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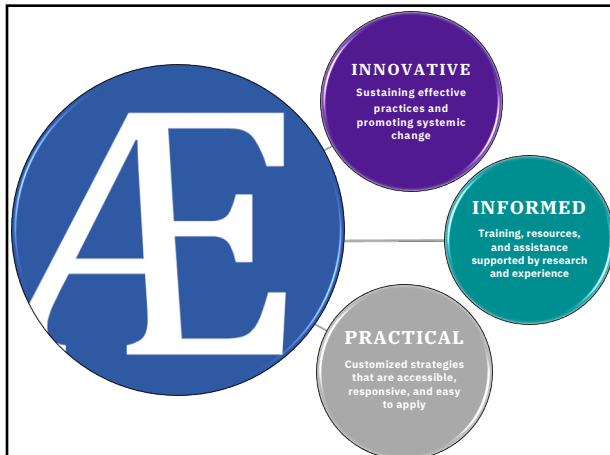
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What We Do	
<p><b>Resources</b></p> <p>Create, research, and curate publications, statutory and case law compilations, and other resources that strengthen prosecution practices</p>	<p><b>Consultations</b></p> <p>Offer on-demand 24/7 consultations with our seasoned prosecutors to answer case-specific inquiries, discuss strategy, conduct research, and recommend data-driven solutions</p>
<p><b>Training Events</b></p> <p>Develop curricula and facilitate a wide range of specialized in-person and web-based trainings designed to empower prosecutors and allied professionals</p>	<p><b>Partnerships &amp; Initiatives</b></p> <p>Provide long-term support in building frameworks for coordinated responses to gender-based violence including data collection and analysis, task force development, and training</p>

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## Support

This project was supported by Grant No. 2020-YX-BX-K001 awarded by the Bureau of Justice Assistance. The Bureau of Justice Assistance is a component of the Department of Justice's Office of Justice Programs, which also includes the Bureau of Justice Statistics, the National Institute of Justice, the Office of Juvenile Justice and Delinquency Prevention, the Office for Victims of Crime, and the SMART Office. Points of view or opinions in this document are those of the author and do not necessarily represent the official position or policies of the U.S. Department of Justice.

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## Objectives

- Reduce opportunities for intimidation
- Educate victims about intimidation
- Use evidence of intimidation to help convict abuser, regardless of whether (or how) the victim testifies
- Litigate motions to admit evidence under the doctrine of forfeiture by wrongdoing

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## Witness Intimidation

What do you picture when you think of witness intimidation?

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Witness intimidation is anything done with the intention or purpose of preventing or altering a witness's testimony or report to law enforcement, or to retaliate against a witness for such testimony or report.

AEquitas' Field Guide to Witness Intimidation (2018)

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Urban criminal justice system professionals said more victims were intimidated in domestic violence cases each year than in gang or drug crime.

Kerry Healey, *Victim and Witness Intimidation: New Developments and Emerging Responses*, NAT'L INST. OF JUST. 2 (1995)

Domestic violence (DV) victims appear at elevated risk for retaliation, especially when living with or economically dependent on the offender, or in contact with the offender because of shared parenting.

DO ARRESTS AND RESTRAINING ORDERS WORK?  
(Buzawa & Buzawa eds., 1996)

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“Only unsuccessful intimidation ever came to the attention of police or prosecutors.”

Kerry Healey, Nat'l Inst. of Just., *Research in Action, Victim and Witness Intimidation: New Developments and Emerging Responses 2* (1995)

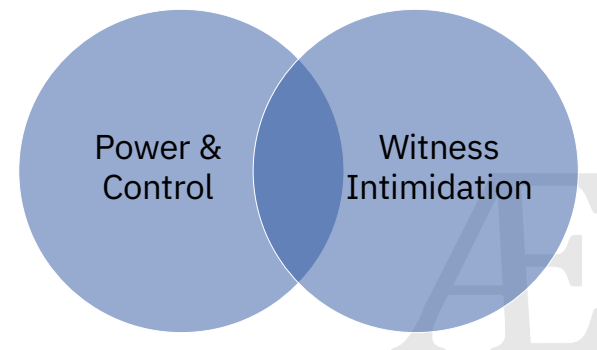
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*“These gaps in our communities’ responses are places that victims fall through and offenders crawl through.”*

Excerpt from a role play on the realities of the justice system, created by Graham Barnes for the National Training Project of Domestic Abuse Intervention Programs, Duluth, MN

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## Techniques



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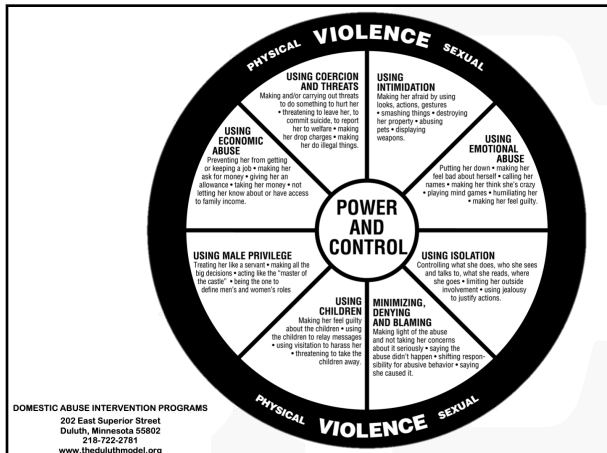
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## Subtle Tactics in IPV/DV Cases

- Non-verbal cues
  - "The look"
  - Taking off jewelry, shirt
  - Making a fist
- "Code" words
  - "Now you did it!"
- Culture

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## Emotional Appeals

After listening to 3 hours of jails calls each for 17 men in custody on DV charges who called their victims, researchers observed:

“Perpetrators are not threatening the victim, but are using more sophisticated emotional appeals designed to minimize their actions and gain the sympathy of the victim.”

A. Bonomi et al., *Meet Me at the Hill Where We Used to Park*, 73 J. Soc. Sci. & Med. 1054-1061 (2011)

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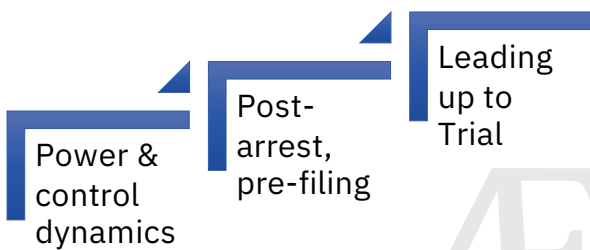
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## Continuation & Escalation



KERRY HEALEY, NAT'L INST. OF JUST.,  
RESEARCH IN ACTION, VICTIM AND WITNESS INTIMIDATION:  
NEW DEVELOPMENTS AND EMERGING RESPONSES (1995)

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## Countering Witness Intimidation



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How do you educate victims  
about witness intimidation?

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## Educate Victims

- What is considered intimidation?
- What should I do if I'm being intimidated?
- What should I save?
- How should I save it?
- Victims are not investigators—consider risk to them and to case

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## Educate Victims

Cont'd

- Discuss witness intimidation during every conversation
- Advise victim on what to expect
- Provide instructions on how to preserve evidence

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## Educate Victims

Cont'd

- Determine point of contact for reports
- Connect victim with services that can assist in continual safety planning
- Do not minimize contact by offender

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## Example

**VICTIM RESOURCE PROGRAM**  
Denver City Attorney's Office | Prosecution and Code Enforcement

**NO MATTER WHAT S/HE SAYS**

- The abuse is not your fault.
- You do not deserve to be abused.
- Any consequences the defendant receives are not your fault.
- You cannot drop the charges. The City of Denver is bringing the charges.

↓

This case results from a City charge. The maximum penalty for a City charge is up to one year in jail and/or a fine of up to \$999. In most cases defendants will be given the opportunity for probation and counseling.

**WHAT MAY HAPPEN WHILE YOUR CASE IS PENDING**

**THE DEFENDANT MAY ATTEMPT TO "REWRITE HISTORY" OR TRY TO CONFUSE YOU ABOUT WHAT HAPPENED DURING THE INCIDENT.**

- "I never said those things - I would never threaten you or hurt you."
- "It's my property - I can do what I want to it."
- "This is all a misunderstanding."
- "You're not really hurt."

**HE/SHE MAY MINIMIZE WHAT HAPPENED.**

- "We were just arguing! I shouldn't go to jail for this."
- "The police blew this way out of proportion. I barely touched you."

**THE DEFENDANT MAY MAKE EXCUSES FOR WHAT HAPPENED, APOLOGIZE, SEND YOU GIFTS, AND PROMISE TO CHANGE.**

- "You know how much stress I'm under."
- "I was drunk. I promise I'll get sober."
- "It was an accident. You know I would never intentionally hurt you."
- "I'm sorry - I just snapped. You know how much I really love you."
- "It will never happen again, I promise."

**VICTIM OUTREACH OFFICE**

490 W. COLFAX,  
FIRST FLOOR  
DENVER, CO. 80202

**720.913.8020**

Please call for information on your case and community referrals or come in to meet with a victim specialist or city attorney.

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## Example

Cont'd

to \$999. In most cases defendants will be given the opportunity for probation and counseling.

**VICTIM OUTREACH OFFICE**

490 W. COLFAX,  
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DENVER, CO. 80202

**720.913.8020**

Please call for information on your case and community referrals or come in to meet with a victim specialist or city attorney.

**THE DEFENDANT MAY BLAME YOU FOR THE ARREST, ATTEMPT TO MAKE YOU FEEL GUILTY, AND CLAIM TO BE THE VICTIM.**

- "This never would have happened if you had (had not)..."
- "You started it! You're always nagging me."
- "You never should have called the police. Now look at the mess we're in!"
- "Why are you doing this? You're tearing our family apart."
- "This could cost me my job."
- "What did you tell them? How am I supposed to defend myself?"

**THE DEFENDANT MAY TRY TO TALK YOU OUT OF APPEARING IN COURT.**

- "If you don't show up in court, this will all go away."
- "You can get them to drop the charges."

**THE DEFENDANT MAY THREATEN YOU.**

- "If you show up in court, you'll pay for it."
- "You have to drop the protection order! If you don't, I'll be homeless."
- "If you don't drop the charges, I'll report you to Child Protective Services."
- "If you show up in court, I'll fight you for custody of the kids."
- "If you testify against me, I'll have to teach you a lesson."

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What strategies do you employ to limit opportunities for intimidation?

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## Limit Opportunities

- Engage with allied partners to assist
  - Transportation
  - Accompany victims in the courthouse
- Train court personnel about overt and subtle witness intimidation

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## Limit Opportunities

Cont'd

- Utilize formal and informal witness rooms
- Ensure safety planning
  - Includes technology safety
- Listen to victims' safety concerns

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## Charging Intimidation Crimes

Are you proactively investigating witness intimidation?

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## Investigation Strategies

- Assume there will be witness intimidation
- Ask victims about prior incidents of DV
- Monitor jail phone calls and visits

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## Investigation Strategies

Cont'd

- Review DV history – criminal cases and civil protection orders
  - Were any dropped?
  - What were the circumstances?
- Collaborate with victim service providers

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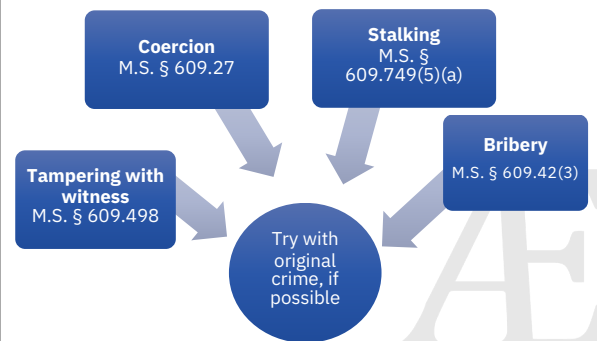
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## Charge Intimidation Crimes



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What do you do with witness  
intimidation evidence?

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## Effective Use of Intimidation Evidence

- Forfeiture by wrongdoing
- Explain witness recantation / minimization
- Consciousness of guilt
- Aggravating factor at sentencing

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## Intimidation Worked - The Victim Cannot Participate

How do we get in the victim's statements?

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## Forfeiture by Wrongdoing (FBW)

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## Concept

- Defendant has the right to confront witnesses against him/her
- Right can be forfeited if the witness cannot be confronted due to the defendant's wrongdoing

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## Forfeiture by Wrongdoing

- Common law from 1666
  - Lord Morley's Case (6 State Trials, 770)
- Law in the U.S. since 1878
  - Reynolds v. United States, 98 U.S. 145 (1879)
- Rule of Equity

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## Reynolds v. U.S.

98 U.S. 145 (1878)

"The Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts. It grants him the privilege of being confronted with the witnesses against him; but if he voluntarily keeps the witnesses away, he cannot insist on his privilege. If, therefore, when absent by his procurement, their evidence is supplied in some lawful way, he is in no condition to assert that his constitutional rights have been violated."

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## Public Policy

U.S. v. Thevis, 665 F.2d 616 (5th Cir. 1982)

"...to permit such a subversion of a criminal prosecution would be contrary to public policy, common sense, and the underlying purpose of the Confrontation Clause... and make a mockery of the system of justice that the right was designed to protect."

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## Giles v. California

554 U.S. 353 (2008)

- Defendant shot ex-girlfriend
  - Claimed self-defense
- Remanded – not enough evidence the victim’s unavailability was due to defendant’s intentional act
  - Defendant must have specific intent to make victim unavailable as a witness when committing wrongdoing

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“Earlier abuse, or threats of abuse, intended to dissuade the victim from resorting to outside help would be highly relevant to this inquiry, as would evidence of ongoing criminal proceedings at which the victim would have been expected to testify.”

*Giles*, 554 U.S. at 376

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## Former Testimony

Minn. R. Evid. 804(b)(6)

Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

- 6) Forfeiture by wrongdoing. A statement offered against a party who wrongfully caused or acquiesced in wrongfully causing the declarant’s unavailability as a witness and did so intending that result.

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## Hearsay Exception

Minn. R. Evid. 804(b)(5)

Definition of unavailability. "Unavailability as a witness" includes situations in which the declarant:

- 5) Is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance . . . by process or other reasonable means."

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## Efforts to Produce Witness

- State must show efforts to produce witness were both reasonable and made in good faith
  - *State v. Cox*, 779 N.W.2d 844, 851 (Minn. 2010) (citing *Barber v. Page*, 390 U.S. 719 (1968)).
- "The lengths to which the prosecution must go to produce a witness . . . is a question of reasonableness."
  - *Cox*, 779 N.W.2d at 852 (citing *Ohio v. Roberts*, 448 U.S. 56, 74 (1980)).

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## Reasonable Efforts

- Subpoena, writ, interstate witness subpoena, offer of travel/lodging expenses
  - *Barber*, 390 U.S. at 723-724 & n.4 (1968).
  - *U.S. v. Yida*, 498 F.3d 945, 960 (9th Cir. 2008).
- Extensive efforts to locate witness may be insufficient if not commenced until eve of trial
  - *U.S. v. Tirado-Tirado*, 563 F.3d 117 (5th Cir. 2009).

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## Prepare to show reasonable efforts to produce witness

- Obtain multiple ways to contact/ locate witness
- Document all contacts with witness and efforts to locate
- Document any statements of intention by witness not to appear or to refuse to testify
- Don't wait till eve of trial!

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## Bench warrant?

"[W]e believe that whether the State is required to secure the presence of a witness by means of a material witness warrant depends in part on the resulting hardship to the witness and the importance of the witness's testimony."

*State v. Hobson*, 810 P.2d 70, 73-74 (Wash. Ct. App. 1991) (emphasis added)

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FBW requires State to show by preponderance of the evidence that:

- 1) Declarant-witness is unavailable;
- 2) Defendant engaged in wrongful conduct;
- 3) The wrongful conduct caused the unavailability; and
- 4) Defendant intended to cause unavailability

*Cox*, 779 N.W.2d at 851-72

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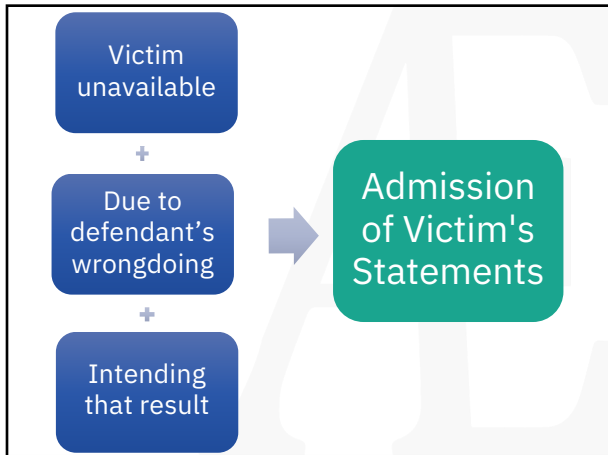
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### FBW Hearing

Preliminary Determinations

- Evidentiary Hearing must be held outside jury's presence
- State must show by preponderance of evidence that:
  - Defendant was involved or responsible for causing witness unavailability; and
  - Defendant acted with intent to cause unavailability

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### FBW Hearing

Preliminary Determinations (Cont'd)

- Evidentiary Hearing is governed by Minn. R. E. 104(a)
  - Court not bound by evidentiary rules, including hearsay
  - Don't need to call intimidated victim to prove FBW

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## Defendant's Wrongdoing

- "Knowledge, complicity, planning or in any other way..."
  - People v. Pappalardo, 152 Misc.2d 364 (N.Y. 1991)
- Evidence of wrongdoing
  - Jail phone calls
  - History of relationship
  - Prior criminal and civil cases
  - Witnesses to intimidation
  - Testimony at prior hearings

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## Evidence

- History of abuse
- Prior charges filed and withdrawn
- Testimony from bond hearing or prior cases
- Evidence of victim's fear of defendant and prior cases
- Anything to show what defendant did to prevent/discourage victim from testifying

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## Additional Resources

<https://aequitasresource.org/resources/>

- "Combatting Witness Intimidation, Experiences in Creating Systems-Based Change"
- "Legal Jiu-Jitsu for Prosecutors in Intimate Partner Violence Cases: Forfeiture by Wrongdoing"
- "Evidence of Other 'Bad Acts'..."
- Webinar: "Safeguarding Victim Privacy in a Digital World"
- Webinar: "#GUILTY: Identifying, Preserving, and Admitting Digital Evidence"

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## Going Forward

- Identify overt and subtle forms of intimidation
- Educate victims about what to expect and how to preserve evidence
- Proactively investigate intimidation
- Identify and preserve admissible out-of-court statements
- Litigate admission of statements pretrial

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## Jonathan H. Kurland

ATTORNEY ADVISOR

✉ [jkurland@aequitasresource.org](mailto:jkurland@aequitasresource.org)  
 ☎ (202) 596-4227

📍 1000 Vermont Avenue NW, Suite 1010  
 Washington, DC 20005

🌐 [www.AEquitasResource.org](http://www.AEquitasResource.org)

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## Office Hours

3<sup>rd</sup> Thursday of Every Month, from 2-4pm Eastern

💬 Discuss the most pressing issues facing prosecutors and allied professionals today

📖 Serve as a resource, and provide you with relevant resources

👥 Connect you with other practitioners in the field to help foster peer relationships

Register here:  
<https://aequitasresource.org/trainings/>

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