No. ___

In the Supreme Court of the United States

THERESA MARIE SCHIAVO, Incapacitated,
ex. rel. ROBERT AND MARY SCHINDLER,
her Parents and Next Friends

Applicant,

v.

MICHAEL SCHIAVO,
Guardian: Theresa Schiavo, Incapacitated,
THE HONORABLE GEORGE W. GREER, and
THE HOSPICE OF THE FLORIDA SUNCOAST, INC.,

Respondents.

EMERGENCY APPLICATION FOR STAY OF ENFORCEMENT OF THE JUDGMENT BELOW PENDING THE FILING AND DISPOSITION OF A PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEAL OF THE UNITED STATES FOR THE ELEVENTH CIRCUIT

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EMERGENCY MOTION FOR STAY

TO: THE HONORABLE JUSTICE ANTHONY M. KENNEDY, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND JUSTICE FOR THE ELEVENTH CIRCUIT.

Pursuant to FED. R. CIV. P. 27(a) and SUP. CT. R. 23, Applicants, Robert and Mary Schindler, individually and as next friends of their daughter, Theresa Marie Schiavo, hereby apply for an order staying further withholding of nutrition and hydration from Theresa Marie Schiavo that was initiated by Defendant on Friday, March 18, 2005, at 1:45 P.M. (EST) pursuant to the order of the Probate Division of the Circuit Court of Pinellas County, Florida, pending the filing and final disposition of Petitioner's Petition to this Court for a Writ of *Certiorari* to the United States District Court, Middle District of Florida. In support of this Motion for Stay, Applicants state as follows:

STATEMENT OF THE CASE

1. On February 25, 2005, the Probate Division of the Circuit Court of Pinellas County, Florida, entered an order mandating the removal of nutrition and hydration from Theresa Marie Schiavo in order to cause her death. In relevant part, the Order provides:

> The Court is persuaded that no further hearing need be required [before Respondent, Michael Schiavo, can act] but that a date and time certain should be established so that last rites and other similar matters can be addressed in an orderly manner. Even though the Court will not issue another stay, the scheduling of a date certain for implementation of the February 11, 2000 ruling will give [Applicants Robert and Mary Schindler] ample time to appeal this denial, similar in duration to previous short-time stays granted for that purpose. Therefore, it is
>
> **ORDERED AND ADJUDGED** that the Motion for Emergency Stay filed on February 15, 2005, is DENIED. It is further
>
> **ORDERED AND ADJUDGED** that absent a stay from the appellate courts, the guardian, Michael Schiavo, shall cause the removal of nutrition

> and hydration from the Ward, Theresa Schiavo, at 1:00 P.M. on Friday, March 18, 2005.
>
> **DONE AND ORDERED** in Chambers at Clearwater, Pinellas County, Florida at 2:50 p.m. this 25th day of February.
>
> February 11, 2000, Order.

2. In the week leading up to March 18, 2005, the state courts dismissed or denied every attempt to stay the enforcement of the death order, including: 1) the thwarted attempt by the Florida Department of Children and Families to intervene to protect its right to investigate a hotline report of abuse and neglect of Terri and 2) the attempt by the House of Representatives to stay enforcement pending an investigation of the House Committee on Government Reform. This Court also denied an Application for Emergency Stay Pending the Filing of a Writ of Certiorari filed by the Schindlers relating to their state court claims of violation of Terri's religious liberty rights. *Schiavo v. Schiavo*, No. 04A801, 2005 WL 615863 (U.S., March 17, 2005) (Mem.).

3. Theresa Schiavo's feeding tube was removed at 1:45 p.m. on Friday, March 18, 2005, and she is dying of starvation and dehydration. If the tube is not reinserted by Order of this Court, Terri will die before this Court is able to consider the merits of the Petition for Writ of *Certiorari.*

4. Public Law No. 109-3 was enacted by Congress and signed by President Bush just after 1:00 a.m., on March 21, 2005. Two hours after the Act's adoption, the Schindlers filed a complaint with the Middle District of Florida alleging the violation of Theresa Schiavo's rights and seeking a temporary restraining order to restrain the Respondents from further withholding Theresa Schiavo's nutrition and hydration.

5. A hearing on the Schindlers' TRO motion was held that same afternoon of March 21 and the Honorable Judge Whittemore issued his decision denying the motion in the early morning of March 22, 2005.

6. Applicants filed their Notice of Appeal to the Eleventh Circuit on March 22; the Eleventh Circuit issued its decision affirming the District Court's Order shortly after 2:00 a.m., March 23. Applicant's Petition for Rehearing En Banc was filed and denied later that day and on the next day this Court again denied a stay application. (*Schiavo v. Schiavo*, No. 04A825, 2005 WL 67685 (U.S. March 24, 2005) (Mem.)).

7. Plaintiffs thereafter amended their Complaint, adding, among other counts, Count 8 in which they asserted the state court violated Theresa Schiavo's Due Process Fourteenth Amendment right to self-determination. They again asked for a TRO ordering that Schiavo's nutrition and hydration be restored pending a trial on the merits of their claims.

8. A TRO hearing was held on March 24. On March 25, the Honorable Judge Whittemore issued his opinion denying the restraining order.

9. The Eleventh Circuit Court of Appeals affirmed the United States District Court on March 25, 2005. *Schiavo v. Schiavo*, No. 05-11628, 2005 WL 681652 (11th Cir. (Fla.) March 25, 2005). Plaintiff-Appellant's petition for rehearing and rehearing en banc was denied March 30, 2005. (En Banc Order, March 30, 2005).

10. Theresa Schiavo has now been without fluids or food for 13 days.

REASONS FOR GRANTING A STAY

11. When a final judgment or decree of any court is subject to review by the United States Supreme Court on writ of *certiorari*, the execution and enforcement of such

judgment or decree may be stayed for a reasonable time to permit a party to obtain a writ of *certiorari* from the Supreme Court. 28 U.S.C.A. § 2101(f).

12. The decision to grant or deny such a stay pending certiorari rests in the court's sound discretion. *Barnes v. E-Systems,* 501 U.S. 1301 (1991), later proceeding (US) 1991 US LEXIS 4097.

13. A stay may be granted by an individual Justice of this Court. *Kake v. Egan*, 80 S. Ct. 33 (1959); *Warm Springs Dam Task Force v. Gribble*, 417 U.S. 1301 (1974); *National League of Cities v. Brennan*, 419 U.S. 1321 (1974); *General Council on Finance & Administration v. California Superior Court*, 439 U.S. 1355 (1978) (Rehnquist); *Amer. Trucking Ass'n v. Gray*, 483 U.S. 1306 (1987).

14. A stay may be granted when: (1) there is a reasonable probability that four justices will vote to grant *certiorari*; (2) there is a fair prospect that a majority of the justices will find the decision below erroneous; and (3) a balancing of the equities weighs in the petitioner's favor. *Araneta v. United States*, 478 U.S. 1301 (1986).

15. and a fair prospect that a majority of the justices will find the decision below erroneous because the Eleventh Circuit has held that Due Process does not require clear and convincing evidence for the termination of an incompetent person's right to life and right to continue receiving life sustaining food and fluids. The Eleventh Circuit's decision conflicts with *Santosky v. Kramer*, 455 U.S. 745 (1982), in which this Court held that it was a violation of the Due Process Clause for a state court to enter an order which would terminate a fundamental right unless the factual basis for its order was supported by clear and convincing evidence.

In addition, the holding below that a state court's finding of clear and convincing evidence satisfied any federal requirement of clear and convincing proof is in direct conflict with *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996), in which this Court held that it is not enough that the state court *asserted* that it applied the heightened standard, and concluded on the basis of its own record that the proofs of fact were "clear and convincing," the *record* had to support the state court's finding that it had met a *federal* "clear and convincing" evidence standard.

16. There is a reasonable probability that four justices will vote to grant certiorari because of the manifest importance of the issue, its growing recurrence in state courts in which family members seek judicial authority to discontinue life support measures of incapacitated patients in contested proceedings, and the demonstrated lack of Supreme Court authority outlining the structure and scope of the Constitutional right to life.

ARGUMENT AND AUTHORITIES

I. Introduction

Count Eight of Plaintiff-Appellants' Amended Complaint asserts that the state court violated Theresa Schiavo's Fourteenth Amendment right to self-determination under the Due Process Clause of the Fourteenth Amendment because the state court failed to require clear and convincing evidence that was sufficient, as a matter of federal due process, that she would have chosen to die in the manner authorized (and ordered) by the order of the guardianship court.

The District Court originally held, and subsequently reaffirmed, that:

> "Plaintiffs have established that an irreparable harm will be suffered unless the injunction issues, the threatened injury outweighs any damage

> the proposed injunction could cause the opposing party and that an injunction would not be adverse to the interests of the public."

Schiavo v. Schiavo, No. 8:05-CV-530-T-27TBM, 2005 WL 677224, at *1 (M.D. Fla. March 25, 2005). The District Court then held that the only real issue to be decided on the request for a preliminary injunction was whether plaintiffs could show a likelihood of success on the merits of any one of Counts Six through Ten, and that:

> Where, *as here*, the "balance of the equities weighs heavily in favor of granting the [injunction]" the "Plaintiffs need only show a substantial case on the merits." *Garcia-Mir v. Meese*, 781 F.2d 1450, 1453 (11th Cir. 1986).

Id. (emphasis added). The Court of Appeals agreed on all of these points:

> [T]he following propositions . . . we take as given in this appeal: . . .(2) we have appellate jurisdiction over the denial of a temporary restraining order in these circumstances and treat it as the denial of a preliminary injunction or a final judgment, . . .; because the other three preliminary injunctive relief factors are present, the merits-related factor is whether the plaintiffs have shown "a substantial case on the merits," . . .

Schiavo v. Schiavo, No. 05-11628, 2005 WL 681652, at *2 (11th Cir. March 25, 2005).

The dissent in the en banc order below asserted that the Applicants have successfully raised their Due Process claim. "The plaintiffs have now stated a plausible claim that the Due Process Clause of the Fourteenth Amendment requires clear and convincing evidence of an individual's wishes before a state court may order withdrawal of life-sustaining nutrition, hydration, or other medical attention" (En Banc Order, at 24., Tjoflat, J., and Wilson, J., dissenting), and expressed concern that in this life-and-death matter, the federal courts were acting too hastily when they failed to grant a stay to permit them to go behind the state court's conclusory statement that clear and convincing evidence supported his decision.

> To give the plaintiffs [*sic*.] claims the reasoned attention they deserve, and to develop the certainty the law demands, we should rehear this case en banc. The United States Supreme Court encourages such caution in life-and-death situations, such as in its federal habeas jurisprudence. The Court has said that "[i]f the district court cannot dismiss the petition on the merits before the scheduled execution, it is obligated to address the merits and must issue a stay to prevent the case from becoming moot" when the prisoner dies. *Lonchar v. Thomas*, 517 U.S. 314, 320 (1996).

(En banc Order, p. 24, n. 2 (Tjoflat, J., and Wilson, J., dissenting). The majority evidently, and contrary to this Court's precedents, disagreed that this life-and-death case was entitled to that much Due Process protection.

With respect to Count Eight, both the District Court (*Schiavo,* 2005 WL 677224, at *4) and the Court of Appeals (*Schiavo,* 2005 WL 681652, at *4) held that the Due Process Clause of the Fourteenth Amendment, as understood and applied by the Supreme Court in *Cruzan v. Mo. Dep't of Health,* 497 U.S. 261 (1990), did not require either the Florida courts or the District Court to apply a heightened standard of proof. The Eleventh Circuit held:

> The plaintiffs have no substantial case on the merits as to this claim for at least two independently adequate reasons.
>
> First, Cruzan did not establish that the Constitution requires application of a clear and convincing evidence standard before termination of care. The Supreme Court held in Cruzan only that a state could, if it wished, require that evidence of the incompetent's wishes be proven by clear and convincing evidence. (citations omitted)
>
> Of course, holding that states may permissibly impose a requirement says nothing about whether states must impose it. One need look no further than the *Cruzan* opinion itself for that truism. Referring to a previous decision upholding a state's favored treatment of family relationships in termination of care situations, the Court explained, "such a holding may not be turned around into a constitutional requirement that a state must recognize the primacy of those relationships in a situation like this." *Id.* at 286, 110 S.Ct. at 2855. In case we missed the point, the Court reiterated it when discussing another decision: "Here again petitioners would seek to turn a decision which allowed a State to rely on family decisionmaking

> into a constitutional requirement that the State recognize such decisionmaking. But constitutional law does not work that way." *Id*.
>
> Second, even if constitutional law did work the way the plaintiffs want, contrary to the explicit teaching of the Supreme Court in the *Cruzan* opinion itself, they would still not have a substantial case on this claim. Plaintiffs would not, because Florida has adopted the very requirement that they say the Constitution mandates, a clear and convincing evidence standard, *In re Guardianship of Browning*, 568 So.2d 4, 15 (Fla.1990), and it was applied by the state courts in this case, *In re Guardianship of Schiavo*, 780 So.2d 176, 179 (Fla. 2d DCA 2001). *The plaintiffs argue that the state courts should have concluded that the clear and convincing evidence standard was not met in this case, but a quarrel with the result of a proceeding does not state a claim that due process was not afforded*. Stated differently, procedural due process does not guarantee a particular result.

(*Schiavo*, 2005 WL 681652, at *3-4).

Appellants respectfully submit that the Court below erred on both points.

II. WHERE A STATE COURT ORDER EXTINGUISHES A FUNDAMENTAL RIGHT, THE DISTRICT COURT MUST REVIEW THE RECORD BEFORE THE STATE COURT TO DETERMINE WHETHER THE FACTUAL BASIS FOR THE ORDER SATISFIED A HEIGHTENED *FEDERAL* STANDARD OF PROOF

A. The District Court Reviewed Only the Procedural History and Results of the Litigation in the State Court, Not the Evidence Adduced in the State Court Proceedings.

In *Santosky v. Kramer*, 455 U.S. 745 (1982), the Supreme Court held that it was a violation of the Due Process Clause for a state court to enter an order which would terminate a fundamental right unless the factual basis for its order was supported by clear and convincing evidence. Some fourteen years later, that Court held that this constitutional requirement applied even in civil actions between private citizens when the state was not a party to the action. *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996). In *Santosky*, the Supreme Court held unconstitutional the state order terminating parental rights unless

the factual basis for the order was supported by clear and convincing evidence. In *M.L.B.* the Supreme Court held that it is not enough that the state court *asserted* that it applied the heightened standard, and concluded on the basis of its own record that the proofs of fact were "clear and convincing," the *record* had to support the state court's finding that it had met a *federal* "clear and convincing" evidence standard. *Id.* at 121-22.

In *Santosky*, the Court explained that the standard of proof must reflect, as a matter of federal constitutional law, the magnitude of the fundamental right or liberty interest at stake.

> Thus, while private parties may be interested intensely in a civil dispute over money damages, application of a "fair preponderance of the evidence" standard both indicates society's "minimal concern with the outcome," and a conclusion that the litigants should "share the risk of error in roughly equal fashion." [*Addington v. Texas*,] 441 U.S. at 423 [(1979)]. When the State brings a criminal action to deny a defendant liberty or life, however, "the interests of the defendant are of such magnitude that historically and without any explicitly constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment." *Ibid*. The stringency of the "beyond a reasonable doubt" standard bespeaks the "weight and gravity" of the private interest affected, *id.* at 427, society's interest in avoiding erroneous convictions, and a judgment that those interests together require that "society impose almost the entire risk of error upon itself."
>
> **The "minimum requirements [of procedural due process] being a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action."** *Vitek v. Jones*, 445 U.S. 480, 491 (1980). *See also Logan v. Zimmerman Brush Co.*, [455 U.S. 422,] 432 [(1982)]. . . . "In cases involving individual rights, whether criminal or civil, 'the standard of proof [at a minimum] reflects the value society places on individual liberty.'"

Santosky, 455 U.S. at 755-56 (emphasis added; brackets in original in part; further citations omitted).

Santosky thus makes it clear that the standard of proof in both the District Court *and* in the Florida courts must reflect the magnitude of the right implicated and being lost. As the District Court rightly observed, Terri Schiavo's natural fundamental right to life itself is at stake. There is no greater right since all other rights depend upon it. The right to life – although textually guaranteed by Article One of the Fourteenth Amendment – is not derived from government, but is an intrinsic right derived from the fact of the individual's very existence. *Yick Wo v. Hopkins*, 118 U.S. 356, 369-70 (1885); *Constitution of the United States of America*: *Analysis and Interpretation* (Killian, J. *et. al.*, ed. 1982), at p. 1623.

In *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996), the Supreme Court again dealt with a state order terminating parental rights. In *M.L.B.*, however, the action was not commenced at the initiative of the state; it was litigation between two private parties. Nonetheless, the Supreme Court – recognizing that the order of the court even in this situation constituted state action – held that the standard of proof announced in *Santosky* was the constitutional minimum under the Due Process Clause.

Just as here, the state court in *M.L.B.* had asserted that it complied with its state law requirement that the proofs be tested under a clear and convincing evidence standard. In the Court's view, it was the obligation of the *federal* court to examine the record *de novo* to determine whether the evidence adduced there met the *federal* "clear and convincing" standard mandated by *Santosky*. *See M.L.B.*, 519 U.S. at 121-22 (emphasis added):

> Consistent with *Santosky*, Mississippi has, by statute, adopted a "clear and convincing proof" standard for parental status termination cases (citation omitted). Nevertheless, the Chancellor's termination order in this case simply recites statutory language; it describes no evidence, and otherwise

> details no reasons for finding M.L.B. "clearly and convincingly" unfit to be a parent (citation omitted). *Only a transcript can reveal evidence to support his stern judgment.*

In his dissent, Justice Tjoflat, with whom Justice Wilson joined, agreed that the determination by the District Court that the state court decision as to Terri's wishes was supported by clear and convincing evidence was premature. "My contention is that we cannot make this determination now. Instead, the district court should make this determination only after a full and careful review of the evidence, which cannot occur under current time constraints." (Order, at 26, n. 3). There has been no review of the evidence, much less a full and careful review.

In the case at bar, both Judge Whittimore and Judge Moody reviewed *only* the procedural and outcome history of the Florida litigation. It was thus impossible for either of them to decide the issues that Santosky, *M.L.B. and* P.L. No. 109-3 require them to contemplate: *i.e.* whether the proofs upon which the state decisions rest actually rise to the level of "clear and convincing" of both Terri Schiavo's *condition*, and of her *wishes* given that condition. As the Court held in *M.L.B.*: *"Only a transcript can reveal evidence to support [the state court's] stern judgment.*" No review of either the transcript or the evidence took place in the District Court.

The factual basis for the state's order in this case is the finding by the trial judge that Terri Schiavo would have wanted to die by denial of nourishment and hydration if she were in a PVS. Later, the court modified that finding and held that she would prefer to die through denial of nutrition and hydration if her condition were such that she would not attain an unspecified and standardless minimum "quality of life."

Whatever the evidence before the state trial court, Congress itself gave Appellants the right to a review of the evidence supporting or undercutting the state court's judgment. P.L. 109-3 makes it clear that this review was to be *de novo* in the United States District Court, and without regard to the record developed in that court.[1]

The results and reasoning of the Florida courts are irrelevant to the task Congress set before the District Court: *i.e.*, to review the evidence anew, and to determine *for itself* that Judge Greer's order was supported by the "clear and convincing evidence" required by *Santosky* and *M.L.B.*

B. The District Court Refused to Consider Any Evidence De Novo, and thus Violated both the Mandate of P.L. 109-3 and the *Santosky-M.L.B.* Line of Cases.

Under *Santosky-M.L.B.* and P. L. No. 109-3, the state courts' assertion that they made their finding based upon clear and convincing evidence is not relevant to the constitutional (or statutory) question. The District Court was required to look at the evidence itself and determine whether, in fact, the record developed in litigation between the Schindlers and Mr. Schiavo meets the constitutional standard under the Due Process Clause.

Appellants sought to adduce evidence that would have proved that the state courts did not, as a matter of either fact or law, meet *even a preponderance of the evidence standard*. That was why they sought a trial by jury. (That the evidence described below was offered is not disputed.)

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[1] A concurring judge and the two dissenters debated the constitutionality of Pub. L. 109-3, which served as one of the jurisdictional bases for the present suit. Applicants believe the statute is clearly constitutional for the reasons identified by the dissent (and not questioned by any other judge aside from the aforementioned single concurring judge). But this is not a matter that need be addressed or resolved definitively at this point. The constitutionality of the federal statute is not an emergency issue, nor is resolution of that issue in any way compromised by the issuance of an emergency injunction. Moreover, under 28 U.S.C. 2403, the Attorney General would have to be given notice and the opportunity to defend the constitutionality of this federal statute. (En banc Order, at 24 (Tjoflat, J., and Wilson, J., dissenting)).

The sum total of the proofs in the Florida courts rests, in large measure, upon the oral testimony of Michael Schiavo and members of his family, who asserted that Terri had said that she essentially would want to refuse life support if she lived in the condition in which she now finds herself. Evidence of these supposed oral assertions was not offered by Michael Schiavo immediately, as is the case in most disputes of this type, but nearly *five years* after the 1990 incident that incapacitated Terri. One of the guardians *ad litem*, Dr. Wolfson, referenced this development and noted how anomalous it was. Dr. Wolfson also noted that Mr. Schiavo made this claim only after the malpractice judgment created the financial interest that led the Schindlers into this prolonged litigation. Notably, Mr. Schiavo himself testified in that malpractice case that his wife would have a normal life expectancy and that he would have to care for her during the full extent of that life expectancy. He also sought damages to pay for Terri's rehabilitation, apparently conceding at the outset that she was not in a PVS and that she might be rehabilitated. His "evidence" concerning Terri's wishes was discovered (or remembered) only after Michael had begun living in what can only be described as a common law marital relationships with another woman. And the recollections he and his family submitted were "recollected" only after Michael *stopped* spending the malpractice award on Terri's rehabilitation. In sum, even the most cursory review of the evidence shows that Michael's recollections concerning Terri's wishes were not "recollected" until long after his commitment to his marriage to Terri Schindler Schiavo had ceased, and only after he had retained a self-described "death lawyer" *to represent Terri's interests* in this dispute over her wishes.

In contrast, Terri's parents, siblings, and other independent witnesses testified that Terri never expressed such wishes to them, and that such an expression would have been out of character and contrary to her professed moral and religious beliefs. Indeed, one hospice worker testified that Michael Schiavo repeatedly told her that he and Terri never discussed what they would do if one of them became severely incapacitated. A friend of Terri's testified that Terri once told her it was wrong for the family of Karen Ann Quinlan to have withdrawn life support from her.

In short, Appellants offered to prove to the District Court that the "evidence" supporting Terri's alleged wishes is not credible, and that a reasonable fact finder would hold – *under any standard of proof* – that her wishes were to the contrary. As the Missouri Supreme Court held in Cruzan, "informally expressed reactions to other people's medical condition and treatment do not constitute clear proof of a patient's intent." *Cruzan v. Harmon*, 760 S.W.2d 408, 424 (1988) (citations omitted). Just as in *Cruzan*, such oral testimony "would be woefully inadequate. It is all the more inadequate to support a refusal that will result in certain death." *Id.* (internal quotation marks and citation omitted).

CONCLUSION

Ordering the action which would cause the death of Terri Schiavo based upon the oral testimony of the type provided by Michael Schiavo, when viewed in context of the entire evidentiary record that P. L. No. 109-3 permits the Appellants to develop, is an unconstitutional deprivation of Terri Schiavo's constitutional right to life. Under these circumstances, the record developed in the District Court would need to demonstrate that *Terri herself* would *not* have wanted information concerning her condition, *and* that she

would have chosen to die the sort of death prescribed by the order of the guardianship court.

As a matter of constitutional law, the life of Terri Schiavo cannot be ordered to be taken on the kind of oral testimony provided in this case.

In the light of the magnitude of what is at stake, and the urgency of the action required, the injunctive relief should be immediately granted and Terri Schiavo's nourishment restored so that this Court can properly review this case *de novo*.

Respectfully submitted,

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Submitted: Wednesday, March 30, 2005.