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11 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
12 **FOR THE COUNTY OF LOS ANGELES**

13 **THE PEOPLE OF CALIFORNIA,**
14 Plaintiff,
15 v.
16 **JOSEPH DOE,**
17 Defendant.

18) Case No.
19)
20) **OPPOSITION TO**
21) **PROSECUTION'S**
22) **MOTION TO QUASH**
23)
24) DATE: February 25, 2014
25) TIME: 8:30 a.m.
26) LOCATION: Dept. 115
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NATURE OF THE CASE

This case arises in connection with a lengthy, bitter custody battle between Mr. DOE and the accusers' mother over their three daughters.

ARGUMENT

I. THE PROSECUTION OVERLOOKS THE ISSUE INVOLVES WHETHER THE DOCUMENTS EXIST

Defense counsel needs documents from the accusers. Defense counsel asked the prosecutor for the documents, but the prosecutor dismissed defense counsel's requests claiming the documents were in the possession of third parties. Defense counsel then subpoenaed the documents from the accusers and the accusers' mother. On February 4, 2014, the prosecutor told defense counsel that the accusers did not have the information. The prosecutor also asked if defense counsel needed the accusers to come to court. Defense counsel told the prosecutor she needed the accusers to come to court so she could ask them about the absence of any documents. Defense counsel was unaware of any objection until the February 11, 2014 court hearing.

The prosecutor seems to have control over the accusers and what they will or will not do. The accusers refuse to talk to the defense. For example, the accusers came to court based on the prosecutor's direction. The prosecutor has now filed a motion to quash, on behalf of the accusers,

1 the defense subpoena. If the prosecutor asks for the documents, the
2 accusers will deliver them.

3
4 The prosecution must get such information from the accusers
5 because “such information is reasonably accessible to the prosecutor, . . .
6 and [the California Supreme Court has] considered information to be in the
7 prosecution's possession for purposes of pretrial discovery if such
8 information is “ ‘reasonably accessible’ to the prosecution,” or “ ‘readily
9 available’ to the prosecution and not accessible to the defense.” (*In re*
10 *Littlefield* (1993) 5 Cal.4th 122, 135, italics omitted)” *Barnett v. Superior*
11 *Court* (2010) 50 Cal. 4th 890, 911.)

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15 If the documents do not exist, then no issue about the production of
16 documents exists. If the accusers do not have any materials, the accusers
17 should submit a statement or similar document attesting to the absence of
18 the documents. Based on the prosecutor’s relationship with the accusers,
19 the information is “reasonably accessible “ to the prosecutor and
20 unavailable to the defense and the prosecutor must get existing documents
21 for defense counsel.

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24 Alternatively, the prosecutor should get a written statement from each
25 accuser, including the mother, that they do not have the subpoenaed
26 materials. Defense counsel needs the discovery to prepare an affirmative
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1 defense for Mr. DOE who is facing several felony counts, a potential life
2 prison sentence and lifetime registration as a sex offender.

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4 **II. THE PROSECUTION LACKS STANDING TO FILE A MOTION**
5 **TO QUASH**

6 The prosecutor lacks standing to bring a motion to quash. It is
7 misconduct to obstruct defense use of subpoena duces tecum. In *Gordon*
8 *v. United States* (1953) 344 U.S. 414, the court admonished prosecutors
9 not to do so: "[A]n accused is entitled to production of [relevant] documents
10 . . . 'the state has no interest in interposing any obstacle to the disclosure
11 of the facts, unless it is interested in convicting accused parties on the
12 testimony of untrustworthy persons.'" (*Id.* at 419, fns. omitted.) "[T]he
13 district attorney cite[s] no statute, and we are aware of none, authorizing
14 the district attorney to represent a third party in discovery proceedings in a
15 criminal action." (*Bullen v. Superior Court* (1988) 204 Cal.App.3d 22, 25.)
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20 Although *Bullen* says the district attorney cannot *represent* a third
21 party in the absence of statutory authority, (*People v. Superior Court*
22 (*Humberto S.*) (2008) 43 Cal.4th 737, 753-754), participation to a lesser
23 degree is not prohibited. In *Humberto S.*, the court said: "[W]e need not
24 decide here whether prosecutorial participation in third party subpoena
25 hearings is permitted or protected; suffice it to say, as with *Pitchess*
26 hearings, it is not prohibited . . . Penal Code section 1326, which governs
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1 . . . third party subpoenas, does not speak to the role (if any) of opposing
2 parties." (*Id.* at p. 749.)
3

4 Although the prosecutor moved to quash a subpoena duces tecum
5 for psychologist records on behalf of a minor-victim in *People v. Hammon*
6 (1997) 15 Cal.4th 1117, 1120, the opinion does not mention any objection
7 and "standing" was not addressed. *Hammon* is not authority for DA
8 "standing." " 'An appellate decision is not authority for everything said in the
9 court's opinion but only "for the points actually involved and actually
10 decided.'" (*People v. Knoller* (2007) 41 Cal.4th 139, 155, citation omitted.)
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13 In *Kling v. Superior Court* (2010) 50 Cal.4th 1068, the Supreme
14 Court held the prosecution has a due process right under the California
15 Constitution to disclosure of the identity of the subpoenaed party and the
16 nature of records sought by a defendant pursuant to a subpoena duces
17 tecum under Penal Code section 1326. (*Kling*, at p. 1078.)
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20 *Kling*, 50 Cal.4th at p. 1078 explained, while "the court may desire
21 briefing and argument from the People about the scope of the third party
22 discovery [citation]," the People have the right to move to quash " 'so that
23 evidentiary privileges are not sacrificed just because the subpoena
24 recipient lacks sufficient self-interest to object' [citation] or is otherwise
25 unable to do so. [citation]." The victim is not a party to the case, and the
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1 People are not counsel for the victim. (See Pen. Code, § 684; see also
2 *People v. Superior Court (Barrett)* (2000) 80 Cal.App.4th 1305, 1313).
3

4 Although the prosecution may file a motion to quash in order to
5 prevent prejudice to their own case (*Kling*, at p. 1078), the prosecution
6 cannot explain how its case against Mr. DOE would be compromised, or
7 how any privileges would be violated, if the accusers had to produce the
8 documents sought in the SDT.
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10 11 **III. THE LAW ENTITLES THE DEFENDANT TO DISCOVERY OF** 12 **ALL RELEVANT INFORMATION**

13 The prosecutor objects to the subpoenaed documents based on the
14 California's Victims' Bill of Rights Act of 2008 a.k.a. Marsy's Law. Cal.
15 Const. art. I, § 28(b)(I). On November 4, 2008, the voters passed
16 Proposition 9, the "Victims' Bill of Rights Act of 2008: Marsy's Law," which
17 took effect the following day and which, as relevant here, added a new
18 constitutional guarantee to the California Constitution: "In order to preserve
19 and protect a victim's rights to justice and due process, a victim shall be
20 entitled to the following rights: [¶] To refuse an interview, deposition, or
21 discovery request by the defendant, the defendant's attorney, or any other
22 person acting on behalf of the defendant, and to set reasonable conditions
23 on the conduct of any such interview to which the victim consents." (Cal.
24 Const., art. I, § 28, subd. (b)(5).) Marsy's Law does not override a criminal
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1 defendant's right to the subpoena documents. The defense still has a
2 constitutional right to the subpoena power of the court.
3

4 "Documents and records in the possession of nonparty witnesses
5 and government agencies other than the agents or employees of the
6 prosecutor are obtainable by subpoena duces tecum.' [Citation.]" (*Kling*, 50
7 Cal.4th at p. 1074.) "A criminal defendant has a right to discovery by a
8 subpoena duces tecum of third party records by showing 'the requested
9 information will facilitate the ascertainment of the facts and a fair trial.'
10 [Citation.]" (*Barrett*, 80 Cal.App.4th at p. 1316.) "In such case, if the
11 custodian of records objects to disclosure of the information sought, the
12 party seeking the information must make a plausible justification or a good
13 cause showing of need therefor." (*Alford v. Superior Court* (2003) 29
14 Cal.4th 1033, 1045.)
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19 "Under Penal Code section 1326, subdivision (c), a person or entity
20 responding to a third party subpoena duces tecum in a criminal case must
21 deliver the subject materials to the clerk of court so that the court can hold
22 a hearing to determine whether the requesting party is entitled to receive
23 them. When the defendant is the requesting party, the court may conduct
24 that hearing in camera. (Pen. Code, § 1326, subd. (c).)" (*Kling*, 50 Cal.4th
25 at p. 1071.)
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1 Neither the prosecution nor the accusers have produced any
2 documents or attested to the absence of the subpoenaed materials. The
3 prosecution's and/or the accusers' failure to produce the documents make
4 the motion to quash or any disclosure moot. The prosecution and/or the
5 accusers should produce any disputed documents before any
6 determination can be made about the relevancy of the documents.
7 Otherwise, they should submit a sworn statement attesting to the absence
8 of the documents or materials.

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12 **IV. THE DEFENSE NEED NOT TELL THE PROSECUTION**
13 **ABOUT THE RELEVANCY OF SUBPOENAED DOCUMENTS**

14 The prosecution filed a motion to quash the subpoena duces tecum.
15 However, the prosecution maintains the accusers do not have the
16 documents. If the accusers do not have the documents, the trial court
17 need not quash the subpoena duces tecum. If the documents are
18 produced and the prosecution objects, the court may order an in camera
19 review of the documents produced in response to a defendant's SDT, and
20 while the People or any person or entity objecting to release of the
21 documents should be given notice of the hearing, the defense is not
22 required to provide the prosecution with its theory of why the documents
23 are relevant. (See *Kling, supra*, 50 Cal.4th at pp. 1079-1080; *Alford, supra*,
24 29 Cal.4th at pp. 1045-1046.)

1 Under limited circumstances, the court "may conduct some or all of
2 the hearing concerning the defendant's entitlement to those records ex
3 parte in order to safeguard privileged information or attorney work product."
4 (*Kling*, at pp. 1079-1080.) If the documents exist, the defense counsel
5 should make a factual showing in support of the SDT. (*Id.*)
6
7

8 **V. MR. DOE HAS THE RIGHT TO COUNSEL, TO DUE**
9 **PROCESS, TO A FAIR TRIAL AND TO THE SUBPOENA**
10 **POWER OF THE COURT**

11 Mr. DOE has the right to counsel (*Gideon v. Wainwright*, 372 U.S.
12 335 (1963); *Powell v. Alabama*, 287 U.S. 45, 69 (1932); to due process,
13 *Spencer v. Texas* (1967) 385 U.S. 554, 563-564 [" . . . Due Process
14 guarantees . . . fairness in a criminal trial"] to a fair trial and to the
15 subpoena power of the court. *Washington v. Texas* (1967) 388 U.S. 14
16 (subpoena power); U.S. Const., 5th, 6th, 8th & 14th Amends.
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19 A criminal defendant's right to discovery is an outgrowth of his or her
20 right to a fair trial, including the right to prepare and present an intelligent
21 defense in light of all relevant and reasonably accessible information.
22 (*People v. Luttenberger* (1990) 50 Cal.3d 1, 17.) The basis for pretrial
23 discovery is the right of the defendant to a fair trial. (*Hill v. Superior Court*
24 (1974) 10 Cal.3d 812, 816) The defendant is entitled to all relevant
25 information which will facilitate a fair trial. (*Pitchess v. Superior Court*
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1 (1974) 11 Cal.3d 531, 535) The defendant is entitled to discovery of all
2 information which is relevant or may lead to relevant evidence. (*Kelvin L.*
3
4 *v. Superior Court* (1976) 62 Cal.App.3d 823, 828) Due process requires
5 the disclosure to the defendant of "evidence favorable to an accused" that
6 is "material either to guilt or to punishment" independently of any demand.
7
8 (*Brady v. Maryland* (1963) 373 U.S. 83, 87.)

9 The defendant must be provided with the maximum information to
10 illuminate the case, including any unprivileged evidence or information if it
11 may reasonably assist in the preparation of the defense, The defendant
12 need not state the defense or elect between available ones: all that is
13 required is a showing of relevancy; necessity--that the defense cannot
14 obtain the material on its own; and specificity-- a list of items desired.
15
16 (*State of California ex rel Dept. of Transportation v. Superior Court (Hall)*
17
18 (1985) 37 Cal.3d 847, 855-6.)

19
20 **VI. THE LAW ENTITLES THE DEFENSE TO THE**
21 **ACCUSERS' MEDICAL (OB/GYN) RECORDS**

22 **A. Records Sought**

23 All 2005 to the present obstetrics and gynecological medical records,
24 including records of visits, receipts for payment, health insurance records,
25 etc.
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1 **B. The California Supreme Court Has Held that Criminal**
2 **Proceedings Trump Any Privilege to Medical Records**

3 Medical records are discoverable and not privileged. (Evid. Code, §
4 998.) The physician-patient privilege (Evid. Code, § 994) is inapplicable in
5 criminal cases. (Evid. Code, § 998; see *Menendez v. Superior Court*
6 (1992) 3 Cal.4th 435, 457, fn. 18; *People v. Lane* (1894) 101 Cal. 513,
7 516; *People v. Dutton* (1944) 62 Cal.App.2d 862, 863 [1]; *People v. West*
8 (1894) 106 Cal. 89, 91.)

9 Any constitutional right to privacy may be outweighed by concerns for
10 the truth. The State's interest in discovering the truth in legal proceedings
11 may compel disclosure of confidential material. (*Brillantes v. Superior Court*
12 (1996) 51 Cal.App.4th 323, 338.) '[A]n individual's medical records may be
13 relevant and material in the furtherance of this legitimate state purpose. . .
14 .' [Citation.]" (*Ibid.*)

15 **C. The Defense Must Examine the Accusers' Medical**
16 **Records for Impeachment Purposes**

17 The accusers claim that their father, Mr. DOE, committed several
18 lewd acts. The medical (OB-GYN) records should show if any sexual acts
19 occurred. If the accusers had been sexually assaulted by Mr. DOE, their
20 gynecological records should contain some reference to such activity.

21 The nature of the charges filed by the prosecution requires the
22 23 24 25 26 27 28

1 defense to make a full inquiry into the alleged accusers' medical (OB-GYN)
2 records. To deprive the defense of the opportunity to review the accusers'
3 medical records would be to require it to defend a serious sex case without
4 any knowledge whether the accusers' have any medical corroboration of
5 their accusations.
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8 The accusers' medical records should contain a source of relevant
9 information about the crucial incidents and are a proper subject for inquiry.
10 Defendant has no other means by which to obtain this information. When
11 the accusers' privacy rights are weighed against defendants' legitimate
12 interest in preparing their defense, the defendants' interest must prevail.
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15 (*Palay v. Superior Court* (1993) 18 Cal. App. 4th 919.)

16 **VII. THE LAW ENTITLES THE DEFENSE TO THE**
17 **ACCUSERS' MENTAL HEALTH RECORDS UNDER**
18 **CERTAIN CIRCUMSTANCES**

19 **A. Records Sought**

20 All 2005 to the present mental health records including records of
21 visits, receipts for payment, health insurance records etc.
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1 **B. The Law Requires the Disclosure of Mental Health Records**
2 **Upon a Showing of Good Cause**

3 In *People v. Reber* (1986) 177 Cal. App. 3d 523, 531-532, the court
4 held that where a defendant shows good cause for discovery of accusers'
5 psychological records, the Sixth Amendment to the United States
6 Constitution requires in camera review of such records and weighing of the
7 defendant's right to present a defense versus patient's right to
8 confidentiality of such records. *People v. Hammon*, 15 Cal.4th at p. 1127,
9 modified *Reber* by holding that such discovery may not be obtained
10 pretrial, but rather may be examined during trial when the court is better
11 positioned to determine its relevance.
12

13 **C. The Defendant Needs the Accusers' Mental Health Records**
14 **to Determine If the Accusers Made Any Statements About**
15 **the Alleged Molestations**

16 The defense has documents showing that, during the preceding child
17 custody battles, the accusers underwent counseling. The accusers sought
18 psychological help during the custody battles and disclosed any
19 molestation. The defense expects the accusers' mental health records to
20 have references to such activity. Alternatively, if the accusers failed to
21 mention any molestation, the accusers may have fabricated their stories
22 against Mr. DOE.
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24 The defense must fully inquire into the mental health records. To
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1 deprive the defense of the opportunity to review the accusers' mental
2 health records would require it to defend a serious sexual misconduct
3 allegations case without any knowledge whether the accusers' have any
4 corroboration of their accusations.
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6 The accusers' mental health records should contain a source of
7 relevant information about the crucial incidents and are a proper subject
8 for inquiry. Mr. DOE cannot get the information any other way. (See,
9 *People v. Reber, supra*, 177 Cal. App. 3d at pp. 531-532.)
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11

12 **VIII. THE LAW ENTITLES DEFENDANT TO DISCOVERY OF**
13 **ALL INFORMATION CONCERNING THE CREDIBILITY**
14 **OF WITNESSES**

15 **A. Records Sought**

- 16 1. Copies of any 2005 - present: Diaries, memoranda, written records,
17 electronic data, notes or recordings about Joseph DOE and/or any
18 molestation.
19 2. 2005 - present: e-mail or text messages about Joseph DOE and/or
20 any molestation.

21 **B. The Law Entitles a Criminal Defendant to All Evidence**
22 **Bearing on the Credibility of a Material Witness**

23 The due process clause of the United States Constitution imposes a
24 duty on the prosecution to disclose " . . . all substantial material evidence
25 favorable to an accused . . . ," (*People v. Hayes* (1992) 3 Cal.App.4th
26 1238, 1244.) The constitutional duty of disclosure: " 'extends to evidence
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1 which may reflect on the credibility of a material witness. [Citation.] ...
2 "[S]uppression of substantial material evidence bearing on the credibility of
3 a key prosecution witness is a denial of due process . . ." [Citation.]'
4 [Citation.] (*People v. Hayes, supra*, 3 Cal.App.4th at pp. 1244-1245, fns.
5 omitted.)
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7

8 **C. The Items Should Be Disclosed Because the Accusers Had**
9 **a Motive and Had Been Influenced to Accuse Mr. DOE**

10 The defense believes the accusers texted and e-mailed each other
11 and Mr. DOE about the alleged events. The requested documents should
12 contain impeaching material. To deprive the defense of the opportunity to
13 review the accusers' relevant e-mails would require Mr. DOE to defend a
14 serious sex case without any knowledge whether the accusers' made any
15 statements that would affect their credibility.
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18 The accusers' test, e-mails, notes and diaries should contain a source
19 of relevant information about the crucial incidents and are a proper subject
20 for inquiry. Defendant has no other means by which to obtain this
21 information. When the accusers' privacy rights are weighed against
22 defendants' legitimate interest in preparing their defense, Mr. DOE's
23 interest should prevail.
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CONCLUSION

Mr. DOE respectfully requests the Motion to Quash be denied, that the prosecution and/or the accusers produce any documents or submit sworn statements from the accusers that the documents do not exist.

Dated: February 24, 2014

Respectfully submitted,
FAY ARFA, A LAW CORPORATION

/s Fay Arfa

Fay Arfa, Attorney at Law

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DECLARATION OF FAY ARFA

I, Fay Arfa, declare:

3. I represent Joseph DOE.
4. On November 20, 2013, I sent a letter to the prosecutor requesting documents, including: All of following for JIWON S. a.k.a. SARAH, JIEUN a.k.a. JOANNA, JISOO a.k.a. PHOEBE:
 1. 2005 - Mental health records including records of visits, receipts for payment, health insurance records etc.
 2. 2005-present - Obstetrics and gynecological medical records, including records of visits, receipts for payment, health insurance records, etc.
 3. 2005 - present: Diaries, memoranda, written records, electronic data, notes or recordings about Joseph DOE and/or any molestation.
 4. 2005 - present: e-mail messages about Joseph DOE and/or any molestation.
5. I did not receive a response from the prosecutor so I filed a Motion to Compel Discovery and set it for January 14, 2014.
6. On January 14, 2014, before court, the prosecutor and I conferred about the discovery. The prosecutor said he did not have any third party documents.
7. Based on the prosecutor's response, I subpoenaed the documents from the accusers and the accusers' mother.

- 1 8. On February 4, 2014, the prosecutor telephoned me and said that the
2 accusers did not have the information and asked whether I needed
3 them to come to court.
4
- 5 9. I told the prosecutor I needed them to come to court on because I
6 wanted to question them on the record about the absence of any
7 documents.
8
- 9 10. The accusers and their mother appeared in court and refused to
10 speak to me.
11
- 12 11. Defense counsel was unaware of any objection to the subpoenas until
13 the February 11, 2014 court hearing when the prosecutor orally
14 objected to my subpoena duces tecum.
15
- 16 12. I do not know if the subpoenaed documents exist. Because of the
17 prosecutor's relationship with the accusers and his ability to act on
18 their behalf, I need the prosecutor to get any documents from the
19 accusers or a sworn statement attesting to the absence of the
20 documents.
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- 22 13. If the documents do not exist, then no issue about the propriety of the
23 SDT exists. However, I need proof that the accusers do or do not
24 have any materials.
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- 26 14. I need the subpoenaed items to prepare a defense for Mr. DOE who is
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facing several felony counts, a potential life prison sentence and lifetime registration as a sex offender.

15. I need the materials to impeach the accusers and to prepare and present a defense.

16. I know that teenage girls keep diaries and share their thoughts because I was once a teenage girl. (See also attached article)

I declare, under penalty of perjury that the foregoing is true and correct to the best of my knowledge. Executed on February 21, 2014 at Los Angeles, California.

/s/ Fay Arfa

Fay Arfa, Attorney for Defendant

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