Oral Argument Not Yet Scheduled

IN THE

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 03-3024, 03-3025 & 03-3133

United States,
Appellee,
VS.
Carlos G. Erazo Robles,
Appellant.

United States,
Appellee,
VS.
Wagner X. Gongora Balon,
Appellant.

United States,
Appellee,
VS.
Wagner E. Gongora Parraga,
Appellant.

On Appeal from the
U.S. District Court for the District of Columbia
02-Cr.-252-02, 02-Cr.-252-06 & 02-Cr.-252-05

JOINT REPLY BRIEF OF APPELLANTS

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TREATIES & INTERNATIONAL LAW

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES, **APPELLEE,** vs. **CARLOS G. ERAZO ROBLES,** **APPELLANT.**	No. 03-3124 (02-Cr.-252-02)
UNITED STATES, **APPELLEE,** vs. **WAGNER X. GONGORA BALON,** **APPELLANT.**	No. 03-3125 (02-Cr.-252-06)
UNITED STATES, **APPELLEE,** vs. **WAGNER E. GONGORA PARRAGA,** **APPELLANT.**	No. 03-3133 (02-Cr.-252-05)

ARGUMENT

The argument of Appellants Carlos M. Erazo Robles, Washington X. Gongora Balon and Wagner E. Gongora Parraga on appeal is simply stated: the acts they admitted doing when they pleaded guilty — agreeing to pilot a ship of Ecuadorian registry from Ecuador to Guatemala on the high seas — were not a crime punishable under 8 U.S.C. § 1324(a), even if the Defendants became aware that other persons on board intended eventually to enter the United States illegally. Therefore, the federal grand jury in the District of Columbia lacked authority to indict them and the U.S. District Court lacked authority to convict and punish them, even after they

were seized illegally on the high seas and brought into this jurisdiction with the assistance of the Mexican government.

Contrary to the position taken by the government in the District Court and here, Appellants are asserting only jurisdictional claims which they did not, and in fact could not, waive when they pleaded guilty. They discuss the 1958 Convention on the Law of the High Seas, limitations imposed by 14 U.S.C. § 89(a) on the U.S. Coast Guard's authority to stop and seize vessels on the high seas, and the Due Process clause of the Fifth Amendment to inform consideration of the jurisdictional issue, not in an attempt to raise claims waived by their guilty pleas.

THE DELGADO-GARCIA MAJORITY NEVER FULLY CONSIDERED THE ISSUE APPELLANTS RAISE HERE

The government repeatedly asserts that Appellants' argument is identical to that rejected by a Panel of this Court in *United States v. Delgado-Garcia*, 374 F.3d 1337 (D.C. Cir. 2004), *cert. denied*, 125 S. Ct. 1696, 161 L. Ed. 2d 528 (2005)" . In keeping with its thesis, the government does not attempt to respond to arguments made in the case at bar that apparently were not even considered by the Panel, and which demonstrate that *Delgado-Garcia* was wrongly decided.[1]

The government relies entirely on the *Delgado-Garcia* majority's holding that "both contextual and textual evidence" in § 1324(a) supports "the conclusion that the presumption against reading statutes to have extraterritorial effect did not apply." Gov't Brief, 9 – 10 (citation omitted). It says,

> The Court pointed out that, on its face, the statute "protects the borders of the United States against illegal immigration." … "This contextual feature of § 1324 establishes that it is fundamentally international, not simply domestic, in focus and effect … It is natural to expect that a statute that protects the borders of the United States, unlike ordinary domestic statutes, would reach those outside the borders." [] This Court wrote that

[1] Relying on *Ranger Cellular v. F.C.C.*, 348 F.3d 1044, 1050 (D.C. Cir. 2003), the government argues that "once a panel of this court has decided a matter, subsequent panels are bound by that decision unless and until it is changed by the court *en banc*. Gov't Brief, 13. On January 23, 2006 Appellants filed a Joint Petition for Hearing *en Banc*.

> "[t]here is also specific textual evidence that … 'the natural inference from the character of the offense[s]' is that an extraterritorial location 'would be a probable place of its commission.' " … The Court found that § 1324, by its terms, "applies to much extraterritorial conduct." …

Id. at 10 (citations omitted).

Responding to Appellants' argument that Congress clearly signals its intent to make a statute apply extraterritorially, and does not expect courts to infer such broad jurisdiction from "contextual" hints, Appellants' Brief, 11 – 15, the government again falls back on *Delgado-Garcia.* Acknowledging that the Maritime Drug Law Enforcement Act, 47 U.S.C. § 1901 *et seq.*, clearly states that it applies extraterritorially, the government argues that "[a] border control statute is more outward-looking than is a prohibition on drug manufacturing [and] [t]hat may be why Congress also thought it necessary to specify explicitly … that trafficking in controlled substances aboard vessels is a serious international problem." Gov't Brief, 12 (quoting *Delgado-Garcia*, at 1349).

But the government never attempts to reconcile this logic with the significant body of antiterrorism legislation enacted or amended since September 11, 2001 in which Congress very carefully circumscribed the jurisdictional limits of U.S. criminal statutes that most definitely are "outward-looking" in that they punish international terrorism against the United States. 18 U.S.C. § 2331(1).

Appellants cited one example in their brief, at 13, 18 U.S.C. § 2332b proscribing acts of terrorism transcending national boundaries, which applies extraterritorially only within the "special maritime and territorial jurisdiction of the United States" defined in 18 U.S.C. § 7. The government makes no mention of Appellants' argument or of these statutes.

Another example, 18 U.S.C. § 2332f, enacted after September 11, 2001, criminalizes "bombings of places of public use, government facilities, public transportation systems and infrastructure facilities," if

> (2) the offense takes place outside the United States and –
> (A) a perpetrator is a national of the United States or is a stateless person whose habitual residence is in the United States;

(B) a victim is a national of the United States;
(C) a perpetrator is found in the United States;
(D) the offense is committed in an attempt to compel the United States to do or abstain from doing any act;
(E) the offense is committed against a state or governmental facility of the United States, including an embassy or other diplomatic or consular premises of the United States;
(F) the offense is committed on board a vessel flying the flag of the United States or an aircraft which is registered under the laws of the United States at the time the offense is committed; or
(G) the offense is committed on board an aircraft which is operated by the United States.

Under 18 U.S.C. § 2332g, Missile systems designed to destroy aircraft, and 18 U.S.C. § 2332h, Radiological dispersal devices,[2]

(b) Jurisdiction. Conduct prohibited by subsection (a) is within the jurisdiction of the United States if —
(1) the offense occurs in or affects interstate or foreign commerce;
(2) the offense occurs outside of the United States and is committed by a national of the United States;
(3) the offense is committed against a national of the United States while the national is outside the United States;
(4) the offense is committed against any property that is owned, leased, or used by the United States or by any department or agency of the United States, whether the property is within or outside the United States; or
(5) an offender aids or abets any person over whom jurisdiction exists under this subsection in committing an offense under this section or conspires with any person over whom jurisdiction exists under this subsection to commit an offense under this section.

Under 18 U.S.C. § 2339B,[3] Providing material support or resources to designated foreign terrorist organizations, Congress was more specific, stating:

(d) Extraterritorial jurisdiction.
(1) In general. There is jurisdiction over an offense under subsection (a) if —
(A) an offender is a national of the United States (as defined in section 101(a)(22) of the Immigration and Nationality Act [8 U.S.C. § 1101(a)(22)] or an alien lawfully admitted for permanent residence in the United States (as defined in section 101(a)(20) of the Immigration and Nationality Act [8 U.S.C. § 1101(a)(20)];

[2] Both were enacted in 2004, P.L. 108-458, Title VI, Subtitle J, § 6903, 118 Stat. 3770 (Dec. 17, 2004)(§ 2332g); P.L. 108-458, Title VI, Subtitle J, § 6905, 118 Stat. 3772 (Dec. 17, 2004)(§ 2332h).
[3] Amended twice since September 11, 2001: P.L. 107-56, Title VIII, § 810(d), 115 Stat. 380 (Oct. 26, 2001); P.L. 108-458, Title VI, Subtitle G, § 6603(c) – (f), 118 Stat. 3762 (Dec. 17, 2004).

(B) an offender is a stateless person whose habitual residence is in the United States;
(C) after the conduct required for the offense occurs an offender is brought into or found in the United States, even if the conduct required for the offense occurs outside the United States;
(D) the offense occurs in whole or in part within the United States;
(E) the offense occurs in or affects interstate or foreign commerce; or
(F) an offender aids or abets any person over whom jurisdiction exists under this paragraph in committing an offense under subsection (a) or conspires with any person over whom jurisdiction exists under this paragraph to commit an offense under subsection (a).
(2) Extraterritorial jurisdiction. There is extraterritorial Federal jurisdiction over an offense under this section.

For purposes of Title 18 of the U.S. Code a criminal act occurs in or affects "foreign commerce" when it begins or ends in the United States. *See, e.g., United States v. Montford*, 27 F.3^{d} 137, 140 (5th Cir. 1994)(victim kidnapped in United States and taken to foreign country or visa versa, Counterfeit security transported from foreign country to United States).

So, too, in 18 U.S.C. § 2339D,[4] Receiving military-type training from a foreign terrorist organization, Congress's intent is clearly stated:

(b) Extraterritorial jurisdiction. There is extraterritorial Federal jurisdiction over an offense under this section. There is jurisdiction over an offense under subsection (a) if—
(1) an offender is a national of the United States (as defined in 101(a)(22) of the Immigration and Nationality Act [8 USCS § 1101(a)(22)] or an alien lawfully admitted for permanent residence in the United States (as defined in section 101(a)(20) of the Immigration and Nationality Act [8 USCS § 1101(a)(20)];
(2) an offender is a stateless person whose habitual residence is in the United States;
(3) after the conduct required for the offense occurs an offender is brought into or found in the United States, even if the conduct required for the offense occurs outside the United States;
(4) the offense occurs in whole or in part within the United States;
(5) the offense occurs in or affects interstate or foreign commerce; or
(6) an offender aids or abets any person over whom jurisdiction exists under this paragraph in committing an offense under subsection (a) or conspires with any person over whom jurisdiction exists under this paragraph to commit an offense under subsection (a).

Most specific of all is 18 U.S.C. § 2339C,[5] Prohibition against the financing of terrorism, which states:

[4] Enacted in P.L. 108-458, Title VI, Subtitle G, § 6602, 118 Stat. 3761 (Dec. 17, 2004).

(b) Jurisdiction. There is jurisdiction over the offenses in subsection (a) in the following circumstances —

…

(2) the offense takes place outside the United States and —

(A) a perpetrator is a national of the United States or is a stateless person whose habitual residence is in the United States;

(B) a perpetrator is found in the United States; or

(C) was directed toward or resulted in the carrying out of a predicate act against—

(i) any property that is owned, leased, or used by the United States or by any department or agency of the United States, including an embassy or other diplomatic or consular premises of the United States;

(ii) any person or property within the United States;

(iii) any national of the United States or the property of such national; or

(iv) any property of any legal entity organized under the laws of the United States, including any of its States, districts, commonwealths, territories, or possessions;

(3) the offense is committed on board a vessel flying the flag of the United States or an aircraft which is registered under the laws of the United States at the time the offense is committed;

(4) the offense is committed on board an aircraft which is operated by the United States; or

(5) the offense was directed toward or resulted in the carrying out of a predicate act committed in an attempt to compel the United States to do or abstain from doing any act.

Congress intended every one of these statutes to reach conduct occurring outside the territorial jurisdiction of United States courts. But, in most of them, it constrained United States extraterritorial jurisdiction within limits imposed by international law and treaties, including the 1958 High Seas Convention and the 1958 Convention on the Territorial Sea and Contiguous Zone. *See* Appellants' Brief, 13 – 15.

Recognizing the sensitive nature of foreign relations, Congress did not leave to judges the job of inferring the scope of extraterritorial jurisdiction from the context of any of these laws. *See Delgado-Garcia*, supra, at 1352 (Rogers, J. dissenting). If Congress had not included explicit jurisdictional parameters in these statutes, and it fell to the *Delgado-Garcia* Panel to determine the scope of jurisdiction, undoubtedly the Panel majority would interpret each of them, as it did § 1324(a), to apply anywhere in the world if the conduct at issue might have an effect in the United States. The majority's interpretation would be wrong as to Congressional intent in several

[5] Enacted in P.L. 107-197, Title II, § 202(a), 116 Stat. 724 (June 25, 2002); amended in P.L. 107-273, Div. B, Title IV, § 4006, 116 Stat. 1813 (Nov. 2, 2002); P.L. 108-458, Title VI, Subtitle G, § 6604, 118 Stat 3764 (Dec. 17, 2004).

of these statutes, including § 2332b, which applies only within the "special maritime and territorial jurisdiction of the United States"; § 2332f, which applies if the perpetrator or victim is a United States national or the perpetrator is an alien who resides here, the crime occurs on a ship or aircraft registered in the United States, or the crime was against property of the United States; and §§ 2332g, 2339B, and 2339D, which are similar to § 2332f but apply also if the crime affected interstate or foreign commerce.

THE JURISDICTIONAL ISSUE IS PRESERVED FOR APPELLATE REVIEW

As it did in *Delgado-Garcia*, the government concedes that Appellants' guilty pleas did not waive their claim that the Trial Court lacked subject matter jurisdiction to enforce § 1324(a). It notes that Judge Sentelle said "there is support for an argument that appellants' claim that § 1324 does not apply extraterritorially is also waived by appellants' unconditional guilty pleas." Gov't Brief, 13 n. 7. But it acknowledges as well that Judge Randolph filed a concurrence specifically to state his disagreement with this proposition. *Id.* at 17 n. 10.

Nonetheless, relying on *dicta* in *Delgado-Garcia*, *supra*, at 1343, the government argues that by pleading guilty Appellants "waived the statutory, constitutional and international law claims they raised on appeal because none of the statutory or constitutional provisions … divested the district court of its original jurisdiction under 18 U.S.C. § 3231, and there were no facial constitutional infirmities in the indictment." Gov't Brief, 17.

The *Delgado-Garcia* majority recognized that a defendant cannot waive his claim that the court lacked subject matter jurisdiction, citing *United States v. Cotton*, 535 U.S. 625, 630, 122 S. Ct. 1781, 152 L. Ed. 2^{d} 869 (2002). It recognized as well that an unconditional guilty plea does not waive a defendant's "right not to be haled into court at all," citing *Blackledge v. Perry*, 417 U.S. 21, 30 – 1, 94 S. Ct. 2098, 40 L. Ed. 2^{d} 628 (1974); *Menna v. New York*, 423 U.S. 61, 62 – 2 & n. 2, 96 S. Ct. 241, 46 L. Ed. 2^{d} 195 (1974)(*per curiam*). The Panel majority held that the jurisdictional claim fell under neither exception.

In the case at bar, Appellants are not asserting that the indictment was defective in that it

failed to provide adequate notice of the conduct for which they would be tried, or because it failed to recite an essential element of the crime. They are challenging the authority of the grand jury to indict them and the District Court to try them for acts done beyond the reach of U.S. law. In that way, Appellants' situation is similar to that of the defendant in *Menna, supra,* who, having previously been held in contempt and sentenced for refusing to answer grand jury questions, could not later be indicted for contempt arising from the same incident. *Id.* at 62. In this case, as in *Menna,* Appellants' "claim is that the State may not convict [them] no matter how validly [their] factual guilt is established."

Explaining the so-called *Blackledge-Menna* exception, the Supreme Court has said that "the concessions implicit in [Blackledge's] guilty plea were simply irrelevant, because the constitutional infirmity in the proceedings lay in the State's power to bring any indictment at all," and Menna's plea to the contempt indictment was "a redundant confession to the earlier offense." *United States v. Broce*, 488 U.S. 563, 575 – 6, 109 S. Ct. 757, 102 L. Ed. 2^{d} 927 (1989). As in *Blackledge* and *Menna,* Appellants can "prove their claim by relying on [the indictment] and the existing record," therefore they did not waive their right to challenge the District Court's jurisdiction when they pleaded guilty. *Broce, supra,* at 576.

THE GOVERNMENT MISCONSTRUES SEVERAL OF THE PRECEDENTS ON WHICH IT RELIES

The government argues alternatively that it did not need to demonstrate a *nexus* between Appellants and the United States to convict them under § 1324(a) and that a *nexus* existed because the *San Jacinto's* passengers intended eventually to enter the United States illegally. Gov't Brief, 20 – 22 & n. 15. Citing *United States v. Davis*, 905 F.2^{d} 245, 249 (9th Cir. 1990), it argues that under the MDLEA, "[w]here an attempted transaction is aimed at causing criminal acts within the United States, there is a sufficient basis for the United States to exercise its jurisdiction." (internal quotations omitted). Gov't Brief, 21.

The government ignores the Ninth Circuit's holding that

two restrictions exist on giving extraterritorial effect to Congress' directives. We require

> Congress [to] make clear its intent to give extraterritorial effect to its statutes…. And secondly, as a matter of constitutional law, we require that application of the statute to the acts in question not violate the due process clause of the fifth amendment.

Id. at 248. It noted that Congress's intent to apply the MDLEA extraterritorially is explicit in the statute, which is not true of § 1324(a). It found that there was sufficient *nexus* between the 58-foot vessel and the United States because when the Coast Guard requested permission to board it was 35 miles from Point Reyes, California, on a course toward San Francisco. *Id.* at 247. But the Court did not reach the issue of *nexus* because the boat's captain claimed British registry and the British government gave permission for boarding. *Id. See, also, United States v. Kahn*, 35 F.3^{d} 426 (9th Cir. 1994)(crew made up of U.S. nationals, alternate landing sites in United States establish *nexus* under MDLEA, country of registry gave permission for boarding); *United States v. Martinez-Hidalgo*, 992 F.2^{d} 1052, 1056 (3^{d} Cir. 1993)(no *nexus* necessary under MDLEA where stateless vessel seized between St. Croix and Puerto Rico, and burlap bags suspected of containing drugs were in plain view).

United States v. Alvarez-Mena, 765 F.2^{d} 1259 (5th Cir. 1985), is no more helpful to the government. The Fifth Circuit held that 21 U.S.C. § 955a explicitly applied to stateless vessels on the high seas. *Id.* at 1264. The Court noted that the ship was on a course toward the United States-Mexico border near Corpus Christi, Texas, that a crewman aboard a U.S. Coast Guard Cutter smelled marijuana on the ship and that when ordered to stop, the ship rammed the Cutter. *Id.* at 1262 – 3.

The government relies on *United States v. Williams*, 617 F.2^{d} 1063, 1070 (5th Cir. 1980), for the proposition that 14 U.S.C. § 89(a) provided authority to seize the *San Jacinto*. But in that case the Coast Guard did not have to rely on statutory authority because Panama gave permission to board the ship, which was registered there.

SETTING THE RECORD STRAIGHT

In its effort to convince the Court in this case to reach the same erroneous conclusion as that enunciated by the *Delgado-Garcia* majority the government mischaracterizes Appellants' arguments and misstates the record of the case at bar.

For example, it states incorrectly that "appellants argue for the first time on appeal that 'the Coast Guard lacked reasonable suspicion to believe that the [*San Jacinto*] was engaged in activity subject to the operation of the United States law.' " Gov't Brief, 14, 18 – 19 & n. 11. But Mr. Gongora Balon's Motion To Dismiss for Lack of Jurisdiction, at 7, argued that under § 89(a) "the government must demonstrate that the *San* Jacinto was otherwise subject to the operation of U.S. law at the time of its initial detention," citing *Williams, supra,* at 1076 – 7, for the proposition that "the jurisdiction showing embedded in § 89(a) requires the USCG to possess reasonable, articulable suspicion that the foreign flagged vessel was engaging in violation of U.S. law at the time of the detention." App. 62.[6]

Citing *United States v. Alvarez-Machain*, 504 U.S. 655, 670, 112 S. Ct. 2188, 119 L. Ed. 2[d] 441 (1992), the government claims "[a]n illegal seizure of the *San Jacinto* would not have barred appellants' subsequent prosecution in the federal district court…." Gov't Brief, 19 -20 n. 14. It appears that the government believes this is so because "respondent's abduction was not in violation of the Extradition Treaty between the United States and Mexico…." *Id.* There are two errors in this argument: Appellants were not "abducted" from Mexico, which actively facilitated the illegal assertion of jurisdiction by U.S. agents; and the government has never asserted Appellants' seizure complied with the extradition treaty between the United States and Ecuador.[7] An arrest must be legal at its inception, and in this case, because Appellants were taken into custody over 150 nautical miles from Mexico, in international waters, the extradition treaty with Mexico is of no relevance. *See, e.g. Terry v. Ohio*, 392 U.S. 1, 17 – 18, 88 S. Ct. 1868, 20 L. Ed. 2[d] 889 (1968).

Similarly, it is not relevant that Ecuador is not a signatory to the 1958 High Seas

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[6] References to Appellants' Joint Appendix are designated "App." followed by the relevant page number, i.e. App. 5. Transcripts of proceedings are designated "Tr." followed by the date of the proceeding and the relevant page number, i.e. Tr. 9/26/02, 5, and if they are reproduced in the Joint Appendix by Tab number.

[7] 18 Stat. 199, T.S. 76, June 28, 1872, 55 Stat. 1196, T.S. 972, Sept. 22, 1939. *See* 18 U.S.C. § 3181.

Convention. Gov't Brief, 20 n. 14. As noted in Appellants' Brief, 22, the limits imposed by that convention on federal jurisdiction have been incorporated into "the municipal law of the United States," because they have been "given effect by congressional legislation." *United States v. Best*, 304 F.3d 308, 312 – 3 (3d Cir. 2002)(quoting *United States v. Postal*, 589 F.2d 862, 875 (5th Cir. 1979)).

In the District Court, the government insisted that it obtained permission from Ecuador to seize the *San Jacinto*, Tr. 9/26/02, 22, 27. App., Tab 3. In response to Appellants' argument to the contrary before this Court, the government apparently concedes that it never asked for and did not receive permission from Ecuador to seize the ship, force it to sail to Mexico, or to prosecute Appellants. It asserts only that "the United States Defense Attaché in Ecuador advised the Ecuadoran (sic) government that the Coast Guard believed there were 'illegal immigrants' (approximately 150) aboard ship." Gov't Brief, 19 n. 13.

In support of the *Delgado-Garcia* majority, the government argues that § 1324(a) permits prosecution of persons who have never entered the United States, and that in many instances alien smugglers never enter the country. Gov't Brief, 11 – 12. Appellants agree with the government and the *Delgado-Garcia* majority that "the statute does not require the violator to have himself 'entered' the United States, or that the alien 'entered' the United States." *Id.* n. 6. But the fact that a federal statute proscribes certain conduct by any person does not confer extraterritorial jurisdiction merely because such conduct may be, and often is, committed by a person outside the United States. *See, e.g., United States v. Perez-Herrera,* 610 F.2d 289, 290 (5th Cir. 1980)(shipboard acts which would be crimes if committed within the territorial United States are not necessarily crimes when committed on the high seas outside the "special maritime and territorial jurisdiction"). As Appellants pointed out in their Brief, at 10 – 11, the *Delgado-Garcia* majority appeared to believe that the purpose of § 1324(a) would be frustrated if it did not read into the statute extraterritorial jurisdiction. Such an interpretation is wrong because, as written, the statute permits prosecution of alien smugglers who are physically present at the border but have not entered the United States, who are aboard ships within U.S. territorial

waters, or where at least one overt act in furtherance of a conspiracy to smuggle aliens occurs in the United States or at its territorial boundary.

CONCLUSION

For the reasons stated in their main brief and above Appellants Carlos M. Erazo Robles, Wagner X. Gongora Balon and Wagner E. Gongora Parraga respectfully request that the Court sitting *en banc* hear this appeal and vacate their convictions because the District Court lacked both subject matter and personal jurisdiction to try them under 8 U.S.C. § 1324(a) and (b).

Respectfully submitted,

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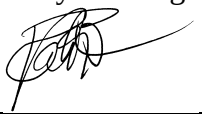

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I, Robert S. Becker, counsel for Wagner E. Gongora-Parraga, certify that on February 6, 2006 I served a true copy of the attached Joint Reply Brief of Appellants by first-class mail on the person(s) listed below.

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