



the grand jury's investigation. At the end of his second grand jury appearance, he agreed to meet with the agents to provide more details regarding evidence he said would corroborate his grand jury testimony, including any documents he found and any names of witnesses who could corroborate his testimony. Morell's testimony, and his statements and handwritten notes provided later to the investigating agents, were an explanation that the money paid to him by Cobian were for legitimate legal services and witnesses whom he said would corroborate him. In fact, the legal services were just a cover story concocted by him and agreed to by Cobian for the extortion payments he received.

In convicting defendant Morell, the jury necessarily rejected his testimony. In fact, the witnesses whom he told the agents would or could confirm that he contacted them in trying to render services for Cobian denied being contacted or said they would have remembered if it had happened and they do not recall this happening. Morell was charged with endeavoring to obstruct the grand jury's investigation under 18 U.S. C. § 1503(a). There is abundant evidence that Morell attempted to do so – and the trial jury must have credited that testimony to convict him of the conspiracy and extortion even though the jury acquitted him of the substantive obstruction count on a “reasonable doubt” standard. For this conduct, defendant Morell's sentence should be enhanced by two levels under U.S.S.G. §3C1.1.

Morell not only spent approximately five hours in the grand jury giving false and misleading testimony over two days. In providing the names of witnesses and whom he claimed would corroborate his story, he caused the federal investigators and prosecutors to spend numerous hours tracking down these witnesses to interview them,

and to present their testimony before the grand jury and at trial. This was a material and significant waste of law enforcement resources, and grand jurors' time and resources. Moreover, he unnecessarily involved these former government employees and family members in the criminal justice process which was no doubt stressful and time consuming. At least one of the witnesses had to flown back to Puerto Rico at government expense to disprove Morell's story.

#### Legal Basis for Enhancement

Section 3C1.1 provides in pertinent part:

If (A) the defendant willfully obstructed or impeded or attempted to obstruct and impede, the administration of justice during the course of the investigation, [or] prosecution . . . of the instant offense of conviction and (B) the obstructive conduct related to defendant's offense of conviction and any relevant conduct, or (ii) a closely related offense, increase the offense by 2 levels.

The enhancements apply if the evidence establishes the factual basis by a preponderance of the evidence. Commentary to §6A1.3, Resolution of Disputed Factors.

Morell's repeated false sworn statements to the grand jury and false statements to the investigating agents fall squarely within this enhancement. Application note 4 provides a non-exhaustive list of the type of conduct to which the enhancement applies. Note 4(b) includes "committing perjury, suborning perjury, or attempting to suborn perjury." Note 4(g) includes "providing a materially false statement to a law enforcement officer that significantly obstructed or impeded the official investigation or prosecution of the instant offense."

"Material" is defined in paragraph 6 as "evidence, fact, statement, or information as used in this section, means evidence, fact, statement or information that, if believed,

would tend to influence or affect the issue under determination.” (Emphasis added.) By its terms, the enhancement includes false material sworn testimony even if it was part of an unsuccessful “attempt” to obstruct justice.

The enhancement also applies where there is a preponderance of evidence of willful obstruction even where the jury acquitted a defendant on the specific charge or where the attempt to obstruct was nevertheless unsuccessful, United States v. Austin, 948 F.2d 783, 788 (1<sup>st</sup> Cir. 1991)( proper to consider even where false testimony was unconvincing or only to a judge); United States v. Villarman-Oveldo, 325 F.3d 1, 16 (1<sup>st</sup> Cir., 2003) (enhancement applied where in convicting the defendant., the jury must have found that defendant lied in trial testimony); United States v. McDonnough, 959 F.2d 1137, 1141 (1<sup>st</sup> Cir. 1992) (sentence enhanced where defendant testified that money he received was loans in conflict with testimony of payer who said it represented bribes and other corroborating evidence.)

No detailed findings of fact were required to support such an application although independent findings necessary to establish the obstruction was willful are required. It suffices, for example, that the false testimony or statements were knowingly given and were not the result of mistake or confusion. United States v. Dunnigan, 507 U.S. 87, 94 (1993) (abrogated on other grounds by United States v. Wells, 117 S.Ct. 921 (1997); see, e.g., United Staets v. Aker, 181 F.3d 167 (1<sup>st</sup> Cir. 1999)(while particularized findings would be nice, the record is clear as to which false statements the court relied upon and evidence supports finding of perjury by a preponderance of the evidence); United States v. Chance, 306 F.3d 356, 390-91 (6<sup>th</sup> Cir. 2002) (court must make specific findings as to each element of perjury or make a finding that “encompasses all of the

factual predicate for a finding of perjury”).

Where defendant appeared before the grand jury with the intent to mislead the grand jury and the prosecutors and agents as to the real purpose for the payments Cobian made and, in fact, kept changing his testimony as it was pointed out to him that it was unreasonable and likely false, there is more than a preponderance of evidence that defendant willfully endeavored to obstruct the investigation of his involvement in the extortion. On this record, the court can also conclude that in providing the names of the persons he did, defendant Morell expected that either these persons would cover for him or that there would be enough basis for confusion over time and in light of other contacts by him that they might not specifically contradict his testimony. But in fact, most of them did contradict his testimony, and none corroborated it. Defendant’s elaborate lies which he knew or reasonably believed would be taken seriously by the investigators should receive enhanced punishment.

**II. Defendant Vazquez’s Sentence Should be Enhanced Based on His Leadership Role in the Offenses under U.S.S.G. § 3B1.1**

Factual Background

The testimony at trial established that Cobian approached Vazquez on behalf of himself and the other four contractors in his group for help in ensuring his team would be made part of the Thames-Dick Superaqueduct Team and would eventually be awarded the contract to build the Superaqueduct of the North Coast. Vazquez said he would think about it and then responded that he would help. He also said that Jose Granados Navedos and Marcos Morell Corrada would help him. He negotiated the total amount to be paid for their services of 2 percent of the contract for approximately \$2.4

million. When Cobian asked to share in the deal in an effort to reduce the total payment to be made, Vazquez said he would get back to him and then confirmed it would be all right. He directed Cobian to negotiate with Granados and Morell about how they would be paid and to make the payments, and that is what happened. As Cobian testified, Vazquez also told him to have the contractors make certain checks payable to vendors to whom he had incurred campaign debts, including Guastella Film Works and Luntz Research. Cobian followed his orders and the contractors followed Cobian's orders. This testimony was corroborated by Mr. Guastella, who said he was contacting Rene Vazquez to get his bills paid at this time.

Cobian testified that he asked for help with this government contract because he had asked for similar help from Vazquez in the past and Vazquez came through for money. He also said on one occasion when he asked for help in securing contracts for Mobile Detention Units from the Juvenile Justice Department, Vazquez directed another person to help him. Cobian believed Vazquez's assistance had been important and he paid him approximately \$50,000.

#### Legal Basis

Section 3B1.1 of the Sentencing Guidelines provides that a defendant will receive an upward adjustment if he played an aggravating role in an offense. The application of this adjustment requires a district court to make two findings: (1) that the defendant exercised some control over another criminal participant or coordinates other in the commission of the offense, and (2) that the defendant participated in a criminal activity that met either the numerosity or the extensiveness benchmarks established by the Guidelines. United States v. Tejada-Beltran, 50 F.3d 105, 111 (1<sup>st</sup> Cir. 1995). In a

criminal activity involving five or more participants, a defendant exercising control over another criminal participant or was otherwise responsible for organizing them in the commission of the offense will be given either a four-level adjustment for acting as a leader/organizer or a three-level adjustment for acting as a manager/supervisor.

U.S.S.G. §§3B1.1(a), (b) (2003). Defendants exercising control over others in a criminal activity involving less than five participants receive only a two-level enhancement. Id. at §3B1.1(c). In counting the number of participants the defendant may be included.

United States v. Preakos, 907 F.2d 7, 10 (1<sup>st</sup> Cir. 1990). In attempting to assign greater punishment to those at the highest level of responsibility in the schemes, the Comments to § 3B1.1 list seven factors to be considered:

the exercise of decision making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised by others.

These factors, “while useful as guideposts, do not possess “talismanic significance.”

Tejeda, 50 F.3d at 111.

The evidence is clear that there are more than four participants including Marcos Morell, Jose Granados, Jose Cobian, and at least the three contractors who acquiesced in making these payments and trying to conceal it, as well as the people who knowingly assisted them in making the secret payments.

As with other adjustments under the Guidelines, the government need only establish by a preponderance of the evidence that the requirements for a role adjustment have been met. United States v. Graham, 162 F.3d 1180, 1182 (D.C. Cir.

1998).

So long as the defendant acted as a manager/supervisor of at least one other participant, and the criminal activity involved five or more participants, then a three-level enhancement is mandated by the Guidelines. See U.S.S.G. §3B1.1, app. note 2 (“to qualify for an adjustment . . . the defendant must have been the . . . manager [ ]or supervisor of one or more other participants”) (emphasis added)); see also United States v. Hardamon, 188 F.3d 843, 851-52 (7<sup>th</sup> Cir. 1999) (holding that the defendant need supervise only one other participant in a criminal activity with five participants in order to trigger application of the three or four level enhancement); United States v. Cruz Camacho, 137 F.3d 1220, 1224 (10<sup>th</sup> Cir. 1998) (same); United States v. Smith, 49 F.3d 362, 367 (8<sup>th</sup> Cir. 1995) (same); United States v. Dota, 33 F.3d 1179, 1189 (9<sup>th</sup> Cir. 1994) (same).<sup>1</sup>

Similarly, it does not matter whether the defendant knew that the criminal activity involved five or more participants, so long as it in fact did. The three-level adjustment in

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<sup>1</sup>In 1993, the Sentencing Commission added application note 2 to §3B1.1, clarifying that a defendant need only supervise one or more other participants in order to qualify for a role adjustment. That clarification resolved a circuit split existing in older cases about whether a defendant need exercise control over more than one other criminal participant in order to qualify for a role adjustment. See United States v. Cruz Camacho, 137 F.3d 1220, 1224 n. 3 (10<sup>th</sup> Cir. 1998) (finding that the then-new application note two overturned circuit precedent and was binding on federal courts’ interpretation of the Guidelines).

§3B1.1 does not require that the defendant knew of the other participants, so long as he exercised control over at least one. United States v. Dota, 33 F.3d at 1189. Indeed, the adjustment does not even appear to require that the involvement of at least five participants was foreseeable to the defendant. Id.

A “participant” in criminal activity is someone “who is criminally responsible for the commission of the offense, but need not have been convicted.” U.S.S.G. §3B1.1, App. Note 1. Unindicted coconspirators and acquitted codefendants are routinely labeled as participants for purposes of a role adjustment. See, e.g., United States v. Dota, 33 F.3d at 1189 (affirming application of a role adjustment when one of the participants was acquitted of all charges by the jury); United States v. Huan, 90 F.3d 1096, 1103 (6<sup>th</sup> Cir. 1996) (defendants who were acquitted or not charged may be participants).

In short, the facts readily support application of both the four and three-level role adjustments to Defendant Vazquez’s sentence.

**III. Both Defendants Should Receive An Upward Departure In Their Sentences Under U.S.S.G. §5K2.7 and U.S.S.G. § 2C1.1, Application Note 5**

Factual Background

This public corruption prosecution arose out of a conspiratorial agreement in mid-1995 and subsequent pay-offs made by four Puerto Rico-based contractors to the defendants and a public official in Puerto Rico between 1997 and 1999. The defendants solicited approximately \$2.4 million in extortion money for their agreement to help secure and retain a contract to construct the Superaqueduct of the North Coast – a \$300,000,000 public works project. Both defendants were high-ranking officials in the

New Progressive Party (NPP) at the time of the illegal agreement, and they or their designates were secretly paid nearly \$1 million by the contractors during the conspiracy until one of the coconspirators realized he was caught by the FBI in another extortion scheme.

Following a six-week jury trial in this District, both defendants were convicted of conspiracy, as well as substantive extortion and tax fraud charges. Out of the 14 charged counts in the superseding indictment, the defendants were convicted of 11.

The crimes committed by the defendants were egregious and pervasive. The defendants and their coconspirators' crimes severely undermined the confidence of the Puerto Rican public in honest and fair government. The defendants' exercise of governmental power in the name of personal greed permanently stained what trial witness after trial witness described as one of the proudest public works accomplishments in the history of Puerto Rico. As the Court itself noted at sentencing, the ripple effects of the defendants' crimes are still being felt.

For these reasons, and others stated below, the United States urges the Court to depart upward pursuant to U.S.S.G. §2C1.1, Application Note 5. The government also moves for an upward departure under U.S.S.G. §5K2.7. The defendants' corrupt conduct was systematic and pervasive, and it plainly resulted in a significant and atypical disruption of a government function, thereby removing this case from the heartland of federal extortion prosecutions.

#### Legal Basis for Upward Departure

Application note 5 to U.S.S.G. §2C1.1 provides: "[w]here the court finds that the defendant's conduct was part of a systematic or pervasive corruption of a governmental

function, process, or office that may cause loss of public confidence in government, an upward departure may be warranted.” Id. Application note 5 references generally “Chapter Five, Part K (Departures)”; but it does not specifically reference U.S.S.G. §5K2.7. Consequently, courts have frequently viewed the two bases for departure distinctly. See, e.g., United States v. Reyes, 239 F.3d 722, 746 (5<sup>th</sup> Cir. 2001) (“The grounds for departure provided in part K are in addition to those, like application note 5, that are found elsewhere in the guidelines.”); United States v. Saadey, 393 F.3d 669, 681 (6<sup>th</sup> Cir. 2005) (distinguishing application note 5 and U.S.S.G. §5K2.7 enhancements).

Under U.S.S.G. §5K2.7, “[i]f the defendant’s conduct resulted in a significant disruption of a governmental function, the court may increase the sentence above the authorized guidelines range to reflect the nature and extent of the disruption and the importance of the governmental function affected.” See id.; see also United States v. Wallace, 461 F.3d 15, 36 (1<sup>st</sup> Cir. 2006). “Substantially disrupting a governmental function is a favored ground for departing.” United States v. Moreno, 367 F.3d 1, 3 (1<sup>st</sup> Cir. 2004); U.S.S.G. §5K2.7. A departure on this basis is appropriate if the interference with the governmental function is not inherent in the offense. See United States v. Sarault, 975 F.2d 17, 19-20 (1<sup>st</sup> Cir. 1992).

In addition, this Circuit and others have recognized that a loss of confidence in government is a valid basis for the imposition of an upward departure. See United States v. Rowe, 999 F.2d 14, 19 (1<sup>st</sup> Cir. 1993) (abrogation on other grounds recognized in United States v. Feldman, 83 F.3d 9, 16-17 (1<sup>st</sup> Cir. 1996)) (permitting inference of loss of confidence in the health insurance industry based solely on the character of the

defendant's fraudulent scheme); United States v. Shenberg, 89 F.3d 1461, 1476 (11<sup>th</sup> Cir. 1996) (no showing of actual harm to confidence in government is required in judicial bribery scheme); United States v. Saadey, 393 F.3d 669, 681 (6<sup>th</sup> Cir. 2005) (district court finding that public lost confidence in county justice system sufficient for upward departure); United States v. Yeaman, 194 F.3d 442, 464 (3d Cir. 1999) (“[W]here the Court can draw the inference that some loss of confidence in the institution occurred, that will suffice; it is not necessary that the loss from this particular scheme be further quantified”).

Defendants' actions in this case easily support, by a preponderance of the evidence, the imposition of an upward departure under either application note 5 or §5K2.7. Based on the trial record alone, the Court can easily make a finding that the defendant's conduct systematically and pervasively corrupted one of the largest, if not the largest, public works projects ever in Puerto Rico, and that this corruption caused a demonstrable loss of public confidence in government.

The degree of corruption in this case is staggering. The office of the Governor was tainted. Two of the Governor's key aides – the defendants in this case – were lining their pockets with the contractors' money at the very time the Governor witnessed the signing of the Master Agreement. Similarly, as the defendants demonstrated repeatedly during their case, the Privatization and Technical Committees, and the Governor's other economic development committee, were all stained by corruption, as the testifying members of those committees stated they had no idea that two key members of the Governor's staff, and a sitting legislator and vocal advocate of the project, were raking in hundreds of thousands of dollars in extortion payments.

The Puerto Rico Legislature was tainted by corruption, as its Vice-President was holding hearings on the Superaqueduct at the very same time he was pledging his support to help the Thames-Dick team win and retain the contract, and secretly pocketing tens of thousands of dollars in cash and other benefits.

And, of course, the defendants' corruption betrayed the citizens of Puerto Rico, including all of the teams that expended time and significant resources bidding for a \$300,000,000 public works project which they had no real chance of securing.

Under the relevant case law, the corruption in this case was sufficiently "systematic or pervasive" to satisfy the requirements of application note 5. United States v. Reyes, 239 F.3d 722 (5<sup>th</sup> Cir. 2001) is instructive. There, a Houston councilman was convicted of bribery, conspiracy and mail fraud based in part on kickbacks Councilman Reyes received on city contracts. As here, Reyes' corruption was limited to a single project, yet the court validated the imposition of an upward departure under Application note 5 to U.S.S.C. §2C1.1, noting that Reyes was "at the apex of city government and had responsibilities that affected the lives of hundreds of thousands." Id. at 745. The court also made clear that one of the district court's bases for departure – a loss of public confidence – was a valid basis for departure as Reyes' conduct had "the potential to cause a loss in public trust." Id. at 744-45.

As in Reyes, the defendants here corrupted a public works project, and the defendants' contamination of the contracting process and construction phase of the Superaqueduct affected every Puerto Rican citizen who believes in clean government. Like Councilman Reyes, these defendants were at the apex of their political party, which controlled the government of Puerto Rico. They greedily and secretly accepted

extortion payment after extortion payment, month after month, year after year, throughout the project's construction. Indeed, had one of their coconspirators not been nabbed by federal investigators in connection with another case, the defendants surely would have continued taking the contractors' money well into the new millennium. And as in Reyes, the Court here could easily find that the media coverage of this case is "relevant in evaluating whether there was a potential for a loss in public confidence." Id. at 745; see also United States v. Saadey, 393 F.3d 669, 681 (6d Cir. 2005) (district court made factual findings sufficient for purposes of one-level upward departure under application note 5 by stating that defendant's "conduct directly contributed to [the] loss of public confidence").

The trial testimony would firmly support Court findings at sentencing that the defendants' conduct was part of a systematic and pervasive corruption of the government contracting process. The genesis of the corruption at issue here was a conversation between defendant Vazquez and Jose Cobian. From there, defendant Morell and Representative Granados joined the illegal agreement. Over the next three years, all four contractors and many of their employees, by their own admission, broke the law repeatedly in making numerous secret extortion payments which they felt they had to pay to participate in this government-sponsored project. The Court, for example, heard testimony from an individual with no relationship to the Superaqueduct who assisted in laundering money to further the scheme on behalf of Cobian. The Court heard additional testimony from an employee of then-Representative Granados who was paid every month by Cobian, Augustin & Ramos with the contractors' money, because her boss – a conspirator in this case - demanded that money.

Simply put, the web of corruption was widespread, ensnaring not only those directly associated with the contracting process, but also other persons having nothing whatsoever to do with the project – all as a proximate result of the defendants’ demands for extortion payments. This corruption directly touched dozens of people. It is no exaggeration to say that it affected thousands. The systematic and pervasive nature of this corruption clearly removes this case from the heartland of federal extortion prosecutions.

Equally, an upward departure pursuant to U.S.S.G. §5K2.7 is appropriate here. In United States v. Sarault, this Circuit upheld an upward departure in a RICO prosecution (with predicate acts of extortion) where a former city mayor pleaded guilty to demanding money in exchange for his help on municipal contracts. In upholding a nine-month upward departure, the court stated that a “significant disruption of governmental functions [] attended [the defendant’s] antics” because “the mayor’s prodigious appetite for extortionate payments” caused the “derangement” of the city’s bid processes. 975 F.3d 17, 20 (1<sup>st</sup> Cir. 1993). Indeed, the court noted that “[t]his factor alone supports the [district] court’s finding that a significant disruption occurred.” Id. Addressing the systematic effect on the contracting process, the court adopted the sentencing court’s finding that “appellant systematically shook down vendors on a regular basis for a period spanning at least two years, and for an amount that was at least \$250,000.” Id. at 21.

The government urges the Court to make similar findings here. As in Sarault, the defendants’ contact was systematic – spanning nearly three years – and the money they and their coconspirators extorted totaled over \$1 million. Defendant’s conduct made a

mockery of the bid process of the Puerto Rico Aqueduct and Sewer Authority by rendering that process a sham. This Circuit noted in Sarault that the scheme in that case was “suffusive; it engulfed city government.” Id. Here too, the defendants’ extortion scheme undercut the integrity of PRASA and the elaborate selection process that PRASA erected, and the defendants pocketed well over the \$250,000 noted by the court in Sarault.

In other §5K2.7 cases, courts have routinely upheld the imposition of upward enhancements when a specific governmental function is disrupted. See, e.g., United States v. Baird, 109 F.3d 856, 871 (3d Cir. 1997) (police officer whose participation in large-scale police misconduct forced city to re-open numerous criminal cases); United States v. Khan, 53 F.3d 507, 518 (2d Cir. 1995) (large-scale Medicare fraud); United States v. Heckman, 30 F.3d 738, 743 (6<sup>th</sup> Cir. 1994) (“substantial disruption” to IRS by filing false tax returns). The substantial disruption here was that the defendants’ actions rendered moot the entire contracting and payment process for the Superaqueduct. There was no need for an elaborate bidding process. There was no need for selection committees. And with each payment made by the government to Thames-Dick and then to the contractors, the defendants pocketed a portion as their share of their spoils. The corruption here unquestionably substantially disrupted the manner in which this huge public works project was bid and award, and had ripple effects that undermined and likely continues to undermine the public’s confidence in government contracts being let in an honest and fair process. Particularly where large public works projects require the participation and competition of foreign contractors and large contractors from the continental United States, competent applicants are likely to be dissuaded from trying to

compete where the playing field is not level. Based on the trial testimony, the intense media coverage of this case, and the obvious negative ramifications from this large-scale extortion scheme, the Court has ample evidence to make findings of the loss of public confidence in governmental contracting as a result of this case. See Yeaman, 194 F.3d at 464 (“It is not necessary in a situation of this kind that the government produce someone whose confidence in the institution has diminished as a result of the defendants’ conduct.”).

#### **IV. The Probation Office’s Guidelines Calculations Should Not Be Disturbed**

In their joint sentencing memorandum, defendants object to the more than \$10 million loss figure used by the Probation Office as “inflated, arbitrary, and imprecise.” Defs’ Sent. Memo at 4. Their objection is frivolous. As demonstrated by the two exhibits filed by the government contemporaneously with this sentencing memorandum, the \$10 million figure is conservative and based on sworn testimony of the contractors as well as exhibits admitted at trial.<sup>2</sup> The contractors’ own testimony (much of it adduced on cross-examination) and documents plainly establish by a preponderance of the evidence an anticipated profits figure of at least \$10 million. See United States v. Vaknin, 112 F.3d 579, 582-82 (1<sup>st</sup> Cir. 1997). This figure has more than “sufficient indicia of reliability to support its probable accuracy.” U.S.S.G. §6A1.3(a).

After re-asserting his innocence of all charges, Defendant Vazquez makes the additional argument that the “methodology” employed by the Probation Office is flawed because, to him, extortion prosecutions should be materially different

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<sup>2</sup> The government attempted to file documents regarding the \$10 million expected profits calculation as attachments to this document, but was unable to do so because of file size restrictions. The government accordingly files as

for guidelines purposes than bribery prosecutions. Defendant cites no law for this proposition, and the United States submits that the Guidelines are crystal clear on the proper methodology for calculating the guidelines, and that the Probation Office appropriately followed that methodology.

By: Edward C. Nucci  
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/s/ \_\_\_\_\_  
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Dated: December 29, 2006

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“Notices of Exhibit” two additional filings, titled “Exhibit 1” and “Exhibit 2.”

CERTIFICATE OF SERVICE

Matthew C. Solomon hereby certifies that a copy of the foregoing will be served electronically on December 29, 2006 to the following counsel of record:

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