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CLERK OF WISCONSIN
SUPREME COURT

STATE OF WISCONSIN

IN SUPREME COURT

No. 2020AP160-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ERIC P. ENGEN,

Defendant-Appellant-Petitioner.

RESPONSE OPPOSING PETITION FOR REVIEW

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INTRODUCTION

After winning his appeal in the court of appeals, Defendant-Appellant-Petitioner Eric Engen petitions for review.

Engen seeks this Court's review on an issue that the court of appeals summarily addressed in a footnote. The court of appeals gave the issue short shrift in its opinion because it had already granted the relief Engen requested on the issue one year earlier, and because it had already resolved the legal question Engen raised less than one month earlier in a published decision in another case.

The issue arises from this Court's decision in *State v. Scott*, 2018 WI 74, 382 Wis. 2d 476, 914 N.W.2d 141. Under *Scott*, an involuntary medication order is a final order for purposes of appeal. *Scott*, 382 Wis. 2d 476, ¶ 34. The defendant is entitled to an automatic stay of the order pending appeal. *Id.* ¶ 43. The State is entitled to a corresponding opportunity to move to lift the stay. *Id.* ¶ 45. The *Scott* court was silent on the question of whether such a stay-lifting motion may be heard in the circuit court, the court of appeals, or either. Engen insists that such a motion can only be heard by the court of appeals. The State has maintained that such a motion may be heard in either the circuit court or the court of appeals.

In *State v. Green*, 2021 WI App 18, ___ Wis. 2d ___, 957 N.W.2d 583, the court of appeals resolved the question, holding that the circuit court has the competency to hear a motion from the State to lift a *Scott* stay. Accordingly, such a motion may be heard in either the circuit court or the court of appeals.

Engen asks this Court to grant review in this case in order to overrule the recent *Green* holding. He asserts that the issue meets the criteria for this Court's review under Wis.

Stat. § (Rule) 809.62(1r) because it will "resolve the conflict between *Green* and *Scott*, and provide guidance on a recurring question of constitutional significance." (Pet. 2.) Both assertions are based on false premises. First, there is no conflict between *Green* and *Scott*. *Scott* left the question of where the State may file a motion to lift a stay of an involuntary medication order unanswered, and *Green* answered that question. Second, this Court need not grant review to provide guidance on this question. The court of appeals ordered publication of the *Green* opinion, so it has provided binding authority. No further guidance is needed.

STATEMENT OF THE CASE

Eric Engen was convicted of two counts of felony stalking and two misdemeanor counts of violating a harassment restraining order in 2013. (R. 124.) He received consecutive jail and prison sentences followed by a five-year period of probation. (R. 124.) After Engen had reportedly violated the terms of his probation, a revocation hearing was scheduled. (R. 170:2–3.) The Administrative Law Judge requested a competency evaluation. (R. 138; 170:2–3.)

On September 30, 2019, the circuit court found that Engen was not competent to proceed with his revocation proceeding, and committed him for treatment to competency. (R. 142; 171:23–24.) The court found that the legal criteria for involuntary medication had not yet been satisfied,[1] but if the psychiatrists found "that an involuntary administration of

[1] Under *Sell v. United States,* 539 U.S. 166, 180–81 (2003), before an involuntary medication order may be entered, the State must prove and the court must find: (1) an important governmental interest; (2) involuntary medication furthering the interest; (3) the necessity of the involuntary medication; and (4) the medical appropriateness of the medication. This Court formally adopted the *Sell* holding in *State v. Fitzgerald*, 2019 WI 69, ¶¶ 14–18, 387 Wis. 2d 384, 929 N.W.2d 165.

medication is the only appropriate way to proceed, they can come back" to the court. (R. 171:24.) Engen was committed to the Wisconsin Resource Center and evaluated by the Wisconsin Forensic Unit, which ultimately filed a written report in the circuit court recommending involuntary medication. (R. 147:1–3.) Relying on that report, the State filed a Motion for Involuntary Administration of Medication to Bring Defendant to Competence on January 2, 2020. (R. 148.)

The circuit court held a hearing and the parties argued about whether the State had satisfied the *Sell* criteria[2] for involuntary medication. (R. 172:11–14, 23–34.) The court found that all of the *Sell* factors had been satisfied, and signed an order committing Engen for treatment, including involuntary medication. (R. 172:36–37; 153.)

Pursuant to *Scott*, 382 Wis. 2d 476, ¶¶ 34, 43, Engen immediately filed an Emergency Motion for Automatic Stay of Involuntary Medication and a Notice of Appeal. (R. 154; 155.)

The next day, the State filed a Motion to Toll Statutory Time to Bring Defendant to Competence. (R. 156.) Under Wis. Stat. § 971.14(5)(a)1., a defendant is committed to the custody of the Department of Health Services for treatment to competence "for a period not to exceed 12 months, or the maximum sentence specified for the most serious offense . . . charged, whichever is less." The State observed that the intent of this statutory period is to give the State 12 months to bring the defendant to competency. (R. 156:3.) Here, four of the statutory 12 months had already passed, leaving only eight months in the commitment period for treatment; it was likely that those eight months would be eaten up by the appeal. (R. 156:5.) Therefore, the State asked the court to toll

[2] *See supra* note 1.

the statutory time limits for restoring Engen to competency for the duration of the appeal. (R. 156:6.)

The court held a hearing on both motions on January 21, 2020. (R. 173.) The court granted Engen's stay motion. (R. 173:41.) The court also granted the State's motion to toll the statutory time limit. (R. 173:42.)

The State had not filed a written motion to lift the stay as it was entitled to under *Scott*. (R. 173:21–22.) The court asked if the State wanted to make that motion. (R. 173:21–22.) The State responded with an oral motion to lift the stay, which the court granted. (R. 173:25–29, 45.) Subsequently, the court entered a written order lifting the stay. (R. 158:2.)

Engen appealed the order lifting the stay to the court of appeals. (R. 159.) On March 2, 2020, the court of appeals granted his motion to vacate the order lifting the stay and reinstated the stay pending appeal of the involuntary medication order. (Pet-App. 220.)

Engen subsequently filed a brief in support of his Notice of Appeal on May 26, 2020. In response, the State confessed error and filed a Motion to Vacate Order of Involuntary Medication of Defendant and to Remand for Further Proceedings on July 2, 2020. Engen opposed the State's motion to confess error and the court of appeals denied the motion on July 29, 2020.

The parties briefed the four issues presented in Engen's brief. After the State filed its response brief, Engen filed a petition in this Court asking it to grant bypass (1) to clarify the automatic stay/motion to lift the stay procedure prescribed by *Scott*, specifically whether such motions may be heard by the circuit court; (2) to clarify the *Sell* requirements; and (3) to clarify whether the order to toll time limits is permitted by Wis. Stat. § 971.14(5). On November 18, 2020,

this Court denied that petition and briefing resumed in the court of appeals.

Later, on February 25, 2021, the court of appeals issued an opinion, which it later ordered published, in *Green*, 2021 WI App 18. *Green* addressed several of the same issues raised in this case, including the three issues on which Engen unsuccessfully sought bypass. The court decided against the State on the *Sell* and tolling issues. *Green*, 2021 WI App 18, ¶¶ 29, 63. Interpreting Green's *Scott* issue as a judicial competency argument, the court held that a circuit court has competency to hear a motion to lift an automatic stay pursuant to *Scott*. *Id.* ¶¶ 64–75. The State filed a partial petition for review in *Green*, seeking review of the tolling issue.

On March 18, 2021, the court of appeals issued its decision in this case. First, it determined that the involuntary medication order must be vacated because it did not comport with *Sell*. *State v. Engen*, No. 2020AP160, 2021 WL 1031365, ¶¶ 18–25 (Wis. Ct. App. Mar. 18, 2021) (unpublished). Notably, the State had already confessed error on that issue, a confession that Engen refused to accept. Furthermore, that ruling was a foregone conclusion after *Green*, which articulated in detail the evidence the State must produce to satisfy *Sell*. *Green*, 2021 WI App 18, ¶¶ 29–51. Second, the court declined to decide an issue regarding the circuit court's interpretation of the Health Insurance Portability and Accountability Act of 1996, about which the State had confessed error, because there was no dispute between the parties and the resolution of the question would have no effect on the case. *Engen*, 2021 WL 1031365, ¶ 10 & n.5. Third, the court of appeals agreed with Engen that the order to toll statutory time limits was impermissible under section 971.1.4(5). *Engen*, 2021 WL 1031365, ¶¶ 28–29. This, too, was

a foregone conclusion after *Green*. *Green*, 2021 WI App 18, ¶¶ 52–63.

In a footnote, the court of appeals addressed Engen's argument that the circuit court misapplied *Scott* because (in Engen's view) a motion to lift a stay under *Scott* should be heard in the court of appeals, and that the circuit court violated his due process rights because it invited the State to make an oral motion to lift the automatic stay and summarily decided that motion in the State's favor. The court noted that it had rejected the *Scott* venue argument in the published *Green* decision, and reproved the circuit court for the way it lifted the *Scott* stay.

> On appeal, Engen contends that such motions [to lift an automatic stay under *Scott*] must be filed in the first instance in the court of appeals. . . . [W]e addressed and rejected this same argument in ***Green***, No. 2020AP298, ¶¶64-75. Therefore, we address this issue no further, except to briefly comment that the manner in which the circuit court addressed the State's motion all but invited a due process challenge. Here, during the course of the hearing, the circuit court invited the State to make an oral motion to lift the stay. The court then decided that motion within minutes, despite an objection by Engen's counsel that he had no notice of the State's arguments and no opportunity to prepare a defense. We address this issue no further because any violation was cured by this court's subsequent entry of an order reinstating the stay.

Engen, 2021 WL 1031365, ¶ 28 n.13.

Engen won this case in the court of appeals. Prior to briefing, the court granted relief to Engen on the stay-lifting issue by reversing the circuit court's order lifting the stay. In its final opinion, the court of appeals admonished the circuit court for the way it handled the State's motion to lift the stay.

Despite all this, Engen now files a petition for review in this Court. He asks the Court to review the court of appeals' treatment of the venue issue, and determine whether the State may file a motion to lift a stay under *Scott* in the circuit court, the court of appeals, or either court. This Court should deny Engen's petition.

ARGUMENT

I. Engen is not entitled to this Court's review because the court of appeals' decision was not adverse to him.

The rules of appellate procedure provide that "[a] party may file with the supreme court a petition for review of *an adverse decision* of the court of appeals." Wis. Stat. § (Rule) 809.62(1m)(a). The rule recognizes two kinds of "adverse decision" and declares unequivocally what an "adverse decision" is not:

> (a) "Adverse decision" means a final order or decision of the court of appeals, the result of which is contrary, in whole or in part, to the result sought in that court by any party seeking review.
>
> (b) "Adverse decision" includes the court of appeals' denial of or failure to grant the full relief sought or the court of appeals' denial of the preferred form of relief.
>
> (c) "Adverse decision" does not include a party's disagreement with the court of appeals' language or rationale in granting a party's requested relief.

Wis. Stat. § (Rule) 809.62(1g).

This Court should deny Engen's petition for review because he did not receive an "adverse decision" from the court of appeals under either of the alternative definitions of "adverse decision." On the contrary, the court of appeals'

decision falls within the category of decisions that are not "adverse decisions."

Under the first definition, a decision would be "adverse" to Engen if it was "contrary . . . to the result sought" by Engen. Wis. Stat. § (Rule) 809.62(1g)(a). Here, Engen asked the court of appeals to "vacate the circuit court's January 16, 2020 Amended Order of Commitment for Treatment (Incompetency) and the portions of the January 21, 2020 order that lifted the automatic stay [and] granted the State's motion to toll." (Engen's Ct. Appeals Opening Br. 46.) The court of appeals "conclude[d] that the involuntary medication order [of January 16, 2020] and tolling orders [of January 21, 2020] were entered in error. Therefore, we reverse and remand for the circuit court to discharge Engen from his commitment." *Engen*, 2021 WL 1031365, ¶ 30. Clearly, this is not an adverse decision because the court of appeals gave Engen exactly what he asked for.

At an earlier stage in the appeal, Engen moved for "relief from the order lifting the automatic stay pending appeal." (Pet-App. 220.) On March 2, 2020, that motion was granted. The order lifting the stay was vacated, and "[t]he automatic stay pending appeal of the order for involuntary medication is reinstated." (Pet-App. 220.) So, even then, Engen did not receive an "adverse decision" from the court of appeals.

Engen fares no better under the second definition; indeed, the analysis is the same. The court of appeals did grant Engen "the full relief sought" and his "preferred form of relief." Wis. Stat. § (Rule) 809.62(1g)(b). That was also true when it granted his motion to lift the circuit court's order lifting the automatic stay of the involuntary medication order on March 2, 2020. He got the "full relief sought" and the "preferred form of relief." *Id.*

The rule states that a decision is not "adverse" if the petitioner merely disagrees with the court of appeals' "language or rationale." Wis. Stat. § (Rule) 809.62(1g)(c). That's what we have here. Engen's petition asks this Court to "accept review and hold that the circuit court violated *Scott* and due process, and hold that the order lifting the stay of involuntary medication should be vacated." (Pet. 11.) With respect to venue, the court of appeals noted that it had already, in *Green*, rejected the argument that a motion to lift an automatic stay must be filed in the court of appeals. *Engen*, 2021 WL 1031365, ¶ 28 n.13. With regard to the way the circuit court handled the motion, the court of appeals criticized the circuit court unreservedly, observing that it "all but invited a due process challenge." *Id.* Despite this, the court of appeals declined to address the issue further "because any violation was cured by this court's subsequent entry of an order reinstating the stay," i.e., the March 2, 2020 order. *Id.*

Engen got the relief he asked for from the court of appeals in the order lifting the automatic stay on March 2, 2020, but he is dissatisfied with the court's "language or rationale" in its discussion of the *Scott* issue in footnote 13. Wis. Stat. § (Rule) 809.62(1g)(c). Engen is not satisfied by the court's reliance on *Green*, its observation that Engen had already received relief, and its mere admonition (without more) to the circuit court about the way it handled the State's motion to lift the stay. Engen's dissatisfaction with the court's treatment of the *Scott* issue does not make the court of appeals' decision an "adverse decision" from which he may petition for this Court's review. *See id.*

In sum, whichever way you cut it, Engen simply did not receive an "adverse decision" from the court of appeals. Therefore, his petition for review should be rejected by this Court out of hand.

II. Engen's argument about whether or not a defendant must file a motion to obtain an "automatic" stay of an involuntary medication order was forfeited because not raised in his court of appeals briefs.

In *Scott*, this Court held that a defendant is entitled to an "automatic" stay pending appeal of an involuntary medication order. 382 Wis. 2d 476, ¶ 43. Here, Engen filed a motion to obtain that automatic stay. (R. 154.) In his petition for review, he argues that because his right to stay is "automatic," he should not have had to file a motion to get it. (Pet. 6–7.)

The issue is forfeited. A "position turning on a point of law known to exist but not briefed or argued" is "deem[ed] abandoned." *Polan v. DOR*, 147 Wis. 2d 648, 660, 433 N.W.2d 640 (Ct. App. 1988). Engen did not raise this issue in either his opening brief or his reply brief in the court of appeals, so he did not give the court of appeals an opportunity to rule on it. Engen made three arguments in his court of appeals briefs about the State's motion to lift the stay, but presented no argument about the "automatic" stay itself. (Engen's Ct. Appeals Opening Br. 32–40; Engen's Ct. Appeals Reply Br. 6–8.)

This Court should decline to hear this forfeited issue.

III. Neither issue raised by Engen warrants this Court's review.

Engen raises two issues arising from the circuit court's order granting the State's motion to lift the automatic stay. First is what he calls the circuit court's violation of *Scott* and the rules of appellate procedure. The second is the manner in which the court conducted the stay-lifting procedure. Neither warrants this Court's review.

A. The venue issue was definitively resolved by *Green*, and further consideration by this Court is unnecessary.

As noted, part of Engen's *Scott* argument is the forfeited issue of whether a defendant must file a motion to obtain an automatic stay. The State will not address that issue any further.

Beyond that, Engen argues that a motion to lift an automatic stay must be filed in the court of appeals and may not be filed in the circuit court. (Pet. 7–9.) Engen acknowledges, as he must, that the court of appeals addressed this issue in *Green* and concluded that the State may file a motion to lift the stay in the circuit court. (Pet. 7–8 (citing *Green*, 2021 WI App 18, ¶¶ 71–74).) What Engen does not acknowledge is that *Green* is a published court of appeals decision and binding authority. *See Manitowoc County v. Samuel J.H.*, 2013 WI 68, ¶ 5 n.2, 349 Wis. 2d 202, 833 N.W.2d 109 (published decision by the court of appeals has statewide precedential effect); *see also Wenke v. Gehl Co.*, 2004 WI 103, ¶ 21, 274 Wis. 2d 220, 682 N.W.2d 405 (this Court abides by published court of appeals precedent absent a compelling reason to overrule it). Therefore, to give Engen the ruling he wants, this Court must overrule that newly minted opinion. Engen does not bother to acknowledge this fact.

The *Green* opinion is not only binding authority, it is also well-reasoned. It started its analysis by responding to defendant Green's interpretation of *Scott*. Green emphasized the *Scott* court's directive to *the court of appeals* to "explain its discretionary decision to grant or deny the State's motion," *Green*, 2021 WI App 18, ¶ 70 (quoting *Scott*, 382 Wis. 2d 476, ¶ 48). Green inferred from this language that the stay-lifting motion must therefore be filed in the court of appeals. The *Green* court explained that Green had misinterpreted *Scott*.

After noting that *Scott* did not specify where the State should file its motion, the court of appeals explained that *Scott*'s "directive to the court of appeals followed only from the fact that the defendant [Scott] filed his motion to stay in the court of appeals, so in that case any motion by the State to lift the stay would have also been filed in the court of appeals." *Green*, 2021 WI App 18, ¶ 71. Because it was the court of appeals that had failed to explain its discretionary decision, it was the court of appeals that was directed to supply that explanation by the *Scott* court. *Id.* There was no further significance to the *Scott* court's reference to the court of appeals. It was not a requirement that a stay-lifting motion must be filed in the court of appeals.

The *Green* court went on to consider Green's reliance on Wis. Stat. § (Rule) 809.12, which provides that "[a] person aggrieved by an order of the trial court granting the relief requested [under Wis. Stat. § 808.07] may file a motion for relief from the order with the court [of appeals]." Based on this, Green (and now Engen) argued that the State, aggrieved by the automatic stay of the involuntary medication order, is an aggrieved party who must seek relief in the court of appeals. *Green*, 2021 WI App 18, ¶ 73. As Engen correctly notes, the *Green* court did not dwell long on this argument, which it considered undeveloped by Green,[3] but it did state clearly that "Green points to no language in the statute or elsewhere directing that a party so aggrieved *must* file a motion to lift a stay in the court of appeals rather than in the circuit court." *Id.*

There are additional compelling reasons to allow the State to file a motion to lift the *Scott* stay in the circuit court.

[3] Engen notes that unlike Green, he "made a complete argument based on § 809.12 in his appellant's brief." (Pet. 8 n.2.) Remarkably, Engen does not bother to divulge even a hint of that "complete argument" in his petition.

First, the circuit court is better placed than the court of appeals to conduct the factual inquiries at the heart of the motion to lift the stay. Second, since the losing party might want appellate review of the stay-lifting decision, the court of appeals is a more appropriate venue than this Court to provide that review.

The State's motion to lift the automatic stay is a modified *Gudenschwager* motion. *Scott*, 382 Wis. 2d 476, ¶¶ 45–47.[4] A *Gudenschwager* motion typically originates in the circuit court. *See*, *e.g.*, *State v. Gudenschwager*, 191 Wis. 2d 431, 439–40, 529 N.W.2d 225 (1995). So, like a motion for a stay pending appeal under *Gudenschwager*, a motion to lift a stay pending appeal under *Scott* is appropriately heard by the circuit court in the first instance rather than the court of appeals "unless it is impractical to seek relief in the trial court." Wis. Stat. § (Rule) 809.12. As with the more familiar *Gudenschwager* motion, the circuit court is in a better position than the court of appeals is to weigh *Scott*'s fact and equity inquiries, i.e., whether the defendant will suffer irreparable harm if the automatic stay is lifted, whether other interested

[4] To lift the stay under *Scott*, the State must:

> (1) make a strong showing that it is likely to succeed on the merits of the appeal;
> (2) show that the defendant will not suffer irreparable harm if the stay is lifted;
> (3) show that no substantial harm will come to other interested parties if the stay is lifted; and
> (4) show that lifting the stay will do no harm to the public interest.

State v. Scott, 2018 WI 74, ¶ 47, 382 Wis. 2d 476, 914 N.W.2d 141. To obtain a stay under *Gudenschwager*, the moving party must make a similar showing. The only difference is in the second factor, Under *Gudenschwager*, the movant must show that, "unless a stay is granted, [the movant] will suffer irreparable injury." *State v. Gudenschwager*, 191 Wis. 2d 431, 440, 529 N.W.2d 225 (1995).

parties will suffer substantial harm, and whether the public interest will suffer any harm. *See Scott*, 382 Wis. 2d 476, ¶ 45.

As with a *Gudenschwager* order, either party can appeal the circuit court's order on the *Scott* stay-lifting motion to the court of appeals. *See* Wis. Stat. § (Rule) 809.12. But if a *Scott* stay-lifting motion *must* originate in the court of appeals, the only avenue of appellate review from the first judicial consideration of the motion would be a petition for review to the supreme court. That process would create judicial inefficiencies and needlessly crowd the supreme court docket with appellate motion practice more appropriate to the court of appeals.

Admittedly, before *Green*, parties in *Sell*/*Scott* cases were uncertain about where the State was supposed to file its stay motion. Because *Green* is a published opinion, it has finally resolved that uncertainty. *Green* provides a clear rule, which is also supported by law and logic. There is no reason to overrule it.

There is no reason for this Court to revisit the venue question definitively resolved by the court of appeals in *Green*. The petition for review should be denied.

B. The circuit court's handling of the State's motion to lift the stay does not satisfy the criteria for this Court's discretionary review.

Engen argues that the circuit court's order lifting the *Scott* stay violated procedural due process because the State did not file a written motion and because the court lifted the stay summarily. (Pet. 9–10.) As noted earlier, the court of appeals gave Engen relief from this order on March 2, 2020, and later criticized the circuit court's handling of the motion in its final decision. *See supra* at 4, 6, 7, 9. No further discussion on this topic is warranted. This Court is not an

error-correcting court, but a law-making court with a discretionary docket. *See Blum v. 1st Auto & Cas. Ins. Co.*, 2010 WI 78, ¶ 49, 326 Wis. 2d 729, 786 N.W.2d 78 (error correction not a basis to grant review). Despite wrapping the circuit court's handling of the stay-lifting motion in constitutional clothing, Engen has not explained how the issue warrants review under the criteria listed in Wis. Stat. § (Rule) 809.62(1r). The Court should deny review.

CONCLUSION

For the stated reasons, the State of Wisconsin respectfully requests that this Court deny Eric Engen's petition for review.

Dated this 17th day of May 2021.

Respectfully submitted,

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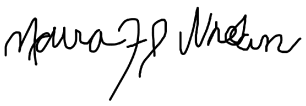
Attorney General of Wisconsin



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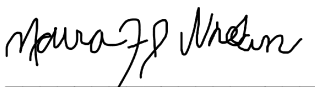
CERTIFICATION

I hereby certify that this response conforms to the rules contained in Wis. Stat. § 809.62(4) for a response to petition for review produced with a proportional serif font. The length of this response is 4,457 words.

Dated this 17th day of May 2021.



MAURA F.J. WHELAN
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.62(4)(b)

I hereby certify that:

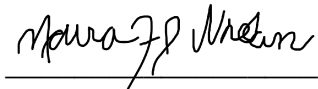
I have submitted an electronic copy of this response to petition for review, excluding the appendix, if any, which complies with the requirements of Wis. Stat. §§ (Rules) 809.62(4)(b) and 809.19(12).

I further certify that:

This electronic response to petition for review is identical in content and format to the printed form of the response to petition for review filed as of this date.

A copy of this certificate has been served with the paper copies of this response to petition for review filed with the court and served on all opposing parties.

Dated this 17th day of May 2021.



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