FIGHTING *U.S. V. PEREZ*: NINTH CIRCUIT HOLDS THAT CAL PC § 243(D) IS A CRIME OF VIOLENCE

By Kathy Brady

See *United States v. Perez*,_F.3d_(9th Cir. July 11, 2019) at: amended on July 25, 2019 at http://cdn.ca9.uscourts.gov/datastore/opinions/2019/07/11/17-10216.pdf, http://cdn.ca9.uscourts.gov/datastore/opinions/2019/07/25/17-10216.pdf. The complete opinion can be found at 2019 WL 3332599.

I. Summary

Conviction of a "crime of violence" can trigger two immigration penalties. If a sentence of a year or more is imposed, it is an "aggravated felony."[1] If the victim is protected under state domestic violence laws or meets similar criteria, it is a deportable "crime of domestic violence" (regardless of sentence).[2]

For immigration purposes, a crime of violence is defined at 18 USC § 16(a).

In a flawed decision, a Ninth Circuit panel held that California Penal Code § 243(d), battery with injury, qualifies as a crime of violence under a definition identical to 18 USC § 16(a).[3] *United States v. Perez* (9th Cir. July 11, 2019). Because of *Perez:*

Criminal defenders must assume that section 243(d) is a crime of violence (COV). There are several alternatives to section 243(d) that are not COVs. Consult the *California Quick Reference Chart* (sign up at www.ilrc.org) to evaluate misdemeanor or felony pleas to, e.g., Pen C §§ 32, 136.1(b)(1), 236/237, 243(a), 243(e), 459/460(a) or (b), 591, 594, or even 207 or 243.4.

While the above offenses should not be held COVs, remember that they might have other consequences, which are discussed in the *Chart.* Some may become an aggravated felony under another category if a year or more is imposed (see especially Pen C §§ 32, 136.1(b)(1)), some may be crimes involving moral turpitude (see especially § 243.4 and perhaps § 32), and DHS even may allege – arguably wrongly – that some are COVs (see especially 207, 243.4, and 236/237). As always, each noncitizen defendant *must* have an individual defense analysis based on their own history, status, and prospects.

Immigration advocates should expect that immigration authorities will follow the decision and hold that section 243(d) is a crime of violence, although the mandate has not issued and a petition for reconsideration and rehearing will be filed in *Perez*. Advocates should contest any adverse decision in line with *Perez* and preserve the issue on appeal. As a starting point for argument, consider the Discussion section, below, asserting that the *Perez* decision is based on a misunderstanding of California caselaw and an incorrect application of Supreme Court precedent.

California Penal Code § 12022.7- Enhancement for infliction of great bodily injury. Does *Perez* affect the immigration consequences of this sentence enhancement? Immigration authorities treat a substantive enhancement that increases the potential sentence of an offense as adding its elements to the offense. Under *Perez*, a felony that can be committed by an intentional, non-violent touching coupled with this type of enhancement would likely be considered a COV. However, a DUI with a section 12022.7 should not be so held, because a DUI does not require an intentional touching. Section 261.5(c) or 288 with a § 12022.7 enhancement based on a resulting pregnancy should not be held a COV -- the pregnancy need not result from an unwanted or violent touching – although it is possible ICE would so charge with a section 288.

Post-Conviction Relief. Immigrants with prior convictions for Pen C § 243(d) that cause adverse immigration consequences may need to obtain post-conviction relief to eliminate the conviction. See information at www.ilrc.org/immigrants-post-conviction-relief.

II. Discussion and Defense Arguments

The issue in *Perez* is whether, under the categorical approach, there is a realistic probability that Pen C § 243(d) is used to prosecute offenses that involve only minimal use of force. If there is, it is not a crime of violence.

Courts have interpreted the definition of a crime of violence (COV) at 18 USC § 16(a) to require the threat or use of *violent* force as an element of the offense. The Supreme Court, Ninth Circuit, and Board of Immigration Appeals have found that a battery that can be committed by *de minimus,* non-violent force (often referred to as "an offensive touching") is never a COV.[4]

The categorical approach requires proof of a "realistic probability" that a particular criminal statute actually will be used to prosecute a particular minimum conduct.[5] One may not use mere "legal imagination" to dream up some minimum conduct that falls outside the generic definition at issue. *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007). Here there must be evidence of a realistic probability that section 243(d) would be used to prosecute conduct that involved an offensive touching, rather than use of violent force.

Section 243(d) provides, "When a battery is committed against any person and serious bodily injury is inflicted on the person, the battery is punishable" as an alternative felony/misdemeanor. California courts have made clear that section 243(d) can be committed by an offensive touching, where the amount of force used is neither intended nor likely to cause an injury, but nevertheless an injury occurs. See CALCRIM 925.

Despite this, the panel in *Perez* held that section 243(d) is a crime of violence. The rest of this advisory will discuss the panel's reasoning and provide preliminary ideas for arguments that *Perez* was wrongly decided. These may be useful to support an appeal of an adverse immigration decision, until a model brief becomes available.

A. The panel found that Mr. Perez did not prove a realistic probability of prosecution. It declined to accept California precedent decisions that analyzed Pen C § 243(d) and that explicitly held, based on the plain language of the statute, that the intent of the legislature in enacting section 243(d) was to include a minimal touching that was not violent but that nonetheless caused an injury. Instead, the panel found that these California courts were using "legal imagination" to dream up "unusual scenarios," because the fact patterns in those cases did not themselves involve an offensive touching. Arguably this is an incorrect application of the *Duenas-Alvarez* requirement of a realistic probability of prosecution.

B. After dismissing the above decisions, the panel concluded that Mr. Perez did not meet the *Duenas Alvarez* threshold due to lack of actual cases that show conviction of section 243(d) for an offensive touching. The panel's conclusion rests on error: in fact, there are reported and unreported California decisions where a section 243(d) conviction is based on an offensive touching that resulted in an injury.

C. The panel noted that the Ninth Circuit has found that some other battery statutes (Cal Pen C §§ 243(c)(2) and 273.5, and Wash. Rev. Code § 9A.36.021(1)(a)) are crimes of violence, and stated that the same logic should apply to section 243(d).

D. On July 25, 2019, the panel amended its decision to include language from *Stokeling v. United States*, 139 S.Ct. 544, 533 (2019). But the Supreme Court specifically states that *Stokeling* does not apply to a battery committed by an offensive touching.

A. The panel found that Mr. Perez did not establish a realistic probability that Pen C § 243(d) would be used to prosecute an offensive touching, in direct conflict with state precedent decisions analyzing the statute

The *Perez* panel acknowledged that the California definition of the term "battery" used in section 243(d) includes an offensive touching that "need not be violent or severe, it need not cause bodily harm or even pain, and it need not leave any mark." *Perez* at *7, citing *People v. Mansfield*, 200 Cal. App. 3d 82, 88 (1988) (section 243(d) is not a crime involving moral turpitude because it can be committed by an offensive touching).

However, the panel held that because section 243(d) involves a battery where the person suffers an injury, the term must have a different definition: it must mean a battery involving a violent use of force. It acknowledged that California precedent decisions have found the opposite: they have found that battery has the same definition in section 243(d) as in other sections of 243. *Perez* at * 8-14.

As will be discussed below, Mr. Perez referenced California precedent decisions that analyzed the elements of section 243(d) and explicitly found that the minimum conduct for guilt includes an offensive touching. But none of the cases themselves involved a fact situation where there was an offensive touching, and some referred to the offensive touching minimum conduct as hypothetical. For that reason, the *Perez* panel disregarded the cases, stating "Perez claims that section 243(d) is not categorically a crime of violence based on decisions by two state appellate courts that have 'dream[ed] up unusual scenarios,' in which a non-violent act could inflict substantial bodily injury." *Perez* at *5 (citations omitted). The panel found that this was insufficient to meet the D*uenas-Alvarez* test.

> There must be "a realistic probability, not a theoretical possibility" that the State would apply its statute in such a manner. *Duenas-Alvarez*, 549 U.S. at 193. A court's "focus on the minimum conduct criminalized by the state statute is not an invitation to apply 'legal imagination' to the state offense." *Moncrieffe v. Holder*, 569 U.S. 184, 191 (2013) (quoting *Duenas-Alvarez*, 549 U.S. at 193).
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> *Perez* at *2.

Are state court precedent decisions that analyze the minimum conduct required for guilt, based on the plain language of the state statute, the "legal imagination" that *Duenas-Alvarez* prohibits? In the quotation above, the panel cited *Moncrieffe* for the proposition that a court must not apply legal imagination. In *Moncrieffe*, the "court" this referred to was a federal court, reviewing a state statute. Generally, state court precedent setting out the elements of a state statute is binding on a federal court. In *Johnson v. United States*, which also addressed the minimum conduct of a battery statute under the *Duenas-Alvarez* test, the Supreme Court held:

> We are, however, bound by the Florida Supreme Court's interpretation of state law, including its determination of the elements of Fla. Stat. § 784.03(2). The Florida Supreme Court has held that the element of "actually and intentionally touching" under Florida's battery law is satisfied by *any* intentional physical contact, "no matter how slight." *Hearn*s, 961 So. 2d, at 218. We apply "th[is]

> substantive elemen[t] of the criminal offense," in determining whether a felony conviction for battery under Fla. Stat. § 784.03(2) meets the definition of "violent felony" in 18 U.S.C. § 924(e)(2)(B)(i).
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> *Johnson v. United States*, 559 U.S. 133, 138 (2010) (emphasis in original, some citations omitted)

The statute at issue in *Johnson* was battery on a law enforcement officer, referred to as BOLEO. The Supreme Court found that it was bound by *State v. Hearns*, 961 So. 2d 211 (Fla. 2007), a Florida Supreme Court case. In *Hearns*, to determine the minimum use of force necessary for guilt, the Florida court did not require a "case where BOLEO itself had been used to prosecute a mere offensive touching of an officer. Instead, it looked at cases analyzing the definition of force used in simple battery. "In applying the *Perkins* test [the minimum conduct test], we analyze the elements of the battery statute from which BOLEO derives its conduct element." *Id.* at 218. In *Johnson*, the Supreme Court found that it was bound by the analysis in *Hearns* for purposes of determining a realistic probability.

Hearns follows the basic canon of statutory construction that in general, a single term, such as battery, must be given the same meaning in different statutes. *Id.* at 217. This applies equally to the use of "battery" in California Pen C § 243. See, e.g., *People v. Dillon* (1983) 34 Cal.3d 441, 468 ("[I]t is generally presumed that when a word is used in a particular sense in one part of a statute, it is intended to have the same meaning if it appears in another part of the same statute."). See also *United States v. Grisel*, 488 F.3d 844 (9th Cir. 2007), which held that where the plain language of the statute sets out the minimum conduct, that alone is sufficient to prove a realistic probability under *Duenas-Alvarez*. Of course here, the analysis does not rest solely on this principle of statutory construction, but also rests on state precedent that specifically describes the minimum conduct required for the subsection at issue.

Just as the Supreme Court was bound by *Hearns*, the Ninth Circuit is bound by California precedent analyzing a California statute. It is worth briefly considering the analyses in the disregarded California precedent. While the cases do not themselves involve an offensive touching, the decisions go through a detailed analysis and describe this minimum conduct as *the salient characteristic, and in some sense the reason for being*, of section 243(d). These discussions are not dicta; the holding in each decision necessarily rested upon the finding that section 243(d) can be committed with an offensive touching.[6]

In *People v. Hopkins* (1978) 78 Cal. App. 3d 316, 320-321, the court relied on the plain meaning of the statute and found that the legislature created section 243(d) specifically with this minimum conduct *in order to fill a gap in the law*.

> The statute (§ 243) makes a felony of the act of battery which results in serious bodily harm to the victim no matter what means or force was used. This is clear from the plain meaning of the statute. Thus, the statute is able to punish, as a felony, those assaults and batteries outside the purview of section 245. For example, with the enactment of section 243, the thief who pushes an elderly lady to the sidewalk in an effort to grab her purse, could be convicted of a felony if the victim broke her hip in the fall. Such an action might be hard to prove under the requirements of section 245 in that the People would have to prove that the force used was likely to have caused serious bodily injury. Section 243 was enacted to fill this gap in the law of assault and battery.

In *People v. Marshall*, 196 Cal. App. 3d 1253, 1260 (Cal. App. 4th Dist. 1987), the court refused to limit section 243(d) to use of violent force, and found that having a minimum conduct that can reach "innocuous" acts is required for section 243(d) to fill the gap in the law.

> Marshall asks us to limit the use of section 243, subdivision (d) to injury. Section 243 was enacted to fill this gap in the law of assault and battery, only those situations where a victim suffers serious bodily injury *as a result of great violence* -- ignoring the fact that moderate, and even innocuous, acts may lead to serious bodily injury. We conclude that by defining the crime solely in terms of the injury inflicted, the Legislature intended to include all batteries which result in serious bodily harm,

> regardless whether inflicted with great violence, within the reach of this statute.")(emphasis in original); *People v. Mansfield,* 200 Cal. App. 3d 82, 88 (Cal. App. 5th Dist. 1988) (finding that section 243(d) is not a crime involving moral turpitude because "the least adjudicated elements of battery resulting in serious bodily injury do not necessarily involve force *likely* to cause serious injury"). [emphasis in original]

People v. Mansfield, cited in *Marshall*, above, held that section 243(d) is not a crime involving moral turpitude under state law because it can be committed by an offensive touching. "The average person walking down the street would not believe that someone who [merely] pushes another is a culprit guilty of moral laxity or 'general readiness to do evil,' even if the push was willful and results in serious injury." *People* v. *Mansfield,* 200 Cal.App.3d at 88-89.

The *Perez* panel stated that these opinions did not demonstrate the required realistic probability of prosecution, because "they involved technical analyses of state law issues unrelated to the question whether section 243(d) constitutes a crime of violence, and rested their conclusions on improbable hypotheticals." *Perez* at *5.

B. The panel did not consider cases where defendants actually were convicted of Pen C § 243(d) based on an offensive touching that resulted in injury

Declining to accept *Hopkins, Marshall,* and *Mansfield, supra,* the panel found that "Perez cites no case where the state courts in fact did apply section 243(d) to a defendant who had engaged in no more than slight touching … We conclude, therefore, that there is no realistic probability that a person could be convicted of violating Section [243(d)] without having committed a violent act." *Perez* at * 5 (internal citations omitted).

The court's conclusion is incorrect. Cases exist where a mere offensive touching was the basis for conviction under section 243(d), and in just the fact situations that the panel derided as "improbable hypotheticals." See *People v. Myers* (1998) 61 Cal. App. 4th 328 (defendant was convicted of Pen C § 243(d) based on a "tragic" encounter, where the victim yelled and poked at defendant, the defendant pushed the victim away defensively, and the victim slipped on wet pavement and hit his head) and *People v. Finta*, 2012 Cal. App. Unpub. LEXIS 7488 (Cal. App. 1st Dist. Oct. 17, 2012) (defendant was convicted of § 243(d) when he "shoved" a man on his bicycle whom he thought had stolen his personal property; the cyclist fell and was injured).

Advocates may identify additional cases, although this is not required. The Ninth Circuit has held that a single unpublished decision is sufficient to prove a realistic probability of prosecution.[7] See also *People v. Hayes* (2006) 142 Cal. App. 4th 175, discussed in Part C, next.

C. The panel cited cases finding that other battery statutes are crimes of violence

The *Perez* panel discussed the fact that the Ninth Circuit has found that California Penal Code §§ 243(c)(2) and 273.5, and Wash. Rev. Code § 9A.36.021(1)(a), meet the definition of a crime of violence. It did not state that these decisions control for Pen C § 243(d), but stated that the same logic should apply. This following provides a preliminary discussion; if deeper analyses are required, counsel may want to join with a criminal law expert.

Section 243(c)(2) is the statute that is most similar to 243(d). Like section 243(d), section 243(c)(2) penalizes committing a battery, including a *de minimus* touching, that results in an injury. The victim must be a known police officer or similar official. In *United States v. Colon-Arreola*, 753 F.3d 841 (9th Cir. 2014), the court held that a conviction of section 243(c)(2) is a crime of violence, based on the court's conclusion that only violent force could ever cause serious injury. "[A] person cannot be convicted under § 243(c)(2) unless he willfully and unlawfully applies *force sufficient* to not just inflict a physical injury on the victim, but to inflict a physical injury severe enough that it requires professional medical treatment." *Colon-Arreola* at 844–45, cited in *Perez* at * 4 (emphasis added).

The *Colon-Arreola* decision suffers from the same flaw as *Perez*. The court assumed without discussion that the only way that an injury could result from a battery is from application of violent force, as opposed to as an unintended consequence of minimal force. If section 243(c)(2) does have the same elements as 243(d) but for the victim, the *Colon-Arreola* panel erred by failing to consider the extensive precedent finding that section 243(d) can be committed with minimal, non-violent force, or the actual cases where section 243(d) was used to prosecute use of minimal force.

In addition, the panel did not consider that section 243(c)(2) has been used to prosecute simple battery resulting in injury in at least one case. See *People v. Hayes* (2006) 142 Cal. App. 4th 175 (defendant was convicted of Pen C § 243(c)(2) when he kicked a large ashtray, which then fell over and hit an officer's leg causing injury).

Section 9A.36.021(1)(a) of the Washington code punishes a perpetrator who "[i]ntentionally assaults another and thereby recklessly inflicts substantial bodily harm." In *United States v. Lawrence*, 627 F.3d 1281 (9th Cir. 2010) the defendant argued that this subsection is not a violent felony for ACCA purposes because, according to Washington state common law, one of the definitions of "assault" includes an "unlawful" touching that can be accomplished by spitting or *de minimus* force. However, neither the defendant nor the court in *Lawrence* could identify any case that involved an unlawful touching. Oddly, the court in *Lawrence* applied the "ordinary case" rule to this elements-based definition. See *Lawrence* at p. 1286 and n. 6. The Ninth Circuit later overruled *Lawrence* when it held that, based on subsequent Supreme Court precedent, section 9A.36.021 is indivisible between its subsections, at least one of which is not a COV, so that no conviction of the statute is a COV. *United States v. Robinson*, 869 F.3d 933 (9th Cir. 2017).

Section 273.5 of the California Penal Code punishes a perpetrator who "willfully inflicts corporal injury resulting in a traumatic condition" upon certain persons who share a domestic relationship with the defendant. Section 273.5 appears to require intent to use a level of force sufficient to cause injury. "The plain terms of [section 273.5] require a person willfully to inflict upon another person a traumatic condition, where willfully is a synonym for intentionally." *United States v. Laurico-Yeno*, 590 F.3d 818, 821 (9th Cir. 2010). But the *Perez* panel likens section 273.5 to section 243(d), because some cases have found that battery is a lesser included offense of section 273.5. However, it did not identify any case where a section 273.5 conviction was based on an offensive touching, and no precedent California decisions have held that this minimum conduct is essential to the definition of section 273.5.

D. The panel cited *Stokeling* in support of its arguments, but *Stokeling* does not apply to battery

On July 25, 2019, the panel amended its decision to add discussion of *Stokeling v. United States*, 139 S.Ct. 544 (2019). *Stokeling* held that a Florida robbery offense that requires use of physical force to overcome the resistance of the victim is a crime of violence, even if the force used is minimal.

> In interpreting [a crime of violence], the Supreme Court defined "physical force" to mean "*violent* force—that is, force capable of causing physical pain or injury to another person." *Johnson v. United States*, 559 U.S. 133, 140 (2010). Clarifying this definition, the Supreme Court explained that "the force necessary to overcome a victim's physical resistance is inherently 'violent' in the sense contemplated by *Johnson*." *Stokeling v. United States*, 139 S.Ct. 544, 533 (2019).
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> *Perez* at *6.
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> Moreover, so long as the force used was sufficient to overcome a victim's resistance (as in the scenario where a thief pushed a victim in order to grab her purse) it would meet the definition of "violent force" for purposes of the generic federal definition of crime of violence. *See Stokeling,* 139 S.Ct. at 555.
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> *Perez* at *13.

The *Perez* panel's citation of *Stokeling* does not support its holding. First, *Stokeling* specifically holds that its new rule does not apply to a battery involving an offensive touching. It reaffirms the holding in *Johnson* that a battery committed by minimal force is not a crime of violence. *Stokeling* applies its new rule to a different type of offense, a Florida robbery statute that requires using force to overcome the resistance of the victim. The Court held that *in the context of that type of confrontation, where a victim's will must be overcome*, even a minimal use of force is inherently violent.

> Stokeling argues that *Johnson* rejected as insufficient the degree of "force" required to commit robbery under Florida law because it is not "substantial force." We disagree. The nominal contact that *Johnson* addressed involved physical force that is different in kind from the violent force necessary to overcome resistance by a victim. The force necessary for misdemeanor battery does not require resistance or even physical aversion on the part of the victim; the "unwanted" nature of the physical contact itself suffices to render it unlawful. See *State* v. *Hearns*, 961 So. 2d 211, 216 (Fla. 2007).
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> *Stokeling*, 139 S.Ct. at 553.

Second, the *Perez* panel appears to suggest that, under *Stokeling*, even minimal force used to commit section 243(d) would be a crime of violence because it involves overcoming the will of the victim. This is based on one of the fact scenarios mentioned in a California opinion, where a thief takes a victim's purse and pushes her down. However, *Stokeling* concerned a robbery offense that has as an element the use of force to overcome a victim's will. Section 243(d) has no such element. And, the encounter with a thief was merely one suggested scenario for section 243(d). Other means of violating section 243(d), including the conduct involved in actual prosecutions, do not involve theft or overcoming a victim, but involve the classic simple battery: the victim is pushed in a rude or offensive manner. See *People v. Meyers, People v. Finta,* discussed in Part 2, above.

For further discussion of *Stokeling,* see ILRC, *Stokeling v. United States: Supreme Court Defines Crime of Violence* (January 2019) at www.ilrc.org/crimes.

Endnotes

[1] INA § 101(a)(43)(F), 8 USC § 1101(a)(43)(F).

[2] INA § 237(a)(2)(E)(i), 8 USC § 1227(a)(2)(E)(i).

[3] The court found that Pen C § 243(d) meets the definition of a "crime of violence" set out in United States Sentencing Guidelines § 4B1.2(a)(1).2, which is "any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—(1) has as an element the use, attempted use, or threatened use of physical force against the person of another . . . . " It equated this definition with 18 USC § 16(a). See *Perez*, slip at *6, n. 2.

[4] See, e.g., *Johnson v. United States,* 559 U.S. 133 (2010), reaffirmed in *Stokeling v. United States*, 139 S.Ct. 544, 533 (2019); *Ortega-Mendez v. Gonzales,* 450 F.3d 1010 (9th Cir. 2006); *Matter of Sanudo*, 23 I&N Dec. 968 (BIA 2006); *Matter of Guzman-Polanco*, 26 I&N Dec. 713 (BIA 2016), withdrawing *Matter of Martin,* 23 I&N Dec. 491 (BIA 2002) to find that causation of injury without the use of violent force is not a crime of violence.

[5] For more information on the categorical approach, including the requirement of a realistic probability of prosecution, see ILRC, *How to Use the Categorical Approach Now* (2017) at www.ilrc.org/crimes.

[6] The finding that section 243(d) can be committed by an offensive touching was necessary to the outcome of each case. In *People v. Hopkins*, the defendant argued that he could not be convicted of "assault by means of force likely to produce great bodily injury" under Pen C § 245 because that offense had been superseded by section 243(d). The court rejected this argument based on its finding that section 243(d) did not include all of the elements of section 245: section 245 required a specified level of force regardless of injury, while section 243(d) could be committed by minimal use of force, but did require an injury. In *People v. Marshall*, the court rejected defendant's argument that he could not be sentenced to the upper term for a section 243(d) conviction based on his use of violent force, because every conviction for 243(d) necessarily involves violence. The court denied this on the grounds that section 243(d) can be committed with minimal use of force. In *People v. Mansfield*, the court found that a conviction of section 243(d) is not a crime involving moral turpitude, because the least adjudicated elements include a nonviolent touching.

[7] See, e.g., *Nunez v. Holder*, 594 F.3d 1124, 1129 and n. 2 (9th Cir. 2010).

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