ABDULLAH AL-KIDD, Plaintiff - Appellee, v. JOHN ASHCROFT, Defendant - Appellant, and ALBERTO GONZALES, ET AL., Defendants.

No. 06-36059

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

2006 U.S. 9th Cir. Briefs 36059; 2009 U.S. 9th Cir. Briefs LEXIS 907

November 10, 2009

On Appeal From a Judgment of the United States District Court for the District of Idaho.

Petition

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TITLE: Opposition To Petition For Rehearing En Banc

TEXT: INTRODUCTION

Defendant does not offer any new arguments in support of rehearing or claim that the Court failed to address his original arguments. Instead, he argues that the decision is wrong and that rehearing is thus warranted. In defendant's view, he is entitled to dismissal of all claims, even if he created and implemented a nationwide policy of deliberately using the material witness statute to preventively detain and investigate innocent individuals whom the government lacked probable cause to charge with a crime. That is an extraordinary position and was properly rejected by both this Court and Judge Lodge in the district court.

BACKGROUND

The complaint alleges that defendant adopted a [*2] nationwide policy of using the material witness statute not to secure testimony, but to detain and investigate suspects. Among other things, defendant himself made clear that he would use the material witness statute for the purpose of preventive detention and investigation, stating that the "[a]ggressive *detention* of lawbreakers and *material witnesses* is vital to preventing, disrupting or delaying *new attacks* .

. . ." First Amended Complaint (FAC) 117 (emphasis added). *See* FAC 118-24 (statements of other high-level officials).

The complaint further alleges that the material witness statute was previously used "sparingly" and under "narrow circumstances," but that after 9-11 it was used "routinely" and in "new" ways that represented a drastic shift in policy. FAC 110, 111. In particular, the complaint states that: (a) material witnesses were routinely held in "high security" conditions throughout the country, more fit for terrorism suspects than supposedly innocent witnesses (PP 129-33); (b) a substantial percentage of post 9-11 material witnesses were ultimately not asked to provide testimony (P 128); (c) many post 9-11 witnesses were not offered immunity, a departure [*3] from standard pre-September 11 practice (P 128); DOJ routinely sought to seal material witness information (P 135); and many witnesses were detained for prolonged periods of time - by DOJ's own estimate, half were detained for more than 30 days (P 133).

The complaint also specifically alleges that Mr. al-Kidd's arrest and detention precisely fit this nationwide pattern of abuse. *See, e.g.,* FAC 1-16, 39-69, 137-41. In 2002, FBI agents conducted surveillance of Mr. al-Kidd as part of a broad terrorism investigation in Idaho. The surveillance logs did not report any illegal activity and Mr. al-Kidd was not charged with a crime. FAC 44. In March 2003, however, plaintiff was humiliatingly arrested as a material witness and led away in handcuffs by FBI agents in front of scores of onlookers. After interrogating Mr. al-Kidd, the FBI had him jailed and, over the next fifteen days, shuffled him between three different detention facilities across the country. When transported between facilities, he was shackled. At each facility, he was held under high-security conditions. FAC 5, 6.

While Mr. al-Kidd remained in detention, FBI Director Mueller testified before Congress and offered examples [*4] of the government's recent "successes" in combating terrorism. The first example was the capture of Khalid Shaikh Mohammed, alleged to be the "mastermind" of the 9/11 attacks. The next was the arrest of Mr. al-Kidd. Director Mueller then listed three additional examples, all involving individuals who had been charged with terrorism-related offenses. The Director's testimony did not mention that Mr. al-Kidd had been arrested as a witness, and not on criminal charges. FAC 8.

Mr. al-Kidd was eventually released from detention under strict conditions. More than fourteen months later, the trial for which Mr. al-Kidd's testimony was supposedly needed ended without conviction on a single count. Mr. al-Kidd was never called as a witness (and was never subsequently charged with a crime). FAC 9.

The affidavit for Mr. al-Kidd's arrest was facially deficient and also contained significant false statements and omissions. Indeed, the government has since admitted that Mr. al-Kidd had a round-trip ticket, and not a one-way ticket as alleged in the affidavit (an admission made only after Mr. al-Kidd had spent more than two weeks in detention). Furthermore, Mr. al-Kidd did not have a first-class [*5] ticket costing approximately $ 5,000, as alleged, but rather a coach-class ticket costing less than $ 2,000. FAC 14.

In addition to the false statements, the affidavit was wholly misleading in what it failed to say, including:

- that Mr. al-Kidd was not a Saudi national returning to his home country, but a U.S. citizen born in 1972 in Kansas and a former football player at the University of Idaho;

- that Mr. al-Kidd had a wife, child, parents, and siblings who were native-born U.S. citizens living in this country;

- that Mr. al-Kidd had voluntarily talked with the FBI on several occasions prior to his arrest;

- that Mr. al-Kidd had never failed to show up to these pre-arranged meetings;

- that prior to his arrest, Mr. al-Kidd had not heard from the FBI for approximately six months;

- that the FBI had never told Mr. al-Kidd that he might be needed as a witness, that he could not travel abroad, or that he must inform the FBI if he did intend to travel abroad; and finally,

- that Mr. al-Kidd was never asked if he would be willing to testify, to voluntarily relinquish his passport or to otherwise postpone his trip to Saudi Arabia (where he was scheduled to study on a scholarship [*6] at a well-known university). FAC 15.

In short, the FBI simply blindsided a cooperative U.S. citizen months after it had last contacted him, without ever affording him the opportunity to testify voluntarily - all under the pretense that his testimony was critically needed for a future trial (a trial in which he was never called to testify). FAC 16.

ARGUMENT

I. THE COURT PROPERLY REJECTED DEFENDANT'S CLAIM OF ABSOLUTE IMMUNITY.

The "actions of a prosecutor are not absolutely immune merely because they are performed by a prosecutor." *Buckley v. Fitzsimmons, 509 U.S. 259, 273 (1993).* Rather, the court must "examine 'the nature of the *function performed,* not the identity of the actor who performed it.'" *Kalina v. Fletcher, 522 U.S. 118, 127 (1997)* (citation omitted) (emphasis added). n1

> n1 Defendant implies that this Court created a whole new inquiry - the "immediate purpose" test. Reh'g Pet. 8. But the Court's opinion talks at length (and applies) the Supreme Court's "functional approach." Slip op. at 12282-92. Indeed, this Court's reference to "immediate purpose" was a *quote* from the Supreme Court. Slip op. at 12286 (quoting *Buckley, 509 U.S. at 275).* And, in *Buckley,* the Supreme Court was simply applying the functional test by necessarily looking at purpose. *See infra* (discussing relevance of purpose).

[*7]

Under the Supreme Court's functional approach, prosecutors have consistently been denied absolute immunity where they are engaging in police-type functions that are "investigative in character." *Buckley, 509 U.S. at 274; see id.* (a "prosecutor neither is, nor should consider himself to be, an advocate before he has probable cause to have anyone arrested").

Here, plaintiff alleges that defendant misused the material witness statute to *investigate* plaintiff and other individuals for possible criminal activity. Defendant nonetheless maintains that he is entitled to absolute immunity, arguing that the Court may look only at a prosecutor's acts, and not his motivation, in determining whether he was engaged in an investigative or prosecutorial function.

But as this Court's opinion explains, the Supreme Court and lower courts have consistently looked at a prosecutor's purpose and goals in determining whether an act involves a prosecutorial function. Slip op. at 12282-92. *See, e.g., Buckley, 509 U.S. at 274-75* (noting that the same act can have different functions and thus finding it necessary to conduct a "careful examination of the allegations" [*8] in the complaint to determine whether the prosecutors' "mission" and "immediate purpose" at the time they reviewed the evidence and witnesses was "investigative in character"); *KRL v. Moore, 384 F.3d 1105, 1111, 1113-15 (9th Cir. 2004)* (examining the "goals" underlying a post-indictment search warrant, looking beyond the face of the warrant to such evidence as deposition testimony, affidavits and the prosecutor's press statements); *Genzler v. Longanbach, 410 F.3d 630, 638 (9th Cir. 2005)* (noting that pre-trial "[w]itness interviews may serve either an investigative or an advocacy-related function"); *Kulwicki v. Dawson, 969 F.2d 1454, 1466 (3d Cir. 1992)* ("complaint on its face point[ed] more convincingly to 'investigation' than to 'prosecution'"). n2

n2 Applying the functional approach, Justice Kennedy has stated that "[t]wo actors can take part in similar conduct and similar inquiries while doing so for different reasons and to advance different functions. . . . The conduct is the same but the functions distinct." *Buckley, 509 U.S. at 289* (concurring in part and dissenting in part).

[*9]

The government is thus incorrect that the same act cannot yield different immunity results depending on the prosecutor's objectives. Indeed, the government's position would leave the courts with no meaningful way of determining whether certain acts by prosecutors are entitled to absolute or qualified immunity.

Moreover, if defendant were entitled to absolute immunity, it would create a perverse result: he would get greater immunity than the two FBI agents who prepared and submitted the affidavit in this case - even if they were simply carrying out his investigative policy directives (issued in his capacity as the ultimate head of the FBI). *See Burns v. Reed, 500 U.S. 478, 495 (1991)* ("it is incongruous to allow prosecutors to be absolutely immune from liability for giving advice to the police, but to allow police officers only qualified immunity for following the advice"); *Buckley, 509 U.S. at 276* ("When the functions of prosecutors and detectives are the same . . . the immunity that protects them is also the same.").

Defendant notes that some courts have granted prosecutors absolute immunity for material witness warrants. Reh'g Pet. 8 (citing [*10] *Daniels v. Kieser, 586 F.2d 64 (7th Cir. 1978)).* But in those cases there was no allegation that the prosecutor was seeking to use the material witness laws to *investigate* the *witness* for possible criminal wrongdoing, *i.e.,* engaging in functions typically carried out by law enforcement. Slip op. at 12284-85 (discussing *Daniels*).

Defendant also claims that his position is supported by cases holding that courts generally may not look at the motives of a prosecutor, even if they are racist, political or otherwise egregious. Reh'g Pet. 10. But those cases also have no bearing here. A prosecutor is entitled to absolute immunity in carrying out his official prosecutorial functions - even if he acts for egregious reasons. Here, plaintiff is not asserting that the Court should look at the motive behind prosecutorial acts, but rather, whether those acts were prosecutorial in the first place. Slip op. at 12285 (discussing these cases).

In sum, to accept defendant's argument, this Court would have to hold that the Attorney General is entitled to complete immunity even where he issues a nationwide policy *directing FBI agents* to seek material witness warrants [*11] for the purpose of *investigating and preventively detaining suspects* whom the government otherwise could not detain because it lacked evidence to charge with a crime. The Court properly rejected that extreme position.

II. THE COURT PROPERLY REJECTED DEFENDANT'S CLAIM OF QUALIFIED IMMUNITY.

A. Defendant's Policy Violated the Fourth Amendment.

The material witness statute represents a dramatic and exceedingly narrow departure from the traditional rule that an individual may not be arrested and detained in the absence of probable cause of *wrongdoing.* Indeed, an arrest of an innocent witness is extraordinary and has only been assumed to be constitutional because of society's compelling need to ensure the testimony of witnesses. *See, e.g., Barry v. United States ex rel. Cunningham, 279 U.S. 597, 617 (1929); cf. In re Prestigiacomo, 234 A.D. 300, 302 (N.Y. App. Div. 1932)* (per curiam) ("Whether constitutional or not . . . the [state material witness] statute is harsh, and carries interference with personal liberty to an extreme limit. . . . Its use for purposes plainly beyond its scope should not be permitted.") (citations omitted). [*12]

Defendant seeks to bootstrap on to this narrow exception to the Fourth Amendment, arguing that the government can intentionally use the material witness statute to arrest innocent individuals, not to obtain testimony, but to detain and investigate them for criminal wrongdoing. But that would allow the government to do a clear end-run around the limited

exception underlying the material witness statute.

Defendant contends that the *Whren* line of cases supports his position. Reh'g Pet. 13 (citing *Whren v. United States, 517 U.S. 806 (1996)*). But defendant has not cited a single decision in which a court has extended *Whren* to a context like the instant one and, in fact, *Whren* itself stated that it involved the "ordinary" Fourth Amendment situation. *517 U.S. at 813.*

Whren is fundamentally different for at least two reasons. *First,* as this Court's opinion stresses (at 12300), *Whren* involved the subjective motives of individual police officers making decisions on the ground. Here, in contrast, the Attorney General is asking this Court to uphold his deliberate decision to promulgate a nationwide policy that systematically authorized [*13] the intentional misuse of the material witness statute to lock up individuals whom the government wished to detain and investigate but lacked evidence to charge with a crime.

The Supreme Court has consistently distinguished *Whren* where a *policy* was at issue, stating that courts must look at the "programmatic purpose" behind the policy. *See City of Indianapolis v. Edmond, 531 U.S. 32, 45-47 (2000)* (distinguishing *Whren* and examining "available evidence" in finding that checkpoint was used for impermissible general law enforcement purposes); *Ferguson v. City of Charleston, 532 U.S. 67, 81-82 (2001). See also* Slip op. at 12300-01 (discussing *Edmond* and *Ferguson*). n3

n3 Defendant suggests (at 15) that these cases can be ignored because a material witness warrant is issued by a magistrate. But it has long been settled that a warrant issued by a magistrate may still violate the Fourth Amendment. *Malley v. Briggs, 475 U.S. 335 (1986)*. Moreover, a magistrate will rarely, if ever, be able to know if there is a hidden government motive. *Cf. Franks v. Delaware, 438 U.S. 154 (1978).*

[*14]

Second, as this Court also explained, *Whren* (unlike the arrest of an innocent witness) involved probable cause that the arrestee had *violated the law.* Slip op. at 12297. Indeed, defendant's sweeping arguments are flatly contradicted by the numerous Fourth Amendment decisions in which the Supreme Court has examined motive in contexts that did not involve probable cause of wrongdoing. *See, e.g., Florida v. Wells, 495 U.S. 1, 4 (1990)* (police "must not be allowed so much latitude that inventory searches are turned into a purposeful and general means of discovering evidence of crime") (citation and internal quotation marks omitted)); *Colorado v. Bertine, 479 U.S. 367, 372 (1987)* (holding that inventory search was permissible in part because "there was no showing that the police, who were following standardized procedures, acted in bad faith or for the sole purpose of investigation"); *Edmond, 531 U.S. at 44* (declining to "suspend the usual requirement of individualized suspicion where the police seek to employ a checkpoint primarily for the ordinary enterprise of investigating crimes").

In these cases, the Court explained [*15] that the Fourth Amendment does not require probable cause of wrongdoing (the traditional rule) where the *purpose* of the search is not to engage in general law enforcement, but rather to address some other governmental interest (such as an inventory search). Accordingly, because the traditional Fourth Amendment standard is relaxed precisely because of the government's purpose, it follows that the Fourth Amendment is violated where the government is seeking to pursue general law enforcement objectives under the guise of these other objectives.

Similarly, in the material witness context, arrests are not governed by the traditional Fourth Amendment standard (probable cause of *wrongdoing*), but under a relaxed standard (probable cause that an individual's testimony is material and cannot practically be secured by subpoena). And like the cases discussed above, the reason the traditional rule is relaxed is precisely because the *purpose* of the arrest is not to detain an individual engaged in wrongdoing, but for some other purpose - to secure testimony. Thus, as in these other cases, purpose is not only relevant, but must be examined so

the government is not able to use the reduced [*16] Fourth Amendment standard for ulterior law enforcement purposes. n4

n4 Judge Bea (but not defendant) relies on *United States v. Villamonte-Marquez, 462 U.S. 579 (1983).* Slip op. at 12340-41. But the Court addressed subjective intent only in a short footnote in that case. *462 U.S. at 584 n.3.* In any event, *Villamonte-Marquez* involved (1) the unique circumstances of applying the Fourth Amendment at sea; (2) a *search* and not the far more intrusive issue of a pretextual *detention;* and (3) the subjective mindset of individual officers on the ground (as in *Whren*), and not a policywide decision. Furthermore, unlike the allegations here, there was no finding that the customs agents in *Villamonte-Marquez* were not genuinely interested in inspecting documents (the ostensible purpose of the search). Slip op. at 12301 n.19 (discussing *Villamonte-Marquez*).

In short, a material witness arrest is unconstitutional where the government uses the statute to investigate and [*17] detain suspects, since the material witness statute's constitutionality is specifically premised on its use for a limited and single purpose - securing testimony. Accordingly, this Court properly looked at the complaint's allegations of pretext.

B. Defendant's Policy Violated Clearly Established Law.

Defendant contends that the law was not clearly established in March 2003 because only the *Awadallah* district court had ruled on this issue. Slip op. at 12307-08 (noting that *Awadallah* was a "high profile" case and that the district court there had stated in "categorical" fashion that the policy about which Mr. al-Kidd complains was unlawful). n5

n5 This Court correctly noted that circuit decisions would have been "almost impossible" given the speed of the appellate process. Slip op. at 12308 n.22. That is especially so where the government took steps to keep secret the nature of its material witness policy. *See, e.g.,* FAC 135 (noting DOJ's request to seal the records of material witness proceedings and the stonewalling of congressional inquiries).

[*18]

Defendant's observation that no other court had ruled on this precise issue by that time does not reflect the unsettled nature of the question, but rather, the fact that there had never before been such an extraordinary policy. And, not surprisingly, the courts that have considered the issue since then have also taken it as a given that the government may not use the material witness statute as pretext for detaining and investigating criminal suspects. *See United States v. Awadallah, 349 F.3d 42, 59 (2d Cir. 2003)* ("it would be improper for the government to use § 3144 for other ends, such as the detention of persons suspected of criminal activity for which probable cause has not yet been established"); *al-Kidd v. Gonzales, 2006 WL 2682346* (D. Idaho Sept. 18, 2006) (same). n6

n6 Defendant suggests that the Second Circuit in *United States ex rel. Glinton v. Denno, 339 F.2d 872 (2d Cir. 1964),* previously upheld the pretextual use of the material witness statute. Reh'g Pet. 16-17. But, in *Glinton,* the police *were* seeking the individual's testimony. *339 F.2d at 873* (material witness not held as a "ruse" to extract confession from him); *id. at 875* (noting that individual "was certainly an important witness"). In any event, the Second Circuit itself clearly does not believe that it has ever sanctioned the government's position. As noted above, the Second Circuit in *Awadallah* pointedly stated that the government could not use the statute in a pretextual manner. *349 F.3d at 59.*

[*19]

Notably, defendant does not claim that there must necessarily be a circuit level case on point. In fact, there need not even be a precedent with "materially" or "fundamentally similar" facts; all that is required is that the defendant have "fair warning" that his conduct is unlawful. *Hope v. Pelzer, 536 U.S. 730, 741 (2002).* And where a practice is so obviously unconstitutional, there is likely not to be a case on point. *See Moreno v. Baca, 431 F.3d 633, 641 (9th Cir. 2005)* ("while there may be no published cases holding similar policies constitutional, this may be due more to the obviousness of the illegality than the novelty of the legal issue") (internal quotations and citation omitted). n7

n7 Defendant incorrectly implies (at 18) that the law is not settled given Judge Bea's dissent. *See Groh v. Ramirez, 540 U.S. 551, 565 (2004)* (finding law clearly established despite dissent by two Justices that there was no Fourth Amendment violation at all); *Friedman v. Boucher, 580 F.3d 847, 858-60, 865 (9th Cir. 2009)* (law clearly established despite dissent on existence of Fourth Amendment violation), *issued on denial of rehearing en banc, superseding 568 F.3d 1119.*

[*20]

As this Court concluded, defendant's policy is patently unconstitutional and that should have been clear to any reasonable official. Indeed, under defendant's argument, he presumably would have believed it reasonable in 2003 to instruct FBI agents and U.S. Attorneys to candidly and directly inform federal magistrates that the government (1) was not interested in the testimony of al-Kidd and others, and (2) simply wished to preventively detain and investigate these individuals but lacked probable cause to arrest them on criminal charges. No reasonable official - much less the Attorney General of the United States - could have believed that such a gross and systematic distortion of the material witness statute was lawful and that federal magistrates throughout the country would have signed off on such a policy.

III. THE COURT PROPERLY REJECTED DEFENDANT'S CLAIM THAT HE CANNOT BE HELD LIABLE FOR THE FAILURE TO SATISFY THE MATERIALITY AND IMPRACTICABILITY REQUIREMENTS.

The Fourth Amendment and the material witness statute, *18 U.S.C. § 3144,* require probable cause that a witness' testimony is material and cannot practicably be secured without a subpoena. [*21] Defendant does not dispute that it would be unconstitutional under clearly established law for him to promulgate a policy authorizing the arrest of witnesses where there is no probable cause to believe the testimony is material or cannot be secured by subpoena. Defendant argues, however, that plaintiff has failed to allege that his policy authorized material witness arrests where these requirements were not satisfied. Specifically, defendant argues that the complaint insufficiently alleges that he was responsible for the specific material misrepresentations and omissions in the warrant for plaintiff's arrest. Reh'g Pet. 18-20; Slip op. at 12309-18 (rejecting defendant's argument on this issue).

Defendant's argument rests on a distorted reading of the complaint and plaintiff's legal theories. Plaintiff's allegation is that defendant's policy authorized the arrest of suspects as supposed witnesses and did so even in cases (such as Mr. al-Kidd's) where the materiality and impracticability requirements were not satisfied:

> Under the post-9/11 policies and practices, individuals have also been impermissibly arrested and detained as material witnesses even though there was no reason [*22] to believe it would have been impracticable to secure their testimony voluntarily or by subpoena.

FAC 127. *See, e.g.,* FAC 128, 136 (setting forth detailed allegations in support of this claim).

But plaintiff need not show that defendant actually authorized the specific misrepresentations and omissions in the

al-Kidd warrant. Rather, plaintiff need only show that defendant authorized arrests even where the materiality and impracticability requirements were not satisfied; how that was accomplished in individual cases is immaterial. Indeed, it will almost never be the case that a high-level official is involved in the minutiae of how to carry out an unconstitutional policy. n8

n8 Relying on *Ashcroft v. Iqbal, 129 S.Ct. 1937 (2009),* defendant appears to suggest that plaintiff must show that the Attorney General was involved in granular implementation decisions, including the content of each warrant. But the Court in *Iqbal* clearly was not suggesting that high-level officials had to be involved at that level; indeed, if the Court had intended to take that extraordinary step, there would have been no need for it to examine the allegations in that case, since no one there remotely suggested that defendants Mueller and Ashcroft were actually making ground-level decisions about individual detainees.

Defendant also cites *Iqbal* for the position that he may not be held liable based on an allegation that he set in motion an unconstitutional chain of events or acquiesced in such events. Reh'g Pet. 18-20. But the Court in *Iqbal* did not rule out such forms of liability. *Iqbal* involved a discrimination claim which requires specific intent. *129 S.Ct. at 1948-49.* In any event, as this Court noted in response to defendant's contention (Slip op. at 12315-16 n.25), plaintiff *has* alleged that defendant acted intentionally in authorizing the constitutional violations.

[*23]

Furthermore, plaintiff's complaint also claims that the warrant was facially deficient and thus unlawful, regardless of whether there were also misrepresentations and omissions. *See, e.g.,* FAC 50 ("The affidavit, on its face, wholly failed to establish probable cause that Mr. al-Kidd's testimony could not be secured voluntarily or by subpoena, without the need for arrest.").

In sum, the Court's ruling on this issue was correct and should not be reheard. That is especially so given that the issue turns on the proper reading of plaintiff's complaint in this case - the type of case-specific issue that does not warrant this Court's en banc attention.

CONCLUSION

The petition should be denied.

Respectfully Submitted,

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BRIEF FORMAT CERTIFICATION

I certify that pursuant to 9th Circuit Rule 40-1(a), the attached Opposition to Petition for Rehearing En Banc is:

Proportionately spaced, has a typeface of 14 points or more and contains 4, 175 words.

/s/ Lee Gelernt .
Counsel for Plaintiff-Appellee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of November, 2009, I electronically filed the foregoing Opposition to Petition for Rehearing En Banc with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system which will send a Notice of Electronic Filing to the following persons:

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AND, I HEREBY CERTIFY that I have served the foregoing Opposition to Petition for Rehearing En Banc by First-Class Mail, postage prepaid, to the following non-CM/ECF Registered Participants:

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