

IN THE SUPREME COURT OF FLORIDA

INQUIRY CONCERNING A  
JUDGE, No. 04-239,

JUDGE RICHARD H. ALBRITTON, JR.

Florida Supreme Court  
Case No. SC05-851

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**MEMORANDUM IN OPPOSITION TO RESPONDENT'S PETITION FOR WRIT OF  
MANDAMUS, OR IN THE ALTERNATIVE MOTION TO COMPEL SPECIAL  
COUNSEL TO PRODUCE DOCUMENTS REVIEWED BY THE INVESTIGATIVE  
PANEL IN FINDING PROBABLY CAUSE**

COMES NOW, the undersigned, as Special Counsel to the Judicial Qualifications Commission ("JQC"), and responds to the Honorable Richard H, Albritton, Jr.'s Petition for Writ of Mandamus or in the Alternative Motion to Compel as follows:

**I. INTRODUCTION**

Judge Albritton petitions this Court to compel the Special Counsel of the Judicial Qualifications Commission ("Special Counsel") to disclose privileged work product material not within the ambit of Rule 12(b) and to assess attorney's fees against Special Counsel. Judge Albritton's Petition should be denied.

As an initial matter, Judge Albritton's petition is premature. At a preliminary hearing conference conducted on April 4, 2006, Judge Wolf specifically held that Judge Albritton had not exhausted his administrative remedies, that Judge Albritton's motion to compel production was still "pending in front of this panel," and secured possession of the confidential witness interview summaries for *in camera* review.<sup>1</sup> Thus, there is no final order denying the relief requested by Judge Albritton in his petition before this court.

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<sup>1</sup> A transcript of the hearing conducted by Judge Wolf was filed with this Court by counsel for the Hearing Panel on April 5, 2006.

Second, contrary to Judge Albritton's arguments, he has no entitlement to the requested documents because they are protected by work-product privilege, and are not "statements" as defined by JQC Rule 12(b) and the Florida Rules of Civil Procedure. Judge Albritton's Petition relies heavily upon *Inquiry Concerning a Judge, Gale S. Graziano*, 696 So. 2d 744 (Fla. 1997) in support of his argument. However *Graziano*, when read in its entirety, supports the position taken by the JQC and confirms that the Judge is only entitled to production of information pursuant to Rule 12(b), not privileged information provided the Investigative Panel of the JQC as he asserts. Quite simply, the Judge is not entitled to review the work product of the JQC Special Investigator unless and until he makes an appropriate showing of prejudice. *Graziano* affirms rather than repudiates this proposition.

Finally, Judge Albritton's Petition seeks the award of attorney's fees from Special Counsel pursuant to Rule 1.380(a)(4), Florida Rules of Civil Procedure. In the event that Judge Albritton's Petition is granted, and the JQC is ordered to produce the disputed documents, an assessment of attorney's fees should be denied. The Special Counsel has, on the JQC's behalf, raised a principled issue that the JQC wishes to have heard in order to clarify a matter of great public interest that is also very important to the JQC's investigative process. It can not be said that the position advanced by Special Counsel and the JQC was not substantially justified, particularly given that both the Chair of the Hearing Panel and then later the entire Hearing Panel have agreed with the position taken by the JQC on this issue.

Judge Albritton's Petition should be denied in total, and the JQC should not be compelled to produce the disputed privileged documents.

## II. FACTUAL BACKGROUND

Prior to the JQC filing formal charges against Judge Albritton, it undertook an investigation into complaints against Judge Albritton filed by various individuals. As part of its investigation, the JQC retained the services of Robert W. Butler, a former FBI Agent of 24 years and currently a licensed private investigator. As part of his investigation of Judge Albritton, and in anticipation of a proceeding against Judge Albritton, Mr. Butler interviewed individuals believed to have information regarding Judge Albritton's misconduct. Prior to the interviews with these individuals, Mr. Butler informed them that the interviews would be confidential and that the interviews were being conducted as part of an investigation into allegations of misconduct by Judge Albritton. Affid. of Robert W. Butler at ¶ 4, attached as **Exhibit "A."**

Mr. Butler took handwritten notes during the confidential interviews he conducted. *Id.* The notes that Mr. Butler took were not verbatim accounts of the interview, but were a summary to assist the investigation. *Id.* The notes were later used, in conjunction with Mr. Butler's thoughts and mental impressions, to prepare typewritten summaries of each interview. *Id.*

Mr. Butler provided copies of these typed confidential interview summaries to Thomas C. McDonald, Jr., general counsel for the JCQ, who submitted them to the Investigative Panel of the JQC prior to its finding of probable cause to institute formal charges against Judge Albritton. The confidential interview summaries have never been introduced as evidence in any proceeding. Furthermore, the JQC has not listed the interview summaries as evidence to be used before the Hearing Panel, nor does Special Counsel anticipate these summaries will be offered as evidence at any time.

### III. ARGUMENT

#### A. Request to Compel Production

Judge Albritton's Petition asks this court to require the JQC to provide him, under JQC Rule 12(b), the confidential interview summaries of potential witnesses which were taken by the JQC's investigator. The JQC claims that these summaries are privileged, and Judge Albritton argues that they must be produced based upon this Court's interpretation of Rule 12(b) in *Graziano* and its order in *Inquiry Concerning a Judge, Cynthia A. Holloway*, No. 00-143, Supreme Court Case No. SC00-2226. The great reliance that the Judge places upon *Graziano* and *Holloway*, however, is misplaced and a more thorough analysis of those cases, the Florida Constitution and the JQC rules requires that his petition must be denied.

Discovery in JQC proceedings is governed by JQC Rule 12. JQC Rule 12(a) provides that Florida Rules of Civil Procedure will apply in JQC proceedings, unless otherwise preempted by the JQC Rules. Rule 12(b) requires, *inter alia*, that the JQC must produce the names and addresses of witnesses, "together with copies of all written **statements** and transcripts of testimony of such witnesses . . ." (emphasis added). "Statements" is a word of art in the legal profession, and the typed mental impressions of the JQC Investigator (made after the fact), which the witnesses have never seen or much less signed, are not "statements." They are, however, clearly work product, which is protected from discovery under the Florida Rules of Civil Procedure except upon a showing that a party would be "unable without undo hardship to obtain the substantial equivalent of the material by other means." Fla.R.Civ. P. 1.280(b)(3) The Judge has made no effort to make the necessary showing. Under the Florida Rules of Civil Procedure, Judge Albritton has the rights of full discovery, like any other litigant, and could seek discovery

of the facts, documents and witnesses upon which the formal charges are based. Although highly improbable, if discovery proved insufficient,, Judge Albritton could always seek the JQC's work product upon making the appropriate showing. In fact, the JQC has repeatedly encouraged Judge Albritton to pursue discovery through interrogatories, deposition, or other sanctioned discovery procedures. Affid. of David T. Knight, at ¶ 13. After resisting Special Counsel's repeated invitations, Judge Albritton has finally done what he should have done almost a year ago, sent out comprehensive interrogatories, attached hereto as **Exhibit "B,"** which will provide him with all the information he needs.

In fact, at a hearing before Judge Wolf, the Chair of the Hearing Panel, Judge Albritton's counsel was specifically asked what he was looking for in the witness interviews so that Judge Wolf could conduct an *in camera* inspection of the summaries to search for the information counsel was seeking. Judge Albritton's counsel could not identify any information he wanted Judge Wolf to search for in the notes. Judge Wolf, through counsel to the Hearing Panel, has taken possession of all the witness interviews, and, pursuant to Judge Albritton's request, performed an *in camera* review of the witness interview summaries of Frank A. Baker, June M. Lashbrook, Alton O. Paulk, and Mark Sims. By letter, dated April 10, 2006, attached hereto as **Exhibit "C,"** Judge Wolf determined that the summary of Frank Baker's interview was the only summary which contained "anything even remotely exculpatory." Accordingly, Judge Wolf provided a copy of that summary to Judge Albritton's counsel.

To support his demand, Judge Albritton has repeatedly insisted that this court's ruling in *Graziano* provides all the authority he needs for the disclosure of the privileged documents. However, a close examination of *Graziano* reveals that Judge Albritton's interpretation is flawed. In *Graziano*, this Court upheld the removal of a judge from the bench, and rejected the

various grounds raised by the judge in an effort to overturn the JQC's recommendation for removal. In spite of the holding, Judge Albritton seizes upon an isolated passage of the opinion and then proceeds to mischaracterize its reach. The issue in *Graziano* relevant to this case was whether the confidential complaint to the JQC about the judge's conduct was discoverable. In the passage of the opinion relied upon by Judge Albritton, the Court held that the confidential complaint was not discoverable, but held that the judge was nevertheless entitled to discovery of the facts underlying the charges, stating:

Although not allowing for discovery of the complaint itself, discovery pursuant to Rule 12(b) allows the accused judge to have full access to the **evidence upon which formal charges are based.**

(emphasis added).

In *Graziano*, no issue was raised about confidential witness summaries, like those involved in this case. The **only** document at issue was the confidential complaint, which this Court held was not subject to discovery. As a consequence, when this Court stated that a judge could have full access to the "evidence" upon which formal charges were based, it certainly was not referring to all of the information reviewed by the Investigative Panel, as Judge Albritton now asserts, and was not speaking to the confidential information considered by the Investigative Panel of the JQC. In the context of the opinion, it is clear that the Court was assuring the accused judge that he could receive the broad discovery rights **permitted** under Rule 12. This Court did not give the judge the right to obtain confidential complaints or otherwise abrogate the law relating to work product privilege.

As a second ground, Judge Albritton has attempted to equate the confidential witness summaries involved in this case with "written statements" as that term is used in Rule 12(b), and the discovery of which was apparently permitted in this Court's order in the *Holloway* case,

requiring that written “statements” of witnesses must be produced. The confidential summaries in this case, however, certainly do not qualify as “written statements.”

The confidential typed witness interview summaries requested by Judge Albritton are not statements, as that term is defined by the Florida Rules of Civil Procedure. Rule 12(a) of the Florida JQC Rules provides that “[i]n all proceedings before the Hearing Panel, the Florida Rules of Civil Procedure shall be applicable except where inappropriate or as otherwise provided by these rules.” Because the Florida JQC Rules do not define the meaning of the term “statement,” reference to the Florida Rules of Civil Procedure is the appropriate way to give further meaning to the undefined term.

Rule 1.280 (b)(3) of the Florida Rules of Civil Procedure defines a statement as “a written statement signed or otherwise **adopted or approved by the person making it**, or a stenographic, mechanical, electrical, or other recording or transcription of it that is **substantially verbatim** recital of an oral statement by the person making **and contemporaneously recorded.**” (Emphasis added). This rule clearly limits the definition of a statement to either a written document adopted as accurate by the person to whom it is attributed or a simultaneous and verbatim transcription of that person’s verbal statement or statements, such as a transcript prepared by a court reporter or stenographer. Since the documents that are the subject of Judge Albritton’s request are obviously not “written statement[s] signed or otherwise adopted ... by the person making [them],” Judge Albritton must be asserting that the typed witness interview summaries prepared by the JQC’s investigator are substantially similar to a deposition or court transcript. This argument is wholly unpersuasive. Not only were the confidential typed summaries not “contemporaneously recorded,” as required by Rule 1.280(b)(3), but they also are not “substantially verbatim recital[s]” of the oral statements made by the witnesses. Affid. of

Robert W. Butler, at ¶ 4. The confidential summaries were prepared hours or even days later by the JQC's investigator and consist of a mixture of both the investigator's impression of the witnesses' words and the Investigator's thoughts and mental impressions. *Id.* Documents of this character do not meet the definition of "statement" contained in Rule 1.280(b)(3).

Additional insight into the meaning of the term "statement" can be had by reference to Florida case law interpreting the meaning of that term in substantially analogous provisions of the Florida Rules of **Criminal** Procedure. Rule 3.220 of the Florida Rules of Criminal Procedure formerly defined a statement precisely as Rule 1.280(b)(3) of the Civil Rules of Procedure defines a statement. In *State v. Latimore*, 284 So.2d 423 (Fla. 3d DCA 1973), the Third District Court of appeal held that "investigation reports which do not quote a person ... directly and never are signed or shown to that person are not statements [as defined by the rule] and thus are not subject to discovery." *Id.* 284 So. 2d at 425. In so holding, the *Latimore* court looked not only to the United States Court of Appeals definition of statements but also cited other Florida cases which were in accord with its holding. *See United States v. Graves*, 428 F.2d 196 (5th Cir. 1970); *State v. Gillespie*, 227 So. 2d 550 (Fla. 2d DCA 1969); *Darrigo v. State*, 243 So. 2d 171 (Fla 2d DCA 1971).

In response to these decisions, Florida Rule of Criminal Procedure 3.220 was substantially amended and the definition of "statement" was changed so as to explicitly include police reports and witness interview summaries. The rule now provides, in pertinent part, "[t]he term 'statement' as used herein includes a written statement made by the person and signed or otherwise adopted or approved by the person and also includes any statement of any kind or manner made by the person and written or recorded or summarized in any writing or recording." Fla. R. Crim. P. Rule 3.220(B). Thus, in sharp contrast to Rule 3.220 of the Florida Rules of

Criminal Procedure, the rules which apply to JQC proceedings specifically do not define “statement” so broadly. The only conclusion that can be drawn from this contrast is that the scope of discoverable statements under the Civil Procedure rules, which are specifically adopted by the JQC rules, does not include confidential summaries of witness interviews.

Even if the confidential typed witness interview summaries sought by Judge Albritton are found to be “written statements” and within the meaning of Rule 12(b), they are work product and, thus, protected by privilege. The work product privilege “is designed to promote the adversary system by protecting an attorney's trial preparations, not necessarily from the rest of the world, but from an opposing party in litigation.” *Visual Scene, Inc. v. Pilkington Bros., Plc.*, 508 So. 2d 437, 442 (Fla. 3d DCA 1987).

The confidential interview summaries are precisely the type of material that fits within the classic definition of work product; material “prepared in anticipation of litigation or for trial” and is not discoverable absent a showing by the Judge that he “has need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means.” Fla. R. Civ. P. 1.280(b)(3). In his opinion denying Judge Albritton’s motion to compel, Judge Wolf has wisely recognized the need to protect classic work product, but at the same time has left the door open for Judge Albritton to come back and seek further relief if he is unable to acquire the information contained in the confidential summaries by other means. This is the rule articulated in Florida Rule of Civil Procedure 1.280(b)(3), which applies to this proceeding. JQC Rule 12(a).

As further protection against unjustly surprising the Judge and to balance the work-product interests of the JQC, Judge Wolf has recently taken possession of the interview summaries for *in camera* inspection of some of them now, and perhaps more later. *See Order*

dated March 14, 2006, attached as **Exhibit “D.”** This in-camera inspection provides an additional layer of protection for Judge Albritton, without compromising the work-product of the JQC. Yet, Judge Albritton ignores this order in his Petition before this court and the fact that Judge Wolf has expressly ruled that the Hearing Panel is still considering this issue, and continues to insist upon immediate production of the confidential documents.

Judge Albritton’s argument that the work product privilege is inapplicable because the confidential interview summaries were provided “as evidence”<sup>2</sup> to the Investigative Panel misses the mark. Judge Albritton argues that the witness summaries have lost their protected status of “work product” because they have been used in “trial.” The Judge cites several cases that support this proposition, and the JQC has no quarrel with the ruling in those cases. It does take issue with the Judge’s application of those rulings to the issues in this case. The proceeding before the Investigative Panel was not the “trial.” That phase of this proceeding will be held before the Hearing Panel of the JQC.<sup>3</sup> Should the JQC wish to use the confidential witness summaries as evidence before the Hearing Panel, the summaries would clearly lose their protected status. That, however, has not happened and is not anticipated.

As a secondary authority in support of his Petition, Judge Albritton cites to this Court’s order in *Inquiry Concerning a Judge, Cynthia A. Holloway*, No. 00-143, Supreme Court Case No. SC00-2226. His reliance upon the *Holloway* case, however, is also misplaced because the Court specifically restricted the group of documents which the JQC had to produce to “statements” – which is exactly what Rule 12(b) allows a judge to receive in discovery –

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<sup>2</sup> It is hard to imagine how the confidential witness summaries could even be admitted as evidence, since they involve double hearsay.

<sup>3</sup> It is apparent that Judge Albritton recognizes this critical distinction, and in an effort to avoid it he repeatedly refers to the Investigative Panel as the “Investigative Hearing Panel,” ignoring the clear distinction between the “Investigate Panel” and the “Hearing Panel” provided in the JQC Rules. See, e.g., the definitions in JQC Rule 2(2) and (3).

stating: “[p]etitioner’s Motion to Compel is hereby granted **only as to the statements** used in determining probable cause.” (Emphasis added).

Nowhere did this Court in *Holloway* require the disclosure of the summaries of confidential witness interviews by the JQC. While Judge Albritton makes much of that fact that the Special Counsel in that case actually produced certain of the witness summaries, the Court can certainly understand that decision by the Special Counsel was made for strategic reasons relating to the dynamics of that case. The fact remains that the *Holloway* order only required the production of “statements.” All statements have been produced in this case.

Finally, important policy considerations outlined in the Florida Constitution and articulated by the Supreme Court in *Graziano* are implicated by Judge Albritton’s petition. Article V, section 12(a)(4) of the Florida Constitution, as implemented by JQC Rule 23, provides that “the proceedings by or before the JQC are confidential until the JQC files formal charges with the clerk of [the Supreme Court]” *Graziano*, 696 So.2d at 751. Maintaining the confidentiality of investigatory stages of JQC proceedings protects Judges from being victimized by unsubstantiated charges and also serves the public’s interest by permitting individuals to make complaints against Judges without fearing reprisal. *Id.* Furthermore, the JQC’s special investigator, in compliance with JQC Rule 23, informed all those he interviewed that the substance of their conversation would remain confidential. If the JQC is now ordered to disclose the typed interview summaries, that expectation of privacy will be violated as will the confidentiality policies that guide the JQC during the investigatory stage of its proceedings, and future investigations will be hamstrung.

Upholding the confidentiality of the JQC’s investigatory witness interview summaries not only protects Florida’s judges from unsubstantiated and frivolous allegations of misconduct

being made public, but it also protects potentially aggrieved parties from retaliation for blowing the whistle on malfeasant judges. Requiring disclosure of complainants' conversations with JQC investigators will have a chilling effect on potential witnesses, many of whom are court personnel or attorneys appearing before the Judge, who could justifiably fear reprisal from an aggrieved Judge. Disclosing witness interview summaries could certainly stifle the willingness of aggrieved parties to come to the JQC with otherwise meritorious complaints. If fewer witnesses are willing to speak to the JQC investigative staff, worthy complaints could well go un-prosecuted for a lack of evidence.

Judge Albritton's petition makes much of the fact that, if his petition is not granted, that the JQC would be permitted to alter its investigative process. On the contrary, if this court denies Judge Albritton's petition, the JQC will be permitted to continue to operate as it previously has and the constitutionally protected privacy interests of accused Judges and their accusers will be protected, interests that this Court clearly recognized in *Graziano*. Shielding the confidential witness interview summaries from discovery as privileged work product strikes an eminently reasonable balance between the privacy of potential witnesses, protection of the JQC's work product, and the accused Judge's ability to put forward a vigorous defense. An accused Judge is provided with the names and addresses of all the witnesses with whom the JQC's investigator spoke, through Rule 12(b)(6). The Judge can supplement that information through other discovery procedures, such as interrogatories and/or depositions to learn which witnesses spoke to the JQC investigator about which topics. Simultaneously, the JQC is not required to disclose documents that contain the mental impressions of its investigators as to the credibility and reliability of potential witnesses. The Judge's petition should be denied.

## **B. Request for Attorney's Fees**

Judge Albritton's petition seeks the award of attorney's fee incurred in prosecuting his motion to compel. Should this court see fit to grant Judge Albritton's petition and order the disclosure of the confidential materials, it should nonetheless reject Judge Albritton's' request for attorney's fees. First, Judge Albritton is not entitled to an award of attorney's fees pursuant to Rule 1.380(a)(4) because the JQC's opposition to Judge Albritton's motion to compel production was, without question, substantially justified. Second, an award of attorney's fees pursuant to Rule 1.380(a)(4) applies only when a party refuses to respond to certain discovery procedures outlined in Rule 1.380, which is not applicable in this case. Third, even if attorney's fees were available pursuant to Rule 1.380(a)(4) for the type of discovery dispute at issue in this case, the court of first instance, and not this Court as a reviewing Court, is the proper forum within which Judge Albritton should seek those fees.

Assuming that it is procedurally correct for this court to award attorney's fees pursuant to Rule 1.380, Judge Albritton's request should still be denied because it fails as a substantive matter. Rule 1.380(a)(4) provides that the non-moving party is liable for the expenses incurred in obtaining the order "unless the court finds that the opposition to the motion was justified or that other circumstances make an award of expenses unjust." Given the procedural history of this case, in which Judge Albritton's substantially identical motion to compel was denied both by Judge Wolf, a highly esteemed member of the First District Court of Appeals, and by the full Hearing Panel, whose membership includes Judge Wolf, a past president of the Florida Bar and an experienced county Judge, it is utterly ludicrous for Judge Albritton to maintain that the JQC's opposition to his motion lacks legal merit and has not been justified.

Furthermore, as Judge Albritton and his counsel are no doubt aware, the confidentiality of witness summaries produced by the JQC's investigator is of great importance to the JQC's role in overseeing the integrity of the state's judiciary. As indicated above, ensuring the confidentiality of these witness interview summaries is essential to protect not only the judges of this state from frivolous prosecutions, but also to permit potential witnesses to speak with candor to the JQC without fearing retaliation from judges. In that regard, this is an issue of great public importance and principle which the JQC and its Special Counsel have been substantially justified in pursuing and their refusal to produce the documents has not been a "mere captious refusal" to cooperate with Judge Albritton's request, the standard for assessment of fees articulated in the Authors' Comment to the Rule. Fla. R. Civ. Pro. 1.380 Authors' Comment.

Second, Judge Albritton claims that he is entitled to attorney's fees pursuant to Rule 1.380(a)(4) of the Florida Rules of Civil Procedure. However, Rule 1.380(a)(4) does not apply to a motion to compel production of JQC Rule 12(b) materials. Under Florida Law, each party is to bear his own costs and attorney's fees unless a specific exception is established by contract, statute or rule. *Price v. Tyler*, 890 So.2d 246, 250 (Fla. 2004). As a corollary to this general rule, provisions governing the award of attorney's fees are to be strictly construed. *Gershuny v. Martin McFall Messenger Anesthesia Professional Ass'n*, 539 So.2d 1131, 1132 (Fla.1989). Rule 1.380(a)(2) provides a mechanism for a party to move to compel discovery in five specifically enumerated situations pursuant to five specific provisions of the Florida Rules of Civil Procedure. Rule 1.380(a)(2) makes no mention of, or reference to, the JQC Rules. The rule provides in subsection (a)(4) that if the motion outlined in 1.380(a)2 is granted, the party opposing it shall pay the reasonable expenses incurred by the moving party in obtaining the order. Any statute governing the awarding of attorney's fees must be strictly construed and since

Judge Albritton is not moving to compel pursuant to Rule 1.380(a)(2), he is not entitled to fees pursuant to rule 1.380(a)(4).

Assuming arguendo that Rule 1.380(a)(4) applies to all motions to compel and not just those enumerated in Rule 1.380(a)(2), Judge Albritton's request should still be denied because this is not the proper court to award fees. Rule 1.380(a)(1) provides that "an application for an order to a party may be made **to the court in which the action is pending.**" This case is currently pending before the JQC Hearing Panel, which is sitting as the trial court. The Supreme Court's role is confined to appellate review of the decisions of the Hearing Panel. If this Court grants Judge Albritton's petition, it should, at most, remand the question of attorney's fees to the hearing panel for a hearing on the question.

#### **IV. CONCLUSION**

Judge Albritton's Petition should be denied because this issue is still being considered by the Hearing Panel and is not ripe for review. His petition should also be denied because the requested documents are not discoverable pursuant to Rule 12(b). Moreover, even if the requested documents are discoverable pursuant to Rule 12(b), they are protected by the work product privilege and accordingly, not discoverable absent a showing by Judge Albritton that he is unable to obtain the information by other means.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by  
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