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PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

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WASHINGTON, D.C. 20543

CAPTION: ROBERT A. BUTTERWORTH, JR., ATTORNEY
GENERAL OF FLORIDA, ET AL., Petitioners V.
MICHAEL SMITH

CASE NO: 88-1993

PLACE: Washington, D.C.

DATE: January 16, 1990

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IN THE SUPREME COURT OF THE UNITED STATES

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ROBERT A. BUTTERWORTH, JR., :
ATTORNEY GENERAL OF FLORIDA, :
ET AL., :
Petitioners :
v. : No. 88-1993
MICHAEL SMITH :
-----x

Washington, D.C.
Tuesday, January 16, 1990

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
1:51 p.m.

APPEARANCES:

GEORGE L. WAAS, ESQ., Assistant Attorney General of
Florida, Tallahassee, Florida; on behalf of the
Petitioners.

GREGG DARROW THOMAS, ESQ., Tampa, Florida; on behalf of
the Respondent.

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1 own testimony?

2 MR. WAAS: That is correct, Your Honor. The
3 Eleventh Circuit found the statute unconstitutional
4 insofar as it applies to a witness disclosing his own
5 testimony after the completion of an investigation. The
6 difficulty with that decision is that it conflicts with
7 the recognition by this Court and others that the
8 interests justifying grand jury secrecy, while reduced
9 when an investigation is completed, are not eviscerated.
10 They remain whole and viable.

11 QUESTION: Which -- which, as applied to a
12 witness revealing his own testimony, what is the state's
13 interest?

14 MR. WAAS: Your Honor, the interests are
15 numerous, and they are borne of those general interests
16 that are cited on pages 12 and 13 of our brief, as well as
17 by this Court in the Douglas Oil case, with these specific
18 additions. Florida is a capital punishment state. There
19 is no statute of limitations with respect to capital
20 punishment in Florida. Therefore, an investigation that
21 is begun during one term of the grand jury and concluded
22 during that term may be picked up months or years later,
23 based upon newly discovered evidence.

24 QUESTION: Well, that may be so, but why prevent
25 a witness from revealing his own testimony?

1 MR. WAAS: Because if a witness may reveal his
2 own testimony, he will be able to also implicate the
3 questions that are asked. That's part of the testimony,
4 the answers in the abstract would not be sufficient --

5 QUESTION: I don't see that, I don't see that it
6 necessarily is. I wouldn't have read the Eleventh Circuit
7 opinion to say that the Florida statute was invalid
8 insofar as it prohibited the revelation of the questions
9 asked to the witness.

10 MR. WAAS: Your Honor, when we talk about
11 testimony, that word has a certain common understanding,
12 and that is when you look at a transcript of testimony
13 what you see are the questions asked and the answers
14 returned. You cannot siphon out the questions from the
15 answers. Indeed, if Mr. Smith here were to have obtained
16 a transcript of his testimony, it would not have simply
17 said in the transcript that which he was responding to.
18 It would include the questions as well.

19 QUESTION: Well, suppose -- supposing the
20 Florida statute had been held invalid by the Eleventh
21 Circuit only insofar as it prevented a witness from
22 disclosing his own testimony, but it also said that the
23 witness, in disclosing his own testimony, could not do it
24 in question and answer form. That the only thing the
25 witness could do would be either to repeat his answers or

1 to give a paraphrase of his testimony.

2 MR. WAAS: Your Honor, the difficulty with that
3 as I see it is that it begins to enter into legislative
4 determinations. And it is our position that the First
5 Amendment, which is the basis of the Eleventh Circuit's
6 decision and the basis for the claim made by Mr. Smith
7 here, is not susceptible, necessarily, to a turning on or
8 turning off like a water faucet. The First Amendment
9 flows with respect to participants and cannot be cut off
10 at the point of limiting any disclosure solely to
11 testimonial matters. It's not so much Mr. Smith's
12 testimony that is involved. It is the testimony of grand
13 jury witnesses.

14 QUESTION: Mr. Waas, suppose -- suppose the
15 witness does not preface his disclosure with this is what
16 I testified to. He just -- he just tells somebody or he
17 prints in a newspaper story the very same thing which he
18 knew, which he happened to testify to before the grand
19 jury. So there is no indication on the face of it that
20 that is what he said. Does that violate your statute?

21 MR. WAAS: No, it does not, Your Honor.

22 QUESTION: It does not.

23 MR. WAAS: And that, I believe, points out a
24 misconception in this case. There is nothing in the
25 statute that prohibits Mr. Smith or any grand jury witness

1 from disclosing the information that that witness had
2 going into the grand jury room. It -- the statute doesn't
3 say that he is prohibited from disclosing what he knew
4 going in or what he knew coming out. He is free to
5 disclose the facts of his investigation. He is free to
6 criticize, to cajole, to condemn the grand jury system,
7 its members, its process.

8 QUESTION: Well, let me ask you then --

9 MR. WAAS: Yes, Your Honor.

10 QUESTION: -- can he disclose the fact he
11 testified?

12 MR. WAAS: He can disclose the fact that he was
13 called before the grand jury.

14 QUESTION: Could the man in this case get on a
15 news broadcast and say I testified before the grand jury
16 yesterday. They are investigating Mayor so and so. I
17 think Mayor so and so is a crook because I saw him do X, Y
18 and Z. Period. That's all he said.

19 MR. WAAS: No problem with either one of those
20 questions, Your Honor.

21 QUESTION: That would be perfectly all right?

22 MR. WAAS: That is correct, for this reason.
23 What the statute addresses is what goes on within the
24 grand jury room. People are free to conjecture as to what
25 the grand jury is investigating. But once you identify --

1 QUESTION: If that's the case, what is the state
2 interest -- I'm sorry, if your answer to me is correct,
3 what is the state interest in saying that's all right, but
4 it suddenly implicates a great state interest if he adds
5 the words "and I so testified yesterday"?

6 MR. WAAS: For this reason, Your Honor. Once
7 you begin to reveal what goes on within the grand jury
8 walls, identity of names, of potential witnesses, of
9 confidential informants are --

10 QUESTION: No, this doesn't identify -- just
11 this particular case. What is the state interest in my
12 hypothetical? How can it possibly hurt, one hurt more
13 than the other?

14 MR. WAAS: Your Honor, your hypothetical may
15 involve -- in the skeletal posture of the questions it is
16 quite possible that with respect to that case there would
17 be no triggering of the interest.

18 QUESTION: Okay.

19 MR. WAAS: But, as the cases which we recite in
20 our reply brief demonstrate, the fact of the absence of
21 any vitality of the interest justifying grand jury secrecy
22 in a particular case doesn't mean that the interests don't
23 exist to the point of overcoming a First Amendment claim.

24 QUESTION: Can you give me a hypothetical in
25 which the witness' description of his own testimony would

1 imperil, after the grand jury investigation is over, would
2 imperil the -- would be contrary to the policy of the
3 statute?

4 MR. WAAS: Yes, Your Honor, for this reason. As
5 I said earlier --

6 QUESTION: Justice Stevens asked you to give him
7 a hypothetical.

8 MR. WAAS: Yes. Let us assume that in the
9 course of his representation the grand jury were to ask,
10 with respect to a confidential informant whose name, if
11 disclosed, would implicate that confidential informant to
12 the point of risking his life. Let's assume that happens.
13 With respect to Mr. Smith's testimony, he is now free, as
14 he represents in his pleadings both below and here, to not
15 only disclose his own testimony, but matters which he
16 learns while before the grand jury. And if he is making a
17 First Amendment --

18 QUESTION: Does he listen to all the other
19 witnesses testify? He doesn't listen to anybody testify
20 except himself. But some grand juror says did you see Joe
21 Smith there, and Joe Smith is the man who might get killed
22 if he is identified. He says yes, I saw him, he was there
23 on the scene of the crime. So he gets on the radio the
24 next day and he doesn't say he testified, he says you
25 know, Joe Smith was at the scene of the crime. And maybe

1 -- won't that kill Joe Smith just as much as saying and I
2 so testified?

3 MR. WAAS: But, Your Honor, what has happened in
4 that case is that at that point, because he has now
5 learned about another person's testimony, if he were to
6 reveal that he would be knowingly revealing grand jury
7 testimony.

8 QUESTION: Well --

9 QUESTION: But the Eleventh Circuit didn't
10 strike down that part of the statute. That isn't the
11 witness' own testimony. That's something he learned as a
12 result of being in the grand jury -- the grand jury room.

13 MR. WAAS: Your Honor, that is correct. The
14 difficulty, though, is, as I said earlier, putting
15 parameters around a First Amendment claim.

16 QUESTION: Well, but the whole law is devoted to
17 putting parameters around things. What you're saying in
18 effect is that although there is no evil involved in
19 situation A, there would be involved in situation B, and
20 therefore you are entitled to prohibit both of them. But
21 that isn't our First Amendment law.

22 MR. WAAS: Your Honor, as I understand it, with
23 respect to those cases involving the former CIA agent and
24 those cases involving opportunities to engage in First
25 Amendment activities on political -- on military bases,

1 this Court said, as I understand this, that even though
2 the interests were not demonstrated to be viable in those
3 cases, the interests of protecting national security and
4 protecting military secrets were enough to overcome the
5 First Amendment claims in those cases, even though those
6 interests were not real and demonstrated for those
7 particular cases.

8 QUESTION: Well, I suppose you can't say that
9 you are really trying to protect the life of the -- of
10 this fellow who wants to reveal his own testimony. If he
11 wants to protect himself he can by being quiet. But I
12 suppose that if he is asked in the grand jury room and he
13 testifies to a certain fact, and he is asked well, where
14 did you -- how do you know this? Then he says John Jones
15 told me. Now, he is then identifying some other people
16 that know maybe some critical facts that some other people
17 wouldn't like him to testify to.

18 MR. WAAS: Your Honor, I understand that, and I
19 am not suggesting that there may not be alternative policy
20 choices available. And perhaps a particular policy choice
21 made by a given state may not be the best choice. But the
22 question is whether there is a First Amendment right for
23 Mr. Smith to disclose --

24 QUESTION: Well, I was trying to give you -- I
25 was trying to give you an example where your -- that would

1 defend your position.

2 MR. WAAS: I understand that, and I am just
3 trying to point out that with respect to the First
4 Amendment posture of the case, when you are talking about
5 the vitality of those interests and apply them to
6 particularized efforts to disclose what has become grand
7 jury information by virtue of its having been imparted,
8 then the question becomes whether it is more feasible for
9 a state to protect its own interests by prohibiting public
10 dissemination or disclosure of that which the grand jury
11 is considering and undertaking.

12 You see, once you identify the fact of the grand
13 jury's having received certain information, then
14 conjecture and speculation that is generally available
15 with respect to particularly media coverage of grand jury
16 proceedings goes by the board. There has to be some way
17 to retain the vitality of grand jury proceedings
18 specifically when we are dealing with, as is Florida's
19 situation, a state that is unique geographically. I am
20 not prepared to argue to this Court that the other 49
21 states don't have their own uniqueness, they do. But
22 Florida's geography means that the types of issues that
23 are presented to a state grand jury involve matters of
24 international consideration, drug trafficking, --

25 QUESTION: Well, Mr. Waas, I suppose that that

1 could be said of Federal investigations for violation of
2 Federal laws in Florida.

3 MR. WAAS: That is correct.

4 QUESTION: But the Federal rule on disclosure of
5 grand jury testimony is not as broad as you describe
6 Florida's as being, is it?

7 MR. WAAS: No, that's correct, Your Honor.

8 QUESTION: And indeed, application of the
9 Federal rule in the State of Florida would not prohibit
10 what Mr. Smith proposes to do.

11 MR. WAAS: That is correct, Your Honor. The
12 Federal rule would permit witnesses to disclose, upon
13 leaving the grand jury room, unless a protective order was
14 entered.

15 QUESTION: And yet the, the public interest is
16 the same. So I -- your argument is a little difficult for
17 me to follow. What provision of the statute would
18 prohibit the witness from revealing identities of grand
19 jurors, for example, or what the witness saw there, other
20 than testimony or evidence?

21 MR. WAAS: With respect to your -- the first
22 question that you asked with respect to the Federal rule,
23 you are quite correct. But --

24 QUESTION: I'm talking about Florida's statute
25 now. What provision of your -- I don't even know what the

1 statute means. It doesn't appear to me, textually, to
2 mean either what you say it does or what your opponent
3 says it does.

4 MR. WAAS: Your Honor, the statute prohibits
5 disclosure of testimony and evidence given to the grand
6 jury.

7 QUESTION: So it wouldn't prohibit disclosure of
8 the identity of the grand jurors?

9 MR. WAAS: If -- if, within the context of
10 questions asked by a grand juror, the identity of the
11 grand jurors is disclosed, then, because it is testimony,
12 to that extent --

13 QUESTION: Well, if it isn't testimony it
14 doesn't prohibit it. Right?

15 MR. WAAS: The statute itself does not address
16 identity of grand jurors. It does address questions asked
17 by the grand jurors, comments made --

18 QUESTION: If -- if you regard those questions
19 as testimony, I mean, that's your theory?

20 MR. WAAS: Yes, Your Honor. Yes. Because it
21 comprises the common understanding of what constitutes
22 testimony. If Mr. Smith, as I said earlier, were to ask
23 for a copy of this transcript, he would not only get the
24 answers, he would get the questions and the answers
25 returned to those questions.

1 QUESTION: Well, I suppose the state could just
2 say Juror Number 1, Juror Number 2. I mean, the grand
3 jurors don't usually say good afternoon, my name is so and
4 so. They don't say that.

5 MR. WAAS: Quite possibly. Quite possibly. The
6 -- the question with respect to identity of grand jurors
7 is not addressed in the statute. But where the questions
8 asked by a grand juror and the grand juror is identified,
9 or by virtue of the witness having knowledge of the grand
10 juror from previous experiences, by coupling that
11 information and then going forth and disclosing that, you
12 will not only have identified the grand juror, but the
13 questions asked by the grand juror. And the effect on
14 future grand jurors is demonstrated by this Court's
15 recognition of the interests justifying secrecy set out in
16 the Douglas Oil cases and in other cases.

17 QUESTION: Mr. Waas, what was the rule about
18 grand jury secrecy at the time the First Amendment was
19 adopted?

20 MR. WAAS: As I understand it, the common law
21 pertaining to grand juries did not preclude witnesses from
22 testifying. However, witnesses who were given oaths were
23 bound by their oaths of secrecy. And indeed, in the
24 landmark case, this Court in a footnote recognized that
25 with respect to participants an oath of secrecy can be

1 administered for the purpose of protecting the
2 confidentiality of those proceedings. And the footnote,
3 footnote 12 of that case, specifically cites to the
4 Florida Judicial Qualifications Commission.

5 Now, it is my position that if the state, or any
6 entity of the state that conducts investigations, may
7 impose an oath of secrecy to protect the internal security
8 of its operations and functions, then surely a state can
9 enact a statute that serves the same purpose. This
10 statute here has the effect of imposing an oath of
11 secrecy, and we have by testimony the fact that --

12 QUESTION: Well, but it doesn't. But it
13 doesn't. That oath of secrecy you are talking about
14 referred to in the footnote --

15 MR. WAAS: That is correct.

16 QUESTION: -- that meant you would not disclose
17 that information to anybody, didn't it? That just didn't
18 mean you would not go up to somebody and say not only is
19 this the fact, but I testified to it. Didn't that oath
20 mean you couldn't go out and tell people that same
21 information?

22 MR. WAAS: I am not so sure, Your Honor.

23 QUESTION: Well, that's how I interpret it.

24 MR. WAAS: I believe that any of these kinds of
25 statutes, where a particular type of investigation is

1 underway, be it a judicial qualifications commission or an
2 ethics commission or an elections commission, and there is
3 an oath that the -- that the witness will not divulge that
4 which he testified to before the forum, still has the
5 substance of that information which is free to be
6 disclosed because it comes from alternative sources, which
7 this Court is most sensitive to. And the fact that the
8 alternative sources are those sources independent of the
9 grand jury or the judicial qualifications commission
10 allows that person to freely disclose what he or she has
11 gathered, so long as what is not disclosed is the fact
12 that that information was imparted to the governing body.

13 QUESTION: There was no general prohibition. I
14 mean, that's a case-by-case determination by the grand
15 jury, that secrecy is needful in this particular case.
16 Was it ever the practice to have simply an across-the-
17 board rule of secrecy, such as you do?

18 MR. WAAS: Your Honor, I am not aware of any
19 other secrecy standard imposed other than the one that is
20 indicated here, and that's that a witness cannot disclose
21 what he tells the grand jury.

22 QUESTION: I am asking was that the situation at
23 common law?

24 MR. WAAS: Under common law a witness was free
25 to disclose. There was no prohibition. But I believe

1 that there was an oath of secrecy that operated to that
2 effect.

3 QUESTION: Which would always be imposed, or
4 which was imposed case by case?

5 MR. WAAS: I am not sure whether it would be
6 imposed in all instances. But there was no regulation in
7 effect.

8 QUESTION: Wasn't it imposed just for the life
9 of the grand jury? Was it imposed just for the life of
10 the grand jury or forever and ever?

11 MR. WAAS: The oaths of secrecy?

12 QUESTION: Yes. Certainly it didn't survive
13 trial, did it?

14 MR. WAAS: Your Honor, I am not sure, but I do
15 know that the oaths now don't have a time frame
16 established. And that's because investigations do carry
17 forth. They don't necessarily --

18 QUESTION: Your statute, as I understand it, is
19 in perpetuity?

20 MR. WAAS: That's correct. That's correct.

21 QUESTION: It seems to me, Mr. Waas, that the
22 position you contend for really has a potential for abuse.
23 A district attorney could summon someone before the grand
24 jury who is about to blow the whistle on some governmental
25 operation and in effect seal his lips, wouldn't he?

1 MR. WAAS: No, Your Honor. And again, that goes
2 to my response earlier. There is nothing in the statute
3 that precludes Mr. Smith or any witness from disclosing
4 the knowledge that he had going into the grand jury room.
5 He is free to unearth and disclose corruption, government
6 misconduct --

7 QUESTION: So, your only quarrel then with the
8 Eleventh Circuit's disposition of this case is that you're
9 afraid its disposition would allow the release not only of
10 the answers of a witness in the grand jury but the
11 questions as well?

12 MR. WAAS: That, and the interests that surround
13 grand jury secrecy generally.

14 QUESTION: But -- let's not get into these vague
15 abstractions. What else does the Eleventh Circuit's
16 opinion forbid you to do that you want to do?

17 MR. WAAS: Your Honor, the problem with the
18 Eleventh Circuit opinion --

19 QUESTION: Can you answer my question?

20 MR. WAAS: Yes.

21 QUESTION: I said what else, other than what we
22 have just talked about, does the Eleventh Circuit's
23 opinion forbid you to do which you want to do?

24 MR. WAAS: It -- it forbids the state from being
25 able to assure, on a continuing permanent basis, that what

1 is disclosed by witnesses before the grand jury remain
2 before the grand jury. It's -- it's the opening the door
3 to the grand jury room.

4 QUESTION: But, this is a very general response,
5 Mr. Waas. I was hoping for something more specific.
6 Where -- you say that the grand -- that the witness is
7 perfectly free to give the substance of his testimony
8 elsewhere.

9 MR. WAAS: That is correct.

10 QUESTION: But what you're afraid of is that the
11 Eleventh Circuit's opinion will not only allow that, but
12 it will allow disclosure of a transcript which would show
13 questions as well as answers. Now, what else is there in
14 addition to that? Now think before you answer that.

15 MR. WAAS: When the information that is imparted
16 contains names of persons who may be proven innocent, that
17 is subject to disclosure before the grand jury now. So
18 the prospect of not being able to protect the innocent
19 accused is vitalized.

20 QUESTION: Well, but you're not going to protect
21 the innocent accused if the guy goes out and says the same
22 thing as he has said before the grand jury. The same
23 names will be in that disclosure as were disclosed to the
24 grand jury.

25 MR. WAAS: But if it's disclosed to the grand

1 jury it identifies potential targets, it identifies
2 potential witnesses that -- whose identity may not have
3 been previously disclosed. You see, once -- the substance
4 of the information may be published, and the fact that a
5 person testifies before a grand jury may be published.
6 But that doesn't mean that at that point the grand jury is
7 in possession of information which operates to target
8 potential defendants, identify potential informants,
9 identify existing informants, subject the grand jurors to
10 the type of scrutiny with respect to their questions. All
11 of these interests begin to ripple out once the door to
12 the grand jury room is opened.

13 QUESTION: But what you're saying is if the
14 grand jury door is open only as far as the Eleventh
15 Circuit opened it, it necessarily is going to be all the
16 way open. And all of our cases suggest that isn't true.

17 MR. WAAS: Your Honor, the Eleventh Circuit's
18 opinion takes away that which is available under the rule
19 -- under the Federal rule upon which Mr. Smith seeks to
20 model Florida's law, and that is the ability to impose any
21 kind of post-testimony protective order. The Eleventh
22 Circuit doesn't address that. It says when the
23 investigation ends. It doesn't say when the investigation
24 ends. It doesn't take into account that investigations
25 carry over months, even years, beyond the term of court.

1 See, that's really the problem with the Eleventh
2 Circuit opinion. It tends to decompartmentalize grand
3 jury proceedings. And we are suggesting, and our
4 witnesses demonstrate, that grand jury proceedings are not
5 decompartmentalized or compartmentalized, but flow from
6 term to term to term. And if at the end of a grand jury
7 investigation a prosecuting attorney announces that this
8 investigation is over and the witness goes forth and holds
9 a press conference, and the next witness comes in and, by
10 virtue of that witness' disclosures, the prosecuting
11 attorney or the grand jury change their mind and want the
12 investigation to proceed further, the cat could be out of
13 the bag. And these interests are not interests that are
14 speculative, because our experience and our knowledge
15 teach us that if certain events occur, certain
16 consequences are going to follow.

17 And that's why I believe that the appropriate
18 test is the one enunciated in Seattle Times, as
19 embellished in the Albertini case. And that is, whether
20 the regulation furthers important or significant
21 government interest which will be achieved --

22 QUESTION: May I --

23 MR. WAAS: -- less effectively absent the
24 regulation.

25 QUESTION: May I ask if any -- may I ask -- two

1 questions really. Has anyone -- any witness ever been
2 prosecuted under this statute?

3 MR. WAAS: I am not aware of any, Your Honor.

4 QUESTION: Has the statute ever been construed
5 by the Florida Supreme Court?

6 MR. WAAS: I believe there has been -- there is
7 one case cited in our reply brief which addresses what
8 this statute means. And it says --

9 QUESTION: Did it involve a witness?

10 MR. WAAS: Excuse me?

11 QUESTION: Did it involve a -- a disclosure by a
12 witness or by an -- some of the other people?

13 MR. WAAS: I believe it was in a -- in a
14 generalized discussion. I don't believe it involved --

15 QUESTION: Because, you know, I didn't realize
16 it before, but as I read the statute one could interpret
17 it as not even applying to witnesses. If -- it has a list
18 of kinds of people who appear before a grand jury and any
19 other similar --

20 MR. WAAS: Or any other person, I believe it
21 says.

22 QUESTION: -- and it doesn't really -- and one
23 could read it as just not even imposing any prohibition
24 against witnesses. I know the Eleventh Circuit didn't so
25 construe it, and we are probably bound by that

1 construction.

2 MR. WAAS: Yes, Your Honor. The interpretation
3 that has been given is that any other person means
4 witnesses.

5 QUESTION: Been given by the Eleventh Circuit.

6 MR. WAAS: That is correct.

7 QUESTION: But no Florida judge --

8 MR. WAAS: And the district court as well.

9 QUESTION: But no Florida judge, no state judges
10 have ever applied it to witnesses.

11 MR. WAAS: No, I am not aware of any Florida
12 courts applying it.

13 I would like to reserve the balance of my time
14 for rebuttal. Thank you.

15 QUESTION: Very well, Mr. Waas.

16 Mr. Thomas.

17 ORAL ARGUMENT OF GREGG DARROW THOMAS

18 ON BEHALF OF THE RESPONDENT

19 MR. THOMAS: Mr. Chief Justice, and may it
20 please the Court:

21 Almost four years ago Mike Smith was compelled
22 to do what citizens in our society should rarely be
23 compelled to do. He was compelled to remain silent,
24 silent about information he had personally gathered,
25 lawfully, by himself, and then surrendered to the grand

1 jury. Silent not for --

2 QUESTION: Excuse me, I thought we just went
3 over that. I -- I thought that he could have disclosed
4 whatever he wanted to disclose, except the fact that he
5 disclosed it to the grand jury.

6 MR. THOMAS: Your Honor, the problem with that
7 is --

8 QUESTION: And that is what this whole fight is
9 about. Your client wants to be able to say not only is
10 all this true, but I told it to the grand jury. That --
11 that's what has brought you here.

12 MR. THOMAS: Your Honor, certainly that is true,
13 but also the problem with the ability to put into column A
14 what he learned or knew before the grand jury and what he
15 learned as a result of the grand jury, and differentiate
16 that so he is not prosecuted criminally for his speech.
17 The problem is, he goes into a grand jury proceeding and
18 he may be there for several hours. When he leaves the
19 grand jury he may not be able to say well, what I learned
20 as a result of that is A, and what I knew when I went in
21 is B. So --

22 QUESTION: What he learned from the questions
23 that people asked him?

24 MR. THOMAS: Yes, Your Honor. There are
25 certainly things he learned from the questions they were

1 asking.

2 QUESTION: How does one learn things from the
3 questions that are asked you? By having your memory
4 stimulated?

5 MR. THOMAS: Well, certainly, Your Honor. Also
6 by the tone of the question or the import of it. Where
7 the question was going. I mean, it may indicate that the
8 grand jury was interested in something here.

9 QUESTION: Well, don't you -- don't you agree
10 that, or do you, that your client wants to reveal not only
11 his testimony but the questions?

12 MR. THOMAS: Yes, Your Honor, he does want to
13 reveal the questions too.

14 QUESTION: Do you agree with the interpretation
15 of the statute that was given to us by the petitioners'
16 attorney, that you -- a witness can disclose the substance
17 of his testimony, not by reference to the fact that it's
18 testimony, but he can tell everything that he knows
19 independently by the transaction?

20 MR. THOMAS: Your Honor, certainly if that was
21 the case that statute would be grossly unconstitutional.
22 Here there is intent by the state to limit what the
23 statute means in one point and then broaden it in another.
24 I think the breadth is at the point where the state says
25 what covers the identities of grand jurors. How could --

1 how could the testimony, content or import of it, ever
2 cover the identities of grand jurors?

3 QUESTION: Just a minute.

4 QUESTION: Was that a yes -- excuse me. Was
5 that a yes to that question?

6 MR. THOMAS: I'm sorry, Justice Scalia.

7 QUESTION: Do you agree with that interpretation
8 or not?

9 MR. THOMAS: Yes, Your Honor.

10 QUESTION: And has it, has the state ever argued
11 to the contrary before a Florida state court?

12 MR. THOMAS: Your Honor, there is no definitive
13 interpretation of the statute in Florida state court.
14 They have asserted that the statute means more than that
15 in this proceeding below.

16 QUESTION: The state has?

17 MR. THOMAS: Yes, Your Honor, that is, by the
18 breadth that I just mentioned, the identities of the grand
19 jurors and comments made.

20 QUESTION: Well, they said -- Mr. Waas said here
21 this afternoon that the statute did not prohibit Mr. Smith
22 from saying who the identities of the grand jurors were if
23 he knew them.

24 MR. THOMAS: Your Honor, that is definitely
25 contrary to the assertion that they made in their briefs.

1 Unless I have misread them now for the two and a half
2 years we have been in this litigation, I thought that the
3 state had always contended that the identities of the
4 grand jurors were important factors in this case.

5 QUESTION: Well, didn't you hear his response
6 this afternoon to my question?

7 MR. THOMAS: Yes, Your Honor, I did. And I
8 guess I am a little bit baffled by it. It's a concession
9 that I think is appropriate given the nature of the
10 statute.

11 QUESTION: Well, what are we arguing about here?
12 The right of your client to disclose the questions that
13 were asked of him before the grand jury, and that's all?

14 QUESTION: No, and the answers.

15 MR. THOMAS: And the answers, Your Honor, and
16 the ability to say I testified.

17 QUESTION: Well, to the extent -- well, I
18 thought Mr. Waas said that he could reveal, under the
19 statute, that he had been called to testify before the
20 grand jury?

21 MR. THOMAS: Yes, Your Honor, but he will not
22 concede the fact that a person can say I testified before
23 the grand jury to the following. It's -- if he
24 compartmentalizes it -- that -- you say I testified before
25 the grand jury, and then later you say what the substance

1 of your testimony is. Here it is vitally significant that
2 a witness before a grand jury at some time be able to say
3 I testified to the grand jury the following.

4 If I can give Your Honors a hypothetical of
5 that. Let's suppose a victim to a violent crime appeared
6 before a grand jury. She testified as to the identity of
7 her assailant unequivocally. There was no true bill
8 returned, and later she found out that the foreman of the
9 grand jury was the nephew of the assailant. That person,
10 in our society, should be able to stand up at some point
11 and say I testified before the grand jury. I told them
12 who the assailant was. They refused to indict, and it was
13 because there was a conflict of interest between the
14 foreman and the assailant.

15 That sort of speech is, as Your Honors have
16 recognized in cases like Wood v. Georgia, absolutely
17 critical. In 1962, I believe you said in Wood v. Georgia,
18 that the grand jury does not function in a vacuum. It is
19 not an isolated body, but rather an institution about
20 which people should speak and speak often.

21 QUESTION: What is it that you can't do under
22 the interpretation of the Florida statute that we now have
23 before us from your opponent, of the things you just said?

24 MR. THOMAS: I testified, Your Honor, that --
25 and identified the assailant who was. It's the

1 combination of those, Your Honor, that the state finds
2 offensive. You can release the information, the state
3 concedes that. But you just can't put the label I
4 testified on it.

5 QUESTION: We have rules of Court governing what
6 our law clerks can generally disclose, and it's darn
7 little. And there are, I suppose, professional sanctions
8 that might be imposed should a law clerk violate the
9 confidence of the Court. Now, I can't really say that
10 every single item of information that that general policy
11 of confidentiality covers would harm the Court if it were
12 disclosed, but we have a general rule. Now, I'm sure that
13 nothing very significant is withheld by that, but is it
14 your contention that we would have to justify case by case
15 every instance in which a law clerk is prohibited from
16 disclosing the confidential doings of the Court?

17 MR. THOMAS: Your Honor, as a former law clerk,
18 I know the oath. But I don't think that -- there there's
19 probably not a compelling need. This institution
20 functions in, and it functions at times in a secret sense,
21 but I don't think that the occasional leaks that occur
22 from this Court diminish the Court, just as it wouldn't
23 diminish the value of the grand jury proceeding in
24 Florida.

25 QUESTION: Oh, so you would extend the same rule

1 to here, then, I gather, that each individual restriction
2 has to be justified. We just can't have a general rule.

3 MR. THOMAS: Your Honor, I think there is a
4 problem with a general rule, and especially if it is a
5 permanent and absolute ban on speech like this one.

6 QUESTION: Well, we better be very careful then.
7 I -- I see this case in a new light.

8 MR. THOMAS: Well, Your Honor, just like --

9 QUESTION: Can grand jurors be forbidden from
10 disclosing the testimony?

11 MR. THOMAS: Your Honor, grand jurors are in a
12 totally different setting than Mr. Smith.

13 QUESTION: Why?

14 MR. THOMAS: Mr. Smith comes into this
15 proceeding having the information that is requested. The
16 grand juror comes as essentially a clean slate. The grand
17 juror is essentially the functionary of the state. He is
18 the prosecutor, as a citizen prosecutor, to decide what --
19 whether someone should be indicted.

20 QUESTION: Well, suppose your same hypothetical.
21 Somebody else on the jury says we heard this testimony and
22 they didn't indict because the foreman was a cousin of the
23 witness.

24 MR. THOMAS: Your Honor, I think --

25 QUESTION: Same horrible hypothetical.

1 MR. THOMAS: Your Honor, the sting that that has
2 is that it's someone inside the grand jury itself.

3 QUESTION: Well, doesn't that make it all the
4 more credible?

5 MR. THOMAS: Your Honor, it does, and that is
6 why this Court can restrict the First Amendment speech to
7 a grand juror to a much greater extent than it can to a
8 witness. The witness in the grand --

9 QUESTION: We restrict the most credible speech
10 and not the least credible speech? I thought it was the
11 opposite.

12 MR. THOMAS: Well, I thought the most credible
13 speech here, Your Honor, would be the witness, the victim.
14 The grand juror would be someone who would have heard
15 that. Moreover, Your Honor --

16 QUESTION: Well, we're quibbling about the
17 hypothetical. I still am not sure why it is that you draw
18 the line between the grand juror and the witness.

19 MR. THOMAS: Your Honor, I think because the
20 grand juror hears all the testimony. It hears not only
21 Mr. Smith's testimony, but hears every other witness, and
22 it deliberates on it.

23 QUESTION: So if you had three witnesses, they
24 could all testify, but not the grand juror?

25 MR. THOMAS: Yes, Your Honor. I think that the

1 grand jury and the secrecy attendant to it is the secrecy
2 of the body itself, the deliberative process, the
3 decision-making process, the voting proces, and not the
4 witnesses who come from the outside. Essentially here Mr.
5 Smith comes before this grand jury and reveals all the
6 information that he knew. He does so and provides the
7 grand jury with all that information which was essential.

8 QUESTION: And what if a reporter -- your client
9 is a reporter?

10 MR. THOMAS: Yes, Your Honor.

11 QUESTION: He gives his testimony and he -- the
12 grand jury -- the state wants to know where he got his
13 information. He says well, I have confidential
14 informants. And the issue is government corruption. And
15 he has information that he believes, he has used this
16 informant in the past and he is found to be reliable, but
17 he won't -- say who it is.

18 MR. THOMAS: Your Honors' decision I think in
19 Branzburg v. Hayes decided that question, Your Honor,
20 almost 16 years ago.

21 QUESTION: I just want to know what your -- do
22 you think the state has an interest then in not having him
23 reveal his testimony?

24 MR. THOMAS: No, Your Honor. I think the state
25 has an interest in him revealing his testimony. I think

1 that, as this Court said in Branzburg, you need every
2 man's testimony. The fact that Mr. Smith was a reporter,
3 you've gotten his testimony in this case. But now the
4 attempt to throw an enormous shroud of secrecy over that,
5 I think that's what's offensive in this case and
6 distinguishes it markedly from the situation in Branzburg.

7 If we look at the justification --

8 QUESTION: What about confidential advice to the
9 President? Suppose Congress wants to find out what one of
10 the President's closest advisors counseled him? I thought
11 there was a privilege for that. Does that privilege have
12 to be examined item of information by item of information,
13 or can you just say it's all privileged, similar to what
14 Florida has done with the grand jury testimony?

15 MR. THOMAS: Your Honor, if the person that you
16 are speaking of is a member of government and has acquired
17 information as a government employee, then I think that a
18 greater degree of breadth of secrecy could be imposed.
19 But here, when you have a citizen who has essentially
20 hailed from the street, gathered his information not in a
21 governmental or security defense environment, but just he
22 viewed something happening, or as a reporter he gathered
23 the information as any reporter would, and then to silence
24 him is the offensive part of this statute.

25 QUESTION: I agree that the interest may be

1 different, but it doesn't seem to me that we're
2 constrained by our First Amendment law to apply a piece-
3 by-piece approach as you are urging upon us. That if --
4 if the state cannot demonstrate that this particular item
5 of information would damage the grand jury, then that is
6 no good. And then we move on to the next piece of
7 information. If that wouldn't damage the grand jury then
8 that is no good. It seems to me that it's possible to
9 have a reasonable general rule.

10 MR. THOMAS: Well, Your Honor, the problem is --
11 with general rules -- is here the chilling effect is
12 substantial in its breadth. Your Honors have
13 traditionally said in First Amendment cases that there
14 needs to be a narrow tailoring. There needs to be some
15 attempt by the legislature to pick out individual items
16 which are critical to the compelling interest of the state
17 or the state's interest of the highest order. Here the
18 state makes no effort to do that, to disseminate what it
19 is that is critical to the release of grand jury
20 information. They didn't draft a statute that said you
21 shall not release the target of a grand jury investigation
22 until that person is released.

23 They attempted to silence all speech, and I
24 think that the possibilities for abuse in this area are
25 substantial, and they are particularly so not only because

1 Mr. Smith is a citizen, but because he is a reporter.
2 Certainly that distinction here is not determinative of
3 your decision. But if Mr. Smith is engaged in
4 investigative reporting, finds out all sorts of
5 information and hasn't published it, is brought before a
6 grand jury and then given, as Your Honors have said, the
7 light tap on the shoulder of the prosecutor on the way
8 out, saying don't reveal any of this information, it is
9 particularly problematic.

10 QUESTION: You don't make a distinction between
11 the reporter and the -- any other citizen, do you?

12 MR. THOMAS: No, Your Honor, the same First
13 Amendment privilege here would apply equally.

14 QUESTION: So, if your reporter finds -- knows
15 that there was a witness who testified before the grand
16 jury and he talks to him, the witness should be able to
17 tell the reporter that, without violating this statute you
18 think, that yes, I testified and here is what I said.

19 MR. THOMAS: Your Honor, I think that puts us
20 right in the middle of Landmark Communications sort of
21 territory and not in the situation that we're in now.
22 Certainly the release by the witness to another person is
23 Landmark Communications and your decisions in Daily Mail.

24 QUESTION: Is the state's interest in preventing
25 targets from becoming fugitives substantially satisfied

1 because in many cases they make the arrest before the
2 indictment, before the grand jury proceeding?

3 MR. THOMAS: Your Honor, certainly they make
4 arrest prior to the indictment, but I think this Court
5 affirmed, I think it's called Worrell Newspapers v.
6 Westhafer, you affirmed a Seventh Circuit decision,
7 although you didn't ride on it, where there was a statute
8 that permitted -- that prohibited anyone from revealing
9 the fact that a sealed indictment had been returned
10 against an individual. The state's interest there, and
11 Indiana asserted, was that until the information -- until
12 the defendant was in custody there was a problem about the
13 release of that information.

14 This Court said that publication about that was
15 offensive to the First Amendment. So, even if the state
16 interest asserted was simply an interest that you couldn't
17 speak about it until the targeted defendant was arrested
18 might not be substantial under Your Honor's previous
19 decisions.

20 QUESTION: Well, I gather then that you wouldn't
21 object to preventing your client from publishing this
22 story while the grand jury was still in session?

23 MR. THOMAS: Your Honor, I don't think I'd
24 concede that. I think the Eleventh Circuit, Judge Vance,
25 decided exactly what they needed to. We were in a

1 situation where it was after the period of time that the
2 grand jury --

3 QUESTION: Well, what is your position? Do you
4 have a position on that?

5 MR. THOMAS: Yes, Your Honor. My position is
6 that while the grand jury is going, this Court would have
7 to establish a compelling need to silence a witness, even
8 during the term of the grand jury.

9 QUESTION: What about -- what's your position
10 about your client publishing what he learned before the
11 grand jury, if he did learn anything?

12 MR. THOMAS: Your Honor, I think he should
13 certainly be able to publish what he learned. This
14 statute doesn't prohibit that, and besides that, Your
15 Honor, he is an incidental party to the grand jury. If
16 the grand jury knows that that's the rule, as I am sure
17 they do in the Federal system, they restrict their speech
18 not to reveal information which is of vital importance.

19 QUESTION: Well, he can -- after -- I take it
20 that you would say that even during -- when the grand jury
21 is still in session, if he knows who a witness is or has
22 been before the grand jury, he can talk to that witness
23 and that witness, as you say, is free to, you think, to
24 talk during -- and so your client learns that testimony
25 and he publishes it.

1 MR. THOMAS: Yes, Your Honor, and that's --

2 QUESTION: Either during the grand jury or after
3 it.

4 MR. THOMAS: Yes, Your Honor, and that's
5 certainly the way it is in the Federal system. If we look
6 for the last 44 years, since 1946, this Court and 37 other
7 states have permitted a witness to leave the grand jury
8 room and immediately essentially give a press conference
9 on the courthouse steps. Federal courts and Federal
10 prosecutors prosecute such things as RICO violations and
11 national security matters and the most egregious and
12 heinous of crimes, and they do it all with the witness
13 free to speak. The commentators, legal commentators or
14 Federal prosecutors or judiciary have made no move, and I
15 don't think there is anything pending before Your Honors
16 to --

17 QUESTION: Well, the witness might be able to do
18 that, but you wouldn't contend that the prosecutor --

19 MR. THOMAS: No, Your Honor.

20 QUESTION: -- or the reporter.

21 MR. THOMAS: No, Your Honor. As with Justice
22 Kennedy's question, those people inside the grand jury
23 room, hearing all the testimony and motivating the
24 progress of the grand jury, are in distinctly different
25 situations than the witness who comes outside and gives

1 information.

2 QUESTION: Mr. Waas, what did it mean in 1791,
3 or do you know what the common law was? Do you agree with
4 -- I'm sorry, Mr. Thomas. Do you agree with Mr. Waas as
5 to what the situation was at common law?

6 MR. THOMAS: Yes, Your Honor, I think I do.

7 QUESTION: That is, you could -- you could
8 disclose everything unless you were put under oath?

9 MR. THOMAS: Yes, Your Honor, I think that's the
10 way common law is. And I think if we look at the history,
11 the history is interesting because it does not indicate a
12 need to silence the individual citizen. The integrity and
13 secrecy of the grand jury has always been focused on the
14 deliberative process and the voting process, and not the
15 individual witness coming from the outside.

16 QUESTION: Any indication that that oath
17 survived the term of the grand jury?

18 MR. THOMAS: Your Honor, I do not know the
19 answer to that question.

20 QUESTION: May I ask you to go back to the
21 question that your opponent was asked at the beginning of
22 the argument about whether the statute applies to the
23 content of testimony when the -- when the former witness
24 doesn't say "and I so testified," but just talks. What
25 was the -- I just looked again at the district court

1 opinion, and he seems to have read the statute as
2 prohibiting disclosure of the content even if there was no
3 reference to the testimony -- the fact that it was in
4 testimony. Was that the way it was construed in the
5 district court? Because he talks about it as a severe
6 infringement on rights under the First Amendment, and that
7 is why I read it that way.

8 MR. THOMAS: It's she, Your Honor. It's Judge
9 Kovacovich in the middle district.

10 QUESTION: I see.

11 MR. THOMAS: I think the construction by the
12 district judge was very broad. It went beyond the state's
13 more limited position that's taken here.

14 QUESTION: And did the state take that position
15 in the district court, do you know?

16 MR. THOMAS: Your Honor, I'm not certain whether
17 they did or not, and I think that the state's position
18 here is refined after reading Your Honors decision in
19 Seattle Times v. Rhinehart where you unequivocally said
20 that if you gained it from some other source there is no
21 way that you could ever prohibit it.

22 QUESTION: Because even the court of appeals
23 opinion is somewhat ambiguous on that point. That's why a
24 number of us asked that very question.

25 MR. THOMAS: Yes, Your Honor, the Eleventh

1 Circuit decision is ambiguous, and I take it to mean that
2 you can simply talk about everything that happened in that
3 proceeding.

4 Your Honor, if you look, interestingly, at Rule
5 6(e), it has language which is totally different than the
6 Florida statute. It says -- it identifies all the
7 individuals and then it says "shall not disclose matters
8 occurring before the grand jury." Well, that's -- that's
9 twice, three times as broad as Florida is. Matters
10 occurring before the grand jury include questions,
11 answers, comments by grand jurors, statements by
12 prosecutors, evidence produced. It's the whole gamut.
13 And in fact what Florida has tried to do is focus
14 specifically on testimony and not that broader purview.

15 In conclusion, Your Honors, I believe only in
16 the most extraordinary circumstances should the state be
17 permitted to silence its citizens. This is particularly
18 true when the citizen is hailed from the street by
19 subpoena and forced to surrender information lawfully
20 possessed by him. The Constitution does not permit the
21 state to interrogate its unwilling witnesses and then
22 silence them. And as Justice White said in Branzburg, we
23 do not expect courts will forget the grand juries must
24 operate within the limits of the First Amendment.

25 Thank you, Your Honor.

1 QUESTION: Thank you, Mr. Thomas.

2 Mr. Waas, you have four minutes remaining.

3 REBUTTAL ARGUMENT OF GEORGE L. WAAS

4 ON BEHALF OF THE PETITIONERS

5 MR. WAAS: Thank you, Mr. Chief Justice.

6 It appears from the argument pressed by Mr.
7 Smith that there are now categories of participants, and
8 depending upon the categorization of participants,
9 different rights ought to flow. I don't read Landmark,
10 particularly the commentary in one of the early footnotes
11 that specifically identify witnesses as participants, as
12 creating a classification of participants separate and
13 apart from the others. In fact, without witnesses, I dare
14 say the other participants in the grand jury process would
15 have little if anything to do. Witnesses lie at the heart
16 of the grand jury process. And I don't believe that there
17 ought to be a categorization of witnesses, either
18 witnesses from other participants or a distinction between
19 subpoenaed witnesses and voluntarily appearing witnesses.

20 With respect to the Federal system, as was
21 pointed out earlier, even though the Federal Government
22 has made a particular policy choice, that doesn't mean
23 that that represents the most effective choice as viewed
24 from other or by other jurisdictions. There is no
25 evidence in the record that establishes that the choices

1 made by the other states and the one made by the Federal
2 Government are more effective or as effective than the
3 choice made by the State of Florida.

4 With respect to the identification of testimony,
5 once it is identified as to what testimony is revealed
6 before the grand jury, we at that point know what the
7 specifics of the investigation undertaken by the grand
8 jury are. It's no longer subject to conjecture or
9 speculation. It is subject now to public knowledge. And
10 the effect of that, the State of Florida has determined,
11 weighs more heavily with respect to preserving the
12 interest of the criminal justice system than any putative
13 First Amendment claim may weigh with respect to Mr. Smith
14 and other witnesses. And I think that --

15 QUESTION: I suppose if we said that the witness
16 can say that he appeared before the grand jury and he said
17 thus and so, there would be very little reason for Florida
18 to prohibit anybody else from saying that he appeared
19 before the grand jury and said thus and so. I mean, the
20 rest of Section 905.27 wouldn't make must sense. It says
21 a grand juror, state attorney, nobody else can disclose
22 the testimony. But if you let the witness himself go out
23 and say this is what I testified, why should you prevent
24 anybody else from --

25 MR. WAAS: Yes, Your Honor, that's my point.

1 That's my point. And that is once the door is open on a
2 First Amendment ground --

3 QUESTION: Yes, but there's a big state interest
4 in protecting the witness in many cases, and lots of times
5 a witness isn't going to tell. And if you put the
6 prohibition on everybody else, that protects the witness.
7 Just because the witness decides to open the door doesn't
8 mean you ought to let everybody else open the door.

9 MR. WAAS: That may be true, except that in the
10 First Amendment context it is not so much who is doing the
11 disclosure, but what is disclosed. That's --

12 QUESTION: Well, certainly it is, because if the
13 witness fears for his life, he is not going to disclose.
14 And the only way to protect that is to say nobody else can
15 disclose.

16 MR. WAAS: That is correct. But if that
17 witness' name happens to be uttered by a member of the
18 grand jury, and the reporter witness --

19 QUESTION: But nobody is questioning the
20 validity of the statute as applied to grand jurors, court
21 reporters, stenographers, everyone else. The only
22 question is whether a witness can take this risk if he
23 wants to.

24 MR. WAAS: That's correct. That's the issue
25 here.

1 QUESTION: What will happen if grand jury, five
2 years later, calls this man. Can he testify? Is he bound
3 by the statute?

4 MR. WAAS: If, five years later, he is called to
5 testify, he would not be able to disclose the fact that he
6 testified before the grand jury with respect to the
7 testimony that he imparts to the grand jury.

8 QUESTION: Isn't that rather silly?

9 (Laughter.)

10 MR. WAAS: Well, Your Honor, if you're looking
11 at a time constraint --

12 QUESTION: (Inaudible).

13 MR. WAAS: Thank you, Your Honor.

14 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Waas.

15 The case is submitted.

16 (Whereupon, at 2:42 p.m., the case in the above-
17 entitled matter was submitted.)

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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

No. 88-1993 - ROBERT A. BUTTERWORTH, JR., ATTORNEY GENERAL OF FLORIDA,
ET AL., Petitioners V. MICHAEL SMITH

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