

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
-----X

UNITED STATES OF AMERICA,

- against -

04 Cr. 356 (KBF)

MUSTAFA KAMEL MUSTAFA,
a/k/a Mostafa Kamel Mostafa,

Defendant.

-----X

**DEFENDANT MOSTAFA KAMEL MOSTAFA'S
REPLY-MEMORANDUM OF LAW
IN SUPPORT OF HIS SENTENCING**

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I. Preliminary Statement

This reply-memorandum of law is submitted for Your Honor's consideration with respect to the determination of Defendant Mostafa Kamel Mostafa's sentencing. We submit this reply to clarify certain misstatements made in the Government's sentencing memorandum in order to ensure that this Court does not similarly misinterpret the defendant's sentencing arguments.

For the reasons that follow as well as those discussed in Defendant's Sentencing Memorandum, dated, December 26, 2014 (hereinafter cited as, "Def. memo"), it is respectfully suggested that this Court impose a sentence of less than life imprisonment while also ordering, or in the alternative recommending, that the Bureau of Prisons ("BOP") designate Mr. Mostafa directly to a Federal medical facility and fashion reasonable accommodations necessary to ensure that his medical *and disability* needs are sufficiently tended to and that he is not treated in an unequal fashion to non-disabled inmates in United States custody

II. The defense does not concede that a life sentence, by itself, is appropriate. To the contrary, we submit that *any* sentence would be inappropriate that does not incorporate recommendations regarding Mr. Mostafa's designation and conditions of confinement.

The Government's sentencing memorandum (hereinafter cited as, "Gov't memo"), while forceful and poignant, at several key points either misrepresents the defendant's position or wholly fails to address it. The first such error is the Government's claim, "The defense even seems to acknowledge that imprisonment for the remainder of Abu Hamza's life is appropriate given the exceedingly serious nature of the defendant's convictions" (Gov't memo at 1-2 n.1 [quoting defense counsel's argument that "Mr. Mostafa is 56 years old and has been convicted of 11 counts of terrorism-related offenses. As such, the defense is under no illusions that Mr. Mostafa will ever freely return to his family even under the most lenient realistically conceivable non-life sentence" [Def. memo. at 20]]).

The Government is incorrect to mistake a realistic acceptance of Mr. Mostafa's expected sentence with a belief that such a sentence is "appropriate" in this case. Quite the contrary, regardless of the severity of his crimes, which we do not dispute, a sentence of life imprisonment without the possibility of release or parole, and without sufficient accommodations to appropriately satisfy his physical disabilities, is barbaric – even more so

when the defendant will also be subject to the isolation imposed upon him by the conditions of his SAMs.

Indeed, we have no doubt that Mr. Mostafa would never have been extradited to the United States by the United Kingdom had the United States disclosed the scope of the SAMs that were to be imposed, nor been forthright regarding the potential for an extended and possibly permanent designation to Florence ADX. See, e.g., *Mustafa Kamel Mustafa (Otherwise Abu Hamza) v. the Government of the United States and the Secretary of State for the Home Department*, Case No. CO/1748/2008, [2008] EWHC 1357 (Admin), High Court of the United Kingdom, Queens Bench Division, Order, dated, June 20, 2008 (annexed to Defendant's Sentencing Memorandum at Exhibit G), at para. 70 ("Naturally, the most dangerous criminals should expect to be incarcerated in the most secure conditions, but even allowing for a necessarily wide margin of appreciate between the views of different civilized countries about the conditions in which prisoners should be detained, confinement for years and years in what effectively amounts to isolation may well be held to be, if not torture, then ill treatment which contravenes Article 3.").

As a result, a life sentence, coupled with the Government's request for complete deference to the BOP (see Gov't memo at 41), will leave in place

the very real possibility that each day in prison will amount to cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution and Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms – principles of law that the Government’s sentencing memorandum wholly fails to address.

Our nation should be better than this. We should learn the lesson that older countries have long since accepted: a nation is only as strong as the example it sets for others to follow. If the United States wishes to continue to hold its place as the world’s leader, then it must show that it understands the difference between meting out punishment and meting out *just* punishment; and it must do so in a civilized manner that other nations can follow and trust, not merely fear.

For purposes of sentencing, we do not dispute the evidence at trial, nor Mr. Mostafa’s recommended Guideline range. But we also cannot turn a blind eye to 18 U.S.C. § 3553(a)(2)(D), which requires this Court to take into consideration “the need for the sentence imposed ... to provide the defendant with needed ... medical care, or other correctional treatment in the most effective manner.” The Government may find it convenient to request that this Court defer consideration of Mr. Mostafa’s significant and extensive disabilities, but we cannot.

III. Insufficient evidence has been submitted to support the Government's allegations of prison misconduct – both while detained in the United States and the United Kingdom – and as such paragraphs 16 and 97 of Mr. Mostafa's Revised Pre-Sentence Report must be stricken and not considered during the imposition of Mr. Mostafa's sentence.

With respect to the allegations of Mr. Mostafa's misconduct while detained in U.S. and U.K. prisons, the Government significantly misstates and attempts to minimize the relevance of Defendant's objections. Such dismissiveness, however, is insufficient to establish, by a preponderance of the evidence, that Mr. Mostafa in fact committed the alleged disciplinary infractions. See Torres v. Berbary, 340 F.3d 63, 71 (2d Cir. 2003) ("due process in sentencing requires *at least* a showing by a preponderance of the evidence to resolve disputed factual issues") (emphasis added); see also McMillan v. Pennsylvania, 477 U.S. 79, 88 (1986) (preponderance standard sufficient where there is no allegation that the sentencing enhancement is "a tail which wags the dog of the substantive offense").

As such, paragraphs 16 and 97 of Mr. Mostafa's Revised Pre-Sentence Report (hereinafter, "Revised PSR") must be stricken and not considered during the imposition of Mr. Mostafa's sentence. Should the Government continue to insist upon the inclusion of paragraphs 16 and 97, before this Court may sentence Mr. Mostafa upon the present record a hearing must be held wherein the Government is required to establish its

allegations by a preponderance of the evidence and based upon actual evidence containing a “sufficient indicia of reliability to support its probable accuracy.” United States v. Cruz, Docket No. 13-2809-cr, 2014 WL 4942037, at *1 (2d Cir. Oct. 3, 2014), quoting, U.S.S.G. § 6A1.3 & cmt.; see also United States v. Fatico, 603 F.2d 1053, 1057 n.9 (2d Cir. 1979).

The Government states, “Just as [Mr. Mostafa] denied all the charges against him at trial, the defendant disputes *every* disciplinary incident reported by prison officials, both in the United Kingdom and at the Metropolitan Correctional Center (‘MCC’)” (Gov’t memo at 20 n.6 [emphasis in original], citing, Deft. Sent. Mem. At 5-6). This claim is both mistaken and intentionally misleading.

We do not dispute “*every* disciplinary incident report by prison officials.” Some we contest because we can prove them to be false. Some we contest because neither our client nor his attorneys in England were ever notified of the issues, and we know of no finding – judicial or administrative – that supports the allegations. Some factual allegations we admit but with explanations, and merely dispute that those should constitute disciplinary conduct violations. Others we contest because they are mere hearsay (possibly double or even triple hearsay), with no indicia of reliability, summarizing allegations that may never have been subject to scrutiny.

Indeed, the Government's summary document related to his purported misconduct at HMP Belmarsh has been presented without *any* support, and the Government has refused to disclose any disciplinary hearing reports or even incident reports, let alone sworn statements or testimony, which could be viewed as even minimally sufficient to provide Mr. Mostafa with an ability to answer and, if necessary, defend.

The Government notes that it "provided to the Probation Office and the defense relevant portions of documents concerning the incidents in the United Kingdom that were provided to the Government by the Metropolitan Police Service of the United Kingdom" (Gov't memo at 20-21 n.6). This Court should be aware that the "relevant" documents referenced by the Government are merely a summary of allegations, providing no details of the underlying conduct or any corroboration that the allegations had ever been established pursuant to any standard of judicial or administrative review.

Indeed, the summary document in question is only a single, two-page, document of unknown origin with unknown reliability that was provided to the United States from the United Kingdom, specifically from the Metropolitan Police Service to the United States Embassy in London. The Government has represented that the Metropolitan Police Service received

the document from the National Offender Management Service, Extremism Unit (hereinafter, “NOMS”), which is an executive agency of the U.K. Ministry of Justice, but the Government has not disclosed any information to establish the authenticity of the two-page summary or the underlying information that the summary purports to relay.

Indeed, while the Government has traced the document back to NOMS, the Government does not claim that NOMS authored the summary, nor has the Government provided the defense with any evidence (however minimal) to even attempt to establish who wrote the summary (neither the agency nor the individual), nor what was used as a basis for it.

The Government notes, “In light of the overwhelming seriousness of the defendant’s offense conduct, however, the Government does not intend to call witnesses to testify about the disciplinary incidents” (Gov’t memo at 21 n.6). Certainly it is the Government’s prerogative to decide not “to call witnesses to testify about the disciplinary incidents.” But if that is the Government’s decision then it must accept the consequence: without competent evidence to establish the authenticity, chain of custody, and accuracy of its allegations of disciplinary misconduct, the allegations simply cannot be considered by this Court and must be stricken from Mr. Mostafa’s Revised PSR.

Moreover, since the Government is unable to meet its burden to establish the reliability of para. 97 but at the same time appears to be sharing the underlying allegations with both the Bureau of Prisons and the Probation Department, we respectfully submit that this Court should make a specific finding that the Government has failed to present competent evidence sufficient to satisfy the requisite indicia of reliability. We ask that this specific finding be reached by this Court to ensure that these allegations do not impact his designation or future conditions of confinement.

IV. In order to ensure compliance with the terms of Mr. Mostafa's extradition, as well as to ensure compliance with the Eighth Amendment to the United States Constitution, Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms, 18 U.S.C. § 3553(a)(2)(D), and the principles imbued in the Rehabilitation Act of 1973 and the Americans with Disabilities Act of 1990, this Court should order (or at a minimum recommend) that Mr. Mostafa be designated to a Federal medical facility and incorporate into his Judgment certain minimal accommodations that this Court expects to be provided in relation to his conditions of confinement.

The Government asks this Court to defer to the Bureau of Prisons any and all decisions related to Mr. Mostafa's designation and conditions of confinement. We respectfully submit that based upon the unique circumstances of this case, this is an instance where such deference is neither warranted nor appropriate.

From the outset we note that we recognize that *ordinarily* this Court may only make recommendations related to the designation process and conditions of confinement. Such recognition is implicit in our repeated requests that this Court order “or, in the alternative, recommend[],” the relief sought in Mr. Mostafa’s sentencing memorandum. See, e.g., Defendant’s Sentencing Memorandum, dated, December 26, 2014, at 1, 20.

However, we also note that based upon international comity and the doctrine of specialty, which relates to defendants like Mr. Mostafa whose custody has only been procured by the United States through extradition proceedings, the ordinary division between the Executive and Judicial Branches of government do not apply. Instead, this Court is required to take all actions in its power to ensure compliance with the representations of the Executive Branch in procuring the defendant’s extradition, and we respectfully submit that includes ordering that Mr. Mostafa be designated to a Federal medical facility and that accommodations be made to his conditions of confinement that take into consideration the needs of his physical disabilities and other health concerns.

As explained by the Second Circuit, “Based on international comity, the principle of speciality generally requires a country seeking extradition to adhere to any limitations placed on prosecutions by the surrendering

country.” United States v. Baez, 349 F.3d 90, 92 (2d Cir. 2003), citing, United States v. Andonian, 29 F.3d 1432, 1435 (9th Cir. 1994). “Because a violation of the extradition agreement may be an affront to the surrendering sovereign, ‘[t]he extradited individual [may] raise those objections to the extradition process that the surrendering country might consider a breach of the extradition treaty.’” Baez, 349 F.3d at 92, quoting, United States v. Diwan, 864 F.2d 715, 721 (11th Cir. 1989).

Although the Second Circuit in Baez ultimately ruled against the defendant based upon a fact-specific examination of the diplomatic assurances at issue therein, the Court explained:

[T]he cauldron of circumstances in which extradition agreements are born implicate the foreign relations of the United States. In sentencing a defendant extradited to this country in accordance with a diplomatic agreement between the Executive branch and the extraditing nation, a district court delicately must balance its discretionary sentencing decision with the principles of international comity in which the rule of speciality sounds.

Baez, 349 F.3d at 93.

To that end, “Courts should accord deferential consideration to the limitations imposed by an extraditing nation in an effort to protect United States citizens in prosecutions abroad.” Baez, 349 F.3d at 93, citing, Andonian, 29 F.3d at 1435. “Moreover, in evaluating the exact limitations

set by the extraditing nation, courts should not elevate legalistic formalism over substance. To do otherwise would strip comity of its meaning.” Baez, 349 F.3d at 93, citing, Texas Employers’ Ins. Ass’n v. Jackson, 862 F.2d 491, 509 (5th Cir. 1988) (Clark, C.J., concurring).

As further held by the Second Circuit:

[C]ourts should temper their discretion in sentencing an extradited defendant with deference to the substantive assurances made by the United States to an extraditing nation. If anything, such deference may well allow the United States to secure the future extradition of other individuals because foreign nations would observe that the limitations they negotiated with the Executive branch in respect to the prosecution of their extradited citizens are being honored. This is not a surrender of the independence of the Judiciary to the Executive branch. To the contrary, it is the classical deference courts afford to the political branches in matters of foreign policy.

Baez, 349 F.3d at 93, citing, Regan v. Wald, 468 U.S. 222, 242 (1984).¹

¹ To avoid confusion we note that the doctrine of specialty (also referred to as “speciality”), applies to extradition based upon bilateral extradition treaties as well as when the extradition is completed pursuant to other means. See Fiocconi v. Attorney Gen. of the United States, 462 F.2d 475, 479-80 (2d Cir. 1972) (defendants may raise doctrine of specialty even though their extradition was an “act of comity,” not pursuant to extradition treaty); United States v. Evans, 667 F.Supp. 974, 979 (SDNY 1987) (defendants may raise doctrine of specialty, even though they were deported by act of comity rather than treaty, since the United States had informed the surrendering government of the accusations against them and requested cooperation in relation to such offenses); United States v. Gonzalez, 275 F.Supp. 483, 484 (SDNY 2003) (applying doctrine of specialty to extradition completed pursuant to, inter alia, a resolution of the surrendering nation’s government, even though no extradition *treaty* existed between the two countries).

As discussed in Defendant's Sentencing Memorandum, Senior District Judge Tim Workman of the City of Westminster (U.K.) Magistrate's Court reviewed, inter alia, a sworn statement by ADX Warden R. Wiley (Exhibit F to Defendant's Sentencing Memorandum). Judge Workman concluded that the conditions of Florence ADX could, if "applied for a lengthy indefinite period" "properly amount to inhuman and degrading treatment which would violate Article 3" of the Convention for the Protection of Human Rights and Fundamental Freedoms (Exhibit E to Defendant's Sentencing Memorandum at para. 43).

In explaining his decision to agree to extradite Mr. Mostafa, Judge Workman noted that Warden Wiley explained under oath that after consultation with the Chief of Health Programs that it would be "highly unlikely" for a person with Mr. Mostafa's conditions and disabilities (i.e., "type 2 diabetes, raised blood pressure, psoriasis, loss of sight in one eye and bilateral amputation of both forearms," that "required assistance with the activities of daily living" [Exhibit F at page 3 para. 5]) to be placed in Florence ADX and that Judge Workman expected that Mr. Mostafa would instead be designed to a Federal medical facility (see Exhibit E at para. 43-44).

Indeed, as Warden Wiley specifically stated in his sworn statement, “If it is determined that [Mr. Mostafa] cannot manage his activities of daily living, it is highly unlikely that he would be placed at the ADX but, rather, at a medical center” (Exhibit F at page 3 para. 5). Warden Wiley then referenced Sheikh Rahman, emphasizing, “I am aware of at least one other high profile convicted international terrorist who, due to various medical concerns, is presently housed at a Bureau medical facility.” Id.

As a result, and as previously discussed, Judge Workman only agreed to order the extradition of Mr. Mostafa because he accepted the representations of Warden Wiley that Mr. Mostafa would not be permanently housed at Florence ADX:

On the basis of his evidence I am satisfied that the defendant would not be detained in these conditions [i.e., ADX] indefinitely, that his undoubted ill health and physical disabilities would be considered and, at worst, he would only be accommodated in these conditions [i.e., ADX] for a relatively short period of time. Whilst I find these conditions offensive to my sense of propriety in dealing with prisoners, I cannot conclude that, in the short term, the incarceration in a supermax prison would be incompatible with his Article 3 Rights.

Exhibit E at para. 44 (emphasis added). Certainly, if Mr. Mostafa is designated by the BOP to Florence ADX rather than a Federal medical facility, such designation could not reasonably be viewed as “for a relatively

short period of time” or “in the short term”. Indefinite or permanent designation to ADX is not “short” under any measure of reason. See also Defendant’s Sentencing Memorandum at 31-35 (discussing understandings of the High Court of the United Kingdom and European Court of Human Rights that Mr. Mostafa would *at worst* only be designated to ADX for a short period of time until his designation to a Federal medical facility was complete).

The Government now submits a letter signed by Jeffrey D. Allen, M.D., the Chief of Health Programs for the BOP and Dominique Raia, Senior Counsel to the BOP, both of whom are based in Washington D.C (see Gov’t memo, Exhibit A). While encouraging in certain respects such as the representation that Mr. Mostafa “will be given a full medical evaluation at a medical center and assessed by a prosthetic specialist” in order to determine which facility to ultimately designate him to (Gov’t memo, Exhibit A at 1), the letter nonetheless leaves open the possibility for a permanent or extended designation to Florence ADX (see Gov’t memo, Exhibit A at 1-2) and therefore contradicts the sworn statements of Warden Wiley.

Indeed, irrespective of the assurances of the Washington D.C. offices of the BOP that Florence ADX “has a variety of housing assignments available in order to accommodate various levels of health care needs”

(Gov't memo, Exhibit A at 2), we respectfully submit that this Court can be confident in Warden Wiley's conclusions that it is "highly unlikely" that ADX will be able to accommodate Mr. Mostafa's disabilities. Certainly, the Warden of Florence ADX knows more about his own facility than administrators (*or prosecutors*) working over 1500 miles away.²

We do not dispute that deference to the BOP ability to render its own *independent* judgment regarding Mr. Mostafa's designation and conditions of confinement is generally warranted. Our concern, however, is that the BOP's independent judgment is being interfered with by, among other things, unsubstantiated and uncorroborated allegations of misconduct emanating from the United States Attorney's Office; allegations which we now know the Government has shared with *both* the Bureau of Prisons *and* the Probation Department in its efforts to assure the harshest punishments permissible under U.S. law.

² The letter of Dr. Allen and Ms. Raia states that ADX maintains "handicap accessible cells" (Gov't memo, Exhibit A at 2). Such may be true but does not explain what "handicap" accommodations are provided in those cells nor for which form of disabilities the cells are designed. For example, by "handicap accessible cells" do they mean that the toilet and showers are fitted with handrails to assist with balance? Such an accommodation would be useful for a defendant whose disability involved his legs but is of no use to a defendant, such as Mr. Mostafa, who has no hands. Similarly, ADX has already been found incapable of suitably housing or caring for a blind inmate (Sheikh Rahman), and, as this Court knows, Mr. Mostafa is not merely a double arm amputee but also is blind in one eye with poor vision in the other. As such, the representation that ADX maintains "handicap accessible cells" is meaningless without a detailed explanation of how those cells have been specifically designed and for what forms of disabilities the cells are intended, particularly in light of Warden Wiley's sworn statement that ADX is "highly unlikely" to be suitable to Mr. Mostafa's needs.

We also do not dispute – indeed we agree – that the BOP should be afforded “broad discretion” in evaluating inmates, determining designations, and dealing with day-to-day operations. Here, however, the unique circumstances of this case (e.g., international comity, the doctrine of specialty, and the minimum care promised by the United States to the United Kingdom and the European Court of Human Rights and therefore necessitated by the assurances and decisions made during the extradition process), requires this Court to consider issues and make judgments that are beyond the scope of less complicated, wholly domestic, prosecutions. But these issues must be considered here, and we respectfully submit this is an instance where this Court should exercise its own full range of sentencing power and not merely defer to the otherwise broad discretion of the BOP.

In light of all of these conflicts, we respectfully submit the safest and most reasonable path – indeed simply the right thing to do – is for this Court to order that Mr. Mostafa be designated to a Federal medical facility that can accommodate not merely his continuing “medical concerns” but also the daily and unique needs of his significant disabilities. If, however, this Court disagrees with our view of the scope of its sentencing power, then, in the alternative and at an absolute minimum, this Court should *recommend* that the BOP consider the relief requested herein. Recommendations regarding

designation and conditions of confinement are common, and as such there should be no hesitation to at least *recommend* the relief requested.

Finally, we note that the Government's reliance on Judge Walker's concurring opinion in United States v. Stewart, 590 F.3d 93, 181 (2d Cir. 2009), is greatly misplaced (see Gov't memo at 44). In Stewart the Second Circuit reversed a substantial downward sentencing variance (28 months imprisonment rather than a Guideline range of 360 months) that had been ordered in light of, *inter alia*, the defendant's age (67 years old) and medical concerns (cancer). However, the majority opinion, which was authored by Judge Sack not Judge Walker, explained that the Court did not reverse because it found age or medical condition an insufficient basis for a variance, it reversed because the District Court declined to decide whether the defendant, an attorney, committed perjury or otherwise obstructed justice. See Stewart, 590 F.3d at 100, 149-50. As such, and contrary to the Government's misplaced reliance on Judge Walker's *concurring* opinion, the Second Circuit did not reject the idea that age or physical health could be relied upon to justify a significant reduction in the length of the defendant's sentence.

Nonetheless, the arguments presented herein are completely and categorically different than those at issue in Stewart. Here, the defense is

realistic about the expected length of the defendant's sentence and merely asks this Court to impose a sentence that, based upon the unique circumstances of this case, would not be cruel and unusual. Recommendations related to designation and conditions of confinement are not remotely equivalent to a request for a downward various similar to what was given in Stewart. As such, Judge Walker's concurring opinion in Stewart has no applicability to the case at bar.

V. Conclusion

We do not dispute that Mr. Mostafa's convictions necessitate an extensive sentence, and, as previously stated, we are under no illusions regarding the length of imprisonment that will likely be set. However, no matter how horrendous Mr. Mostafa's crimes of conviction his sentence may not be cruel and unusual.

In light of the representation made and understandings relied upon during Mr. Mostafa's extradition proceedings, this Court is in the unique position to take preemptive measures to ensure that Mr. Mostafa's sentence, however long, complies with the Eighth Amendment, the Convention for the Protection of Human Rights and Fundamental Freedoms, and the separate protections Congress requires for the disabled. We are not asking for

unwarranted leniency, we are merely asking that justice be tempered with mercy.

For all of these reasons, as well as those previous discussed in Defendant's Sentencing Memorandum, we respectfully submit that a sentence of less than life imprisonment is appropriate in this case and this Court should order (or, in the alternative and at a minimum, recommend) that:

- Mr. Mostafa's significant and extensive medical disabilities require that he be incarcerated in a Federal medical facility, and as such he should be directly designated to either a Federal Medical Center (FMC) or a Medical Center for Federal Prisoners (MCFP);
- In light of the fact that Mr. Mostafa is unable to accomplish the tasks associated with daily living under his present level of accommodation and given his present prosthetic devices without putting himself at a significant risk of further complications and infection or even amputation, Mr. Mostafa should be transferred to a facility where he will have the daily assistance of a "home" health aide (or a reasonable equivalent);
- He should also be provided proper accommodations for his unique disabilities, which would include, among other items, a shower, toilet and sink suited to the needs of a double upper extremity amputee, in the event that he is ever left to accomplish tasks of daily living without the assistance of an aide;
- An independent occupational therapist familiar with the needs of double upper extremity amputees should be appointed to review the accommodation and medical issues unique to Mr. Mostafa that are raised herein and to advise Bureau of Prisons staff as to the nature and construction of the accommodations required; and

- Even if Mr. Mostafa is provided with sufficient accommodations for his disabilities and the assistance of a “home” health aide (or a reasonable equivalent), he must nonetheless have daily access to medical attention and care.

We thank Your Honor for your consideration in this matter.

Dated: New York, New York
January 5, 2015

Respectfully submitted,

/S/

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