IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	)	Supreme Court No. _____
	)	
Appellee,	)	Appeal from the Ohio Court of Appeals, Eighth Judicial District,
	)	
v.	)	No. 18-107374
	)	
DELVONTE PHILPOTTS,	)	Cuyahoga County Court of Common Pleas, No. 17-619945
	)	
Appellant.	)	

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT DELVONTE PHILPOTTS

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WHY THIS CASE INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION AND AN ISSUE OF PUBLIC OR GREAT GENERAL INTEREST

According to the Eighth District, it is constitutional for the government to automatically withdraw a fundamental based on nothing more than an unindividualized, baseless "inference" of dangerousness. The Eighth District is wrong—this unfounded "inference" and the deprivation that follows it are flagrantly *un*constitutional.

A.

Section 2923.13(A) of the Ohio Revised Code makes it a crime for a person merely *under indictment* for a statutory "felony offense of violence" to possess any firearm, no matter where or for what purpose.[1] Moreover, the ban absolutely bars any possession—even continue, preexisting possession at home for protection. Worst of all, the ban attaches automatically to *every* indictee, without regard for individual circumstances and without a *pre*-deprivation hearing on an *individual* indictee's actual dangerousness. It automatically burdens all indictees, even though they are legally presumed to be "law-abiding" until actually convicted, and even if no other "disability" affects them. Because the statute reaches everywhere, and uses the most invasive method possible, it violates the Second Amendment on its face. Likewise, by automatically withdrawing a fundamental, individual constitutional right without a pre-deprivation hearing, the statute violates the right to procedural due process on its face. The Eighth District, however, both misunderstood the core civil rights at issue *and* misapplied the relevant law, leaving the rights of thousands of presumptively law-abiding Ohioans in jeopardy.

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[1] R.C. 2923.13(A) applies to people under indictment for, among other things, a "felony offense of violence." To avoid referring cumbersomely to this phrase—and without suggesting that literally *all* indictees are encumbered—the remainder of this memorandum refers to the group of undifferentiated indictees affected by the statute simply as "indictees."

B.

The Eighth District's opinion is flawed in a variety of ways, but two momentous problems deserve your especial attention.

First, the Eighth District premised its decision largely on the fact that R.C. 2923.14(D) provides for a *post*-deprivation hearing, in which an indictee can ask for his rights back from the very authorities who have preemptively withdrawn them. 8th Dist. Op at ¶ 29. But R.C. 2923.14(D) doesn't solve the problem, because the prior restraint *is* itself the unconstitutional occurrence; a later hearing is too late to repair the damage. More importantly, though, the very existence of R.C. 2923.14(D) is a clear acknowledgment by the General Assembly that the only way to find out who specifically is and isn't too dangerous to continue possessing their firearms during indictment is to have an individualized hearing. In other words, the General Assembly knows that in fact not all indictees are necessarily too dangerous to continue possession a firearm—the only problem is that right now, the law does it backwards, taking the rights away first and asking the necessary questions later.

The other major problem with the Eighth District's opinion is that it applied the wrong standard of constitutional scrutiny—namely intermediate as opposed to *strict* scrutiny. 8th Dist. Op. at ¶ 30. When the government absolutely withdraws a core constitutional right, strict scrutiny is required. Under the appropriate degree of scrutiny, this statute could never survive constitutional attack, as it uses the most invasive means imaginable—automatic criminalization—and is not remotely narrowly tailored.

To be clear, nobody is saying that the government cannot temporarily disarm *specific* indictees through either the ordinary bond-setting process or through a separate pre-

deprivation hearing. The problem here is that the government presumes—or "infers," to use the Eighth District's phrasing—that *all* indictees are dangerous until proven safe; an inversion of constitutional norms and centuries of Anglo-American law for which history records no parallel. This seize-first-ask-questions-later approach cannot be reconciled with the Constitution's codification of the timeless right to defend one's self, home, and family. While *new* acquisitions after indictment are criminalized nationwide, and have been for over a century, Ohio's abnormal and extraordinary ban on *continued, pre-existing* possession is without any historical precedent and cannot survive constitutional scrutiny. Only three states—Washington, Hawaii and (for now) Ohio—criminalize continued pre-existing possession of firearms at home by indictees. Since the decisions in *Heller* and *McDonald*[2] it has become unmistakably clear that such laws are unconstitutional.

C.

At the very least you should take this case and hold it pending resolution of *State v. Weber*, Supreme Court No. 2019-0544. In *Weber*, you accepted jurisdiction over Weber's second proposition of law, among others, which declares that "[w]here a challenge is made that a statute unconstitutionally impinges on the fundamental right to bear arms, review is undertaken employing a strict scrutiny standard." If you were to so hold, then the Eighth District's analysis would unquestionably need to be redone under that standard.

Either way, you should take this case. At present, thousands of Ohioans are at risk of having their core civil rights withdrawn based on nothing more than an indictment, and without the necessary protection of a counseled, adversarial pre-deprivation hearing. Such

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[2] 554 U.S. 570, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008) and 561 U.S. 742, 130 S.Ct. 3020, 177 L.Ed. 894 (2010), respectively.

a broad and non-specific burden cannot be reconciled with constitutional principles in our free Republic. This law should be called what it is—unconstitutional.

STATEMENT OF THE CASE AND FACTS

Delvonte Philpotts had never been convicted of a felony when sixteen armed police ransacked his home and found a pistol. He had been indicted, true—for rape, kidnapping, and assault—but his trial was still months away. Except the trial never happened, because the government couldn't prove its case and dropped all charges.

Del's home was in a crime-ridden, dangerous neighborhood, so he felt safer having a gun at home to protect his family. But according to the government, once Del was indicted in the rape case he violated the law simply by continuing to keep his pistol at home for protection. The government went to the grand jury, which returned an indictment on one count of having a weapon while under a "disability," namely the eventually-dismissed indictment for a "felony offense of violence."

Mr. Philpotts moved to dismiss the weapons charge because the Ohio statute under which he was being prosecuted, R.C. 2923.13, violated his constitutional rights. The trial court ruled against Mr. Philpotts. A few weeks later, he pleaded no contest to the sole count in the new indictment, pleaded guilty in another case not on appeal, and was sentenced.

On appeal to the Eighth District Court of Appeals, Mr. Philpotts challenged the constitutionality of the statute on Second Amendment and procedural Due Process grounds. As the Second Amendment challenge the Eighth District, applying a lower standard of constitutional scrutiny than required, held that the statute was narrowly tailored to protect the public from guns because it applies only to indictees charged with "violent" felonies (and drug felonies) and besides provides indictees with a means of

requesting their constitutional rights back after they've already been taken away. As to the due process challenge, the appellate court, misapprehending the issues, held that indictees have sufficient notice that their continued possession of firearms after indictment is unlawful. This is *not* what Mr. Philpotts argued, and it's not the problem with the statute—the statute violates due process because it takes away indictees' core constitutional rights *first*, without a hearing, and only affords them an opportunity to challenge that deprivation *after* it has already occurred. The Eighth District did not address this problem.

This timely appeal follows.

LAW AND ARGUMENT

First Proposition of Law: On its face, R.C. 2923.13(A)'s blanket ban on continued possession of firearms by indictees violates the Second Amendment.

The Second Amendment does not permit the wholesale, automatic deprivation of the right it secures based on mere indictment. Unlike "longstanding" limitations on *convicted* felons' Second Amendment rights, or other similarly ancient restrictions, Ohio's absolute prohibition on the possession of firearms by indictees is unexampled in history, insufficiently narrow, and unnecessarily invasive. Consequently, on its face this ban violates the Second Amendment. You should take this case and strike the statute down.

3. Strict scrutiny is required when the government withdraws an enumerated, individual constitutional right from an entire group without distinction.

Although holding in *Heller* that the Second Amendment protects an individual right, the U.S. Supreme Court cautioned that "nothing in [its] opinion should be taken to cast doubt on longstanding," "presumptively lawful" "prohibitions on the possession of firearms by felons," among various other well-established regulations. 554 U.S. at 626-627. On the other hand, R.C. 2923.56—re-codified in 1971 as today's R.C. 2923.13—was first enacted in

only 1969, just a generation before *Heller*. It was putatively "based on a provision in the federal law," namely the Gun Control Act of 1968, Pub. L. 90-618. *See* Ohio Legis. Comm'n, Proposed Ohio Crim. Code: *Final Rep. of the Technical Comm. To Study Ohio Crim. Laws and Proc.*, 254 (1971). But Ohio's law goes much further than the federal law that supposedly inspired it, and in doing so breaks with all convention. Compared with time-honored prohibitions on the possession of weapons by *convicted* felons, *e.g.*, *Heller*, 554 U.S. at 626-627, or carrying arms with lawless purpose, *e.g.*, Statute of Northampton, 2 Edw. III, 258, ch. 3 (1328), or bearing hidden weapons, *e.g.*, *Louisiana v. Chandler*, 5 La. Ann. 489, 489-490 (1850), Ohio's ban on the possession of firearms by mere indictees is unmoored from any discernible historical antecedent and hardly "longstanding."

Although *Heller* did not state the exact test for Second Amendment constraints not considered "longstanding," the Court rejected "rational basis" review out of hand. 554 U.S. at 634-635 ("If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment * * * would have no effect."). Instead, the Court said that "[u]nder *any* of the standards of scrutiny that [it has] applied to enumerated constitutional rights, banning from the home the most preferred firearm in the nation to keep and use for protection of one's home and family would fail constitutional muster." *Id*. at 628 (emphasis supplied). Thus, "[w]hat we know from [*Heller*] is that Second Amendment guarantees are at their zenith within the home," *Kachalsky v. Westchester*, 701 F.3d 81, 89 (2d Cir.2012), and so "any law that would burden the 'fundamental,' core right of self-defense in the home by a law-abiding citizen would be subject to strict scrutiny," *United States v. Masciandaro*, 638 F.3d 458, 470-471 (4th Cir.2011).

R.C. 2923.13(A) is just such a law. First, a person merely under indictment must be considered a "law-abiding citizen" entitled to the Second Amendment protections. After all, "[t]he assumption that [a defendant is] more likely to commit crimes than other members of the public, *without an individualized determination to that effect*, is contradicted by the presumption of innocence." *United States v. Scott*, 450 F.3d 863, 874 (9th Cir.2006) (emphasis supplied). The statute thus reaches the lawless and the law-abiding alike. Moreover, by prohibiting indictees from possessing firearms under *any* circumstances, the statute penetrates even into the home and prohibits *all* uses, including defense of one's home and family. No exception is made for certain uses in certain places. In other words, R.C. 2923.13(A) "would burden the fundamental, core right of self-defense in the home by a law-abiding citizen." *Masciandaro*, 638 F.3d at 470-471. Strict scrutiny is therefore required.

B. The statute uses the most restrictive means imaginable and is not remotely "narrowly tailored."

Throughout this case, the government has claimed—without a molecule of evidence—that "people indicted with * * * violent offenses * * * pose a unique danger on the streets to the public." Tr.31-32. The assumed danger of these indictees is openly based on "a legal finding of probable cause by a government entity, the grand jury," Tr.32, and literally nothing else. This is not enough.

3. Grand juries do not evaluate a person's general danger to society, and so their findings of probable cause tell us nothing *about an individual's risk.*

A grand jury's findings are immaterial when evaluating individual risks to the citizenry because the grand jury evaluates probable cause—and nothing else. It is also, of course, trivially easy to obtain an indictment, hence the droll if depressing quip that the government can indict something as blameless as "a ham sandwich." *In re Grand Jury*

Subpoena of Stewart, 545 N.Y.S.2d 974, 977 fn.1 (Sup.Ct.N.Y. 1989). The government's own statistics show that in 2015—the most recent available data—just 3% of cases were "no-billed" by the Cuyahoga County grand jury. Federal numbers are even more dismal—only *eleven* out of 162,351 cases, or a microscopic 0.0068%, were no-billed by federal grand juries in 2010. *See* Bureau of Justice Statistics, *Federal Justice Statistics 2010*, Statistical Tables (2013). But the government's enviable success rate is possible because the "process" offers almost no protection to the soon-to-be-indicted.

Not only "can [it] *fairly* be said that the prosecutor holds all the cards before the grand jury," *Mass. V. Walczak*, 979 N.E.2d 732, 752 (2012)—it is a staggering understatement. Behold: the target of a potential indictment is not present at the grand jury's secretive proceedings; nor is his attorney if he has one. Ohio R. Crim. P. 6(D). He therefore lacks the opportunity to confront the government's witnesses or present his own. The rules of evidence do not apply, Ohio Evid. R. 101©(2), so hearsay is freely permitted, routinely used, and may even constitute the entirety of the government's so-called evidence, *see Costello v. United States*, 350 U.S. 359, 361, 76 S.Ct. 406, 100 L.Ed. 397 (1956). The government is even allowed to present "evidence" that would violate the Fifth Amendment right against self-incrimination, *Lawn v. United States*, 355 U.S. 339, 345, 78 S.Ct. 311, 2 L.Ed.2d 321 (1958), or the Fourth Amendment's exclusionary rule, *United States v. Calandra*, 414 U.S. 338, 342, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974), if offered at a real trial. Indictments therefore can be obtained on literally *zero* admissible evidence. *See, e.g.*, *Holt v. United States*, 218 U.S. 245, 247, 31 S.Ct. 2, 54 L.Ed. 1021 (1910) (refusing to quash an indictment although there was "very little evidence against the accused" and most of it would be inadmissible at trial). On the other hand, if the government has exculpatory evidence it is under no obligation to

disclose it to the grand jury. *State v. Wilks*, 154 Ohio St. 3d 359, 2018-Ohio-1562, 114 N.E.3d 1092, ¶¶ 30-34. This might be enough for probable cause, but it's scarcely conclusive proof of the indictee's dangerousness to society in general, and indeed is completely divorced from that question. Yet this is the "process" the government relies on for what is exposed as no more than an *assumption* of dangerousness.

2. No other potential consequence of indictment works this way.

Indictment has historically had but limited effects on the indictee's constitutional rights. Indeed no other potential consequence of indictment works to *automatically* strip them from the indictee.

Probably the commonest consequence is possible detention before trial, but this is kept constitutional only by substantial procedural protections that precede the deprivation. In *United States v. Salerno*, the Supreme Court upheld the power of federal courts to detain an arrestee before trial to ensure the safety of the community. 481 U.S. 739, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987). The power withstood constitutional scrutiny only for being constrained by many procedural safeguards. To wit:

> [T]he [g]overnment must first of all demonstrate probable cause to believe that the charged crime has been committed by the arrestee, *but that is not enough*. In a *full-blown adversary hearing*, the [g]overnment must [also] convince a *neutral decision-maker* by *clear and convincing evidence* that *no conditions* of release can *reasonably assure* the safety of the community or any person.

Id. at 751-752 (emphases supplied). In short, unlike Ohio's automatic disability upon indictment, an indictee may lose his right to be free pending trial only after an adversarial hearing, with counsel. Even then he can be held without any bond under rare circumstances and upon an individualized finding of extreme risk. R.C. 2937.222(A)-(C). Hence, any

comparison between pretrial detention and the automatic loss of Second Amendment rights would be ham-fisted at best.

Along the same lines, an indictee may be subjected to release conditions that infringe upon his constitutional rights only after an individualized determination that they are warranted. *See, e.g.*, Ohio R. Crim. P. 46(B)(5) (allowing pretrial restriction on contact with witnesses "upon proof of the likelihood" that the accused will interfere with them); Ohio R. Crim. P. 46(B)(6) (allowing mandated pretrial drug or alcohol treatment upon individualized judicial finding of need); *United States v. Bena*, 664 F.3d 1180, 1182-1185 (8th Cir.2011) (upholding federal ban on possessing firearms for those subject to protection order, 18 U.S.C. § 922(g)(8), based on statutory requirement of an adversarial pre-deprivation "*finding* that such person represents a credible threat" to protected persons (emphasis supplied)). Conversely, when the government invents categorical restrictions on constitutional rights that attach automatically upon indictment but without an individualized determination of need, courts declare them unconstitutional. *See, e.g.*, *Scott*, 450 F.3d at 874 (holding that pretrial release conditions confected to require that defendant "consent" to random home searches and drug tests violated Fourth Amendment in absence of individualized determination that the conditions were necessary).

Here, too, the problem is the total lack of individualization: the government knows nothing about the people whose rights it is withdrawing except that a grand jury found probable cause. Yet Ohio automatically criminalizes the possession of firearms in any place and for any reason by people indicted for *any* "violent" or drug-related felony, in the absence of an individualized consideration of dangerousness; in the absence of a prior opportunity to respond in an adversarial hearing before a neutral magistrate; and even if

the felony bears at most a nebulous connection to gun violence. *E.g.*, R.C. 2909.03(A)(5) ("creat[ing] a substantial risk of * * * harm * * * to any * * * brush-covered land"); R.C. 2921.03(A) ("recording * * * [a] fraudulent writing * * * in wanton manner * * * to influence * * * a public servant"); R.C. 2905.11(A)(4), (5) (threatening to "[u]tter * * * any calumny" or "expos[e] * * * any person to * * * ridicule" for profit). This is not permitted.

3. There are less restrictive, more narrowly tailored, and more effective *approaches.*

Arrangements far less restrictive than automatic criminalization spring readily to mind. For instance, public safety could be adequately protected if the judge in the initial, potentially-disabling felony case simply made an individualized determination regarding whether the accused is sufficiently dangerous to be temporarily deprived of his Second Amendment rights as a condition of pretrial release. Bond conditions, properly tailored to individual circumstances, can and already do prohibit some people from continuing to possess firearms while an indictment is pending where their doing so is shown to be actually risky. Ohio R. Crim. P. 46(B)(7). Limiting possession as part of the bond-setting process also allows the accused the important protection of a counseled, adversarial hearing that costs the government next-to-nothing.

Alternatively, the government could exclude possession from the statute as it pertains to indictees, like the federal government and almost all other states do, while continuing to prohibit *acquisition* after indictment. This is the enormous difference between Ohio's approach to indictees and everyone else's. The federal government prohibits indictees only from "ship[ping], transport[ing], * * * or receiv[ing] any firearm," 18 U.S.C. § 922(n), but has never criminalized mere possession by them. Instead, the federal government only bans it after *conviction*. 18 U.S.C. § 922(g); *United States v. Laurent*, 861

F.Supp.2d 71, 102 (E.D.N.Y. 2011) ("Unless the defendant already possesses a firearm prior to his indictment, § 922(n) does deny him the ability to keep and bear arms for the purpose of self-defense in his home," meaning if he *does* already possess a firearm, § 922(n) *does not* deny him that ability.).

In Ohio, though, it is absolutely forbidden to continue possessing a firearm after indictment, even though continued pre-existing possession at home—which the statute reaches by its expansive breadth—is not demonstrably portentous of evil intent. Yet the law could easily separate prohibited conduct while under indictment—namely, acquiring or carrying firearms—from prohibited conduct after conviction—namely, acquiring, carrying, using, or even just *having* firearms. This would allow indictees to continue possessing firearms in their own homes for self-defense while prohibiting them from carrying their weapons out of doors or obtaining more of them.

Instead of any of this, Ohio has determined simply to strip all indictees affected by R.C. 2923.13(A) of their Second Amendment rights automatically—regardless of individual risk factors, regardless of whether possession precedes indictment, regardless of whether the firearm in question is kept in the home for self-defense, and in the total absence of an individualized, adversarial hearing before a neutral magistrate. This is not remotely the "least restrictive means" of accomplishing the government's stated goal. Calling it "narrowly tailored" would be lavishly charitable. In short, the statute violates the Second Amendment.

Second Proposition of Law: On its face, R.C. 2923.13(A)'s blanket ban on possession of firearms by indictees violates the constitutional right to procedural due process.

The Due Process Clause of the Fifth Amendment prohibits the federal government from depriving any person of "life, liberty, or property, without due process of law." U.S. Const., am. V. The same clause of the Fourteenth Amendment prohibits such abuses by the

several states. U.S. Const., am. XIV; *State v. Alim*, 150 Ohio St.3d 489, 2017-Ohio-2956, 83 N.E.3d 883, ¶ 40. These clauses protect procedural and substantive rights alike. Accordingly, even if "government action depriving a person of life, liberty, or property survives substantive due process scrutiny, it must still be implemented in a fair manner," namely with sufficient procedural safeguards. *Salerno*, 481 U.S. at 746.

"Procedural due process rules are meant to protect persons * * * from the mistaken or unjustified deprivation of life, liberty, or property." *Carey v. Piphus*, 435 U.S. 247, 259, 98 S.Ct. 1042, 55 L.Ed.2d 252 (1978). They prevent the government from either withdrawing benefits from those entitled to them or from depriving people of their liberties wrongfully and needlessly. *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). Under procedural due process, the "standard analysis" proceeds in two steps. First, a reviewing court asks "whether there exists a liberty * * * interest of which a person has been deprived, and if so [it] ask[s] whether the procedures followed * * * were constitutionally sufficient." *Swarthout v. Cooke*, 562 U.S. 216, 220, 131 S.Ct. 859, 178 L.Ed.2d 732 (2011). To determine whether the "procedures followed," if any, are sufficient, courts rely on the test articulated in *Eldridge*, *supra*, balancing "the private interest that will be affected by the official action" and "the risk of an erroneous deprivation * * * through the procedures used" against "the [g]overnment's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." 424 U.S. at 335.

People merely under indictment have procedural due process rights not to be needlessly or wrongfully deprived of their liberties, including their Second Amendment rights, or their property, including firearms. Other categorical prohibitions on possession of

firearms by indictees have been struck down as violating procedural due process. For example, the Adam Walsh Act's provisions mandate that a defendant charged with a child pornography offense be required to "refrain from possessing a firearm" as a condition of pretrial release. 18 U.S.C. § 3142(c)(1)(B). Several courts have held that those provisions violate procedural due process on their face because they mean "that an arrest on the stated charges, without more, irrebuttably establishes that such conditions are required, thereby eliminating the accused's right to an independent judicial determination as to required release conditions, in violation of the right to procedural due process * * * under the Fifth Amendment." *United States v. Crowell*, 2006 U.S. Dist. LEXIS 88489, *10 (W.D.N.Y. 2006); *see also United States v. Polouizzi*, 697 F.Supp.2d 381, 394-395 (E.D.N.Y. 2010) (holding requirement that all individuals under arrest for child pornography charges be required to undergo electronic monitoring as condition of release unconstitutional).

Here, the private interest involved is a fundamental, individual constitutional right based on the inalienable right to defense of family, hearth, and home. *Heller*, 554 U.S. at 628-629. The risk of erroneous deprivation is immense given that the law applies broadly and without regard to individual factors or specific risks, and the "procedures used," *Eldridge*, 424 U.S. at 335, are literally non-existent. Furthermore, no hearing is provided whatsoever, and the only "procedure" activating the ban is the grand jury process whose manifest frailties in this context were thoroughly exposed above. Finally, the government's interest in proceeding apace without a hearing is anemic, especially when it would be a negligible burden for the government to include a dispossession hearing in the bond-setting process. Yet indictees are not afforded the process needed or easily provided. This violates the constitutional right to procedural due process.

CONCLUSION

For the foregoing reasons, the appellant, Mr. Delvonte Philpotts, respectfully urges the Court to accept jurisdiction over this important matter.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing **Memorandum in Support of Jurisdiction of Appellant Delvonte Philpotts** was electronically served via the Ohio Supreme Court's electronic filing system on September 3, 2019. On the same day, a courtesy hard copy was sent via U.S. Mail to counsel for the government at the address listed upon the cover page of the foregoing Memorandum. Likewise, and also on the same day, a courtesy electronic copy was emailed to counsel for the government at the email address listed upon the cover page.

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