



U.S. Department of Justice

United States Attorney
District of Massachusetts

1003 J.W. McCormack Post Office and Courthouse
Boston, Massachusetts 02109

December 16, 1996

FILED UNDER SEAL

Honorable Rya W. Zobel
U.S. District Judge
U.S. District Court
J.W. McCormack POCH
Boston, MA 02109

Re: United States v. Alfred W. Trenkler, Cr. 92-10369-Z
(Allegation of Possible Misconduct on Part of Alternate Juror)

Dear Judge Zobel:

As the government previously advised the Court, an individual named Donna Shea (a former associate of defendant Alfred Trenkler) contacted the government in recent months and alleged, implicitly, that a Trenkler trial juror failed on voir dire to disclose prior, out of court contact with Trenkler. The government notified Trenkler's counsel of this, completed interviews on the matter (the juror in question was purposely left alone), and notified the Court of the foregoing by letter dated November 1, 1996. That letter went on to advise the court that -- even accepting Shea's allegations regarding out of court contact at face value -- the juror in question was determined to have been an alternate juror, who was excused after jury charge and thus played no part in deliberations or in returning the Trenkler verdict. Because that circumstance conclusively precludes any showing of actual prejudice or bias to Trenkler, the government ultimately advised the Court that no further action on the matter was either necessary or warranted.

Defendant thereafter filed a Motion for Judicial Inquiry ("Motion"), stacking speculation (that the alternate juror may have known Defendant) upon conjecture (that the alternate juror may have "communicated that fact (and possibly other information) to the deliberating jurors"). (Motion, at 8). The Motion then tells the Court that it "must conduct" an inquiry to determine whether the alternate juror failed to disclose "that she knew Trenkler" and "whether that extraneous information affected the

deliberating jurors...." (Motion, at 11).¹

Defendant's characterization of the record notwithstanding, there is no allegation in this case of any extraneous influence (such as contact with a party; a bribe; newspaper articles, or other writings bearing upon the case but not introduced in evidence) which may be deemed to have prejudiced the jury.² Indeed, there is no direct allegation that the alternate juror actually knew Defendant, pre-trial. Rather, there is simply a claim from a single source -- Donna Shea -- that Defendant and Ms. Walsh were together in the same room on one or more occasions in the early 1980's, when Defendant sold cocaine to one Nancy Tolmie/Russell, then a friend of Ms. Walsh's. As the record of investigation provided the Court and counsel plainly reflects, Tolmie/Russell flatly denies Shea's claim; moreover, when first questioned on the matter, Shea stated that she had "no memory" of Ms. Walsh having been present during and Trenkler-Tolmie/Russell visit.

At bottom, and as will be shown below, the sole factual claim in this matter -- hamstrung in any case by contradictions and denials -- deals solely with one who played no role in the outcome of Defendant's (meticulously fair) trial. For this reason, it falls far short of the threshold showing which must be met before any juror may be disturbed through post-verdict interrogation.

Legal Discussion/Government's Position

Under First Circuit law, "the burden is on a defendant to provide at least a modicum of evidence sufficient to warrant an intrusion into the sphere of jury privacy." Neron v. Tierney, 841 F.2d 1197, 1205 (1st Cir. 1988). While granting a post-verdict hearing remains within the sound discretion of the court, such an extraordinary request "presumes a showing sufficient to undergird genuine doubts about impartiality." Id. at 1202.³ More

¹ Rule 606(b) of the Federal Rules of Evidence -- restated within Defendant's Motion (at n. 5, p. 7) -- explicitly forbids any examination of a trial juror's deliberative process.

² These cases involve what the Supreme Court has characterized as "presumptively prejudicial datum." See Remmer v. United States, 347 U.S. 227, 229 (1954).

³ The Eleventh Circuit recently restated the threshold test for post-verdict hearing as follows:

No per se rule requires the trial court to investigate
(continued...)

particularly, the First Circuit has restated the balance to be struck by trial courts in ruling upon such a motion as follows:

We have found no case which purports to lay down an ironclad rule necessitating post-trial interrogation upon demand of every juror in every circumstance. The Constitution, as we read it, imposes no such across the board requirement.... There are at one extreme situations where the evidence shows the well to be so heavily poisoned that the inference of taint is inescapable; in such straitened circumstances, interrogating the juror would be an exercise in superfluity. On the other hand, there are situations where the evidence of impropriety may be so slight or conjectural as not to support any reasonable inference of prejudice bias or misconduct. At this extremity, as at the other, interviewing the juror will not significantly decrease the risk of error.

...

At the termini, ..., the presumptive value [of direct juror inquiry] is low. The need for post-verdict interviewing is dubious at best, and ultimately depends on the nature and weight of the independent evidence underbracing the claim and on the trial justice's sound discretion.

Neron v. Tierney, supra, 841 F.2d at 1202-03 (emphasis supplied).

The public's interests in avoidance of juror harassment and finality of verdicts militate heavily against post-verdict interrogation of jurors and may be deemed outweighed only in the most limited circumstances. In a recent Third Circuit case,

³(...continued)

the internal workings of the jury whenever a defendant asserts juror misconduct... "The duty to investigate arises only when the party alleging misconduct makes an adequate showing of extrinsic influence to overcome the presumption of jury impartiality." (citation omitted). To justify a post-trial hearing involving the trial jurors, the defendant must do more than speculate; he must show "clear, strong substantial and incontrovertible evidence... that a specific, nonspeculative impropriety has occurred."

United States v. Cuthel, 903 F.2d 1381, 1383 (11th Cir. 1990) (emphasis supplied; copy attached) (district court's denial of post-verdict interrogation of juror upheld).

upholding the district court's denial of request for a hearing such as that sought here, the appeals court:

recognize[d] that sometimes judges are tempted to order hearings to put matters to rest even if strictly not required...But this is not one of those circumstances for there are compelling reasons not to hold a hearing involving the recalling of discharged jurors.

United States v. Gilsonan, 949 F.2d 90, 97 (3d Cir. 1991) (emphasis supplied; copy attached). The trial jurors in Gilsonan, a RICO case, had been said to have been exposed to information about failed plea discussions involving one of the defendants. The district court denied the request for a hearing; in affirming that decision, the Third Circuit ruled as follows:

Jurors who complete their service should rarely, if at all, be recalled for proceedings such as those appellants propose here. It is qualitatively a different thing to conduct a voir dire during an ongoing proceeding at which the jury is part of the adjudicative process than to recall a jury months or years later for that purpose. It is useful in the regard to recall the following germane words of the Supreme Court:

There is little doubt that post-verdict investigation into juror misconduct would in some instances lead to the invalidation of verdicts reached after irresponsible or improper juror behavior. It is not at all clear, however, that the jury system could survive such efforts to perfect it. Allegations of juror misconduct, incompetency, or inattentiveness, raised for the first time days, weeks, or months after the verdict, seriously disrupt the finality of the process.

United States v. Gilsonan, supra, 949 F.2d at 98, quoting Tanner v. United States, 483 U.S. 107, 120 (1987).


The corresponding interests in avoidance of juror harassment and certainty of verdicts, voiced by the U.S. Supreme Court in Tanner, obtain equally in our circumstances and compel the same result. As the First Circuit reasoned in Neron, "the evidence of impropriety" here is "so ... conjectural as not to support any reasonable inference of prejudice bias or misconduct." The government respectfully submits that, in these circumstances and for the reasons set forth within its original filing of November 1st and above, no action on the part of the Court, either in the

form of evidentiary hearing or otherwise, is necessary or warranted.

Respectfully submitted,

DONALD K. STERN
United States Attorney

By:


FRANK A. LIBBY, JR.
Assistant U.S. Attorney

cc: Attorney Amy Axelrod

UNITED STATES of America, Plaintiff-
Appellee,

v.

William James CUTHEL, Dade Frank Sokoloff,
Wilbur Harwood Hoover, Jay William
Marden, Defendants-Appellants.

No. 88-5625.

United States Court of Appeals,
Eleventh Circuit.

June 22, 1990.

Defendants were convicted in the United States District Court for the Southern District of Florida, No. 87-0741-CR-SM, Stanley Marcus, J., of violations of federal narcotics laws. The Court of Appeals, Edmondson, Circuit Judge, held that: (1) defendants were not entitled to hearing to impeach verdict, and (2) defendants were not entitled to grant of use immunity for defense witness who had claimed privilege against self-incrimination.

Affirmed.

[1] CRIMINAL LAW ⇔ 868
110k868

District court has discretion to determine whether evidence of premature jury deliberation warrants evidentiary hearing. Fed.Rules Evid.Rule 606(b), 28 U.S.C.A.; U.S.Dist.Ct.Rules S.D.Fla., General Rule 16, subd. E.

[2] CRIMINAL LAW ⇔ 959
110k959

Anonymous telephone call by possible juror stating that jury was pressured into making decision and alternate juror's letter suggesting the juror reached personal conclusions prior to close of trial did not entitle defendant to hearing to impeach verdict; telephone caller suggested normal dynamic of jury deliberations; and letter concerned counsel's style and was written two days after verdict. Fed.Rules Evid.Rule 606(b), 28 U.S.C.A.; U.S.Dist.Ct.Rules S.D.Fla., General Rule 16, subd. E.

[3] CRIMINAL LAW ⇔ 957(1)
110k957(1)

District court may not question jurors to impeach verdict, even where inquiry concerns misconduct

prior to deliberations. Fed.Rules Evid.Rule 606(b), 28 U.S.C.A.; U.S.Dist.Ct.Rules S.D.Fla., General Rule 16, subd. E.

[4] CRIMINAL LAW ⇔ 957(1)
110k957(1)

Alternate juror was not "outsider" for purposes of rule on impeachment of verdict; alternate could not have been "outsider" until start of deliberations, and after deliberations started, alternate was separated from jury. Fed.Rules Evid.Rule 606(b), 28 U.S.C.A.

See publication Words and Phrases for other judicial constructions and definitions.

[5] WITNESSES ⇔ 297(13.1) -
410k297(13.1)

Formerly 410k297(13)

Witness may invoke privilege against self-incrimination when witness reasonably apprehends risk of self-incrimination, though no criminal charges are pending and even if risk of prosecution is remote. U.S.C.A. Const.Amend. 5.

[6] WITNESSES ⇔ 304(4)
410k304(4)

District court could not grant use immunity to defense witness merely on ground that witness possessed essential, exculpatory information not available from other sources. U.S.C.A. Const.Amend. 5.

[7] WITNESSES ⇔ 304(4)
410k304(4)

Defendants were not entitled to grant of use immunity for defense witness who allegedly had made exculpatory statements about two of the defendants, where two defendants could have testified to information that defendants sought to obtain from witness. U.S.C.A. Const.Amend. 5.

*1381 Steven E. Kreisberg, Coconut Grove, Fla., for Cuthel.

Joel Kaplan, Miami, Fla., for Sokoloff.

Jay R. Moskowitz, Sands & Moskowitz, Coconut Grove, Fla., for Marden.

Lawrence Besser, Miami, Fla., for Hoover.

*1382 Myles H. Malman, Carol Herman, Linda C. Hertz, Sonia E. O'Donnell, Asst. U.S. Attys., Miami, Fla., for plaintiff-appellee.

Appeal from the United States District Court for the Southern District of Florida.

Before FAY and EDMONDSON, Circuit Judges, and YOUNG [FN*], Senior District Judge.

FN* Honorable George C. Young, Senior U.S. District Judge for the Middle District of Florida, sitting by designation.

EDMONDSON, Circuit Judge:

Appellants Sokoloff, Hoover, Marden and Cuthel appeal their convictions for violations of the federal narcotics laws. Appellants claim reversible error from (1) the failure of the district judge to conduct a post-verdict investigation of alleged jury misconduct; (2) alleged prosecutorial misconduct regarding a potentially exculpatory witness's invocation of the fifth amendment; (3) allegedly prejudicial opening remarks of the prosecutor; and (4) allegedly improper wording of the jury instruction on the elements of conspiracy. We find no merit to these claims and affirm the convictions. [FN1] We discuss two of the contentions in some detail.

FN1. We conclude that the remarks in the prosecutor's opening statement were not unduly prejudicial or inflammatory. About the jury instruction, we conclude that the subject of the requested charge was substantially covered by other instructions delivered.

1.

Several days after the jury returned a verdict, Marden moved the trial court to interview the jurors. The motion was prompted by an anonymous telephone call allegedly received by Marden the day after the verdict was rendered. A woman, possibly a juror, reportedly stated that "we were pressured into making our decision" and that she wanted to let Marden know that she was sorry. Marden later supplemented this motion with evidence of a letter sent to the prosecutor after the trial by an alternate juror; in this letter the alternate juror expressed her views of the trial, the lawyers and the defendants

(See Appendix). Marden, joined by the other appellants, contended that the letter indicated that the jurors considered the merits of the case before they were instructed to begin deliberations.

The government opposed Marden's motion, citing the "good cause" requirement for interviewing jurors under Local Rule 16 E of the Southern District of Florida [FN2] and Fed.R.Evid. 606(b), which prohibits post-verdict inquiry into juror deliberations. Following a hearing, the district court denied Marden's motion, reasoning that the letter and anonymous phone call "provided no colorable showing that any external influence had affected the jury's verdict," that Rule 606(b) precluded "any inquiry for the purpose of uncovering the internal deliberative process," and that Marden's motion failed to demonstrate good cause under the Local Rule. *United States v. Sokoloff*, 696 F.Supp. 1451, 1458 (S.D.Fla.1988).

FN2. Local Rule 16 E of the Southern District of Florida provides for jury polling "after the jury has been discharged, upon application in writing and for good cause shown, ... to determine whether the verdict is subject to legal challenge."

[1] The district court has discretion to determine whether evidence of premature deliberation warrants an evidentiary hearing. See *United States v. Chiantese*, 582 F.2d 974, 978-80 (5th Cir.1978); accord *United States v. Yonn*, 702 F.2d 1341, 1345 (11th Cir.1983) (discretion extends to initial decision whether to interrogate jurors); *United States v. Edwards*, 696 F.2d 1277, 1282 (11th Cir.1983) (decision within "sound discretion of trial judge especially when the alleged prejudice results from statements made by jurors themselves, and not from media publicity or other outside influences"); *Grooms v. Wainwright*, 610 F.2d 344, 347 (5th Cir.1980) (same). We therefore review the trial court's decision not to hold an evidentiary hearing for abuse of discretion. *Chiantese*, 582 F.2d at 978.

[2] No per se rule requires the trial court to investigate the internal workings *1383 of the jury whenever a defendant asserts juror misconduct. *United States v. Barshov*, 733 F.2d 842, 851 (11th Cir.1984). "The duty to investigate arises only when the party alleging misconduct makes an adequate showing of extrinsic influence to overcome the presumption of jury impartiality." *Id.* (citation

omitted). To justify a post-trial hearing involving the trial's jurors, the defendant must do more than speculate; he must show "clear, strong, substantial and incontrovertible evidence ... that a specific, nonspeculative impropriety has occurred." *United States v. Ianniello*, 866 F.2d 540, 543 (2d Cir.1989) (quoting *United States v. Moon*, 718 F.2d 1210, 1234 (2d Cir.1983)). "The more speculative or unsubstantiated the allegation of misconduct, the less the burden to investigate." *United States v. Caldwell*, 776 F.2d 989, 998 (11th Cir.1985). We agree with the district court that the letter and the alleged phone call failed to show that the integrity of the trial process was impugned. There was no abuse of discretion. [FN3] See *Barshov*, 733 F.2d at 852.

FN3. *United States v. Heller*, 785 F.2d 1524 (11th Cir.1986), is distinguishable on its facts and, therefore, does not control this case. Not only did *Heller* involve racial and religious slurs not at issue here, but, more important, that case involved a challenge to the jury's integrity made before the jury returned a verdict.

[3] Largely for reasons of finality in litigation, the district court may not question the jurors after the verdict is rendered, thereby impeaching the verdict. See *Tanner v. United States*, 483 U.S. 107, 120-21, 107 S.Ct. 2739, 2747-48, 97 L.Ed.2d 90 (1987). This is so even where the inquiry concerns misconduct prior to the deliberations. *Id.* There are two exceptions: jurors may testify to extraneous information brought to their attention and to outside influences brought to bear upon a juror. Fed.R.Evid. 606(b); *United States v. Badolato*, 710 F.2d 1509, 1515 (11th Cir.1983). But here there was no allegation of extraneous prejudicial information being brought to the jury's attention; nor was there evidence of improper outside influence sufficient to warrant an inquiry. The anonymous allegation that "we [the jurors] were pressured into making our decision" can suggest the normal dynamic of jury deliberations, with the intense pressure often required to reach a unanimous decision.

[4] Even assuming that Rule 606(b)'s shield does not apply to alternate jurors, the decision of the trial judge not to question the alternate juror was no abuse of discretion on these facts. We reject appellant's characterization of the alternate juror as an outsider who influenced the jury: it is impossible

for the alternate to have been an "outsider" until the deliberations started; and, after deliberations did start, the alternate was separated from the rest of the jury.

The letter fails to state that the jury deliberated prematurely. At most, the letter suggests that the alternate juror reached personal conclusions prior to the close of trial. Any pre-verdict discussions reflected in the letter were on counsel's style and not on the merits. Moreover, the letter was written two days after the verdict was rendered and might discuss remarks made in a post-verdict meeting, or in telephone conversations, of jurors and alternates.

Furthermore, the district court's finding, especially in the light of the jury's split verdicts (defendants were acquitted on some counts and convicted of others), of ample evidence that the jury reached a reasoned conclusion free of undue influence and did not decide the case before the close of evidence was not clearly erroneous.

2.

Randy Fink was the leader of a drug-smuggling organization. Following his arrest, Fink cooperated fully by giving testimony implicating other defendants. Later, Fink changed his story by making statements that tended to exculpate both Sokoloff and Hoover.

At trial, defendants called Fink as a defense witness. Upon advice of counsel, Fink asserted his fifth amendment right against self-incrimination to almost every *1384 question put to him. The district court then rejected a proffer of Fink's out-of-court exculpatory statements as admissions against penal interest under Fed.R.Evid. 804(b)(3) on the ground that the statements were not sufficiently trustworthy in the light of Fink's pattern of materially inconsistent statements.

[5] Considering Fink's contradictory prior statements given to federal agents, the trial court found that Fink had a realistic fear of potential perjury charges, which provided a sufficient basis for invoking the fifth amendment. See *United States v. Fortin*, 685 F.2d 1297, 1298 (11th Cir.1982) (testimony could have been used "in aid of" potential perjury charges); 18 U.S.C. § 1001 (witness may be prosecuted for giving false

information to federal agent). A witness may properly invoke the privilege when he "reasonably apprehends a risk of self-incrimination, ... though no criminal charges are pending against him ... and even if the risk of prosecution is remote." In re Corrugated Container Anti-Trust Litigation, 620 F.2d 1086, 1091 (5th Cir.1980). While there is arguably a conflict between a witness's fifth amendment privilege and a defendant's sixth amendment right to compulsory process, such conflict long ago was resolved in favor of the witness's right to silence. *Alford v. United States*, 282 U.S. 687, 694, 51 S.Ct. 218, 220, 75 L.Ed. 624 (1931).

[6][7] Defendants would have had the trial court compel Fink's testimony with a grant of use immunity, but "[d]istrict courts may not grant immunity to a defense witness merely because that witness possesses essential exculpatory information unavailable from other sources." *United States v. Gottesman*, 724 F.2d 1517, 1524 (11th Cir.1984). Furthermore, the exculpatory information in Fink's testimony was arguably available from other sources, namely the two defendants who could have testified. We find no error in the handling of Fink's refusal to testify.

AFFIRMED.

APPENDIX

April 11, 1988

[Name and Address deleted]

Mr. Myles Malman

c/o U.S. Attorney's Office

155 S. Miami Ave

Miami, Fl

Dear Mr. Malman,

Congratulations [sic] on winning most of the cases against the Fink Organization. It was an interesting trial for us, the Jury. We made a few observations & had a few questions about the trial. I wanted to share them with you.

First of all, we saw through most of the Defense attorneys & how they tried to pull our attention away from the facts by putting up smoke-screens or attacking you personally. That was very regrettable. We were impressed with the professionalism in which you conducted yourself & the trial. The phrase everyone kept repeating was that you were "Sharp as a tack". Your presentation of the facts, in my opinion, got you your convictions. The facts alone were not sufficient but with the way in which you laid them out before us, gave us a better understanding of the case. I just can't impress upon you how impressed we were with your presentation of the case. Not one juror said otherwise. We were all in agreement on this.

Second, I wondered why Soccaloff [sic] had only 2 counts against him? In my opinion [sic] he should have had the book thrown at him. I felt that he was the guiltyest [sic] of all. Of course, I wasn't in on the deliberations so my knowledge is lacking. I think if he had had all 4 counts against him he would have been found guilty on all 4.

Third, we were wondering what became of Claudia Rodriguez?

Fourth, & this doesn't pertain to the trial at all but I wanted to let you know that we, the jury, was [sic] also impressed by the suits & ties you wore & those Argyle socks too.

When things became dull or we were trying to keep from falling asleep after sitting for so long, we noticed things like *1385 that. It all started off that first day by us remarking in a laughing manner about how bright yellow it was. As the days went by & you continued to wear sharp suits & bright ties, we starting [sic] remarking about it. There was only one negative remark & it was that you should use wooden hangers to hang your slacks over so as to prevent the crease across your knee.

Once again, congratulations [sic] to you & Mr. Bentley too.

Sincerely--Juror # 13

[Name deleted]

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UNITED STATES of America
v.
Thomas GILSENAN and Ralph Cicalese,
Appellants.

Nos. 91-5166, 91-5167.

United States Court of Appeals,
Third Circuit.

Argued Sept. 5, 1991.

Decided Nov. 15, 1991.

Rehearing Denied Dec. 24, 1991.

Defendants were convicted of numerous Racketeer Influenced and Corrupt Organizations Act and Hobbs Act violations after District Court rejected plea agreement proposed by Government. Defendants' subsequent motions for new trial based on exposure of jurors to failed plea negotiations was denied by the United States District Court for the District of New Jersey, Maryanne Trump Barry, J. Defendants appealed. The Court of Appeals, Greenberg, Circuit Judge, held that: (1) media coverage of failed plea agreement could not have prejudiced defendants; (2) jury was not influenced by plea agreement information; and (3) request for evidentiary hearing was properly refused.

Affirmed.

Stapleton, Circuit Judge, dissented with opinion.

[1] CRIMINAL LAW ⇔ 1156(5)
110k1156(5)

Court of Appeals reviews district court's order, which denies new trial based on alleged prejudicial information, for abuse of discretion by considering probable effect of allegedly prejudicial information on hypothetical average juror.

[2] CRIMINAL LAW ⇔ 1174(2)
110k1174(2)

Any error if jurors learned of media coverage of rejected plea agreement in RICO and Hobbs Act prosecution was harmless where media accounts made it appear that Government's case was extremely weak, Government made plea proposal and indicated that it wished to dispose of cases quietly, that trial court was not pleased with

Government, and media coverage occurred at time when trial court was cautioning jury to decide case based on in-court presentations. 18 U.S.C.A. §§ 1951, 1961 et seq.

[3] CRIMINAL LAW ⇔ 1174(2)
110k1174(2)

Any juror exposure to media coverage of rejected plea agreement in RICO and Hobbs Act prosecution could not have prejudicial impact on verdict where allegedly prejudicial information was received at beginning of trial and was followed by massive evidence delivered over six-week period, jury deliberated for one week and delivered fractured verdict, and jury was instructed to decide case on basis only of evidence and not extrinsic information. 18 U.S.C.A. §§ 1951, 1961 et seq.

[4] CRIMINAL LAW ⇔ 1144.15
110k1144.15

Jury is presumed to follow instruction that it is to decide case based only on evidence and not extrinsic information.

[5] CRIMINAL LAW ⇔ 868
110k868

Refusal to conduct evidentiary hearing to determine extent to which jurors were exposed to media coverage of rejected plea agreement in RICO and Hobbs Act prosecution was not abuse of discretion where district court assumed that defendants could substantiate allegations that jury was exposed to plea proposal information when it decided motion for new trial and court could not ask jury effect of information on its verdict directly. Fed. Rules Evid. Rule 606(b), 28 U.S.C.A.; 18 U.S.C.A. §§ 1951, 1961 et seq.

*91 Peter W. Till (argued), Goldstein, Till, Lite & Reiken, Newark, N.J., for appellant Gilsenan.

Michael Critchley (argued), West Orange, N.J., for appellant Cicalese.

Michael Chertoff, U.S. Atty., Edna B. Axelrod, Asst. U.S. Atty., Eric L. Muller (argued), Asst. U.S. Atty., Newark, N.J., for appellee.

Before STAPLETON, GREENBERG, and ALDISERT, Circuit Judges.

OPINION OF THE COURT

GREENBERG, Circuit Judge.

BACKGROUND

This criminal case is before this court on appeal from an order entered on February 21, 1991, denying new trials. In 1988 the appellants Ralph Cicalese and Thomas Gilsean, law enforcement officers employed by the prosecutor of Essex County, New Jersey, were charged in a 41-count indictment with numerous offenses including ones arising under the Racketeer Influenced and Corrupt Organizations Act (RICO) and the Hobbs Act arising from *92 narcotics corruption. The appellants pleaded not guilty and a jury trial was to begin on October 3, 1989.

However, by October 2, 1989, the appellants and the government reached a tentative plea agreement on which a hearing was scheduled on that day. The appellants requested that these proceedings be held in camera as they were concerned that the plea agreement might be rejected and that the resulting publicity could prejudice them in jury selection. The district court denied the motion and the plea agreement was then recited in open court. The agreement provided that the appellants would plead guilty to a one-count information charging them with conspiracy to violate the Hobbs Act but that neither would be incarcerated. Instead, each would be placed on probation for five years and would agree not to seek reinstatement of his employment with the Essex County Prosecutor. Inasmuch as the agreement provided for a specific sentence, it was subject to district court approval pursuant to Fed.R.Crim.P. 11(e)(1)(C) and Fed.R.Crim.P. 11(e)(2).

After the terms of the agreement were stated, the court asked why a noncustodial disposition was appropriate. The assistant United States attorney explained that the plea would demonstrate the appellants' guilt and would remove them as law enforcement officers, results more significant than the imposition of punishment. The government then acknowledged that its case was difficult "in terms of proof." Ultimately the district court rejected the agreement as it regarded the proposed punishment as insufficient.

As the appellants contemplated, there was considerable publicity regarding the plea agreement. The Star-Ledger, said to be the New Jersey newspaper with the greatest circulation, ran an article on October 3, 1989, indicating that the district court rejected the agreement declaring it would not violate its principles and roll over and play dead. The article said that the authorities tried "to quietly dispose of a much-heralded police drug corruption case by offering guarantees of freedom to two accused lawmen in exchange for their guilty pleas." It further recited that the court noted that the government lacked confidence in its case and that one of the defense attorneys said the case was an "institutional embarrassment" and that the government "had proposed the plea deal in a desperate effort to save face." The article then quoted the appellants' attack on the government's case and indicated that they insisted they were innocent. The article referred to the plea as a "surprise government proposal" and stated that the appellants' attorneys said they only "agreed to consider the proposal" because it was an "irresistible temptation" to do so as the appellants were facing 50-year terms regardless of whether or not they were innocent. Remarkably, the article never said that the appellants agreed to accept the proposal, though that inference can be drawn from it.

On October 4, 1989, there was a similar article in the Star-Ledger. The article stated once again that the "federal authorities had attempted to quietly dispose of the case by offering to guarantee the defendants probation in exchange for guilty pleas, but the deal was angrily rejected by" the district court. The thrust of this article, as had been that of the day earlier, was that the government's case was weak and the appellants were maintaining their innocence.

There was other publicity regarding the proposed agreement. The Associated Press distributed an article, which was apparently run in at least one newspaper on October 3, 1989, along the same lines as that in the Star-Ledger. It referred to the government having made a "plea proposal" and said that the assistant United States attorney "conceded that the case was a tough one for the government." It also appears that there was television coverage of the plea proceedings but the record does not reveal its content.

The jury was selected on October 3, 1989, a process that seems to have caused the court no particular difficulty. Some jurors who had read about the plea agreement were excused and ultimately 16 jurors, including Patricia Spraguer, were selected. *93 Spraguer, however, was excused after several weeks of service during the trial. As might be expected, the court instructed the jury not to read or listen to anything about the case other than what was presented in court. The trial was lengthy as evidence was given on 24 days over a six-week period. On December 8, 1989, after a week of deliberations, the jury convicted Gilsenan on 13 counts and acquitted him on 11, and convicted Cicalese on 15 counts and acquitted him on six. [FN1] Following the denial of motions for a new trial and the imposition of long terms of incarceration, the appellants filed direct appeals but we affirmed their convictions by judgment orders without opinion.

FN1. There seems to be some confusion in the record with respect to count 41, a charge against Gilsenan for obstruction of justice. According to the docket sheets he was found not guilty on this count but the judgment of conviction recites that he was found guilty on it. Our division of 13 convictions and 11 acquittals treats the judgment as correct. If the docket sheets are correct the division is 12 and 12, a difference having no significance on this appeal.

The appeals now before us were directly triggered by a letter dated November 7, 1990, from Richard A. Rosen, a professor of law at the University of North Carolina, to Cicalese's attorney, enclosing an affidavit of Patricia Spraguer dated November 6, 1990. In her affidavit Spraguer explained that she was then a law student at the University of North Carolina and in the course of a criminal law class realized "that something that happened during the trial may be a significant error." [FN2] She said that on what she remembered as the second day of the trial several members of the jury were aware that there had been a plea offer the night before and that this development was discussed in the jury room. She said that someone said "[t]hey had offered to settle, but the judge said no because no time would be served." She then said that the matter had been on television and she believed that several jurors may have seen the report on television or read about it in the newspaper. She attributed the words

regarding the settlement offer to a juror named "George." She also indicated that when the jury was asked by the court that day or the next whether it knew anything that would affect its opinion she said nothing because she honestly felt that what she had heard would not affect her decision.

FN2. While the record is not clear on the point, we infer that Spraguer became a law student after her jury service in this case.

Armed with Spraguer's affidavit, Cicalese and Gilsenan moved directly for new trials pursuant to Fed.R.Crim.P. 33 and, alternatively, asked for a hearing on the application in the expectation that they could develop evidence which would be the basis for a new trial. In addition to supplying Rosen's letter and Spraguer's affidavit, Cicalese's attorney filed an affidavit indicating that Rosen had brought the jury matter to his attention by a telephone call to him on October 25, 1990. He said that he discussed the matter with Gilsenan's trial attorney and they asked Rosen to prepare the affidavit. [FN3] He also indicated that they were able to verify the affidavit to the extent of determining that there had been a juror named "George" on the jury. Cicalese's attorney attached the Star-Ledger articles to his motion.

FN3. Gilsenan has been represented by a different attorney on this appeal.

The district court denied the motions for a new trial on February 11, 1991, in an opinion from the bench. The court pointed out that Spraguer's affidavit was vague and in some respects was inaccurate. The court then indicated that on October 3, 1989, because of the initial Star-Ledger article, it asked the jury array whether anyone had heard or read about the case. Six persons responded affirmatively but two were not excused as they were "utterly vague" about what they heard or read though the other four were excused. After lunch the jurors were again asked whether they had read about the case and none responded. The jurors were qualified in groups and as the members of each group were asked if there was any reason they could not be fair there was no response. *94 [FN4] The jurors were instructed not to read about the case or listen to radio or watch television accounts regarding it.

FN4. Of course, a failure to respond meant that a juror had nothing to bring to the court's attention.

In its opinion the court then said that notwithstanding the inconsistent and inaccurate statements in Spraguer's affidavit it would view the matter from "the most favorable scenario" for the appellants that:

at least several sitting jurors were aware that there had been a plea offer which I had rejected and the matter was discussed in the presence of all the sitting jurors with the words Miss Spraguer remembers being "They offered to settle, but the judge said no because no time would be served." App. at 221.

The court also said it would assume that the Star-Ledger articles were the source of the awareness of the jurors as the appellants pressed the articles on it.

The court nevertheless ruled that the appellants were not entitled to a hearing or a new trial. It indicated, citing *Government of Virgin Islands v. Dowling*, 814 F.2d 134, 139 (3d Cir.1987); *United States v. Vento*, 533 F.2d 838, 869 (3d Cir.1976); and *United States v. DiNorscio*, 661 F.Supp. 1041, 1042-43 (D.N.J.1987), *aff'd sub nom. United States v. DiPasquale*, 864 F.2d 271 (3d Cir.1988), [FN5] cert. denied, 492 U.S. 906, 109 S.Ct. 3216, 106 L.Ed.2d 566 (1989), "that [the] information not only did not prejudice the defendants but did not even have the potential for prejudice." It said that each case involving an application of the kind presented was *sui generis*, *DiNorscio*, 661 F.Supp. at 1043. It pointed out that the thrust of the Star-Ledger articles was that the government's case was weak and the court was perturbed that the government brought it. It then indicated that even if there had been some prejudice from the article of October 3, 1989, it was clearly dissipated as there was no allegation that the jurors discussed it after the time mentioned in Spraguer's affidavit. Furthermore, the lack of prejudice was demonstrated by the circumstance that the jury verdict was not returned until after seven days of deliberations on December 8, 1989, and included acquittals on many counts.

FN5. In this opinion we refer to the district court's opinion in *DiNorscio* several times on the issue of jury prejudice. On the appeal in *DiNorscio* we affirmed without discussion of the district court's

reported opinion as we found the appellants' contentions on the point to be plainly without merit. 864 F.2d at 273 n. 1.

The court then indicated, citing *Dowling*, 814 F.2d at 139, that "not every exposure to extra-record information about the case will require a new trial" and that the district court is in the best position to determine "what a given situation requires." *Id.* at 137. The court determined that in this case nothing was required and that "even assuming that at a hearing Miss Spraguer's averments were tested under oath and found to be true, a finding I have assumed, a new trial would not be warranted." On February 21, 1991, the court entered the order denying a new trial and this appeal followed.

The appellants take two positions on this appeal. First, they contend that the district court abused its discretion in denying the motion for a new trial because there was a reasonable possibility that the un rebutted information in Spraguer's affidavit prejudiced them by affecting the jury's verdict by enhancing the possibility of convictions. Second, they contend that assuming that presumptively prejudicial extraneous information concerning the plea proceeding was presented to the jury, the district court abused its discretion when it refused to conduct an evidentiary hearing to determine the precise nature, quality and extent of the jury breach.

ANALYSIS

Preliminarily in considering the merits of the appeal it is important to recognize that there are two general sources from which the jurors or some of them could have obtained information regarding the plea negotiations. One source was from the media publicity and the other was from another *95 juror. [FN6] There is nothing in the record which suggests that any juror heard of the negotiations from any other source and the appellants do not claim that any did. It is also important that we recognize that the request for a hearing raises significant considerations not present in the direct request for the new trial as a meaningful hearing would require that jurors be questioned, a delicate matter indeed. See *McDonald v. Pless*, 238 U.S. 264, 267-68, 35 S.Ct. 783, 784, 59 L.Ed. 1300 (1915).

FN6. The district court indicated that it would assume that the jurors became aware of the information from the Star-Ledger. While the record does not justify this assumption we see no reason to remand the matter for reconsideration for in fact the district court recognized that some jurors may have obtained their information from the discussion among the jurors and there is nothing in the record to support a conclusion that the nature of the other media reporting was different from that in the Star-Ledger.

The motion for a new trial

[1] We deal first with the denial of the motion for a new trial. As the appellants acknowledge, we review the district court's order on this point to determine if it abused its discretion. *Government of the Virgin Islands v. Lima*, 774 F.2d 1245, 1250 (3d Cir.1985). Thus, we must determine if on the record already made the appellants have demonstrated they suffered substantial prejudice from the information. See *Dowling*, 814 F.2d at 139; *United States v. Armocida*, 515 F.2d 29, 49 (3d Cir.), cert. denied, 423 U.S. 858, 96 S.Ct. 111, 46 L.Ed.2d 84 (1975). We make this determination on the basis of an objective analysis by considering the probable effect of the allegedly prejudicial information on a hypothetical average juror. *United States v. Boylan*, 898 F.2d 230, 262 (1st Cir.), cert. denied, --- U.S. ---, 111 S.Ct. 139, 112 L.Ed.2d 106 (1990). [FN7]

FN7. We do not find that the circumstances of this case are close to being sufficiently aggravated to give rise to a presumption of prejudice to the appellants. See *United States v. D'Andrea*, 495 F.2d 1170, 1172-73 (3d Cir.), cert. denied, 419 U.S. 855, 95 S.Ct. 101, 42 L.Ed.2d 88 (1974). See also *United States v. Boylan*, 898 F.2d at 261. But even if there was such a presumption, it was rebutted by the overall facts here which show that the extra-record information was harmless.

[2] We are quite unable to understand how the media attention could have possibly prejudiced the appellants. [FN8] Rather, from an objective point of view, quite the opposite is true as the newspaper accounts made it appear that the government's case was extremely weak and that it was desperate to salvage something from the prosecution. Furthermore, the articles made it clear that the

government had made the plea proposal and they indicated that it was the government which wished to dispose of the cases quietly. The articles further reflected the court's displeasure with the government and the appellants' assertions of innocence. We think that from an objective point of view a defendant would be very happy to have a juror discover that the government was willing to admit on the eve of trial that it had a weak case.

FN8. Inasmuch as the appellants did not supply evidence of the content of the television reporting of the proceeding on the motion for the new trial, it is not part of the record so we cannot infer that the television reporting was prejudicial to them. In any event we have no reason to believe that the content of the telecast or telecasts was different in substance from that in the newspapers.

While the statement of the juror that "[t]hey had offered to settle, but the judge said no because no time would be served" cannot fairly be characterized as helpful to the appellants, neither was it substantially prejudicial. The statement did not suggest that appellants admitted they were guilty as it simply suggested that they wanted to dispose of the case without incarceration. We also point out that this statement was made to the jury at a time that the court was cautioning it that it must decide the case on the basis of the formal presentations in court.

While, as we have indicated, we decide this case from an objective viewpoint, we think it not inappropriate to point out that the appellants themselves have supplied the court with evidence of the actual or subjective impact of the allegedly prejudicial material. Ordinarily it would not be possible to obtain such evidence following *96 the return of the verdict because under Fed.R.Evid. 606(b) "a juror may not testify ... to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict ... or concerning the juror's mental processes in connection therewith...." Here, however, we are not barred by Rule 606(b) from considering Spraguer's affidavit as she was excused during the trial and thus her mental state had nothing to do with the verdict. Therefore, we are not considering a statement by a juror who actually deliberated as to whether information about the plea proposal affected the verdict. Significantly,

Spraguer explained that she did not report the receipt of the information to the court when asked if she knew anything that would affect her opinion because she honestly felt that what she had heard would have no such effect. Neither, of course, did any other unexcused juror. It was only after Spraguer went to law school that she perceived the material as prejudicial. But we are not considering whether the evidence was prejudicial from the perspective of a law student and we know that Spraguer as a juror did not find it prejudicial.

[3, 4] While we have determined that even on an examination of the situation when the allegedly prejudicial information was received there was no basis to find prejudice we do not stop there. After all, what really counts is whether the jury was influenced by the plea agreement when it deliberated and delivered its verdict, as we are concerned with the information's effect on the verdict rather than the information in the abstract. [FN9] In this case the allegedly prejudicial information was received at the outset of the trial and was followed by a mass of evidence delivered over a 24-day, six-week period. Then the jury deliberated for a week and delivered a fractured verdict showing that it carefully delineated among the offenses and between the appellants. This, of course, was after the jury was instructed to decide the case on the basis only of the evidence and not extrinsic information, an instruction the jury is presumed to have followed. See *Francis v. Franklin*, 471 U.S. 307, 324 n. 9, 105 S.Ct. 1965, 1976 n. 9, 85 L.Ed.2d 344 (1985). We cannot conceive in these circumstances that the allegedly prejudicial information could have had an impact on the verdict. [FN10]

FN9. This concern of the effect on the verdict means the effect on the hypothetical average juror, not the actual effect.

FN10. The appellants make what they characterize as the "tangential" contention that they were prejudiced because the jurors were not responsive at the voir dire as they did not reveal that they had received the prejudicial information. There are two problems with this. To start with it was not raised as a basis for a new trial in the district court and accordingly has not been preserved as an issue on the appeal. See *United States v. Batka*, 916 F.2d 118, 120 (3d Cir.1990). Furthermore, it is not clear from the record that when the voir dire was

conducted the extraneous material had been received by the jury.

The request for a hearing

[5] The appellants' second argument is that the district court abused its discretion when it refused to conduct an evidentiary hearing to determine the precise nature, quality and extent of the "jury breach." Undoubtedly there is precedent to support the conclusion that in some cases the district court will abuse its discretion in not ordering a hearing to ascertain what extra-record information the jury has received. After all, how can a court determine on an objective standard the effect of information on a hypothetical average juror if it does not know what that information was? Thus, in *United States ex rel. Greene v. New Jersey*, 519 F.2d 1356 (3d Cir.1975), we held that the district court correctly granted a writ of habeas corpus when a state court did not conduct a voir dire during a trial to determine if a jury had been exposed to prejudicial information that the defendant had attempted to plead non vult during the trial and to ascertain whether, if the jury had been so exposed, it could nevertheless render a fair and true verdict. [FN11]

FN11. The allegedly prejudicial material here cannot be equated with that in *Greene* as here the plea agreement contemplated a no-time sentence whereas in *Greene* the defendant by pleading guilty exposed himself to a life sentence. Furthermore, in *Greene* the thrust of the publicity was that the defendant, unlike the appellants here, initiated the plea negotiations.

More recently in *Government of the Virgin Islands v. Dowling*, 814 F.2d 134, we held that the district court erred in not *97 determining what extra-record information the jury received and, if it received such information, whether the jury could be relied upon to ignore it and confine its deliberations to the record evidence. In *Dowling* we considered that the information had the potential for substantial prejudice because it related to the facts of the case and because the defendant had a prior conviction for bank robbery, the same charge as in the case being tried. [FN12] We indicated, however, that "not every exposure to extra-record information about the case will require a new trial." *Id.* at 139. See also *United States v. Boscia*, 573 F.2d 827, 831 (3d Cir.) ("[T]he failure to provide a

full evidentiary hearing into possible prejudice resulting from communications with jurors does not, in itself, require a reversal or remand."), cert. denied, 436 U.S. 911, 98 S.Ct. 2248, 56 L.Ed.2d 411 (1978). In *Greene and Dowling* the claim that the jury had received allegedly prejudicial information came to the court's attention during the trial.

FN12. As in *Greene* the extra-record information in *Dowling* was far more serious than here as it involved, in addition to the conviction, information that the defendant had been charged with attempted armed robbery and murder but acquitted.

Here, however, we cannot conclude that the district court abused its discretion in not holding a hearing. *Dowling*, 814 F.2d at 137. The purpose of a hearing is to determine what happened, that is to establish the historical record. Accordingly, a hearing need not be held at the behest of a party whose allegations if established would not entitle it to relief. See *Government of the Virgin Islands v. Forte*, 865 F.2d 59, 62 (3d Cir.1989). Here the district court assumed that the appellants could substantiate their allegations that the jury was exposed to the plea proposal information. Therefore a hearing was not needed to develop the facts and the court did not abuse its discretion in not holding one. Of course, under Fed.R.Evid. 606(b) a hearing could not be held for the court to ask the jury the effect of the information on its verdict.

In reaching our result we recognize that sometimes judges are tempted to order hearings to put matters to rest even if not strictly required. After all, a call for a hearing has an inherently reasonable ring to it. But this is not one of those circumstances for there are compelling reasons not to hold a hearing involving the recalling of discharged jurors. As the Court of Appeals for the Second Circuit recently said:

We are always reluctant to 'haul jurors in after they have reached a verdict in order to probe for potential instances of bias, misconduct or extraneous influences.' As we have said before, post-verdict inquiries may lead to evil consequences: subjecting juries to harassment, inhibiting juryroom deliberation, burdening courts with meritless applications, increasing temptation for jury tampering and creating uncertainty in jury verdicts.

United States v. Ianniello, 866 F.2d 540, 543 (2d Cir.1989) (omitting citations).

Indeed, the concerns expressed by the Court of Appeals in *United States v. Ianniello* are hardly new, for the Supreme Court 76 years ago in *McDonald v. Pless* said:

But let it once be established that verdicts solemnly made and publicly returned into court can be attacked and set aside on the testimony of those who took part in their publication and all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding. Jurors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict. If evidence thus secured could be thus used, the result would be to make what was intended to be a private deliberation, the constant subject of public investigation; to the destruction of all frankness and freedom of discussion and conference.

238 U.S. at 267-68, 35 S.Ct. at 784.

We cannot lose sight of the fact that we have been forced to recognize that jurors *98 are subject to threats and intimidation. Thus, we now in some circumstances approve the use of an anonymous jury, a practice that at one time might have been unthinkable. See *United States v. Scarfo*, 850 F.2d 1015, 1021-26 (3d Cir.), cert. denied, 488 U.S. 910, 109 S.Ct. 263, 102 L.Ed.2d 251 (1988). In fact in *Scarfo* we acknowledged that "[j]uror's fears of retaliation from criminal defendants are not hypothetical; such apprehension has been documented." *Id.* at 1023. As the district court said in *United States v. DiNorscio*, 661 F.Supp. at 1042, "it is at least fair to say that disappointed defendants serving lengthy terms of incarceration will quite understandably use every weapon at their disposal to set aside their convictions." We do not doubt that desperate criminals willing to commit violent crimes in the first place would think nothing of attempting to intimidate jurors in an effort to overturn verdicts. [FN13]

FN13. We are not implying by this statement that we think that the appellants somewhere improperly approached Rosen or Spraguer. In fact, we do not have the slightest doubt that it was Rosen who made the initial contact exactly as appellants assert and

that Spraguer's affidavit was the product of nothing other than her sense of justice on the basis of her law school experience.

Jurors who complete their service should rarely, if at all, be recalled for proceedings such as those appellants propose here. It is qualitatively a different thing to conduct a voir dire during an ongoing proceeding at which the jury is part of the adjudicative process than to recall a jury months or years later for that purpose. It is useful in this regard to recall the following germane words of the Supreme Court:

There is little doubt that postverdict investigation into juror misconduct would in some instances lead to the invalidation of verdicts reached after irresponsible or improper juror behavior. It is not at all clear, however, that the jury system could survive such efforts to perfect it. Allegations of juror misconduct, incompetency, or inattentiveness, raised for the first time days, weeks, or months after the verdict, seriously disrupt the finality of the process.

Tanner v. United States, 483 U.S. 107, 120, 107 S.Ct. 2739, 2747, 97 L.Ed.2d 90 (1987).

CONCLUSION

The order of February 21, 1991, will be affirmed.

STAPLETON, Circuit Judge, dissenting:

The opinion of the court sets forth accurately and fairly the facts of this matter and I agree with its conclusion that exposure to the full text of the newspaper articles would be very unlikely to prejudice the defendants in the eyes of a juror. There is, however, a problem with the court's analysis. The uncontradicted record evidence indicates that a number of jurors were told that "they offered to settle, but the judge said no because no time would be served" and the record provides no assurance that the jurors exposed to this information read the newspaper articles. I cannot escape the conclusion that an average juror who was exposed only to the "news according to George" would understand that the defendants offered to plead guilty as part of a deal with the government but that the judge refused to go along because the stipulated punishment was too light. [FN1] This is the kind of understanding that would stay with an average juror and color his or her view throughout

even the longest of trials.

FN1. This court was unable to escape a similar conclusion in *United States ex rel. Greene v. New Jersey*, 519 F.2d 1356 (3d Cir.1975) where members of the jury received information that the defendant had offered to plead non vult and we held that the risk of prejudice required a new trial.

Were it true that further development of the record is either precluded or imprudent, I would hold, in accordance with *United States ex rel. Greene v. New Jersey*, 519 F.2d 1356 (3d Cir.1975), that the current record requires a new trial. In my view, however, the sensible and entirely proper thing to do in these circumstances is to hold an evidentiary hearing and determine precisely what, if any, extraneous prejudicial information was brought to the attention *99 of members of the jury. It may be that the jurors who heard extraneous information received a fair understanding of what went on at the hearing on the plea agreement and, if so, the conviction should stand. While care would have to be taken to avoid inquiry into "the effect of anything upon ... a juror's mind or emotions ... or concerning his mental processes," Fed.R.Evid. 606(b) (emphasis supplied), nothing cited by the court suggests that a post verdict inquiry of the kind I propose would be impermissible or impractical. Indeed, Federal Rule of Evidence 606(b) and its legislative history, as reviewed in *Tanner v. United States*, 483 U.S. 107, 107 S.Ct. 2739, 97 L.Ed.2d 90 (1987), make clear that such a post verdict hearing is expressly authorized and that a juror could testify at such a hearing concerning any "extraneous prejudicial information ... improperly brought to the jury's attention." Fed.R.Evid. 606(b).

I would remand this case to the district court with instructions to hold an evidentiary hearing consistent with this opinion.

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