

No.

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IN THE SUPREME COURT OF THE UNITED  
STATES

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MICHAEL S. CARONA,  
Petitioner,

v.

UNITED STATES OF AMERICA,  
Respondent.

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*On Petition for a Writ of Certiorari to the United  
States  
Court of Appeals for the Ninth Circuit*

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PETITION FOR A WRIT OF CERTIORARI

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## **QUESTIONS PRESENTED**

1. Does the phrase "withhold testimony . . . from an official proceeding" in 18 U.S.C. § 1512(b)(2)(A) include giving false testimony in an official proceeding?

2. Does a federal prosecutor violate the no-contact rule embodied in the ethical codes of most states and made applicable to government lawyers by the McDade Amendment, 28 U.S.C. § 530B, when he equips a secretly cooperating witness with fake subpoena attachments and sends him to question a represented target shortly before indictment?

**PARTIES TO THE PROCEEDING**

The parties to the proceeding in the United States Court of Appeals for the Ninth Circuit were Petitioner Michael S. Carona and Respondent United States.

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## PETITION FOR A WRIT OF CERTIORARI

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Michael S. Carona petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

### OPINIONS BELOW

The amended opinion of the court of appeals (App. 1-25) is reported at 660 F.3d 360. The relevant district court orders (App. 55-72 and App. 114-129) are unreported.

### JURISDICTION

The court of appeals entered judgment on January 6, 2011. 630 F.3d 917. The court filed an amended opinion and otherwise denied a timely petition for rehearing on October 25, 2011. App. 1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

### STATUTES AND RULES INVOLVED

Section 1512(b) of Title 18 of the United States Code provides in relevant part:

Whoever . . . corruptly persuades another person . . . with intent to--

(1) influence, delay or prevent the testimony of any person in an official proceeding; [or]

(2) cause or induce any person to--

(A) withhold testimony . . . from  
an official proceeding . . .

shall be fined under this title or  
imprisoned not more than 20 years, or  
both.

Section 530B of Title 28 of the United States  
Code (the McDade Amendment) provides in relevant  
part:

(a) An attorney for the Government  
shall be subject to State laws and rules,  
and local federal court rules, governing  
attorneys in each State where such  
attorney engages in that attorney's  
duties, to the same extent and in the  
same manner as other attorneys in that  
State.

Section 2-100 of the California Rules of  
Professional Conduct provides in relevant part:

(A) While representing a client, a  
member shall not communicate directly  
or indirectly about the subject of the  
representation with a party the  
member knows to be represented by  
another lawyer in the matter, unless  
the member has the consent of the  
other lawyer.

....

(C) This rule shall not prohibit:

.....

(3) Communications otherwise authorized by law.

### **STATEMENT OF THE CASE**

The grand jury indicted petitioner Carona on October 25, 2007. The indictment charged Carona with conspiracy to commit honest services fraud as Sheriff of Orange County, three counts of honest services fraud, and two counts of witness tampering. App. 84-107. The jury acquitted Carona on five counts and found him guilty on one witness tampering count (Count Six). ER 1792-94.<sup>1</sup>

Two aspects of the proceedings below are significant here: the government's surreptitious preindictment contacts with Carona, and the scope of 18 U.S.C. § 1512(b)(2)(A), the statute at issue in Count Six.

#### **I. THE AUGUST 13 CONTACT WITH CARONA.**

Count Six, the lone count of conviction, arose from a meeting on August 13, 2007 that the government directed its informant Don Haidl to arrange with Carona and secretly record. At the time of the meeting, the government knew that Carona had been represented by counsel in the

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<sup>1</sup> References to "ER" are to petitioner's Excerpts of Record in the court of appeals.

grand jury investigation for almost two years. It nonetheless equipped Haidl with fake grand jury subpoena attachments, carefully designed to appear genuine, and instructed him to use the sham documents to get Carona to incriminate himself.

Carona moved before trial for an order suppressing his statements to Haidl because the prosecutors violated the California "no contact" rule, embodied in Cal. Rule of Professional Conduct 2-100 and made applicable to federal prosecutors by the McDade Amendment, 28 U.S.C. § 530B.

The district court found that the prosecutors had violated the no-contact rule and the McDade Amendment. App. 68. Applying *United States v. Hammad*, 858 F.2d 834 (2d Cir. 1988), the court declared that "[t]he *Hammad* court was concerned that a subpoena was given to the informant 'to create a pretense that might help the informant elicit admissions from a represented suspect.' *Hammad*, 858 F.2d at 839-40. That is exactly what occurred here with the August 13, 2007 meeting." App. 66. The court found that "the Government approached Defendant Carona, hoping that he would make statements damaging to his case. It is in this circumstance that the protections of Rule 2-100 are most needed." App. 68.

Despite finding that the prosecutors had improperly denied Carona the protections of the no-contact rule, the district court refused to order his statements suppressed or to provide any other remedy. The court concluded that Bar sanctions were an adequate response to the prosecutors'

unethical conduct, App. 72, but declared at a later hearing that "it certainly wouldn't be the recommendation of this court that on such a close question, there be any follow-up ethical activities, so I wanted to make that clear," ER 276. The court's comments foreclosed the remedy that it had identified in its order as the appropriate alternative to suppression.

Over defense objection, ER 1553-62, 1609-18, 1696-97, the district court instructed the jury, with specific reference to Haidl's secret recording of Carona, that "[a]lthough the law does impose some limitations on the use of such tactics, law enforcement is not precluded from engaging in stealth and deception, such as the use of informants, to apprehend persons who have engaged in criminal activities. In this regard, the government may utilize a broad range of schemes and ploys to ferret out criminal activity." ER 1707-08. The court thus left the jury with the impression that the government's August 13 communications with Carona were permissible.

## **II. THE SCOPE OF 18 U.S.C. § 1512(b)(2)(A).**

The government took full advantage of its August 13 communications with Carona. It charged him with two counts of witness tampering under 18 U.S.C. § 1512(b) based on the single August 13 conversation. Count Five--charged under § 1512(b)(1)--alleged that "[f]rom on or about March 17, 2004, through on or about August 13, 2007 . . . defendant CARONA knowingly and willfully did corruptly

persuade and attempt to corruptly persuade Haidl, with intent to influence Haidl to testify falsely, and to prevent him from testifying truthfully," before the grand jury. App. 106. Count Six--charged under § 1512(b)(2)(A)--alleged that "[o]n or about August 13, 2007 . . . defendant CARONA knowingly and willfully, did corruptly persuade and attempt to corruptly persuade Haidl to withhold testimony through, among other ways, the use of false and misleading statements, with intent to cause and induce Haidl to withhold testimony" before the grand jury. App. 106-07.

Carona moved to dismiss Count Six for vagueness. In its response, the government asserted that Carona violated § 1512(b)(2)(A) "by attempting to corruptly persuade Haidl to lie." ER 237-38. Carona replied that, under the government's reading, Count Six failed to charge an offense, because "[i]t makes no sense to say that someone who gives false and misleading statements 'withholds' testimony." ER 253. As defense counsel explained: "Withholding testimony means not testifying about either a subject or all together and that is properly charged under 1512(b)(2)," but "you do not withhold testimony when you give testimony whether that testimony is true or false." ER 262.

The district court, though conceding that Count Six was "regrettably vague," adopted the government's reading: "Count Six alleges that Defendant attempted to persuade Haidl to use false and misleading statements." App. 44-45. The court acknowledged but declined to address "now"

Carona's argument that Count Six "charges conduct that does not violate the code section cited." App. 45.

Following the guilty verdict on Count Six, Carona moved for arrest of judgment and judgment of acquittal. He again argued that § 1512(b)(2)(A)'s prohibition on causing a person to "withhold testimony . . . from" the grand jury does not include causing a person to *give* false testimony *in* the grand jury. The district court denied both motions, declaring that "Carona parses the definition of 'withhold' too finely." App. 128. It sentenced Carona to 66 months in prison. App. 27.

### **III. THE COURT OF APPEALS DECISION.**

The court of appeals affirmed. Relying on circuit precedent, the court rejected the district court's finding that the prosecutors had violated the no-contact rule and the McDade Amendment by dispatching Haidl to question Carona with the aid of the fake subpoena attachments. The court did not reach the question of an appropriate sanction. App. 15. It acknowledged that its decision diverges from the Second Circuit's ruling in *Hammad*. App. 12-13.

The court of appeals also rejected Carona's contention that § 1512(b)(2)(A)'s prohibition against causing a person to "withhold testimony . . . from" a proceeding does not encompass his alleged effort at the August 13 meeting to get Haidl to lie to the grand jury. App. 15-24.

**STATEMENT OF THE FACTS<sup>2</sup>**

Carona was elected Sheriff of Orange County in June 1998, took office in January 1999, won re-election in 2002 and 2006, and resigned in early 2008, following his indictment. In 2004, the government began investigating alleged corruption by Carona and others connected to the Orange County Sheriff's Department, including Haidl and former Assistant Sheriff George Jaramillo. ER 138.

In September 2005, Carona retained attorney Dean Steward to represent him in the investigation. ER 77. In October 2005, Steward notified the federal prosecutors that he represented Carona. ER 77. Over the following twenty months, Steward had numerous contacts with the prosecutors as Carona's attorney. ER 77-78. Steward also had regular contact with Haidl's counsel, Mark Byrne. ER 78-79. Haidl, a friend and former colleague of Carona, was also reported to be under federal investigation. ER 78.

On February 16, 2007, Haidl signed a sealed plea agreement with the government. He entered his guilty plea under seal on March 6, 2007. ER 114, 1918. Haidl's agreement required him to act "in an undercover capacity" at the government's instruction. ER 1929.

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<sup>2</sup> Most of the trial was devoted to evidence concerning the honest services mail fraud and conspiracy counts. Because Carona was acquitted on those counts, we refer to that evidence only as it bears on Count Six.

On July 7, 2007, Haidl had his first undercover contact with Carona. He appeared at an event honoring the Board of Directors of the Orange County Fair, which he knew Carona would attend. ER 869. Haidl--who wore a hidden recorder--spoke to Carona for only "moments at the beginning and moments at the end." ER 871. The meeting produced little usable evidence. ER 1457-58.

A few days later, at the government's direction, Haidl's sister Peggy contacted Carona's wife to arrange a dinner between Haidl and Carona. ER 876. That dinner occurred on July 15, 2007 at a restaurant in Newport Beach, California. Haidl again secretly recorded the conversation. The second meeting, like the first, produced little of value to the government's investigation.

On July 30, 2007, with the statute of limitations looming, the prosecution team met to plan the final undercover contact. ER 1453-59. The lead prosecutor (AUSA Brett Sagel), FBI Special Agent Anthony Alston, IRS Special Agent Steve Berryman, Haidl, and Byrne attended the meeting. ER 1434, 1452-53. To obtain incriminating statements from Carona, Haidl suggested that he use a document with some "legal authority behind it," ER 1044-45, "something that could get [Carona's] attention and cause him to want something from me and cause him to be at a meeting on short notice," ER 883-84. The group decided to use a fake grand jury subpoena "as a ruse to guide [Haidl's] conversation with . . . Carona." ER 139.

Agent Berryman prepared a subpoena that looked in all respects like an authentic grand jury subpoena. ER 1461, 1464-65. AUSA Sagel determined that only the attachments should be used and not the subpoena itself. ER 1465. To make the attachments appear authentic, the government faxed them to Haidl's counsel and inserted blank pages to disguise that they were not part of actual subpoenas. ER 139, 1466-67, 1915. The blank pages ensured that the attachments would have fax machine page numbers as if they had been faxed with actual subpoenas. ER 1466-67.

On August 13, 2007, Haidl asked his sister "to call [Carona's wife] and set up a meeting very quickly, as quickly as we could with almost no notice, so that Mr. Carona didn't have a chance to have his people there." ER 1060. The goal was to give Carona the impression that the subpoenas required an "emergency meeting." ER 1471-72.

Haidl brought the fake subpoena attachments to the August 13 meeting "to get [Carona] to open up and talk." ER 883; *see* ER 1052, 1059. Shortly before the meeting, Haidl jotted notes on the attachments as "talking points." ER 1054, 1915. These "talking points" consisted largely of falsehoods that Haidl intended to tell Carona to make him believe that there was investigative activity and to motivate him to talk. ER 1058-59, 1068-69. The government instructed Haidl to get Carona to incriminate himself. ER 1067; *see* ER 985-86, 1030, 1093.

Carona met Haidl at a restaurant on the evening of August 13. Haidl began by showing Carona the fake subpoena attachments and reciting his "talking points." ER 1068-70, 1944-45. Haidl and Carona referred to the attachments throughout the meeting. ER 1946-50, 1956, 1984, 2004, 2007-08, 2035, 2037.

Early in the conversation, Haidl raised the subject of lying. DX 2269 at 16 min. 34 sec.; ER 1951. Carona did not take the bait. A few minutes later, Haidl declared, "I want to make sure--I want to make sure our stories are straight, number one, and there's no tracing cash, number two." ER 1952. He continued:

DH: Mike I--I--I don't care who fucked who. I don't want--I don't want some fucking serial number on a hundred dollar bill to fucking put me in jail for five years on a fucking perjury deal when I'm standing there you know. All I want to do is get the fucking story straight.

MC: Right. Martha Stewart.

DH: [UI] I'll--I'll lie my ass off. I'll say it didn't happen. Not a quarter changed hands. But I better goddamn know everybody else is saying the same--the same thing, or whatever the story is gonna be, you know. And I think George [Jaramillo] was there,

'cause the whole you know--it--it was all discussed how we were gonna do it.

DX 2269 at 19 min. 59 sec.; ER 1955. Carona did not respond directly to Haidl's offer to lie.

Two hours into the conversation, under persistent encouragement from Haidl, Carona finally acquiesced:

DH: They got too much money in this deal to walk away.

MC: Right. And they'll--they'd love to have the Martha Stewart thing of, I don't have to prove this. All I got to do is prove that you lied. So that's why, when I say I don't know--

DH: That's what--that's what this is--set up for.

MC: Exactly. Exactly. But if--

DH: If we have different stories, they're going to--

MC: Amen, Amen.

. . . .

DH: And George, he--I don't care if he stands there and says I saw it happen. As long as you and me are on the same page--

MC: The answer is--

DH: --and we say--

MC: --flat-ass didn't fucking happen. It didn't happen. And that's the deal of-- you know, thing about checks.

DX 2269 at 2 h. 16 min. 22 sec.; ER 2005-06.

Carona continued in this vein a few minutes later:

MC: So I figured I'd be the first one on the stand. [UI] and Mark [Byrne] was gonna get everything that I said. So all you got to do is, here's "A" through "Z." You know, if it's true, it's true. Just consis . . . consistently stays true. My sense is you're going to be the first on the stand, 'cause I don't think you're the target at all, I think I'm the target. So bottom line is, you know, first person in there is what you say becomes the truth. It's--it--it becomes the truth.

DX 2269 at 2 h. 40 min. 40 sec.; ER 2018.

Haidl again insisted that they get their stories straight:

MC: To get back to did it [Haidl giving money to Carona] ever happen?

DH: Right. And as long as you and me are telling the same story, and nobody

else knows shit, and like I said, there was no hotel cameras or cash paid for whatever, nobody fucking knows anything on my side, nobody.

....

DH: I don't want to be up there on the stand, lying my ass off and I'm willing to, I got no problem doing it. I'll raise my fucking hand, I'll say it never happened, but I don't want somebody coming behind me that's a hostage in a chokehold and saying, yeah.

MC: Yeah.

....

DH: And all of a sudden I get a round in the head; where did that come from? I mean I got no problem--

MC: There's only--

DH: --you and me, get our stories straight

MC: That's--

DH: I want it straight.

DX 2269 at 3 h. 3 min. 56 sec.; ER 2028, 2030.

Carona gave Haidl the assurance that he sought:

DH: . . . . As soon as they--as soon as they throw you in the room and say goodbye to your kids, you're never gonna see your kids or your husband again, all the rest of that, I've been there, you know. Right here--

MC: Your answer--

DH: --take me, let's do it.

MC: Your answer is my answer.

DH: Okay. All right. That's what I--

MC: [UI]

DH: That's what I needed to know.

DX 2269 at 3 h. 8 min. 50 sec.; ER 2031.

The meeting ended soon afterward. While driving alone to meet the agents, Haidl forgot that the recorder was still on and muttered:

DH: (Sighs) It's like fucking pulling teeth all the way. [UI] trying to get [UI] my campaign shit. [UI] the fucking money. I'm not going down for goddamn perjury.

(Pause)

DH: (Sighs)

(Pause)

DH: Ah, fuck, like fucking pulling teeth all the way.

DX 2269 at 3 h. 29 min. 8 sec.; ER 2039.

Carona did not testify at trial. Haidl was the only witness who described the August 13 meeting. Haidl testified to his "understanding" that Carona used the meeting "[t]o get me to lie to the federal government." ER 975. According to Haidl, "[t]he entire night was him rehearsing me and making sure that I was going to say what he hoped I would say to the federal government should we have ever been indicted or brought before a grand jury. That was the entire evening." ER 1118.<sup>3</sup>

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<sup>3</sup> See also, e.g., ER 944 ("Q . . . What is your understanding of what Mr. Carona is saying there? A Convincing me and confirming that I am going to lie to the grand jury or lie to the Government."); ER 1101 ("A He's trying to convince me to say things to the federal government that aren't true so we didn't get prosecuted together."); ER 1103 ("A He tried to get me to lie with him. . . . The fact that I was supposed to go along with his story was the whole point of the matter."). The government as well repeatedly characterized Count Six as charging Carona with attempting to persuade Haidl to lie. For example, in its opposition to Carona's pre-trial motion to dismiss, it described Count Six as "an obstruction charge and a witness tampering charge, which defendant committed by attempting to corruptly persuade Haidl to lie." ER 238. Similarly, the government argued post-trial that "[o]n the August 13th Recording, defendant urges Haidl to falsely deny true events, and to provide untrue explanations of events, in connection with the grand jury investigation." Doc. 613 at 10. Summing up the evidence, it declared that, in the August 13 meeting, Carona "stated his intent to use a combination of identical false denials (e.g., 'flat-ass didn't happen') and false cover stories" to conceal Haidl's cash payments and gifts, and urged "Haidl to do the same." *Id.* at 12.

## REASONS FOR GRANTING THE WRIT

This case illustrates the extraordinary power that federal prosecutors can bring to bear upon an individual whom they decide to target. An intense three-year investigation produced too little evidence to persuade a jury that Carona had committed any federal offense during his tenure as Orange County Sheriff. Nonetheless, the prosecutors wired their informant, equipped him with phony subpoena attachments, and dispatched him with express instructions to get Carona (whom the prosecutors knew was represented by counsel) to incriminate himself. After hours of "pulling teeth," the informant induced Carona to agree with him to lie. The prosecutors then charged Carona *twice* for that conduct, once under 18 U.S.C. § 1512(b)(1) in Count Five and a second time under 18 U.S.C. § 1512(b)(2)(A) in Count Six. These tactics paid off: although the jury acquitted on one witness tampering count (Count Five), it convicted on the other (Count Six), and the district court sent Carona to prison for 66 months.

Two aspects of this overreaching prosecution warrant the Court's review. First, to achieve the tactical benefit of charging Carona twice with witness tampering for trying to persuade Haidl to lie at the August 13 meeting, the government stretched § 1512(b)(2)(A) to cover conduct to which the statute had never before been applied. Count Five charged Carona under the "influence testimony" prong of 18 U.S.C. § 1512(b)(1). That is the provision the government has used in every reported case to prosecute defendants who try to persuade witnesses

to lie. Unable to charge that same offense again in Count Six because of the rule against multiplicitous counts, the government resorted to § 1512(b)(2)(A). But that provision prohibits causing a person to "*withhold* testimony . . . *from* an official proceeding"; it has nothing to do with persuading a witness to lie. Contrary to this Court's insistence that criminal statutes be construed narrowly, the district court and the court of appeals adopted the government's view that "withhold testimony . . . from" an official proceeding means *give* false testimony *in* an official proceeding. As this Court has done before, *e.g.*, *Arthur Andersen v. United States*, 544 U.S. 696 (2005); *United States v. Aguilar*, 515 U.S. 593 (1995), it should intervene to curb the lower courts' improper expansion of the obstruction of justice and witness tampering statutes.

Second, in conflict with its own precedent and the Second Circuit's decision in *Hammad*, the court of appeals approved a federal prosecutor's use of fake court documents to trick a represented target into talking to an informant without his lawyer present. The decision effectively exempts *all* such indirect preindictment contacts with represented targets from the "no-contact" rule, a cornerstone of professional ethics and the adversarial system that Congress made applicable to federal prosecutors by the McDade Amendment, 28 U.S.C. § 530B. The application of the no-contact rule to indirect contacts by federal prosecutors with represented targets has produced more than two decades of debate among the courts, the organized bar, legal scholars, the Department of Justice, and Congress. The issue presented here has profound implications for the

administration of justice and the integrity of the courts and warrants this Court's attention.

**I. THE COURT SHOULD GRANT THE WRIT TO CURB THE LOWER COURTS' EXPANSION OF 18 U.S.C. § 1512(b)(2)(A).**

The Court should grant the writ to review the court of appeals' broad interpretation of 18 U.S.C. § 1512(b)(2)(A). The decision below marks the first time any court has extended § 1512(b)(2)(A) to an effort to persuade a potential witness to lie to a grand jury (rather than to persuade a witness not to testify); every previous such case (and there are many) has been brought under the "influence . . . testimony" prong of 18 U.S.C. § 1512(b)(1).

The court of appeals' expansive approach contravenes the rule of lenity and the "cardinal principle of statutory construction" that statutes should be construed so that "no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001). The court's interpretation of § 1512(b)(2)(A) causes it to subsume entirely the "influence" prong of § 1512(b)(1). In addition, the court's broad interpretation of § 1512(b) stands in striking tension with this Court's decision in *Arthur Andersen*, which read the statute narrowly in accordance with the usual construction of criminal provisions.

**A. The Ordinary Meaning of the Phrase "Withhold Testimony."**

Interpretation of "withhold testimony" must begin with the ordinary meaning of that phrase. *See Arthur Andersen*, 544 U.S. at 705. At § 1512(b)(2)(A)'s enactment, *Black's Law Dictionary* defined "withhold" as "[t]o retain in one's possession that which belongs to or is claimed or sought by another. To omit to disclose upon request; as, to withhold information." *Black's Law Dictionary* 1437 (5th ed. 1979). It separately defined "withholding of evidence" as "to stifle, suppress or destroy evidence knowing that it may be wanted in a judicial proceeding or is being sought by investigating officers, or to remove records from the jurisdiction of the court, knowing they will be called for by the grand jury in its investigation." *Id.* Neither definition suggests that "withhold testimony" includes giving false testimony.

Judicial usage in related contexts supports the ordinary meaning of "withhold testimony." *Arthur Andersen* involved alleged corrupt persuasion to "withhold" (and destroy) documents under §§ 1512(b)(2)(A) and (B). In interpreting "corruptly persuade," this Court drew a parallel to withholding testimony. It observed that persuading a person with intent to cause him "to 'withhold' testimony or documents from a Government proceeding or Government official is not inherently malign." 544 U.S. at 703-04. The Court's examples involved the ordinary understanding of "withhold testimony": (1) "a mother who suggests to her son that he invoke his right against compelled self-incrimination," and (2)

"a wife who persuades her husband not to disclose marital confidences." *Id.* at 704. In discussing withholding of documents, the Court added a third: invoking the attorney-client privilege. *Id.* These examples involve not providing information at all or about some subject; none involves giving false information.

Similar usage appears in lower court decisions. In *United States v. Vampire Nation*, 451 F.3d 189 (3d Cir. 2006), for example, "to withhold" the evidence (a counterfeit check) under § 1512(b)(2)(A) meant not to provide it, without any affirmative misrepresentation. *Id.* at 193-94, 205. Likewise, in *United States v. Boyd*, 309 F. Supp. 2d 908 (S.D. Tex. 2004), the court refused to dismiss an indictment that effectively defined "withhold testimony" as to "remain quiet" on the subject of the underlying case. *Id.* at 916.

In related contexts as well, courts recognize the distinction between withholding testimony and giving false testimony. For example, § 1512(b)(3) prohibits (among other things) corruptly persuading a person with intent to "hinder, delay, or prevent the communication" of information about an offense to a law enforcement officer. In *United States v. Khatami*, 280 F.3d 907 (9th Cir. 2002), the court remarked that "[a]ttempting to persuade a witness to *give false testimony* and bribing a witness to *withhold information* are both forms of non-coercive conduct that fall within the reach of the statute," and it noted a circuit split on "whether merely attempting to persuade a witness to *withhold cooperation or not to disclose information* to law

enforcement officials--as opposed to *actively lying*--falls within the ambit of § 1512(b)." *Id.* at 913 (emphases added). The court further contrasted persuading a witness "to lie" with persuading him "not to disclose information" or "to decline to speak with law enforcement officials." *Id.* at 914.

Similarly, the Third Circuit in *United States v. Farrell*, 126 F.3d 484 (3d Cir. 1997), concluded under § 1512(b)(3) that "both attempting to *bribe* someone to *withhold* information and attempting to *persuade* someone to provide *false* information to federal investigators constitute 'corrupt persuasion' punishable under § 1512(b)," but held that encouraging a co-conspirator to properly invoke the Fifth Amendment and thus "*refrain . . . from volunteering information*" does not. *Id.* at 488 (final emphasis added); *see id.* at 490-91 (remanding to reinstate judgment if defendant attempted to persuade person to "lie" rather than "withhold information"); *see United States v. Byrne*, 435 F.3d 16, 26 (1st Cir. 2006) (evidence sufficient for "the jury to find that the defendant corruptly attempted to persuade [witnesses] to lie *or* to withhold information from federal investigators") (emphasis added).

**B. The Context of § 1512(b)(2)(A) Confirms That To "Withhold Testimony" Does Not Include Giving False Testimony.**

Section 1512(b)(1)--the subsection preceding § 1512(b)(2)(A)--confirms that "withhold testimony . . . from" does not mean "give testimony in." Section

1512(b)(1) squarely addresses acts intended to produce false testimony. That provision makes it a crime to seek corruptly to "influence . . . the testimony of any person in an official proceeding." Until this case, federal prosecutors invariably and exclusively used the "influence" prong of § 1512(b)(1) to prosecute persons who sought to have a witness lie to a grand jury. In keeping with this uniform practice, the government charged Carona in Count Five under § 1512(b)(1) for trying to persuade Haidl to lie. App. 74-77, 106.

If causing a person to "withhold testimony" included causing a person to give false testimony, as the court of appeals held, then § 1512(b)(2)(A) would render superfluous the "influence" prong of § 1512(b)(1). Every instance of "influenc[ing]" testimony would also cause the "withhold[ing]" of testimony, and the "influence" prong would have no independent significance. The court of appeals' interpretation thus violates "the cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW*, 534 U.S. at 31; *see, e.g., Corley v. United States*, 556 U.S. 303, 129 S. Ct. 1558, 1566-67 (2009). This rule applies with particular force in this setting, because the words at issue "describe an element of a criminal offense." *Ratzlaf v. United States*, 510 U.S. 135, 140-41 (1994).

The court of appeals provided a single example of "influencing" that (in its view) does not involve "withholding": persuading a person with no relevant information to testify to a false alibi. App.

22. But even that lone example fails, because under the court's interpretation of § 1512(b)(2)(A), the person "withholds" the fact that he does not have any relevant information (including, presumably, concerning the defendant's whereabouts at the time in question). Neither the government nor the lower courts produced a single example of "influencing" that would not also involve "withholding," if, as the court of appeals concluded, the phrase "withhold testimony . . . from" a grand jury includes giving false testimony to a grand jury.

**C. The Legislative History of § 1512  
Reinforces What Its Text and  
Context Require.**

The legislative history of § 1512 confirms what the text of that section indicates--"withholding testimony" does not include giving false testimony. The relevant history involves § 1512's enactment in 1982 and amendments in 1986 and 1988.

What is now § 1512(b) was originally § 1512(a) and provided in part:

Whoever knowingly uses intimidation or physical force, or threatens another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to--

(1) influence the testimony of any person in an official proceeding; [or]

(2) cause or induce any person to--

(A) withhold testimony, or withhold a record, document, or other object, from an official proceeding

commits a crime. Victim and Witness Protection Act of 1982, Pub. L. 97-291, § 4(a), 96 Stat. 1248, 1249. The legislative history of this provision addresses the withholding of testimony only in the context of non-testimony--either a claim of right not to provide testimony or non-attendance. See S. Rep. No. 97-352, at 16, 19 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2515, 2522, 2525; 128 Cong. Rec. 27391 (Oct. 1, 1982) (analysis of Rep. Rodino). Nowhere does it suggest that "withhold testimony" subsumes the broad phrase "influence testimony." See S. Rep. No. 97-352 at 16 ("influence" is "the broadest word used in 18 U.S.C. 1503" and should "receive an expansion [sic] interpretation" in § 1512), *reprinted in* 1982 U.S.C.C.A.N. at 2522.

In 1986, Congress amended § 1512 in response to the First Circuit's holding in *United States v. Dawlett*, 787 F.2d 771 (1st Cir. 1986), that the "influence" clause did not reach a defendant who tried to kill a witness. The court reasoned "that one who attempts to kill a witness does not intend to influence that person's testimony, but rather to eliminate it entirely." *Id* at 773-74. The court pointed to what is now subsection (b)(2): "[H]ad Congress intended that subparagraph 1 forbidding conduct that 'influences' the testimony of a witness also include conduct which *prevents* the testimony of a witness, it would not have drafted the statute to include subsections 2(A)-2(D), various parts of which refer explicitly to causing a witness to 'withhold

testimony' or 'be absent from an official proceeding.'" *Id.* at 774. The court twice noted the possibility that a prosecution under the "withhold testimony" subsection might have worked. *Id.* at 774 n.4 & 776.

Finally, Congress reinforced the ordinary meaning of "withhold testimony" while amending § 1512(b) in 1988 to extend it to corrupt persuasion. Again, Congress was responding to a circuit court's reading § 1512's terms with restraint. The court in *United States v. King*, 762 F.2d 232 (2d Cir. 1985), had held that § 1512 did not extend to non-coercive, non-deceptive conduct, such as "merely urging and advising a witness to give false testimony." *United States v. Kulczyk*, 931 F.2d 542, 546 (9th Cir. 1991) (agreeing).

On the Senate floor, Senator Biden, the Judiciary Committee chairman, included the following in explaining the amendment: "'Corrupt persuasion' of a witness is a non-coercive attempt to induce a witness to become unavailable to testify, or to testify falsely." 134 Cong. Rec. 37201 (Oct. 21, 1988). Senator Biden's analysis focused on the latter, mentioning as examples "preparing false testimony" and bribing "in return for false testimony," and he connected such conduct to "influence" under § 1512(b)(1). *See id.* Consistent with the ordinary meaning of the statutory terms, Senator Biden treated an intent to cause a person to *withhold* testimony *from* a proceeding as distinct from an intent to cause the person's testimony *given in* a proceeding to be false.

**D. Cases Arising Under  
§ 1512(b)(2)(A)'s "Withhold  
Testimony" Provision Involve  
Seeking To Cause Non-Testimony.**

Case law buttresses this reading of § 1512(b)(2)(A) in two ways. First, every reported case decided under § 1512(b)(2)(A) involves efforts to obtain a witness' non-testimony; none involves acts intended to cause false testimony. Second, and correspondingly, acts intended to cause a witness to give false testimony in an official proceeding are invariably prosecuted under § 1512(b)(1)'s "influence" clause.

The First, Second, Fifth, and Sixth Circuits have repeatedly treated § 1512(b)(2)(A) as addressing efforts to cause non-testimony, not false testimony. For example, the Fifth Circuit in *United States v. Salazar*, 542 F.3d 139 (5th Cir. 2008), held the evidence sufficient to convict the defendant of "knowingly intimidating, threatening, and corruptly persuading the wife of Iran Rolon (Sarah Rolon) and her sister (Maria Vela) with the intent to cause and induce Iran Rolon to withhold testimony from a case." *Id.* at 142. Salazar told Vela to tell Ms. Rolon "that he was going to rape and kill" her because Mr. Rolon "was responsible for Salazar's two brothers being in jail." *Id.* at 143. Mr. Rolon, on learning this, "considered not testifying against Salazar's brothers." *Id.* The Fifth Circuit similarly applied the "withhold testimony" subsection in *United States v. Fagan*, 821 F.2d 1002 (5th Cir. 1987), in which the defendant had a friend bribe a witness "not to testify" (by not appearing) and threaten him with

death if he refused the bribe. *Id.* at 1006. The defendant did not dispute that the friend's conduct violated § 1512, but argued that the evidence was not sufficient to hold him responsible for it, an argument the court rejected. *Id.* at 1014.

The First Circuit also has applied § 1512(b)(2)(A) to acts intended to cause or induce non-testimony, while not suggesting it might apply to acts intended to make a person give false testimony. In *United States v. Freeman*, 208 F.3d 332 (1st Cir. 2000), the court held the evidence sufficient to support the conviction of a police officer who, when being investigated for his relationship with the owner of the "Golden Banana" strip club, had told a club employee, Amy Clarke, to "keep the lip zipped" and "mum's the word"; and, several weeks later, "not to say anything about the Golden Banana." *Id.* at 335, 338. Freeman never suggested that Clarke lie. He simply "told her not to talk to the federal investigators." Brief of the United States, at 3, *Freeman*, 1999 WL 34826412; *see id.* at 5 (summarizing testimony as indicating "two occasions when the defendant asked a potential witness not to give information to federal agents"); *id.* at 25 (arguing that "Clarke's descriptions of the defendant's statements telling her not to speak with federal investigators" justified the verdict); *id.* at 26-28 (not disputing defendant's factual argument that "he did not encourage Clarke 'to fabricate a story' or to lie," but arguing that this was legally irrelevant).

A few years earlier, in *United States v. Elwell*, 984 F.2d 1289 (1st Cir. 1993), the First Circuit similarly found the evidence sufficient to convict

under § 1512(b)(2)(A) for telephone conversations in which the defendant, trying to ensure "that nobody's going to no Grand Jury," threatened an informant if he continued to cooperate with an investigation. *Id.* at 1294.

The Sixth Circuit in *United States v. Canan*, 48 F.3d 954 (6th Cir. 1995), affirmed convictions under § 1512(b)(2)(A) where the defendant "threatened to kill" one witness "after learning that he intended to cooperate with authorities," and became "irate" at another upon learning the same thing, warning that "[f]amilies have a way of being hurt, people have a way of disappearing." *Id.* at 957. The defendant argued unsuccessfully that the indictment did not charge an offense because it was written in the conjunctive rather than disjunctive. *Id.* at 962-63.

The Second Circuit applied § 1512(b)(2)(A) in similar fashion in *United States v. Johnson*, 968 F.2d 208 (2d Cir. 1992). The court affirmed a conviction resting on the defendant's having made "threats of violence" against two persons to cause them "to withhold testimony or other evidence from his trial" by not testifying. *Id.* at 213, 214. Johnson told the first person that "[i]f I get indicted and you testify, I'm going to take care of you, I'm going to get you. . . . But if you don't, everything will be fine, everything will be okay." *Id.* at 210. He told the second person (secretary of the first) that getting involved was "not worth it." *Id.* Much as in *Canan*, the court did not have to decide whether such conduct violated § 1512(b)(2)(A), which the defendant did not contest. Instead, the case turned on the affirmative defense

in § 1512(d), under which Johnson had sought to prove "that the evidence he wanted Maydwell and Smith to withhold was false testimony." *Id.* at 213. But the court in analyzing the defense indicated that the conviction rested on Johnson's efforts to silence them, and in reciting the elements of § 1512(b)(2)(A) followed the statutory language, without suggesting that the statute could encompass false testimony. *See id.* at 211, 213.

In contrast to this uniform treatment of § 1512(b)(2)(A) as applying to efforts to silence witnesses, cases in which a defendant seeks to cause a witness to perjure himself before a grand jury are uniformly brought under the "influence testimony" provision of § 1512(b)(1). In *United States v. Thompson*, 76 F.3d 442 (2d Cir. 1996), for example, the defendant urged the witness to give a false story that included a misleading and partial truth. *Id.* at 453 (holding evidence sufficient where defendant told witness, who had purchased marijuana from him 20 times, "[b]asically, just to tell [the grand jury] I purchased marijuana a couple of times from him and that was it, just don't tell them anything else other than that") (brackets in *Thompson*); *see also*, e.g., *United States v. Davis*, 380 F.3d 183, 196 (4th Cir. 2004) ("The evidence is easily sufficient to show that Davis 'corruptly persuaded' White to perjure herself. . . ."); *United States v. Pennington*, 168 F.3d 1060, 1066 (8th Cir. 1999) ("[T]he evidence was sufficient for the jury to find that Oldner violated § 1512(b)(1) by telling McPherson to lie. . . ."); *United States v. Morrison*, 98 F.3d 619, 629 (D.C. Cir. 1996) (holding evidence sufficient to establish that defendant "attempted to 'corruptly persuade' [the

witness] with the intent to influence her testimony in an official proceeding" by inducing her "to present false testimony").

The cases thus follow the ordinary meaning of "withhold testimony."

**E. Although § 1512(b)(2)(A) Is Clear, Any Doubt As To Its Scope Would Require Application of the Rule of Lenity.**

This analysis confirms the common sense understanding that "withhold testimony . . . from" in § 1512(b)(2)(A) does not mean "give testimony in." But even if the phrase were ambiguous, the rule of lenity would require a narrow interpretation, contrary to the court of appeals' expansive reading.

The rule of lenity requires that "ambiguity concerning the ambit of criminal statutes . . . be resolved in favor of lenity." *Cleveland v. United States*, 531 U.S. 12, 25 (2000). This Court applied a related rule to § 1512(b)(2)(A) in *Arthur Andersen*. The Court explained that it had "traditionally exercised restraint in assessing the reach of a federal criminal statute, both out of deference to the prerogatives of Congress and out of concern that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed." 544 U.S. at 703 (citations and internal quotation marks omitted); see *Aguilar*, 515 U.S. at 600 (same).

As *Arthur Andersen* and *Cleveland* demonstrate, even if the text, context, history, and case law left room for the lower courts' novel view that to "withhold testimony . . . from" the grand jury can mean *giving* false testimony *in* the grand jury, the rule of lenity requires that the statute be narrowly construed to exclude this interpretation.

Because the court of appeals' reading of § 1512(b)(2)(A) impermissibly expands the scope of the statute, contrary to its language, settled principles of statutory construction, and the uniform approach of other federal courts, the Court should grant the writ and reverse.

## **II. THE COURT SHOULD GRANT THE WRIT TO RESOLVE THE CIRCUIT SPLIT OVER THE APPLICATION OF THE NO-CONTACT RULE.**

The court of appeals' holding that federal prosecutors may question a represented person pre-indictment through an informant they have equipped with fake court documents eviscerates the McDade Amendment, which Congress enacted to prevent the kind of abuse that occurred here. The Court should grant the writ to give meaning to the statute and to resolve the circuit split over the application of the no-contact rule during the investigatory stage of the federal criminal process.

**A. The McDade Amendment and the No-Contact Rule.**

The McDade Amendment--captioned "Ethical standards for attorneys for the Government"--provides that "[a]n attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State." 28 U.S.C. § 530B. The statute, which took effect in 1999, resolved the controversy that arose when the DOJ, through the "Thornburgh Memorandum," purported to exempt federal prosecutors from state ethics rules. See *United States v. Talao*, 222 F.3d 1133, 1139-40 (9th Cir. 2000); American Bar Association Standing Committee on Ethics and Professional Responsibility, Formal Opinion 95-396, *Communications with Represented Persons* (July 28, 1995).

The McDade Amendment "was principally designed to dismantle the DOJ's policy of authorizing pre-indictment *ex parte* interrogation by federal prosecutors and their agents of represented criminal suspects." *United States v. Bowman*, 277 F. Supp. 2d 1239, 1243 (N.D. Ala. 2003), *vacated as moot*, 2003 U.S. Dist. LEXIS 24817 (N.D. Ala. Sept. 12, 2003). The statute accomplishes this goal by making applicable to federal prosecutors the "venerable" no-contact rules that appear in every state ethics code and in the ABA Model Rules. *Talao*, 222 F.3d at 1138; see ABA Model Rules of Professional Conduct, Rule 4.2 (2011).

The California no-contact rule declares that, with certain exceptions, "[w]hile representing a client, a member shall not communicate directly *or indirectly* about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer." Cal. Rule of Professional Conduct 2-100(A) (emphasis added). The rule applies to public prosecutors as well as private counsel. *See, e.g., United States v. Lopez*, 4 F.3d 1455, 1459 (9th Cir. 1993).

The no-contact rule "exists in order to preserve . . . the attorney-client relationship and the proper functioning of the administration of justice." *Talao*, 222 F.3d at 1138 (quotation omitted). By ensuring the presence of counsel, the rule contributes to the truth-finding function of the judicial process: "If a party's counsel is present when an opposing attorney communicates with a party, counsel can easily correct any element of error in the communication or correct the effect of the communication by calling attention to counteracting elements which may exist." *Mitton v. State Bar of California*, 71 Cal. 2d 525, 534, 455 P.2d 753, 758 (1969); *see also Continental Insurance Co. v. Superior Court of Los Angeles County*, 32 Cal. App. 4th 94, 112, 37 Cal. Rptr. 2d 843, 853-54 (1995) (no-contact rule "prevent[s] injurious disclosures").

**B. The "Authorized by Law" Exception.**

Virtually every version of the no-contact rule contains an exception for communications with

represented persons that are "authorized by law." The California exception appears in Rule 2-100(C)(3), which provides that the rule does not prohibit "[c]ommunications otherwise authorized by law." The comments to Rule 2-100 explain that "[o]ther applicable law . . . includes the authority of government prosecutors and investigators to conduct criminal investigations, *as limited by the relevant decisional law.*" (Emphasis added.) The rule thus leaves the courts to determine whether, and under what circumstances, prosecutors should be exempt from a rule that binds all other lawyers.<sup>4</sup>

Two cases--the Ninth Circuit's decision in *Talao* and the Second Circuit's decision in *Hammad*--have rejected the position advanced by the Department of Justice that preindictment undercover contacts with represented persons are categorically exempt from the no-contact rule. *Talao* and *Hammad* adopt nuanced approaches that enforce the protections of the no-contact rule without unduly hampering legitimate investigative techniques. The court of appeals' decision conflicts with both cases.

### C. The Conflict with *Talao*.

In *Talao*, the court of appeals rejected the government's contention that the "authorized by law" exception grants prosecutors a blanket

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<sup>4</sup> Comment 5 to the current version of ABA Model Rule 4.2 notes opaquely that "[c]ommunications authorized by law may . . . include investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings."

exemption for all preindictment, non-custodial contacts with represented persons. *See* 222 F.3d at 1139. The court held instead that the no-contact rule should be applied "through 'case-by-case adjudication,' policing clear misconduct while keeping in mind that prosecutors are 'authorized by law' to employ legitimate investigative techniques in conducting or supervising criminal investigations." *Id.* (quoting *Hammad*, 858 F.2d at 840). *Talao* concluded that, absent special circumstances not present here, Rule 2-100 "govern[s] [federal prosecutors'] pre-indictment, non-custodial communications with [a represented target]" where the case involves "[1] fully defined adversarial roles, [2] impending grand jury proceedings, and [3] awareness on the part of the responsible governmental actors of [the target's] ongoing legal representation." *Id.* (bracketed numbers added).

Applying the *Talao* standard here, the prosecutors' communications with Carona through Haidl were not "authorized by law" under Rule 2-100(C)(3). First, by the time of the August 13 meeting--a few months before the indictment--there were "fully defined adversarial roles." *Talao*, 222 F.3d at 1139. Steward had had at least a dozen contacts with the prosecution team. ER 77-78. Second, in August 2007, the grand jury investigation had been under way for at least a year. ER 77. Haidl had pleaded guilty, as had at least one other target. The indictment of Carona was just a few months away. As in *Talao*, therefore, there were "impending grand jury proceedings." 222 F.3d at 1139. Third, at the time of the August 13 meeting, the "responsible government actors" were aware--

and had been aware for almost two years--of Carona's "ongoing legal representation." *Id.*

The court of appeals did not mention the three-part *Talao* standard. Instead, while acknowledging that decision's "case-by-case" approach in passing, it effectively resurrected the categorical rule that *Talao* rejected. Relying on *United States v. Powe*, 9 F.3d 68 (9th Cir. 1993), and *United States v. Kenny*, 645 F.2d 1323 (9th Cir. 1981), the court left no doubt that informants' preindictment contacts with represented persons are *always* "authorized by law" under Rule 2-100, regardless of the prosecutor's involvement, the extent of the deception, the stage of the grand jury proceedings, and the adversarial relation between the target's lawyer and the prosecution.

The court of appeals based its decision in part on the remarkable conclusion that "the concern that a suspect might be tricked by counsel's artful examination is inapplicable here, since Carona was not subject to any interrogation, let alone one by the prosecutor. Rather he was engaging in a conversation with an individual he believed to be his ally against the prosecution." App. 14. This overlooks that the prosecution team equipped Haidl with fake subpoena attachments, prepared him carefully for the encounter with Carona, and instructed him to get Carona to incriminate himself. The resulting encounter surely amounts to an interrogation, albeit one done through stealth and deception.

The court of appeals alluded as well to the so-called "house counsel" concern: the risk that a

person will "immunize himself against such undercover operations simply by letting it be known that he has retained counsel." App. 14. But a principal point of the nuanced *Talao* approach--overlooked by the court of appeals--is to distinguish between targets such as Carona, who retain counsel to address a specific, concrete controversy with the government, and (for example) mobsters who keep lawyers on retainer in an effort to insulate themselves from undercover contacts. Under the three-part *Talao* standard, targets such as Carona receive the protections of the no-contact rule; mobsters do not.

#### **D. The Conflict with *Hammad*.**

The prosecutors' communications with Carona through Haidl similarly overstepped the "authorized by law" exception under *Hammad*. That case focused on whether the informant acts as "the alter ego of the prosecutor" in contacting the represented person. 858 F.2d at 840. The Second Circuit found a violation of the no-contact rule where an informant used a "sham subpoena supplied by the prosecutor" to induce a represented target to talk. *Id.* at 836-40.

Here, the district court found, based largely on *Hammad*, that the prosecutors' communications with Carona through Haidl on August 13 violated the no-contact rule. The court observed that "[t]he *Hammad* court was concerned that a subpoena was given to the informant 'to create a pretense that might help the informant elicit admissions from a represented suspect.' *Hammad*, 858 F.2d at 839-40. That is *exactly what occurred here* with the August

13, 2007 meeting." App. 66 (emphasis added). The court concluded: "Some deception in criminal investigations is necessary and proper. But *Hammad* holds that the trickery of a sham official document steps over the line in cases like this. Thus, the conversation between Haidl and Defendant in this case was not 'authorized by law.'" *Id.*

The court of appeals' decision, reversing the district court's determination that the prosecutors violated the no-contact rule, places the Ninth Circuit squarely in conflict with *Hammad* and with its own decision in *Talao*. This Court should grant the writ to resolve that conflict and to give force to Congress' determination, manifest in the McDade Amendment, that the no-contact rule should apply to federal prosecutors as it does to other lawyers.

### CONCLUSION

The petition for a writ of certiorari should be granted.

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