IN THE SUPREME COURT OF THE STATE OF ALASKA

In the Matter of the Hospitalization of,	)	
	)	
H.R.	)	
	)	
	)	
	)	
	)	Supreme Court No..: **S-15793**
	)	

Trial Court Case No.: **3AN-14-02936 PR**

APPEAL FROM THE SUPERIOR COURT
THIRD JUDICIAL DISTRICT AT ANCHORAGE
THE HONORABLE PAUL E. OLSEN, JUDGE

BRIEF OF AMICUS STATE OF ALASKA IN SUPPORT OF NEITHER PARTY

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ALASKA STATUTES:

AS 47.30.700. Initial involuntary commitment procedures

(a) Upon petition of any adult, a judge shall immediately conduct a screening investigation or direct a local mental health professional employed by the department or by a local mental health program that receives money from the department under AS 47.30.520 - 47.30.620 or another mental health professional designated by the judge, to conduct a screening investigation of the person alleged to be mentally ill and, as a result of that condition, alleged to be gravely disabled or to present a likelihood of serious harm to self or others. Within 48 hours after the completion of the screening investigation, a judge may issue an ex parte order orally or in writing, stating that there is probable cause to believe the respondent is mentally ill and that condition causes the respondent to be gravely disabled or to present a likelihood of serious harm to self or others. The court shall provide findings on which the conclusion is based, appoint an attorney to represent the respondent, and may direct that a peace officer take the respondent into custody and deliver the respondent to the nearest appropriate facility for emergency examination or treatment. The ex parte order shall be provided to the respondent and made a part of the respondent's clinical record. The court shall confirm an oral order in writing within 24 hours after it is issued.

(b) The petition required in (a) of this section must allege that the respondent is reasonably believed to present a likelihood of serious harm to self or others or is gravely disabled as a result of mental illness and must specify the factual information on which that belief is based including the names and addresses of all persons known to the petitioner who have knowledge of those facts through personal observation.

AS 47.30.705. Emergency detention for evaluation

(a) A peace officer, a psychiatrist or physician who is licensed to practice in this state or employed by the federal government, or a clinical psychologist licensed by the state Board of Psychologist and Psychological Associate Examiners who has probable cause to believe that a person is gravely disabled or is suffering from mental illness and is likely to cause serious harm to self or others of such immediate nature that considerations of safety do not allow initiation of involuntary commitment procedures set out in AS 47.30.700, may cause the person to be taken into custody and delivered to the nearest evaluation facility. A person taken into custody for emergency evaluation may not be placed in a jail or other correctional facility except for protective custody purposes and only while awaiting transportation to a treatment facility. However, emergency protective custody under this section may not include placement of a minor in a jail or secure facility. The

peace officer or mental health professional shall complete an application for examination of the person in custody and be interviewed by a mental health professional at the facility.

(b) In this section, "minor" means an individual who is under 18 years of age.

AS 47.30.710. Examination; hospitalization

(a) A respondent who is delivered under AS 47.30.700 - 47.30.705 to an evaluation facility for emergency examination and treatment shall be examined and evaluated as to mental and physical condition by a mental health professional and by a physician within 24 hours after arrival at the facility.

(b) If the mental health professional who performs the emergency examination has reason to believe that the respondent is (1) mentally ill and that condition causes the respondent to be gravely disabled or to present a likelihood of serious harm to self or others, and (2) is in need of care or treatment, the mental health professional may hospitalize the respondent, or arrange for hospitalization, on an emergency basis. If a judicial order has not been obtained under AS 47.30.700, the mental health professional shall apply for an ex parte order authorizing hospitalization for evaluation.

AS 47.30.715. Procedure after order

When a facility receives a proper order for evaluation, it shall accept the order and the respondent for an evaluation period not to exceed 72 hours. The facility shall promptly notify the court of the date and time of the respondent's arrival. The court shall set a date, time, and place for a 30-day commitment hearing, to be held if needed within 72 hours after the respondent's arrival, and the court shall notify the facility, the respondent, the respondent's attorney, and the prosecuting attorney of the hearing arrangements. Evaluation personnel, when used, shall similarly notify the court of the date and time when they first met with the respondent.

AS 47.30.720. Release before expiration of 72-hour period

If at any time in the course of the 72-hour period the mental health professionals conducting the evaluation determine that the respondent does not meet the standards for commitment specified in AS 47.30.700, the respondent shall be discharged from the facility or the place of evaluation by evaluation personnel and the petitioner and the court so notified.

AS 47.30.915. Definitions

In AS 47.30.660 - 47.30.915,

. . .

(19) "screening investigation" means the investigation and review of facts that have been alleged to warrant emergency examination or treatment, including interviews with the persons making the allegations, any other significant witnesses who can readily be contacted for interviews, and, if possible, the respondent, and an investigation and evaluation of the reliability and credibility of persons providing information or making allegations;

. . .

INTEREST OF AMICUS

The Court notified the Attorney General of this appeal under Appellate Rule 514(f) because H.R. indicated that this case draws into question the constitutionality of a state statute. The State of Alaska has an interest in defending the constitutionality of its statutes. Additionally, the State often participates in civil commitment proceedings as a litigant in a protective capacity. As the Court has explained, the State's concerns in such proceedings are "to provide care to those whose mental disorders render them unable to care for themselves and to protect both the community and the individuals themselves from dangerous manifestations of their mental illness."[1] As a frequent participant in civil commitment proceedings, the State has an interest in the Court's interpretation of the civil commitment statutes.

ISSUES PRESENTED

Upon receiving a petition filed by H.R.'s neighbors, a probate master[2] heard testimony from five witnesses and then issued an ex parte order under AS 47.30.700 finding probable cause to believe that H.R. met the standard for civil commitment and authorizing that she be detained for an involuntary psychiatric evaluation.

1. *"Screening investigation."* Alaska Statute 47.30.700(a) says the court must

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[1] *Wetherhorn v. Alaska Psychiatric Inst.*, 167 P.3d 701, 703 (Alaska 2007) (quoting *Goetz v. Crosson*, 967 F.2d 29, 34–35 (2d Cir.1992)).

[2] H.R. lists a challenge to the probate master's authority as her third point on appeal, but she has waived this argument by failing to make it in her opening brief. *See Weiner v. Burr, Pease & Kurtz, P.C.*, 221 P.3d 1, 6 n.14 (Alaska 2009) (holding that argument not raised in appellant's opening brief was waived). The State's position is that the probate master acted within his authority. The State cannot respond to H.R.'s contrary position without briefing explaining the argument.

do a "screening investigation" before issuing an ex parte order. Did the court fail to conduct an adequate "screening investigation" under the statute?

2. *Due process*. Is the procedure in AS 47.30.700—under which a person may be briefly detained for an evaluation upon an ex parte finding of probable cause that she meets the standards for commitment—unconstitutional under the due process clause?

3. *Probable cause*. H.R.'s neighbors testified that her mental health was deteriorating, she was acting aggressively, and she could not control her large dog. Did the superior court err in finding that there was probable cause to believe that H.R. met the standards for commitment—i.e. that she was mentally ill and that condition caused her to be gravely disabled or to present a likelihood of serious harm to herself or others?

ARGUMENT

The State does not take a position on the appropriate outcome in H.R.'s case because the State was not a party below. Instead, the State files this brief to defend the constitutionality of AS 47.30.700—to the extent that it is in question—and to caution the Court not to create any across-the-board statutory or constitutional obstacles to obtaining swift psychiatric evaluations of citizens who may need them. What is sufficient to constitute a "screening investigation" under AS 47.30.700 varies depending on the circumstances of the case at hand. And the procedure in AS 47.30.700—under which a person may be briefly detained for an evaluation upon a finding of probable cause that the person meets the standards for commitment—complies with due process.

I. What kind of "screening investigation" supports a finding of probable cause and thereby satisfies AS 47.30.700 depends on the facts of a case.

Alaska Statute 47.30.700 allows anyone to petition the court for an ex parte order finding probable cause to believe that a person meets the standard for civil commitment and authorizing that he or she be detained for an involuntary psychiatric evaluation. The statute requires the court to do a "screening investigation" before issuing such an order. H.R. asserts that the master failed to conduct a "screening investigation" before issuing the order in her case. [At. Br. 7-8] Though she does not explain in detail, her position must be that the master's hearing did not constitute a "screening investigation" within the meaning of the statute. The State does not take a position on whether the statute was satisfied in H.R.'s case, but rather writes to explain that what kind of "screening" is necessary depends on the facts of a particular case.

Alaska Statute 47.30.700 applies not only to cases like H.R.'s, in which the respondent has not yet been detained when the ex parte order issues, but also to cases in which the respondent has already been detained and examined before the ex parte order issues. This is because the statutes authorize taking a respondent into custody in either of two distinct ways—(1) under AS 47.30.700, by authority of an ex parte order, or (2) under AS 47.30.705, by a "peace officer, a psychiatrist or physician . . . or a clinical psychologist" if the threat of harm is too immediate to await a court order.[3] When a

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[3] This is how the respondent was initially taken into custody in the *Daniel G.* case. *See In re Daniel G.*, 320 P.3d 262, 264 (Alaska 2014), *reh'g granted* (Mar. 14, 2014) ("At 8:50 a.m. the police officer transported Daniel to the Providence Alaska Medical Center Psychiatric Emergency Room under AS 47.30.705 and gave the Providence staff a 'Notice of Emergency Detention and Application for Evaluation.'").

person is taken into custody under AS 47.30.705 without a prior court order and is assessed as requiring further hospitalization, the evaluating mental health professional must then apply for an ex parte order under AS 47.30.700.[4] For this reason, petitions for ex parte orders under AS 47.30.700 are often filed by mental health professionals concerning respondents who have already been detained and examined. Other times, such as in H.R.'s case, petitions are filed by laypeople—such as relatives, friends, or neighbors—concerning respondents who have not yet been detained or examined. Alaska Statute 47.30.700 thus covers a range of different possible situations.

Alaska Statute 47.30.700 tells the court that upon receiving a petition it must conduct a "screening investigation" and then determine whether there is "probable cause to believe the respondent is mentally ill and that condition causes the respondent to be gravely disabled or to present a likelihood of serious harm to self or others." Alaska Statute 47.30.915(19) defines a "screening investigation" as

> the investigation and review of facts that have been alleged to warrant emergency examination or treatment, including interviews with the persons making the allegations, any other significant witnesses who can readily be contacted for interviews, and, if possible, the respondent, and an investigation and evaluation of the reliability and credibility of persons providing information or making allegations.

H.R. does not cite or discuss this statutory definition. The Legislature clearly did not

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[4] *See* AS 47.30.710(b) ("If a judicial order has not been obtained under AS 47.30.700, the mental health professional shall apply for an ex parte order authorizing hospitalization for evaluation."). This is what happened in the *Daniel G.* case after the respondent was already in custody. *See Daniel G.*, 320 P.3d at 264 ("At approximately 3:10 p.m., Providence staff filed a 'Petition for Involuntary Commitment for Evaluation' under AS 47.30.700 and AS 47.30.710, asking the superior court to authorize detention of Daniel at the Alaska Psychiatric Institute (API) for 72 hours for psychiatric evaluation.").

intend this "screening investigation" to be an adversarial hearing involving the respondent—this is apparent because AS 47.30.700 refers to an "ex parte order." If notice and an adversarial hearing were required, the order would not be "ex parte."

The purpose of the required "screening investigation" is to allow the court to assemble sufficient facts to determine whether there is "probable cause" to believe that a person meets the standards for civil commitment—i.e., "is mentally ill and that condition causes [him or her] to be gravely disabled or to present a likelihood of serious harm to self or others."[5] In some cases, the petition alone may give the court a lot of reliable information from which it could make its probable cause determination. For example, a petition may be filed by a mental health professional who has examined the respondent, and medical information about the respondent's mental health diagnoses might be attached to the petition. Faced with such a strong petition, the court might be able to reach a probable cause determination without much further inquiry. In a different case, a petition might be filed by a lay observer making more ambiguous allegations. Faced with this less clear petition, the court might need to obtain more facts to assess the situation. The purpose of the AS 47.30.700 "screening investigation" is to allow the court to gather whatever facts may be necessary to ascertain whether or not probable cause exists under the circumstances of a particular petition.

The Court should interpret AS 47.30.700 and AS 47.30.915(19) as giving the court the flexibility to decide how much investigation is necessary to ascertain whether there is

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5 *See* AS 47.30.700(a).

probable cause under the facts of a given case. A rigid requirement that the court always take specific steps, such as commissioning the services of an outside investigator, would waste scarce judicial resources in the many cases in which probable cause can be found without this step. Thus, in deciding whether the investigation in H.R.'s case was adequate, the Court should avoid creating such rigid requirements.

The real protection for the respondent's rights in the AS 47.30.700 process is in the "probable cause" standard itself. If the record before the court—whatever it may consist of—does not establish "probable cause" that the respondent meets the standard for civil commitment, the court may not issue an ex parte order. This is the same "probable cause" standard that protects citizens' rights in a variety of ex parte contexts, from arrest[6] and search[7] warrants to protective orders[8] to orders for contagious disease testing.[9] Proper application of the probable cause standard will ensure that citizens are not detained for involuntary psychiatric evaluations without adequate justification.

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[6] *See Riney v. State*, 935 P.2d 828, 833 (Alaska App. 1997) (explaining that "[t]he judicial review that precedes the issuance of an arrest warrant is non-adversarial—that is, the hearing is conducted ex parte, and the government can rely on affidavits and hearsay").

[7] *See Cruse v. State*, 584 P.2d 1141, 1146 (Alaska 1978) (discussing "ex parte nature" of search warrant proceedings, which apply "probable cause" standard).

[8] *See* AS 18.65.855 (authorizing ex parte and emergency protective orders for stalking and sexual assault on showing of probable cause); AS 18.66.110 (authorizing ex parte and emergency protective orders for crimes of domestic violence on showing of probable cause).

[9] *See* AS 18.15.375(d) (authorizing ex parte order for testing, examination, or screening for contagious disease posing a significant risk to the public health upon a showing of probable cause).

For these reasons, regardless of what the Court concludes about H.R.'s specific case, the Court should avoid reading inflexible, burdensome investigatory requirements into AS 47.30.700 and AS 47.30.915(19).

II. Alaska Statute 47.30.700 does not violate due process.

H.R. also contends that detaining her for a psychiatric evaluation without prior notice and an opportunity to be heard violated her constitutional right to due process. [At. Br. 8-13] The State takes no position on the facts of H.R.'s specific case and whether she should have been detained. But the State defends the constitutionality of its commitment statutes. As the Court has observed, "Alaska Statutes Title 47 details a mandatory timeline for emergency psychiatric detention and evaluation which reflects the legislative concern for the liberty interests at stake."[10] The procedure in AS 47.30.700—under which a person may be briefly detained for an evaluation upon a finding of probable cause that the person meets the standards for commitment—complies with due process.

H.R. asserts that due process requires notice and an opportunity to be heard *before* a person is detained, absent an emergency to justify dispensing with such safeguards. [At. Br. 8-12] But AS 47.30.700 comports with this general principle because it authorizes detention only when a dangerous situation justifies ex parte proceedings. The statutes do not authorize detention of a person simply because she suffers from a mental illness. A court may issue an ex parte evaluation order only if it finds there is probable

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[10] *Daniel G.*, 320 P.3d at 269.

cause to believe a person is gravely disabled—i.e., incapable of surviving safely in freedom[11]—or presents a likelihood of serious harm to herself or others.[12] If the court has probable cause to believe these dire circumstances exist, that is in itself an emergency. Delaying detention and evaluation for long enough to allow prior notice and an adversarial hearing would present a risk that the "likelihood of serious harm to self or others" would come to fruition before the hearing could be completed. In some cases, the threatened harm might be so immediate that it would justify detention by a peace officer or clinician under AS 47.30.705 without even an ex parte order. When the threat is not so immediate, but a likelihood of serious harm exists, detention and evaluation under an ex parte order issued on a finding of probable cause by a neutral magistrate strikes an appropriate balance.

As the Court of Appeals has observed, "[t]he issuance of ex parte orders is not an unusual procedure. Courts issue ex parte orders in a variety of situations . . ."[13] Ex parte orders on findings of probable cause are issued in a many circumstances affecting citizens' liberty and property rights. A person may be arrested and brought before the

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[11] *See Wetherhorn*, 156 P.3d 371, 384 (Alaska 2007) ("We conclude that the definition of 'gravely disabled' in AS 47.30.915(7)(B) is constitutional if construed to require a level of incapacity so substantial that the respondent is incapable of surviving safely in freedom.").

[12] AS 47.30.700 (a) ("[A] judge may issue an ex parte order orally or in writing, stating that there is probable cause to believe the respondent is mentally ill and that condition causes the respondent to be gravely disabled or to present a likelihood of serious harm to self or others.").

[13] *MacDonald v. State*, 997 P.2d 1187, 1189 (Alaska App. 2000).

court on a warrant issued on an ex parte finding of probable cause.[14] A person's home may be searched under a warrant issued on an ex parte finding of probable cause.[15] A person may be barred from his home or from contact with his spouse for twenty days with a domestic violence protective order issued on an ex parte finding of probable cause.[16] A person may be detained and tested for a contagious disease posing a public health risk with an order issued on an ex parte finding of probable cause.[17] In all of these situations, the application of the probable cause standard by a neutral judicial officer protects against an erroneous deprivation of rights.

Alaska's civil commitment statutes provide an expedited process to ensure that a respondent's detention under an ex parte evaluation order is as brief as possible. As the Court observed in *Daniel G.*, "[t]he expedited process required for involuntary commitment proceedings is aimed at mitigating the infringement of the respondent's liberty rights that begins the moment the respondent is detained involuntarily."[18] The court appoints an attorney for the respondent immediately upon issuance of an ex parte

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[14] *See* Criminal Rule 4(a)(1).

[15] *See* Criminal Rule 37(a)(2); *Jacobs v. State*, 953 P.2d 527, 533 (Alaska App. 1998) ("A defendant has fewer due process rights at a search warrant proceeding than at trial. Most notably, the police apply for search warrants in ex parte proceedings, and they may rely on hearsay information from even presumptively untrustworthy informants (as long as the information is corroborated). The owner of the property has no right to cross-examine the police witnesses who testify at a search warrant application, nor to question the police about their informants.").

[16] *See* AS 18.66.110.

[17] *See* AS 18.15.375(d).

[18] *Daniel G.*, 320 P.3d at 269 (quoting *Wetherhorn*, 156 P.3d at 381).

order.[19] The ex parte order authorizes detention of the respondent for only 72 hours.[20] The court must schedule, and give notice of, a time and place for a contested hearing within 72 hours.[21] A facility must evaluate the respondent within 24 hours of arrival.[22] If at any time the facility determines that the respondent does not meet the standard for commitment, she must immediately be released.[23]

This statutory scheme strikes an appropriate balance that passes the *Mathews v. Eldridge*[24] due process test. Under this test, the Court looks at several factors:

> [f]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probative value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[25]

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19 AS 47.30.700(a).

20 AS 47.30.715.

21 *Id.*

22 AS 47.30.710(a).

23 AS 47.30.720.

24 424 U.S. 319, 334–35 (1976).

25 *Brandal v. State, Commercial Fisheries Entry Comm'n*, 128 P.3d 732, 738 (Alaska 2006) (quoting *State, Dep't of Health & Soc. Servs. v. Valley Hosp. Ass'n, Inc.*, 116 P.3d 580, 583 (Alaska 2005)).

The Court has recognized that "due process does not require a full-scale hearing in every situation to which due process applies."[26] The process "must be appropriate to the nature of each case and an appropriate accommodation of the competing interests involved."[27]

Looking at the first *Mathews v. Eldridge* factor, the private interest affected by an AS 47.30.700 ex parte evaluation order is certainly a very important one because the respondent is being deprived of his or her liberty. However, the potential deprivation of liberty will last only 72 hours or less. As the Court recognized in *Daniel G.*, "preliminary determinations may be incorrect and result in unnecessary 72-hour evaluations. But the evaluation period may also not last a full 72 hours, and the result of the evaluation may be immediate freedom."[28]

As for the second factor, the risk of erroneous deprivation of rights through the AS 47.30.700 procedure is relatively low. A neutral magistrate must find probable cause to believe the respondent meets the standard for civil commitment. As mentioned above, this is similar to the procedure used in other contexts involving important rights. And magistrates are well versed in application of the probable cause standard.

The third *Mathews v. Eldridge* factor is "the probative value, if any, of additional or substitute procedural safeguards." H.R. seems to argue for notice and a full contested hearing, with counsel, before issuance of a 72-hour evaluation order. [At. Br. 8-12] She

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26 *Haggblom v. City of Dillingham*, 191 P.3d 991, 995 (Alaska 2008) (quoting *Laidlaw Transit, Inc. v. Anchorage Sch. Dist.*, 118 P.3d 1018, 1026 (Alaska 2005)).

27 *Hayes v. Alaska USA Federal Credit Union*, 767 P.2d 1158, 1163 (Alaska 1989).

28 *Daniel G.*, 320 P.3d at 272.

also says the court should have considered whether there was a less restrictive alternative to an evaluation. [At. Br. 12-13] But if evidence exists that suggests a respondent has a dangerous mental health condition and should be committed, the only effective way to resolve this issue is an evaluation by a mental health professional. H.R. does not suggest what would be a "less restrictive alternative" to such an evaluation. [At. Br. 12-13] Adding layers of litigation before such an evaluation can be accomplished is unlikely to improve the speed or accuracy with which cases are resolved. The Court in *Daniel G.* recognized "the practical importance of evaluation orders for the functioning of the civil commitment system and the necessity of providing the court in a subsequent 30-day commitment hearing with the opinion of an informed health professional."[29]

As for the final factor—the government's interest—additional procedures would insert considerable cost and dangerous delay into the commitment process. Drawing out the process of obtaining an evaluation order under AS 47.30.700 could endanger the respondent and others during the delay. The government has a significant interest in protecting the public. If the respondent is incapable of surviving safely in freedom[30] or is likely to seriously harm herself or others, delay could be very dangerous.

For this reason, lengthening the process for obtaining an order under AS 47.30.700 could create the unintended consequence of *decreasing* procedural protections by

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[29] *Id.* at 273.

[30] *See Wetherhorn*, 156 P.3d at 384 ("We conclude that the definition of 'gravely disabled' in AS 47.30.915(7)(B) is constitutional if construed to require a level of incapacity so substantial that the respondent is incapable of surviving safely in freedom.").

funneling more cases into the emergency detention provision, AS 47.30.705. This provision allows detention without a prior court order when "considerations of safety do not allow initiation of involuntary commitment procedures set out in AS 47.30.700." If the procedure for obtaining a prior court order for an evaluation under AS 47.30.700 is lengthy and difficult, there will be more cases in which considerations of safety do not allow petitioners to wait for such an order. The current AS 47.30.700 procedure, which is swift but involves judicial review, strikes an appropriate balance.

Accordingly, the AS 47.30.700 procedure complies with due process. If the Court examines the facts of H.R.'s case and believes that H.R. should not have been detained for an evaluation, it should not conclude from this that AS 47.30.700 is unconstitutional. Rather, it should simply conclude that the evidence below did not establish probable cause to believe that H.R. met the standards for civil commitment.

CONCLUSION

For the foregoing reasons, the Court should not interpret AS 47.30.700(a) as creating rigid investigation requirements, and should hold that the procedure provided in AS 47.30.700 complies with due process.

DATED April 1, 2015.

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