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STATEMENT OF THE CASE

The defendant has a prior conviction for attempted second degree arson committed on October 17, 2001, and sentenced on January 24, 2002. CP 70. Following his release on this commitment, the defendant spent five consecutive years in the community without committing or being convicted of any other criminal offenses. RP 138-144. At sentencing on the current convictions, the court ruled that under RCW 9.94A.525(2), the attempted arson conviction washed. *Id.* Following his conviction, the defendant filed timely notice of appeal. CP 96. The state thereafter filed timely notice of cross-appeal from the court's ruling that the defendant's attempted arson conviction should not be included in the defendant's offender score in the current case. CP 99-100.

ARGUMENT

THE TRIAL COURT DID NOT ERR UNDER RCW 9.94A.525(2) WHEN IT HELD THAT THE DEFENDANT'S PRIOR CONVICTION FOR ATTEMPTED SECOND DEGREE ARSON HAD WASHED FROM HIS OFFENDER SCORE.

Under RCW 9.94A.525(2), the legislature established a “washout” provision under which certain prior convictions are not included in a defendant’s offender score. This section of RCW 9.94A.525 states as follows:

(2)(a) Class A and sex prior felony convictions shall always be included in the offender score.

(b) Class B prior felony convictions other than sex offenses shall not be included in the offender score, if since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender had spent ten consecutive years in the community without committing any crime that subsequently results in a conviction.

(c) Except as provided in (e) of this subsection, class C prior felony convictions other than sex offenses shall not be included in the offender score if, since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender had spent five consecutive years in the community without committing any crime that subsequently results in a conviction.

(d) Except as provided in (e) of this subsection, serious traffic convictions shall not be included in the offender score if, since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender spent five years in the community without committing any crime that subsequently results in a conviction.

(e) If the present conviction is felony driving while under the influence of intoxicating liquor or any drug (RCW 46.61.502(6)) or felony physical control of a vehicle while under the influence of intoxicating liquor or any drug (RCW 46.61.504(6)), prior convictions of felony driving while under the influence of intoxicating liquor or any drug, felony physical control of a vehicle while under the influence of intoxicating liquor or any drug, and serious traffic offenses shall be included in the offender score if: (i) The prior convictions were committed within five years since the last date of release from confinement (including full-time residential treatment) or entry of judgment and sentence; or (ii) the prior convictions would be considered "prior offenses within ten years" as defined in RCW 46.61.5055.

(f) This subsection applies to both adult and juvenile prior convictions.

RCW 9.94A.525(2).

In the case at bar, the defendant has a prior conviction for attempted second degree arson. As the state concedes in its brief on cross-appeal, under RCW 9A.48.030, second degree arson is a Class B felony, and under RCW 9A.28.020, attempted second degree arson is a Class C felony. In addition, in its brief on cross-appeal, the state conceded that following his release on this conviction, the defendant spent “five consecutive years in the community without committing any crime that subsequently result[ed] in a conviction.” Applying these facts, the trial court ruled that as a Class C felony, the defendant’s prior conviction for attempted second degree arson washed under RCW 9.94A.525(2)(c).

In this case, the state has argued on cross-appeal that the trial court

erred in ruling that the defendant's prior conviction for attempted second degree arson washed because under RCW 9.94A.525(4), the legislature has stated that the courts should "[s]core prior convictions for felony anticipatory offenses (attempts, criminal solicitations, and criminal conspiracies) the same as if they were convictions for completed offenses." This argument is in error for three reasons: (1) under the plain meaning of RCW 9.94A.525, all Class C felonies, completed or inchoate, wash after five years, (2) under the doctrine of *expressio unis est exclusio alterius*, the fourth section of RCW 9.94A.525 is not a stated exception the second section, and (3) under the rule of lenity, any ambiguity in the second and fourth sections of RCW 9.94A.525 must be settled to the benefit of the defendant. The following sets out these arguments.

(1) Under the Plain Meaning of RCW 9.94A.525, All Class C Felonies, Completed or Inchoate, Wash after Five Years.

When interpreting a statute, a court must first assume that the legislature means exactly what it says. *State v. Keller*, 143 Wn.2d 267, 276, 19 P.3d 1030 (2001). Thus, if the statute is clear on its face, its meaning is derived from the statutory language alone. *State v. Watson*, 146 Wn.2d 947, 51 P.3d 66 (2002). In *State v. Hall*, 112 Wn.App. 164, 48 P.3d 350 (2002), Division II of the Court of Appeals puts this rule as follows:

Where the meaning of a statute is clear on its face, this court assumes that the Legislature "means exactly what it says" and we give

effect to the plain language without regard to rules of statutory construction.

State v. Hall, 112 Wn.App. at 167 (quoting *State v. Warfield*, 103 Wn.App. 152, 156, 5 P.3d 1280 (2000)).

In addition, when looking at the meaning of any particular statute, the courts give the words within the statute their common legal or ordinary meaning unless the statute includes specific statutory definitions. *State v. Chester*, 133 Wn.2d 15, 940 P.2d 1374 (1997). One of the sources the court uses for determining the common definition of non-technical words is the dictionary. *State v. Chester*, 133 Wn.2d at 22.

The courts also discern the plain meaning of a statute from the context of the statute containing the provision, related provisions, and the statutory scheme as a whole. *Christensen v. Ellsworth*, 162 Wn.2d 365, 372-73, 173 P.3d 228 (2007). The court also attempts to construe statutes “so that all the language used is given effect, with no portion rendered meaningless or superfluous.” *State v. Roggenkamp*, 153 Wn.2d 614, 624, 106 P.3d 196 (2005) (quoting *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003)). Finally, when interpreting a criminal statute, the courts “give it a literal and strict interpretation.” *State v. Delgado*, 148 Wn.2d 723, 727, 63 P.3d 792 (2003).

Under RCW 9.94A.525 as a whole, the legislature has set out a

framework for determining a defendant's offender score, which is one of the two factors in determining what a defendant's standard range is for a particular offense. This conclusion flows from the introductory language of the statute, which states:

The offender score is measured on the horizontal axis of the sentencing grid. The offender score rules are as follows:

The offender score is the sum of points accrued under this section rounded down to the nearest whole number.

RCW 9.95A.525 (introduction).

The body of the statute then defines what a "prior offense" is (section 1), when it should be included (section 2), how to treat out-of-state convictions (section 3), how to score inchoate crimes (section 4), how to score multiple prior convictions (section 5), the variation in the number of points to assign prior concurrent convictions based upon the type of current offense (sections 6 through 20), and a final provision calling for the independent determination of the correct offender score for each new sentencing (section 21). As a review of this statute as a whole reveals, section 4 has nothing to do with determining whether or not a prior conviction should be excluded from the offender score, as does section 2.

The specific language of section four states as follows:

(4) Score prior convictions for felony anticipatory offenses (attempts, criminal solicitations, and criminal conspiracies) the same as if they were convictions for completed offenses.

RCW 9.94A.525(4).

As the plain language of this provision states, it deals with how inchoate crimes should be “scored.” It does not deal with those circumstances under which a prior conviction “should be included in the offender score.” Thus, seen as a whole, sections two and four of RCW 9.94A.525 deal with different subjects, and section four cannot properly be seen as an exception to subsection two.

(2) Under the Doctrine of “Expressio Unis Est Exclusio Alterius,” the Fourth Section of RCW 9.94A.525 Is Not a Stated Exception in the Second Section.

In cases in which the legislature provides a list of terms or requirements to define a specific word or status, or to exclude the same, the courts also employ the principle of *inclusio unius est exclusio alterius* or *expressio unius est exclusio alterius*. The former is translated as “the inclusion of one is the exclusion of another,” while the latter is translated as “the expression of one thing is the exclusion of another.” *Blacks Law Dictionary*, 5th Edition (1979), pages 687 and 521 respectively. This principle of statutory construction states that if the legislature uses a list of terms to define a specific word or condition, it thereby excludes all other terms or conditions. The decisions in *State v. Swanson*, 116 Wn.App. 67, 65 343 (2003), and *State v. Kazeck*, 90 Wn.App. 830, 953 P.2d 832 (1998), illustrate this primary rule of statutory construction.

In *State v. Swanson, supra*, a convicted felon appealed the trial court's refusal to restore his right to possess firearms in spite of the fact that he had met the requirements the legislature set in RCW 9.41.040(4)(b)(ii) for the restoration of such rights. In reply, the state argued that while the defendant did meet the several requirements of the statute, the trial court still had inherent discretion to deny his petition, even though the statute did not explicitly grant the court that authority. In addressing these arguments the court relied upon the principle of *expressio unius est exclusio alterius*, which is defined as follows:

Expressio unius est exclusio alterius, a common maxim of statutory construction, also aids our decision. The maxim holds that, "[w]here a statute specifically designates the things or classes of things upon which it operates, an inference arises in law that all things or classes of things omitted from it were intentionally omitted by the legislature." *Wash. Natural Gas Co. v. Pub. Util. Dist. No. 1*, 77 Wash.2d 94, 98, 459 P.2d 633 (1969).

State v. Swanson, 116 Wn.App. at 75 (italics added).

Applying this maxim, the court of appeals reversed the trial court on the basis that the legislature's failure to specifically grant the trial court discretion to deny a petitioner who met the listed requirements thereby prohibited the court from exercising that discretion. The court of appeals held:

Expressio unius est exclusio alterius commands that RCW 9.41.040(4) imposes no burden beyond the three enumerated, threshold requirements set forth at RCW 9.41.040(4)(b)(ii). The

maxim also refutes the State's argument that the restoring court is free to impose conditions that were not imposed at the petitioner's sentencing. Several of the statutes discussed above illustrate that the Legislature has considered and imposed conditions other than sentencing conditions; but, in those statutes, the extra conditions are express. The sole mention of "conditions" at RCW 9.41.040(4)(b)(ii) concerns "conditions of the sentence." RCW 9.41.040(4)(b)(ii). Thus, *expressio unius est exclusio alterius* commands that no other conditions are required.

State v. Swanson, 116 Wn.App. at 76-77 (italics added).

Similarly, in *State v. Kazeck, supra*, the defendant appealed his conviction for felony possession of marijuana. At the time of his arrest the marijuana in his possession weighed slightly over 40 grams. However, by the time of trial most of the moisture had evaporated and it weighed less than 40 grams. Following conviction, the defense argued on appeal that at the time of his arrest, the defendant had actually possessed less than 40 grams of marijuana which had enough water in it to put the combined weight just over 40 grams. Thus, the court of appeals was faced with the question of just what the term "marijuana" meant.

In addressing this question the court first noted that the legislature had defined the term "marijuana" to include "all parts of the plant Cannabis, whether growing or not" with a number of listed exceptions. "Water" or "moisture" were not listed as part of the exceptions. Thus, employing the principle of *expressio unius est exclusio alterius*, the court refused to include these terms as part of the exception. The court held:

This may also be expressed in the maxim of statutory construction, “*expressio unius est exclusio alterius*.” That is to say, “the mention of one thing implies the exclusion of another thing.” “Where a statute specifically designates the things or classes of things upon which it operates, an inference arises in law that all things or classes of things omitted from it were intentionally omitted by the legislature under the maxim *expressio unius est exclusio alterius*--specific inclusions exclude implication. “Where a statute provides for a stated exception, no other exceptions will be assumed by implication.”

Had the Legislature intended to exclude water from the definition of marijuana, it would have listed water as an exception. The Legislature did not; ergo, we will not.

State v. Kazeck, 90 Wn.App. at 833 (citations omitted).

In the case at bar, section (2)(c) of RCW 9.94A.525 specifically excludes all prior Class C felonies from a defendant’s offender score given the existence of the other qualifying factors. The exact language of this provision is as follows:

(c) Except as provided in (e) of this subsection, class C prior felony convictions other than sex offenses shall not be included in the offender score if, since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender had spent five consecutive years in the community without committing any crime that subsequently results in a conviction.

RCW 9.94A.525(2)(c).

As the language of this provision states, class C prior felony convictions wash “[e]xcept as provided in (e) of this subsection” Under the rule of *expressio unius est exclusio alterius*, the inclusion of the one exception (“[e]xcept as provided in (e) of this subsection) excludes all

other exceptions (except as provided in subsection 4). Thus, the state's interpretation of the statute violates the rule of *expressio unius est exclusio alterius*.

(3) Under the Rule of Lenity, Any Ambiguity in the Second and Fourth Sections of RCW 9.94A.525 must Be Settled to the Benefit of the Defendant.

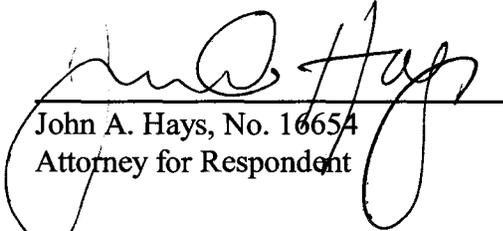
Under the rule of lenity, if an ambiguous statute has two reasonable interpretations, the statute is to be strictly construed in favor of the defendant. *State v. Lively*, 130 Wn.2d 1, 921 P.2d 1035 (1996). Under this rule, even if the state's interpretation were reasonable that the legislature intended section four of the statute to stand as an exception to subsection 2, the defendant's interpretation that section (2)(c) excludes all class C felonies both complete and inchoate is just as reasonable, particularly because it conforms to the plain language of section (2). Thus, under the rule of lenity, the trial court correctly adopted the interpretation that favored the defendant.

CONCLUSION

The trial court did not err when it ruled that the defendant's prior conviction for attempted second degree arson washed.

DATED this 23RD day of November, 2009.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Respondent

APPENDIX

RCW 9.94A.525

The offender score is measured on the horizontal axis of the sentencing grid. The offender score rules are as follows:

The offender score is the sum of points accrued under this section rounded down to the nearest whole number.

(1) A prior conviction is a conviction which exists before the date of sentencing for the offense for which the offender score is being computed. Convictions entered or sentenced on the same date as the conviction for which the offender score is being computed shall be deemed "other current offenses" within the meaning of RCW 9.94A.589.

(2)(a) Class A and sex prior felony convictions shall always be included in the offender score.

(b) Class B prior felony convictions other than sex offenses shall not be included in the offender score, if since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender had spent ten consecutive years in the community without committing any crime that subsequently results in a conviction.

(c) Except as provided in (e) of this subsection, class C prior felony convictions other than sex offenses shall not be included in the offender score if, since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender had spent five consecutive years in the community without committing any crime that subsequently results in a conviction.

(d) Except as provided in (e) of this subsection, serious traffic convictions shall not be included in the offender score if, since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender spent five years in the community without committing any crime that subsequently results in a conviction.

(e) If the present conviction is felony driving while under the influence of intoxicating liquor or any drug (RCW 46.61.502(6)) or felony physical control of a vehicle while under the influence of intoxicating liquor or any drug (RCW 46.61.504(6)), prior convictions of felony driving while under the influence of intoxicating liquor or any drug, felony physical control of a vehicle while under the influence of intoxicating liquor or any drug, and serious traffic offenses shall be included in the offender score if: (i) The prior convictions were committed within five years since the last date of release from confinement (including full-time residential treatment) or entry of judgment and sentence; or (ii) the prior convictions would be considered “prior offenses within ten years” as defined in RCW 46.61.5055.

(f) This subsection applies to both adult and juvenile prior convictions.

(3) Out-of-state convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law. Federal convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law. If there is no clearly comparable offense under Washington law or the offense is one that is usually considered subject to exclusive federal jurisdiction, the offense shall be scored as a class C felony equivalent if it was a felony under the relevant federal statute.

(4) Score prior convictions for felony anticipatory offenses (attempts, criminal solicitations, and criminal conspiracies) the same as if they were convictions for completed offenses.

(5)(a) In the case of multiple prior convictions, for the purpose of computing the offender score, count all convictions separately, except:

(i) Prior offenses which were found, under RCW 9.94A.589(1)(a), to encompass the same criminal conduct, shall be counted as one offense, the offense that yields the highest offender score. The current sentencing court shall determine with respect to other prior adult offenses for which sentences were served concurrently or prior juvenile offenses for which sentences were served consecutively, whether those offenses shall be counted as one offense or as separate offenses using the “same criminal conduct” analysis found in RCW 9.94A.589(1)(a), and if the court finds that they shall be counted as one offense, then the offense that yields the highest offender score shall be used. The current sentencing court may presume that such other prior offenses were

not the same criminal conduct from sentences imposed on separate dates, or in separate counties or jurisdictions, or in separate complaints, indictments, or informations;

(ii) In the case of multiple prior convictions for offenses committed before July 1, 1986, for the purpose of computing the offender score, count all adult convictions served concurrently as one offense, and count all juvenile convictions entered on the same date as one offense. Use the conviction for the offense that yields the highest offender score.

(b) As used in this subsection (5), "served concurrently" means that: (i) The latter sentence was imposed with specific reference to the former; (ii) the concurrent relationship of the sentences was judicially imposed; and (iii) the concurrent timing of the sentences was not the result of a probation or parole revocation on the former offense.

(6) If the present conviction is one of the anticipatory offenses of criminal attempt, solicitation, or conspiracy, count each prior conviction as if the present conviction were for a completed offense. When these convictions are used as criminal history, score them the same as a completed crime.

(7) If the present conviction is for a nonviolent offense and not covered by subsection (11), (12), or (13) of this section, count one point for each adult prior felony conviction and one point for each juvenile prior violent felony conviction and 1/2 point for each juvenile prior nonviolent felony conviction.

(8) If the present conviction is for a violent offense and not covered in subsection (9), (10), (11), (12), or (13) of this section, count two points for each prior adult and juvenile violent felony conviction, one point for each prior adult nonviolent felony conviction, and 1/2 point for each prior juvenile nonviolent felony conviction.

(9) If the present conviction is for a serious violent offense, count three points for prior adult and juvenile convictions for crimes in this category, two points for each prior adult and juvenile violent conviction (not already counted), one point for each prior adult nonviolent felony conviction, and 1/2 point for each prior juvenile nonviolent felony conviction.

(10) If the present conviction is for Burglary 1, count prior

convictions as in subsection (8) of this section; however count two points for each prior adult Burglary 2 or residential burglary conviction, and one point for each prior juvenile Burglary 2 or residential burglary conviction.

(11) If the present conviction is for a felony traffic offense count two points for each adult or juvenile prior conviction for Vehicular Homicide or Vehicular Assault; for each felony offense count one point for each adult and 1/2 point for each juvenile prior conviction; for each serious traffic offense, other than those used for an enhancement pursuant to RCW 46.61.520(2), count one point for each adult and 1/2 point for each juvenile prior conviction; count one point for each adult and 1/2 point for each juvenile prior conviction for operation of a vessel while under the influence of intoxicating liquor or any drug.

(12) If the present conviction is for homicide by watercraft or assault by watercraft count two points for each adult or juvenile prior conviction for homicide by watercraft or assault by watercraft; for each felony offense count one point for each adult and 1/2 point for each juvenile prior conviction; count one point for each adult and 1/2 point for each juvenile prior conviction for driving under the influence of intoxicating liquor or any drug, actual physical control of a motor vehicle while under the influence of intoxicating liquor or any drug, or operation of a vessel while under the influence of intoxicating liquor or any drug.

(13) If the present conviction is for manufacture of methamphetamine count three points for each adult prior manufacture of methamphetamine conviction and two points for each juvenile manufacture of methamphetamine offense. If the present conviction is for a drug offense and the offender has a criminal history that includes a sex offense or serious violent offense, count three points for each adult prior felony drug offense conviction and two points for each juvenile drug offense. All other adult and juvenile felonies are scored as in subsection (8) of this section if the current drug offense is violent, or as in subsection (7) of this section if the current drug offense is nonviolent.

(14) If the present conviction is for Escape from Community Custody, RCW 72.09.310, count only prior escape convictions in the offender score. Count adult prior escape convictions as one point and juvenile prior escape convictions as 1/2 point.

(15) If the present conviction is for Escape 1, RCW 9A.76.110, or

Escape 2, RCW 9A.76.120, count adult prior convictions as one point and juvenile prior convictions as 1/2 point.

(16) If the present conviction is for Burglary 2 or residential burglary, count priors as in subsection (7) of this section; however, count two points for each adult and juvenile prior Burglary 1 conviction, two points for each adult prior Burglary 2 or residential burglary conviction, and one point for each juvenile prior Burglary 2 or residential burglary conviction.

(17) If the present conviction is for a sex offense, count priors as in subsections (7) through (11) and (13) through (16) of this section; however count three points for each adult and juvenile prior sex offense conviction.

(18) If the present conviction is for failure to register as a sex offender under RCW 9A.44.130(11), count priors as in subsections (7) through (11) and (13) through (16) of this section; however count three points for each adult and juvenile prior sex offense conviction, excluding prior convictions for failure to register as a sex offender under RCW 9A.44.130(11), which shall count as one point.

(19) If the present conviction is for an offense committed while the offender was under community custody, add one point. For purposes of this subsection, community custody includes community placement or postrelease supervision, as defined in chapter 9.94B RCW.

(20) If the present conviction is for Theft of a Motor Vehicle, Possession of a Stolen Vehicle, Taking a Motor Vehicle Without Permission 1, or Taking a Motor Vehicle Without Permission 2, count priors as in subsections (7) through (18) of this section; however count one point for prior convictions of Vehicle Prowling 2, and three points for each adult and juvenile prior Theft 1 (of a motor vehicle), Theft 2 (of a motor vehicle), Possession of Stolen Property 1 (of a motor vehicle), Possession of Stolen Property 2 (of a motor vehicle), Theft of a Motor Vehicle, Possession of a Stolen Vehicle, Taking a Motor Vehicle Without Permission 1, or Taking a Motor Vehicle Without Permission 2 conviction.

(21) The fact that a prior conviction was not included in an offender's offender score or criminal history at a previous sentencing shall have no bearing on whether it is included in the criminal history or offender score for the current offense. Prior convictions that were not counted in the offender score or included in criminal history under repealed or previous versions of

the sentencing reform act shall be included in criminal history and shall count in the offender score if the current version of the sentencing reform act requires including or counting those convictions. Prior convictions that were not included in criminal history or in the offender score shall be included upon any resentencing to ensure imposition of an accurate sentence.

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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION II

STATE OF WASHINGTON,
Respondent,

NO. 38728-0-II

vs.

AFFIRMATION OF SERVICE

MARK JOHNSON;
Appellant.

STATE OF WASHINGTON)
County of Clark) : ss.

CATHY RUSSELL, states the following under penalty of perjury under the laws of Washington State. That at all times herein mentioned I was and now am a citizen of the United States and resident of the State of Washington, over the age of eighteen and competent to be a witness and make service herein.

On November 23rd, 2009 , I personally placed in the mail the following documents

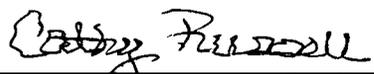
- 1. BRIEF OF CROSS-RESPONDENT
- 2. AFFIRMATION OF SERVICE

to the following:

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Dated this 23RD day of NOVEMBER, 2009 at LONGVIEW, Washington.


CATHY RUSSELL
LEGAL ASSISTANT TO JOHN A. HAYS

AFFIRMATION OF SERVICE - 1

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