

ARIZONA SUPREME COURT

STATE OF ARIZONA,

Appellee,

v.

AARON BRIAN GUNCHES,

Appellant.

CR 13–0282–AP

Maricopa County Superior Court

No. CR 2003–038541–001

THE STATE’S RESPONSE TO BRIEF OF AMICI CURIAE

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Pursuant to this Court’s February 17 order, the State hereby responds to the four amicus briefs filed in this matter. One amicus brief, filed by the Maricopa County Attorney’s Office (“MCAO”), argues that a warrant should issue based on MCAO’s expansive and unprecedented interpretation of the law. The other three briefs – filed by the Federal Public Defender (“FPD”), Arizona Attorneys for Criminal Justice (“AACJ”), and American Civil Liberties Union (“ACLU”) – articulate different but often overlapping reasons why this Court is not required to issue a warrant under the unique circumstances present here.

The FPD, AACJ, and ACLU briefs demonstrate that a wide variety of reasons exist not to issue a warrant in this case. Those reasons include arguments grounded squarely in the law, as well as those grounded in common sense. The arguments thus support the State’s dual contentions here: (1) the law does not require this Court to issue a warrant when the State has withdrawn any request for a warrant and is asking this Court *not* to issue one, and (2) issuing a warrant on these facts would make little practical sense.

The MCAO brief, meanwhile, argues for several different expansive interpretations of the law, including a brand-new interpretation of the interplay between A.R.S. § 13–759 and Rule 31.23. In doing so, MCAO relies in large part upon out-of-state cases that are easily distinguishable or affirmatively hurt their case. MCAO also details a litany of changes to the relevant laws over the past 122

years, but nonetheless argues that the practical effect of all those changes is that little changed at all. Finally, MCAO offers an interpretation of its own authority that is irrelevant in this case and ignores the statutes that speak directly on the subject. The MCAO brief frequently strays from the question presented by this Court, and the Court should reject MCAO's unprecedented interpretations of several laws.

I. Issuance of a warrant requires an active request from the State.

A. Several of the arguments made by amici mirror and/or buttress those made by the State.

Given the myriad arguments made in the supplemental and amicus briefs, it is perhaps helpful to begin again with the narrow question this Court asked:

Because the State's original motion for warrant of execution placed this Court on notice that the requirements of A.R.S. § 13-759(A) and Ariz. R. Crim. P. 31.23(a) have been satisfied, and because the State's motion to withdraw does not assert otherwise, does this Court have authority to do anything other than issue the Warrant of Execution?

Order (Jan. 31, 2023). All four amicus briefs help establish that the answer is yes.

Many of the arguments made by amici mirror those made by the State in its supplemental brief. The FPD and ACLU both identified this Court's longstanding practice of declining to issue execution warrants when to do so would be pointless or create absurd results. FPD Br. at 5-7; ACLU Br. at 12 n.30; *see also* State's

Supp. Br. at 9-10, n.4, & Attach. F. Meanwhile, AACJ identified the obvious separation of powers problems created by an interpretation of A.R.S. § 13–759 and Rule 31.23 that would require issuance of a warrant the State does not seek.¹ AACJ Br. at 6–10; *see also* State’s Supp. Br. at 5–8.

The ACLU brief, too, recognized the separation of powers concerns, as well as practical considerations identified in the State’s Supplemental Brief. *See* ACLU Br. at 2 (“The executive branch is best positioned to decide whether Arizona’s execution protocol requires review because it has the most access to relevant information.”); State’s Supp. Br. at 10–14. And the ACLU brief, as the State has done, points out that many state executives have recently put executions on hold pending reviews of execution procedures and protocols. ACLU Br. at 12-13.

On all of these fronts, the arguments made by amici help confirm that ample reason exists to believe this Court has “authority to do anything other than issue the Warrant of Execution.” Order (Jan. 31, 2022).

a. Meanwhile, MCAO unpersuasively argues this Court should issue warrants *automatically*, with no request from the State.

¹ The State does not agree with AACJ to the extent it suggests that issuance of a warrant would “be a direct order to the executive branch to execute a person.” AACJ Br. at 9. Rather, a warrant consistent with the law would “authorize” an execution, not require one. A.R.S. § 13–759(A).

In arguing that a warrant should issue here, MCAO goes beyond the question presented by the Court and argues that before the commencement of federal habeas proceedings, “this Court’s obligation to issue a warrant is automatic—it requires no litigation or motion from the State or any other party.” MCAO Br. at 5. To interpret the statute this way would read Rule 31.23(a) out of existence. Indeed, this Court explicitly rejected this automatic-issuance scheme when it adopted an amendment to the rule in 2014 after a petition from its own Staff Attorneys’ Office.² *See* State’s Supp. Br. at 8–9 & Attachs. D (2014 order amending prior version of rule), E (rule change petition).

Automatic issuance of warrants would also make little sense in 2023. Should warrants issue even if the State cannot safely procure execution drugs, as is currently the case in Ohio and Louisiana? *See* ACLU Br. at 13 n.35. How about if the State has recently determined that it has failed to comply with its own execution protocols, as recently happened in Tennessee? *See* ACLU Br. at 13 n.34. Or how about if after three failed executions, the Governor orders a “top-to-bottom” review of the capital punishment system, as happened just a few months

² To the extent MCAO argues that the statute must control over the rule because it is substantive, any such argument fails. As the FPD articulated well in its amicus brief, the relevant part of the statute is plainly procedural. FPD Br. at 13 (citing *State v. Reed*, 248 Ariz. 72, 75–77 ¶¶ 8, 13, 16 (2020)).

ago in Alabama? *See* ACLU Br. at 13 n.33 (citation omitted). Or, finally, should warrants issue even if the Governor has announced no intent to execute anyone pending a review by an independent death penalty commission, as happened not long ago in Oklahoma?³

No. Issuing a warrant only when the State seeks one makes far more sense. And that is precisely the procedure Arizona law has provided for, through A.R.S. § 13–759(A) and Rule 31.23.

b. MCAO’s reliance on out-of-state authority misses the mark.

Beyond its automatic-issuance argument, MCAO further argues that a warrant should issue on the unique facts of this case despite the State’s withdrawal of its motion for a warrant. In making this argument, MCAO characterizes this Court’s role in issuing warrants of execution as ministerial in nature. MCAO Br. at 13. But while this Court’s role in issuing warrants is indeed a limited one, MCAO’s argument goes too far on multiple fronts. For one thing, it ignores that

³ *See* Oklahoma Halts Executions After Using Wrong Drug on Inmate (Oct. 8, 2015), <https://apnews.com/article/f7fe7d5b76cd4a12a2e00e8f929520fb> (last visited Feb. 22, 2023); Oklahoma Commission Recommends Death Penalty Moratorium, Extending Existing Moratorium (Apr. 25, 2017), <https://kfor.com/news/oklahoma-commission-recommends-death-penalty-moratorium-extending-existing-moratorium/> (last visited Feb. 22, 2023) (containing link to commission report).

this Court's limited role must be triggered by action from the State.⁴ *See* Ariz. R. Crim. P. 31.23(a), (b) (both requiring action from the State to seek a warrant).

MCAO similarly ignores this Court's longstanding practice of declining to issue warrants when it is clear an execution will not occur or where absurd results might occur. *See* State's Supp. Brief at 9–10 & Attach. F (collecting cases); FPD Br. at 5–7 (same). And although those orders were entirely consistent with Rule 31.23, any such order was permissible even if the Court were to conclude otherwise. *See* FPD Br. at 7-9 (citing Ariz. R. Crim. P. 31.3, which allows this Court, for good cause, to “suspend any provision of [Rule 31] in a particular case, and may order such proceedings as the court directs,” and collecting cases relating to the Court's inherent authority to issue necessary orders).

In support of its position, MCAO cites several out-of-state cases that shed little light on how this Court should interpret Arizona's statute and rule. None of those cases confronted Arizona law, which requires that the State trigger any action from this Court in issuing a warrant of execution. Additionally, none of the cases confronted a situation where the State had withdrawn a request for a warrant,

⁴ Indeed, contrary to MCAO's assertion, the State is not arguing that the statute or rule allow for “contested proceedings.” MCAO Br. at 1–2. Rather, the State is simply arguing that the State must initiate any warrant proceedings, and that where it is not seeking to initiate those proceedings this Court should not act.

where the State affirmatively avowed to this Court that it did not want a warrant to issue, or where the State notified this Court that it “cannot ensure it has adequate and properly trained personnel to meet its responsibilities in carrying out an execution,” all of which have happened here. State’s Supp. Brief at 13–14.

Nor did any of the cases appear to confront an out-of-state scheme that was similarly structured to Arizona’s. Among other cases, MCAO cites a 1950 Nebraska civil case holding that taxing of a judgment awarding costs by the clerk of court is ministerial. *See Rehn v. Bingaman*, 40 N.W.2d 673, 677 (Neb. 1950). In the warrant-of-execution context, MCAO argues that “other states have concluded their *similarly drafted statutes* are ministerial,” citing among other cases a Virginia case which held that “[i]n this State *there is no statute* which directs the trial court to fix the date of execution of one convicted of a capital crime.” MCAO Br. at 13 (citing *Rose v. Commonwealth*, 55 S.E.2d 33, 35 (Va. 1949) (emphasis added)).

The other cases cited by MCAO similarly fail to help its case, as they either analyzed schemes requiring no action from the State to trigger issuance of a warrant or analyzed a situation where the State actively sought a warrant. *See State v. McKenzie*, 894 P.2d 289, 293 (Mont. 1995); *State v. Joubert*, 518 N.W.2d 887, 893 (Neb. 1994); *Pate v. State*, 393 P.2d 247, 249 (Okla. 1964); *State v. Miller*, 217 P.2d 287, 293 (Kan. 1950). The 1964 Oklahoma case, for example,

held only that an order “fixing or resetting the date of execution” was not appealable. *Pate*, 393 P.2d at 250. Perhaps a more relevant precedent from Oklahoma comes from 2015, when the Governor initiated a six-year pause in executions pending review by a “Death Penalty Review Commission.”⁵

Finally, as the FPD pointed out in its amicus brief, even those states that view the issuance of a warrant as a purely ministerial task performed by the court clerk’s office might decline to issue a warrant where doing so would make little practical sense, as the South Carolina Supreme Court did just two weeks ago. (FPD Brief at 7, n.5 & Ex. I (citing *Mahdi v. South Carolina*, No. 2014–002131 (S.C. Feb. 9, 2023)).)

c. The history of Arizona’s laws does not dictate that a warrant must issue under the current laws absent an active request.

In addition to looking at out-of-state laws different from A.R.S. § 13–759 and Rule 31.23, MCAO spends substantial time detailing Arizona laws long ago superseded. *See* MCAO Br. at 10–14. On this front, MCAO gathers more than

⁵ Oklahoma Halts Executions After Using Wrong Drug on Inmate (Oct. 8, 2015), <https://apnews.com/article/f7fe7d5b76cd4a12a2e00e8f929520fb> (last visited Feb. 22, 2023); Oklahoma Commission Recommends Death Penalty Moratorium, Extending Existing Moratorium (Apr. 25, 2017), <https://kfor.com/news/oklahoma-commission-recommends-death-penalty-moratorium-extending-existing-moratorium/> (last visited Feb. 22, 2023) (containing link to commission report).

100 years of changes to Arizona’s laws in this area, arguing that through the litany of changes, “the process is mostly unchanged.” MCAO Br. at 10. This argument fails to survive close inspection of the changes MCAO cites, as might be expected given the dramatic changes in capital punishment jurisprudence between 1901 and 2023.

The first of these laws, dating to territorial times, provided for automatic issuance of warrants by the trial court. MCAO Br. at 10–11, App. A § 1023. Executions were by hanging, and were prohibited only when the condemned was insane or pregnant. *Id.* at §§ 1027–35. The law provided for issuance of certain subsequent warrants *by the governor*. *Id.* at §§ 1031–33. And under some circumstances, the 1901 law and other early 20th century laws permitted issuance of certain subsequent warrants upon application of other members of the executive branch. *See id.* at § 1034; App. B (1913) at § 1147, App. C (1928) at § 5128; App. D at § 44-2314.⁶

More broadly, close inspection of the early 20th century laws shows that they bear little resemblance at all to A.R.S. § 13–759 and Rule 31.23. Capital

⁶ In yet another novel interpretation of the law, MCAO cites the 1939 law in urging this Court to hold that “the plain language of § 13–759(A)” authorizes a single member of this Court to issue a warrant. MCAO Br. at 8. Although the point does not seem to be relevant here, it’s worth noting that § 13–759(A) says no such thing.

punishment law on the whole similarly bears little resemblance to what it looked like 122 years ago, especially as litigation surrounding the use of lethal injection has proliferated in the 21st century. And while extensive, MCAO's research and argument certainly do not capture every relevant change in the law. Indeed, MCAO fails to cite the most recent change made to the rule by this Court in 2014, ending its survey in 1994. *See* MCAO Br. at 13.

MCAO's recitation of the history has demonstrated well that the law has often evolved over the last 122 years in attempts to meet the often-changing nature of capital litigation. While MCAO may prefer a prior iteration of Arizona's law, the current scheme, which requires that the State affirmatively act to seek a warrant before one is issued, is the only scheme in effect for capital litigation today.

II. The State has the right to withdraw its motion for warrant of execution.

In a variety of contexts, Arizona courts and others have held that a party has the right to withdraw a motion before the Court acts on that motion. *See* State's Supp. Br. at 2-4 (collecting cases). So too for notices, which may sometimes be conditioned on facts or circumstances subject to change. *See id.* at 4-5. Indeed, Rule 31.23, which speaks of notices in one subsection and motions in another, demonstrates how functionally similar notices and motions are in some contexts, including this one.

Both subsections of Rule 31.23 require the State to affirmatively act to request a warrant. And as the FPD points out in its amicus brief, the use of the word “notice” in Rule 31.23(a) – and thus the distinction between the two subsections’ mechanisms – may simply be a relic of a prior version of the rule. *See* FPD Br. at 10 n.6.

Under either subsection, the underlying premise is that a warrant should issue only when the State seeks one. If Gunches had sought federal habeas relief, as most inmates do, presumably subsection (b) would apply and a “motion” would be required to trigger issuance of an execution warrant. There is little reason to think that simply because he did not seek federal habeas relief, the situation is so fundamentally different that only bare “notice” of certain facts (which were surely already known to the Court) should irrevocably trigger issuance of a warrant.

In arguing that the State may not withdraw a motion for warrant of execution, the best MCAO can muster is to argue that “[t]he statute provides no method to withdraw a request for a warrant of execution, suggesting that such a procedure is unauthorized.” MCAO Br. at 7. By MCAO’s account, motions thus may only be withdrawn if the relevant statute expressly mentions withdrawal.

Precedent and common sense foreclose this argument. In many contexts, withdrawal of a motion or notice is permitted despite silence on the subject of withdrawal in the relevant statute or rule. In *State v. Super. Ct. in & for Cnty. of*

Navajo, for example, the Court of Appeals held that a trial court could not “prevent the county attorney from withdrawing a previously filed motion to transfer a juvenile for prosecution as an adult.” 180 Ariz. 384, 385 (App. 1994); *compare with* A.R.S. § 8–327(B) (providing mechanism for State to request transfer without any provision for withdrawal).

Similarly, in *State v. Fell*, this Court acknowledged the State’s prior withdrawal of a notice of intent to seek the death penalty. 210 Ariz. 554, 556 ¶ 2 (2005); *compare with* Ariz. R. Crim. P. 15.1(i) (providing detailed requirements for a notice of intent to seek the death penalty, but not providing for possible withdrawal of any such notice). When the legislature drafts a statute, and when this Court drafts a rule, it need not expressly incorporate the entire body of other standard procedural law that may be relevant. Instead, the normal presumption is that the background body of procedural law applies, absent an express statement to the contrary.

Indeed, prior events in this case help illustrate the point. During his post-conviction relief proceedings, Gunches waived PCR review, functionally withdrawing a notice of post-conviction relief previously filed on his behalf. *See State v. Gunches*, Maricopa Cnty. Super. Ct. No. CR 2003–038541–001; *compare with* Ariz. R. Crim. P. 32.4 (providing rules for the filing of a notice requesting post-conviction relief, while being silent on the possibility of withdrawal of any

such notice). Surely MCAO would not contend that the lack of an explicit withdrawal provision in Rule 32.4 should have required Gunches to continue seeking PCR relief.

MCAO's arguments ignore these precedents and common-sense conclusions. In support of its odd position, MCAO cites *State v. Maestas*, which held that a certain law did not apply to "possession or use of marijuana on public college and university campuses" because a list in the relevant law did not include such campuses. MCAO Br. at 7 (citing *Maestas*, 244 Ariz. 9, 13 ¶ 15 (2018)). That conclusion is not close to relevant to the question presented here.

MCAO likewise ignores that circumstances can change while a motion or notice is pending. To accept MCAO's argument that the State may never withdraw a notice or motion filed pursuant to Rule 31.23, even when the executive no longer seeks a warrant and no longer seeks to carry out an imminent execution, would create absurd results. Imagine for a moment that after the State's filing of a notice or motion, a fire or some other event rendered the State's execution chamber totally unusable for the foreseeable future. Irrelevant, says MCAO; the State may not withdraw its request and a warrant must issue. Arizona law does not require this absurd result.

III. Victims’ rights are entitled to great respect, but they do not change the meaning of A.R.S. § 13-759 or Rule 31.23.

Through the Victims’ Bill of Rights (“VBR”), victims of crime have the right “[t]o be treated with fairness, respect, and dignity, and to be free from intimidation, harassment, or abuse, throughout the criminal justice process.” Ariz. Const. art. II, § 2.1(A)(1). So too do they have the right to a “prompt and final conclusion of the case after the conviction and sentence.” Ariz. Const. art. II, § 2.1(A)(10).

These rights are entitled to respect and consideration when weighing competing interests, as this Court must often do. But MCAO argues that, to comply with these rights, “the State must request, and this Court must issue, a warrant of execution.” MCAO Br. at 15. That is both wrong as a matter of law and well beyond the scope of the narrow question posed by this Court’s January 31 order.

While the VBR conveys several important rights, it “does not guarantee victims any particular appellate disposition.” *Reed*, 248 Ariz. at 72 (2020). For example, this Court has held that the constitutional right to a prompt and final conclusion “does not give victims a vested right to sustaining a conviction on appeal.” *State v. Montes*, 226 Ariz. 194, 197, ¶ 16 (2011) (citing *State ex rel. Thomas v. Klein*, 214 Ariz. 205, 209, ¶ 14 (App. 2007)). Nor do victims’ rights entitle a victim to a particular outcome in a given case. *See, e.g., State v. Gates*,

243 Ariz. 451, 454–55 ¶ 16 (2018) (holding that in deciding whether to order a post-waiver intellectual disability determination, one factor among others for the court to consider is whether doing so might lead to delay that would prejudice the victim’s right to prompt and final conclusion). Instead, the right must be balanced with other compelling rights and legal obligations. *See, e.g., State v. Sahagun-Llamas*, 248 Ariz. 120, 128 ¶ 30 (App. 2020) (victim’s right to prompt and final conclusion did not overcome defendant’s right to appeal).

Likewise, here, the right to a prompt and final conclusion does not guarantee the issuance of a warrant of execution where the State is not seeking a warrant. Indeed, a victim could not move this Court for issuance of a warrant of execution. *See* A.R.S. § 13–759(A) (providing for issuance of warrant on motion by “the state”); Ariz. R. Crim. P. 31.23 (same); *cf. State v. Lamberton*, 183 Ariz. 47, 51 (1995) (crime victims are not “parties” to criminal proceedings and thus cannot file petition for review, separate from the State, of order granting defendant relief). And victims’ rights simply do not change the meaning of A.R.S. § 13–759 or Rule 31.23. They are therefore not pertinent to the limited statutory interpretation question before this Court.

Finally, ensuring that any executions are carried out properly and lawfully protects not only important rights of capital defendants, but also protects State and victims’ interests, including making sure that executions carried out in the name of

the people of Arizona are handled lawfully and constitutionally. Victims, too, benefit from close adherence to the law.

IV. As this Court has recognized in this case, the Attorney General represents the State before this Court.

Finally, MCAO asserts that it has the power to represent the State in this Court and thus has the power to seek execution warrants itself. Although this Court is not now confronted with a request for a warrant from MCAO and thus need not resolve any issue on this front now, a few things must be said regarding MCAO's gratuitous assertion that it has the power to seek a warrant of execution on its own. On this front, too, MCAO attempts to stretch the law too far.

The only support MCAO offers for its proposition is a cite to the generic definition of "State," which includes the District of Columbia and United States territories. MCAO Br. at 6 (citing A.R.S. § 1-215(38)). Obviously, Guam cannot seek a warrant of execution in this Court. The statute gives MCAO no greater rights. And while citing this generic (and irrelevant) statute, MCAO ignores the statutes that specifically delineate the roles and authority of the Attorney General and the various county attorneys.

The Attorney General "serve[s] as chief legal officer of the state." A.R.S. § 41-192. Section 41-193 specifically delineates several responsibilities for the "department of law," which "shall be composed of the attorney general and the subdivisions of the department created as provided in this article." The very first

responsibility on that list is that “the department shall . . . [p]rosecute and defend in the supreme court all proceedings in which this state or an officer of this state in the officer's official capacity is a party.” A.R.S. § 41–193(A)(1).

Looking at this statutory grant of authority, this Court has previously concluded that “the Attorney General is the proper state official to institute [an] action” in the Supreme Court. *State ex rel. Morrison v. Thomas*, 80 Ariz. 327, 332 (Ariz. 1956); *see also Crosby-Garbotz v. Fell in & for Cnty. of Pima*, 246 Ariz. 54, 60 ¶ 24 (2019) (noting that Attorney General’s Office has supervisory authority over county attorneys and handles appeals from criminal cases tried by county attorneys). The Attorney General similarly represents “this state in any action in a federal court.” A.R.S. § 41–193(A)(3).

It thus should be no surprise that the Attorney General has long represented the State in post-trial capital litigation, much of which happens in this Court and in federal court. And having the Attorney General represent the State in the context of warrant proceedings makes particular practical sense. For one thing, issues of statewide concern are undoubtedly implicated. Furthermore, executions must be conducted by ADCRR—a state agency represented by the Attorney General—and coordination with ADCRR is often required. *See* A.R.S. §§ 13–759, 41–192(D).

More broadly, Section 41-193 further provides that the Attorney General may “prosecute and defend any proceeding in a state court other than the supreme

court in which this state or an officer of this state is a party” if doing so is “deemed necessary by the attorney general.” A.R.S. § 41–193(A)(2). And the statute requires the Attorney General to “[e]xercise supervisory powers over county attorneys of the several counties in matters pertaining to that office.” A.R.S. § 41–193(A)(4).

The statute delineating powers of the respective county attorneys, meanwhile, provides much different authority. *See* A.R.S. § 11–532 (providing, among other things, that county attorneys shall “[a]ttend the superior and other courts within the county and conduct, on behalf of the state, all prosecutions for public offenses,” and “shall furnish the attorney general” with certain information upon “receipt of an appellant’s brief in a criminal appeal”). The county attorney has no statutorily granted right to represent the State in this Court.⁷

⁷ To be sure, county attorneys sometimes appear on behalf of the State in this Court, perhaps most often in the unique context of PCR proceedings. They can do so, however, only if permitted by the Attorney General. The Attorney General plainly has the statutory right to represent the State in this Court when she wishes to do so. *See* A.R.S. § 41–193(A)(1). The Attorney General has no intent to depart from the longstanding practice of being the sole representative of the State before this Court (and others) in post-trial capital litigation. If a county attorney ever purports to represent the State in this Court in post-trial capital litigation, including a request for a warrant of execution, without the express written permission of the Attorney General, this Court should summarily strike the filing.

In light of all this, MCAO’s protestation that “the Attorney General should not have the ability to withdraw” a county attorney’s request for a warrant assumes too much. County attorneys have no power to ask this Court for a warrant in the first place. Any hypothetical “philosophical tug-of-war between dueling officials taking opposing positions” has thus already been resolved by the legislature, which has clearly delineated the respective responsibilities of the Attorney General and the county attorneys on this front. MCAO Br. at 7–8. Pursuant to statute and rule, warrants of execution issue from this Court, and the Attorney General represents the State in this Court.

CONCLUSION

Turning back to the question posed by this Court, the Court is not powerless to do “anything other than issue the Warrant of Execution.” Order (Jan. 31, 2023). Neither the statute nor the rule compels the Court to issue a warrant here, where the State has withdrawn its request for a warrant and is in fact asking this Court *not* to issue a warrant. This Court has ample power not to issue a warrant where the State is not seeking one.

This Court should not issue a warrant of execution.

Respectfully submitted,

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