantity as described by Donaldson), or access to it, the State continued to pursue Morris and "manufactured the crime" of trafficking where none previously existed. Obviously, every user has a source of supply and, but for the State demanding two kilos of cocaine, Morris would not have searched his sources for that quantity. Can the State create the crime, enhance the crime and penalty to a mandatory fifteen years by directing the user to obtain the amount of cocaine selected by the State, which is equal to the selected crime manufactured by the State? It is important to consider the case of State v. Molnar, 81 N.J. 475, 484, 410 A.2d 37, 41 (1980) cited with approval by this Court and the State in its brief. (See State's brief at p. 29.)

> '(a)s the part played by the State in the criminal activity increases, the importance of the factor of the defendant's criminal intent decreases, until finally a point may be reached where the methods (employed) by the state to obtain a conviction cannot be countenanced, even though a defendant's predisposition is shown.'

The vigorous, concentrated and relentless efforts of the State to pursue, ensnare, entrap and target Morris for a set up is corroborated by the State waiving the mandatory sentence for the admitted cocaine supplier (Cord) in exchange for Cord's testimony against the user-introducer, Morris. One is indeed hard pressed to understand the benevolence of the State to the supplier (arrested at scene), who would have been convicted in any event, as a result of the testimony of Morris in his own defense

(entrapment).

G. This Court Should Not Abandon The Objective Test.

In support of its bold argument that this Court should overrule its decision in Cruz, supra, the State blithely suggests that, in adopting the objective test in Cruz, this Court did not carefully consider the implications of its decision in that the objective test merely duplicates due process protection afforded the defendant and constitutes unwarranted usurpation by the judiciary into constitutional and statutory regulation of police conduct. In reply to this argument, the Petitioner respectfully refers the Court and the State to footnote two of the Cruz opinion where this Court said:

> "While the objective view parallels due process analysis, it is not founded on constitutional principles. The justices of the United States Supreme Court who have favored the objective view have found that the court must 'protect itself and the government from such prostitution of the criminal law'..." Cruz, supra at 164.

Thus, because the objective view is not constitutionally required, this Court has found that it must protect itself from egregious behavior of State agents by adopting the objective view. A plain reading of Cruz renders it immediately obvious that this Court did in fact carefully and fully consider the implications of its decision.

H. The Objective Test Should Be Applied Retrospectively.

In arguing that Cruz, supra, should be given prospective application only, the State has ignored the well settled principle that "decisional law and rules in effect at the time an appeal is decided govern the case even if there has been a change since time of trial." Lowe v. Price, 437 So.2d 142, 144

(Fla. 1983); Wheeler v. State, 344 So.2d 244 (Fla. 1977); Williams v. State, 366 So.2d 817 (Fla. 3d DCA 1979). The State has also ignored the "fairness" doctrine adopted by this Court in determining when retrospective application should be given to an otherwise final conviction and sentence.

> "Considerations of fairness and uniformity make it very 'difficult to justify depriving a person of his liberty or his life, under process no longer considered acceptable and no longer applied to indistinguishable cases." Witt v. State, 387 So.2d 922,925 (Fla. 1980).

Obviously, fairness to the Petitioner, who is incarcerated for 15 mandatory years, cries out for retrospective application of the Cruz decision.

I. Morris Has Not Waived His Right To Argue Entrapment As Matter Of Law In This Court.

The State contends that Morris waived his right to argue entrapment as a matter of law in this Court because he allegedly failed to make this argument in the District Court below. This spurious contention is refuted by the cases cited by the State. In Trushin v. State, 425 So.2d 1126,1130 (Fla. 1982), this Court held that the defendant was precluded from raising certain issues before the Supreme Court which had not been raised before either the trial court or the District Court. Accord: Simmons v. State, 305 So.2d 178, 180 (Fla. 1974). The Petitioner is not estopped to raise the issue in this Court, since he clearly argued entrapment as a matter of law in the trial court.[5] [Tr. 542-543, 625, 1943; R. 1709]. For the same reason, Morris has not waived the entrapment as a matter of law argument under

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[5] The Petitioner respectfully contends that he also clearly argued entrapment as a matter of law in the District Court. (See p. 13, n. 9 of Morris' Reply Brief.)

Silver v. State, 188 So.2d 300, 301 (Fla. 1966) where the Court said "matters not presented to the trial court by the pleadings and evidence will not be considered by this Court on appeal." (Emphasis supplied)

Finally, the trial court's denial of Morris' Motion for New Trial (inter alia, reasserting the matter of law arguments/ Motion to Dismiss) and the trial court's denial of the Motion to Dismiss and judgment for acquittal on the grounds of entrapment, as a matter of law [Tr. 625; 1943], constitutes fundamental error therefore, any alleged failure to raise the issue in the District Court would not preclude this Court's review thereof. Ogilvie v. State, 181 So.2d 710 (Fla. 2d DCA 1966); Carlisle v. State, 186 So.2d 529 (Fla. 1st DCA 1966); Miller v. State, 246 So.2d 169 (Fla. 3d DCA 1971); McAbee v. State, 391 So.2d 373 (Fla. 2d DCA 1980).

J. Morris Properly Raised the Requisite Jurisdictional Conflict By Filing His Notice Of Reliance On Supplemental Authority.

In accordance with Fla.R.App.P. 9.210(g), the Petitioner properly filed a Notice of Reliance on Supplemental Authority, subsequent to the filing of his Jurisdictional Brief, indicating his reliance on Cruz, supra, in connection with his claim of jurisdictional conflict. This supplemental authority, decided after Morris had submitted the Brief on Jurisdiction, is now considered part of the Jurisdictional Brief and, therefore, the State's novel anti-jurisdictional issue is invalid.

K. The State Has Clearly Failed Both Prongs of the Cruz Objective Test.

The record affirmatively shows that the State invented the criminal activity (with Donaldson's assistance). The State

targeted Morris for "virtue testing". This is so in the first instance because, as previously argued in the Initial Brief, prior to commencing its self-styled set up, the State had absolutely no reliable information that Morris was involved in any criminal drug activity. Secondly, and more importantly, the undisputed testimony in the record establishes the State, after two days of meetings, concluded and believed that Morris had no cocaine and was not a supplier of cocaine. Yet, the State agents continued to encourage Morris to obtain cocaine from a supplier at the direction of the chief investigator and were instructed to purchase the cocaine directly from Morris and not from the actual supplier. [Tr. 385; 1258-71; 1309; 1576 and R. 438] Certainly, the State did not satisfy the first prong of the Cruz test.

Additionally, the procedures employed by the State to set up or entrap Morris violate the most fundamental principles of "decency, good faith, fairness and justice"[6] consistently required by this Court in criminal investigations since its decision in Peters v. Brown, 55 So.2d 334 (Fla. 1951). See also Thomas v. State, 185 So.2d 745 (Fla. 3d DCA 1966). The State, on page 26 of its brief, asserts:

> "When the objective test is met, however, there is no finding that the defendant is not guilty; rather the prosecution is barred as a punishment ...".

This Court so determined for the defendant, Cruz, and the

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[6] The State has labeled all of its procedures as routine, accepted, essential, justified and reasonable. (See pp. 38-40 of State's Answer Brief.) Thus, the State continues to cavalierly dismiss as irrelevant its flagrant violation of a clear cut court order, condemned by the trial judge. [Tr. 622-23] See also Petitioner's Initial Brief at pp. 14-15 and Appellant's Brief in District Court below at pp. 10-11.

defendant, Morris, requests, upon this record, that this Court so determine that he was, indeed, entrapped as a matter of law.

II.

THE PETITIONER IS ENTITLED TO RELIEF ON HIS CLAIMS OF INCONSISTENT VERDICTS.

L. Morris Is Not Estopped To Claim The Verdicts Are Inconsistent.

The State has failed to advise this Court that Morris requested that the lower court instruct the jury that his defense was not guilty by reason of entrapment whenever the words "not guilty" were used in the charges, in order not to mislead the jury. This request was denied, over objections [Tr. 1944] of the defendant [Also see Tr. 1943, 1924-25; 1929-31] Therefore, the State is incorrect in its argument that Morris agreed to the giving of standard jury instruction 2.08(a) and, accordingly, Morris is not estopped. McKee v. State, 450 So.2d 563 (Fla. 3d DCA 1984). Furthermore, the State never raised in the District Court below either its estoppel argument or the argument that Morris failed to object to the inconsistent verdicts prior to discharge of the jury. Therefore, the State has itself waived these arguments. Florida First National Bank at Key West v. Fryd Construction Corp., supra.

The State's further novel advice to this Court is that a defendant somehow is required to request the trial court to order the jury to return to the jury room to change its verdict when there is an inconsistent verdict prior to discharge of the jury. However, supportive citation to authority or case law is lacking. Once the jury is polled as herein, and the verdict is final but inconsistent, and the appropriate post trial motions having been

filed, the trial judge can rectify the inconsistency and, thereupon, enter the appropriate order. The trial judge herein was given the full opportunity to rule but declined.

The State suggests to this Court for the first time that the jury desired to "pardon" the defendant, as an attempt to validate the inconsistent verdicts. The State seriously suggests that the jury gave the defendant "charity" by allowing him to serve a mandatory fifteen year sentence and selectively pardoned the defendant from the non mandatory counts of sale/transfer of cocaine (samples).

The remainder of the State's argument ignores the original sin of primary inducement. One cannot be a "little bit" pregnant and one cannot be a "little bit" entrapped. Once the jury found the defendant not guilty by reason of entrapment (the only defense asserted), it is immaterial how many sales or possessions took place thereafter. [Sherman v. U.S., 356 U.S. 369, 78 S.Ct. 819, 2 L.Ed. 2d 848 (1958)].

CONCLUSION

It is passing strange that the State now suggests that the defense properly filed its Motion to Dismiss "as a matter of law" pretrial. The State advises this Court to "remand" the Motion to Dismiss to the trial judge for the full hearing which was denied pretrial. However, all the "pretrial" and trial facts available of record, including Gotbaum's Affidavit, have been presented to this Court. Therefore to now remand the Motion to Dismiss for a determination would be a waste of judicial time. Contrary to the State's argument, this Court does have jurisdiction to rule "as a matter of law" on the "text book" issue of entrapment, as it did in Cruz and Teague.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief of Petitioner, Eugene "Mercury" Morris, was delivered, by Mail, to the Office of the Attorney General, 401 Northwest 2nd Avenue, Miami, FL 33131; and to the Office of the State Attorney, 1351 Northwest 12th Street, Miami, FL 33125, this 19th day of July, 1985.

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