IN THE SUPREME COURT OF FLORIDA

CASE NO. 84,701

LEONARDO FRANQUI,

Appellant,

-vs-

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA CRIMINAL DIVISION

REPLY BRIEF OF APPELLANT LEONARDO FRANQUI

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POINT I

THE TRIAL COURT'S PRECLUSION OF THE DEFENDANT'S EXERCISE OF PEREMPTORY CHALLENGES ON TWO JURORS CONSTITUTED REVERSIBLE ERROR AND VIOLATED THE FIFTH AND SIXTH AMENDMENTS AND ITS FAILURE TO ACCEPT THE RACE-NEUTRAL REASONS GIVEN BY THE DEFENDANT WAS MANIFESTLY ERRONEOUS.

The state makes a number of arguments which appear to have little or nothing to do with this Court's resolution of this important issue. Perhaps the central question here is whether peremptory challenges exist at all anymore. Crucial to this issue are the questions whether a challenge enjoys any presumption of neutrality and whether the burden of proof shifts to the challenger in the absence any evidence of improper motive. Here, however, regardless of the answers, the defendant's peremptory challenges were so obviously race/gender/ethnicity neutral that their disallowance was error in any regard.

There is not one iota of racial or gender bias on the part of the defense apparent in this record. Juror Diaz is (apparently) Hispanic and so is Franqui. Any logical defense bias would favor, not discriminate against, Diaz. That defense counsel did not "like him" was a profoundly innocent and quintessentially non-racial explanation for their peremptory challenge. It was exactly the kind of visceral, non-rational, and extraordinarily non-sinister basis upon which peremptory challenges have been exercised for

decades. It is unlike "uncomfortable", cf., Wright v. State, 586 So.2d 1024 (Fla. 1991), which is probably not a "reason" at all.

The state strongly condemns the motives of defense counsel who, later during voir dire, collectively offered the trial court additional, more rational reasons for the exclusion of Diaz and characterizes those explanations as "newly discovered reasons" that were "hatched" and "pretextual." It thereby mistakes deliberation and contemplation for racial bias. It confuses articulation with bigotry. It cavalierly accuses without any evidence of any improper motive. It also overlooks the fact that there exists no authority for the imposition of a time limit at trial for the explanation of a peremptory challenge. Delay in and of itself means nothing absent some indication of a discriminatory agenda. The can be no pretext absent an ulterior motive.

The state also, but too belatedly, suggests that other jurors accepted by the defense shared Diaz's infirmities. Nothing was offered by the state to the trial court to suggest that other jurors of similar characteristics escaped defense peremptory challenge. In fact, the state failed to object at all to any of the reasons given by the defense for its challenge. This constitutes a waiver. "If [a party] fails to object to the reasons given by [the other party] for excusing a particular juror, the opportunity to exercise a Neil challenge is waived." Miller v. State, 636 So.2d 144 (Fla. 1st DCA 1994); accord Joiner v. State,

618 So.2d 174, 176 (Fla. **1993).**

With regard to Franqui's claim that the state's Neil challenges were too vague to have prompted a Neil inquiry at all, the state misses the point. This issue has nothing to do with the right of a trial court to conduct a **sua** sponte inquiry "under the right circumstances''or the right of jurors to be discrimination free. The point is simply that there can be no meaningful Neil inquiry if the alleged bias is not identified and a trial court is never apprised of the nature of the alleged violation. A trial court cannot deem the exercise of a peremptory impermissible when the nature of the Neil violation remains unspoken and therefore unknown to it. Absent a specific description and finding, Neil can not be implicated, the burden does not shift to the striking party, and the trial court errs if it disallows a peremptory strike.

The state asserts that "Ms. Andani" was clearly a woman and "Diaz" was likely Hispanic. While that may be so, it gives no clue to the trial court or the opposing party as to what bias the challenger claims. Ms. Andani may be Indian, Hindu, and/or black, as well as female. Diaz could be Catholic and/or **black** as well as Cuban. A juror could could belong to any of a myriad of Neil-recognized ethnic groups, religious backgrounds, or racial makeups at the same time. A Neil challenge could be a valid one grounded in any legitimate class membership or it could be an utterly improper one based on an unrecognized class affiliation which

should prompt no inquiry at all.

Whatever claim the state was trying to make here, it failed to make any identifiable claim at all, and waived the issue altogether, at least as to Diaz. The trial court was wrong to conduct inquiry and it was even more erroneous to disallow the defendant's peremptory strikes.

POINT II

THE TRIAL COURT ERRED IN OVERRULING THE DEFENDANT'S CHALLENGE TO THE STATE'S UNJUSTIFIABLE EXCLUSION OF A FEMALE JUROR WHERE THE STATE FAILED TO OFFER A GENDER-NEUTRAL EXPLANATION FOR ITS EXERCISE OF PEREMPTORY CHALLENGES AGAINST HER, THEREBY VIOLATING THE DEFENDANT'S FIFTH AMENDMENT DUE PROCESS AND SIXTH AMENDMENT IMPARTIAL JURY RIGHTS.

Proffered reasons for striking a juror which appear facially neutral do not foreclose a Neil challenge. The reasons, in addition, must not be pretextual. Wrisht v. State, 586 So.2d 1024, 1028 (Fla. 1991); Roundtree v. State, 546 So.2d 1042, 1045 (Fla. 1989); State v. Slappy, 522 So.2d 18, 22 (Fla. 1988), citing Batson v.Kentucky, 476 U.S. 79, 98, fn. 20, 106 S.Ct. 1712, 1724, fn. 20, 90 L.Ed.2d 69 (1986). A showing of reasonableness, alone, is constitutionally insufficient where the challenges are pretextual. See Slappy, supra; Gadson v. State, 561 So.2d 1316 (Fla. 4th DCA 1990) (where proffer was reasonable, reversal still required because strikes were pretextual).

Allowing one juror to go unchallenged, while challenging another juror for the same characteristic, shows an impermissible pretext. Slappy, 522 So.2d at 22; Richardson v. State, 575 So.2d 294, 295 (Fla. 4th DCA 1991). Case law uniformly finds the disparate treatment of similarly situated jurors to be pretextual. E.g.I Hall v. Daee, 602 So.2d 512, 516 (Fla. 1992) (striking three

jurors with ties to medical community in medical malpractice case appears to be pretext where seated white jurors also had ties to medical community); Roundtree v. State, supra, at 1045 (striking single, black, thirty year old unemployed woman pretextual where unemployed white female selected as juror); Richardson v. State, suara, at 295 (striking black juror opposed to applying statute prohibiting drug purchase with 1,000 feet of school to in-home use invalid, where three other jurors gave identical or similar responses); Slater v. State, 588 So.2d 320, 321 (Fla. 4th DCA 1991) (challenges to two black teachers not pretextual where all teachers were stricken, regardless of race); Gadson v. State, 561 So.2d 1316, 1317 (Fla. 4th DCA 1990) (striking of prospective juror who used to be a teacher pretextual where unchallenged juror had a similar work history); Charles v. State, 565 So.2d 871, 872 (Fla. 4th DCA 1990) (challenge of three black jurors pretextual where stronger reasons to strike seated white jurors existed); Maves v. State, 550 So.2d 496, 498 (Fla. 4th DCA 1989) (striking of black practical nurse pretextual where lab technologist went unchallenged by state); Floyd v. State, 511 So.2d 762, 765 (Fla. 3d DCA), rev. denied, 545 So.2d 1369 (Fla. 1989) (white student not challenged demonstrated a subterfuge to avoid claim of discriminatory use of peremptory challenge where black students were challenged).

Here, as demonstrated in Franqui's initial brief, there is no question that female juror Raquel Pascual was singled out for exclusion by the state while other, similarly situated, male jurors

were retained. The defense not only showed a likelihood of an impermissible, gender-based discrimination, it proved such a bias to the exclusion of any real doubt.

The defense preserved its objectian to the state's exclusion of Pascual not only by its explicit contemporaneous protest [TR 804 - 805], but by its equivocal acceptance of the jury only "subject to our prior objections." [TR 828] The trial court's interjection, "Diaz Andani and Weaver --" in no way limited the scope or intent of the defense's protest and should not, as the state suggests, operate to impair Franqui's right to appeal this issue.

POINT III

THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO GRANT THE DEFENDANT'S REPEATED MOTIONS FOR SEVERANCE BASED UPON THE UNFAIR PREJUDICE OF THE INTRODUCTION AT THIS JOINT TRIAL OF HIS NON-TESTIFYING CO-DEFENDANTS' POST-ARREST CONFESSIONS WHICH DIRECTLY INCRIMINATED HIM, THEREBY VIOLATING THE DEFENDANT'S CONFRONTATION AND DUE PROCESS RIGHTS GUARANTEED BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The Confrontation Clause of the Sixth Amendment to the United States Constitution guarantees the right of a criminal defendant to confront the witnesses against him. The Confrontation Clause applies to the states through the Fourteenth Amendment. Pointer v. Texas, 380 U.S. 400, 403-406, 85 S.Ct. 1065, 1068-1069, 13 L.Ed.2d 923 (1965).

Thus, in a joint trial, the Confrontation Clause prevents a party from introducing a nontestifying codefendant's statement that inculpates a defendant, because that defendant is denied the opportunity to confront, and cross-examine, the nontestifying codefendant. Cruz v. New York, 481 U.S. 186, 189, 109 S.Ct. 1714, 1717, 95 L.Ed.2d 162 (1987)(citing Pointer v. Texas, 380 U.S. 400, 404, 85 S.Ct. 1965, 1068, 13 L.Ed.2d 923 (1965). Moreover, a violation of the Confrontation Clause cannot be cured by instructing the jury to consider the statement only in assessing the guilt of the codefendant who made it. Bruton v. United States,

391 U.S. 123, 135-136, 88 S.Ct. 1620, 1627-1628, 20 L.Ed.2d 476 (1968).

In Cruz, however, the Court held that the introduction of a defendant's own confession that corroborates, or 'interlocks" with, the nontestifying codefendant's statement "might, in some cases render the violation of the Confrontation Clause harmless, but could not cause introduction of the nontestifying codefendant's confession not to constitute a violation." Id. 481 U.S. at 191, 107 S.Ct. at 1718 (adopting reasoning of concurring opinion in Parker v. Randolph, 442 U.S. 62, 77-80, 99 S.Ct. 2132, 2141-2142, 60 L.Ed.2d 713 (1979)(Blackmun, J., concurring in part and concurring in judgment).

Thus, in a joint trial, a nontestifying codefendant's statement, to the extent it implicates another defendant, violates Bruton even though that statement interlocks with the statement of the implicated defendant. Id. Accordingly, the only real question is whether the state has met its burden of proving that error "harmless beyond a reasonable doubt." Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). For all the reasons described in appellant's initial brief, it has not.

Moreover, the state's Answer Brief of Appellee ignores recent United States Supreme Court authority.

In Williamson v. United States, U.S. ___, 114 S.Ct. 2431, 2437, 129 L.Ed.2d 476 (1994), the High Court held that the "statement against penal interest" exception to the hearsay rule does not apply to statements that are non-self-inculpatory, even if they are made within a broader narrative that is generally self-inculpatory. The Court reiterated that:

> [t]he question under 804(b)(3) is always whether the statement was sufficiently against the declarant's penal interest 'that a reasonable person in the declarant's position would not have made the statement unless believing it to be true.' and this question can only be answered in light of all the surrounding circumstances.

Id. at ___, 114 S.Ct at 2437, as cited by United States v. Costa, U.S.___, 8 Fla. L. Weekly Fed. C55, C56 (11th Cir. Sept. 13, 1994).

Thus, the Costa Court rejected the notion that simply because a codefendant's custodial statement is against his own penal interest and probative of his own guilt it is necessarily admissible against a defendant who is also implicated by the statement. Noting that such a superficial analysis "...does not adequately take into account the circumstance that the confession was made while in custody", the Costa Court reversed. It reasoned, citing Lee v. Illinois, 476 U.S. 530, 545, 106 S.Ct. at 2064 (1986) that "...a codefendant's confession is presumptively unreliable as to the passages detailing the defendant's conduct or culpability because those passages may well be the product of the codefendant's

desire to shift or spread blame, curry favor, avenge himself, or divert attention to another."

Citing its predecessor circuit in United States v. Sarmiento-Perez, 633 F.2d 1092, 1101-1102 (5th Cir Unit A Jan. 1991), the Costa Court concluded that because a custodial "...statement would have probative value against the declarant does not necessarily indicate that, insofar as it implicates the accused, it is sufficiently against the declarant's interest so as to be reliable." Perez at C656.

The Court also cited the Advisory Committee Notes to Rule 804(b)(3) for the accepted proposition that custodial confessions that implicate other codefendants often are not genuinely against the penal interest of the declarant:

> Whether a statement is in fact against interest must be determined from the circumstances of each case. Thus a statement admitting guilt and implicating another person, made while in custody, may well be motivated by a desire to curry favor with the authorities and hence fail to qualify as against interest.... On the other hand, the same words spoken under different circumstance, e.g., to an acquaintance, would have no difficulty in qualifying.
>
> * * *

Fed. R. Evid. 804 Advisory Committee's note.

Applying these tenets here, where San Martin's custodial hearsay statements were not really self-inculpatory, they were not admissible against Franqui no matter whether they were

interlocking, as the state argues, or not.

Citing Lee v. Illinois, 476 U.S. 530, 541 (1986), the Court correctly observed, not only that "[T]he arrest statements of a codefendant have traditionally been viewed with special suspicion...", but also that:

> The fact that a person is making a broadly self-inculpatory confession does not make more credible the confession's non-self-inculpatory parts. One of the most effective ways to lie is to mix falsehood with truth, especially truth that seems particularly persuasive because of its self-inculpatory nature.
>
> [Williamson, at S392]

In every case, the issue being particularly fact-intensive, the trial court is obligated to undertake a careful examination of all the circumstances surrounding the criminal activity involved. Williamson, supra, at S393. Here, absent the benefit of the Supreme Court's decision and its progeny, the trial court did not focus on the internal reliability of the codefendant's statements, satisfied as it was that it was rendered reliable by its similarity to Franqui's statement. This, we now know, is not sufficient to protect an accused's Sixth and Fourteenth Amendment rights. Costa, at C656.

The defendant here was denied a fair trial and his right of confrontation by the introduction of his co-defendant's hearsay statements. He should be granted a new separate trial at which his co-defendant's inadmissible and unreliable confessions are not used against him in violation of his constitutional rights.

POINT IV

THE TRIAL COURT ERRED IN FAILING TO GRANT THE DEFENDANT RELIEF FROM THE PROSECUTORS' RELENTLESS APPEALS TO THE JURY'S SYMPATHY BY THEIR INJECTION OF IRRELEVANT AND UNFAIRLY INFLAMMATORY EVIDENCE OF THE VICTIM'S PERSONALITY AND CHARACTER INTO THIS LAWSUIT, THEREBY DENYING THE DEFENDANT A FAIR TRIAL AND DUE PROCESS OF LAW GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Contrary to the state's, assertion, Franqui does not rely on "fundamental error" or frame this issue dependent on the doctrine of "fundamental error." This issue is preserved by objection and by motion in limine. While the prosecutor's two improper comments during opening statement avoided specific challenge, the prosecutor's subsequent misconduct, during direct examination and closing argument, provoked consistent protest and is clearly preserved for review.

This Court should reject the state's hyper-technical analysis of the defendant's objections. During direct examination by the state of bank teller Hadley, the prosecutor elicited that victim "Steve" [Officer Bauer] cried out, asked her if she was all right, and caused her to feel "good" (by his selfless expression of concern.) Franqui's counsel renewed his final objection (to the introduction of Bauer's inflammatory post-shooting statements) immediately following the colloquy, and the court announced, "Same

ruling". [TR 957] Franqui's protest was directed accurately to the state's elicitation of Bauer's irrelevant statements and the state's exploitation of them to garner the jury's sympathy. The issue is clearly preserved.

The state attempts to justify its conduct by arguing that brief "humanizing" comments are not improper, the statements were part of the res gestae, and the statements were integral to proof that Bauer was exercising his lawful duties. These arguments are spurious.

Far from merely constituting brief "humanizing" comments, the statements at issue were effective "super-humanizing" ones unlike those in Stein v. State, 632 So.2d 1361, 1367 (Fla. 1994). It is unquestionably worse, this prosecutor essentially argued, to murder a hero. Whether it is or not, such an inducement is not an appropriate one for the state to offer the jury in the guilt phase of a capital prosecution.

Moreover, the statements were neither res gestae nor necessary to establish the element of "lawful duty." Res gestae is generally considered an exception to the hearsay rule allowing contemporaneous statements, made under circumstances of extraordinary reliability by virtue of their inseparability from the event in question, to be admitted for their truth. Bauer's statements were not admitted for their truth. In fact, Bauer's

expressions of concern belied his own grievious injuries. They were offered, in fact, precisely because they demonstrated Bauer's courageous willingness to ignore the truth of his own fatal plight and attend, instead, to others. Moreover, Bauer made his statements substantially after the crimes had been committed and any relevant event had concluded. They were no longer part of or relevant to the event or crime in question.

They similarly had little or nothing to do with his duties as a police officer and were offered, not to show Bauer was a conscientious cop, but rather that he was a wonderful and extraordinary, caring, selfless, and brave human being. As such, it constituted an improper and unfairly prejudicial appeal to the jury's sympathies. Moreover, of course, the statements were entirely irrelevant to the state's case where there was never any issue about the uncontested and conceded fact that Bauer was, and was at all relevant times acting in the capacity of, a police officer. [TR 879]

Finally, this error cannot cavalierly be dismissed as "harmless error." It is not simply, as the state suggests, a matter of counting pages or the number of offending words vis-a-vis the length of the transcript. The state's tactic of painting Bauer a hero was unquestionably both deliberate and successful. The prosecutor drove the point home during every important part of the trial, opening statement, direct examination, and closing argument

(No matter . . . "how brave and good [the teller] was, she still doesn't come close to Steve." [TR 2236]). The prosecutor's conduct was wrong and denied Franqui his constitutional right to a fair trial.

POINT V

THE TRIAL COURT ERRED IN SENTENCING THE DEFENDANT TO DEATH, THEREBY DENYING THE DEFENDANT DUE PROCESS OF LAW AND EQUAL PROTECTION WHILE IMPOSING A DISPROPORTIONAL, CRUEL AND UNUSUAL, PUNISHMENT UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

A.

The Trial Court Erred in Rejecting altogether the Non-Statutory Mitigating Factors that he was a good employee, that he had demonstrated good conduct and rehabilitation in prison, and that he suffered mental problems, as well as Rejecting and Refusing to Instruct the Jury on Age as Either a Statutory or non-Statutory Mitigating Circumstance.

Franqui's biological age of 21, especially when coupled with evidence of his intellectual shortcomings ("he was slow to learn, to understand" [TR 2512]), entitled him to the benefit of the statutory mitigating age factor. A defendant's age of 21 can reasonably support a life recommendation. Perry v. State, 522 So.2d 817, 821 (Fla. 1988); Caruso v. State, 645 So.2d 389 (Fla. 1994).

The trial court's failure to grant the defendant's request for a jury instruction on "age" as a mitigating factor was error especially since a statutory mitigating factor was involved. The state's argument that the trial court's nonfeasance was rendered harmless by the "any other aspect..." instruction is inapposite

where the catch-all instruction relates only to non-statutory factors.

That defense counsel decided not to argue "age" as a mitigating factor under the "catch-all" instruction shows, not the inapplicability of the factor, but the severity of the limitation under which trial counsel operated. Juries have no choice but to listen to the court and follow its instructions. It has no such obligation (or inclination?) relative to defense attorneys. In the penalty phase of a capital prosecution, credibility is everything. Denied the court's imprimatur, and without a specific basis in the law to argue, it is in no way surprising that defense counsel abandoned any hope of successfully urging age as a mitigating factor and chose, instead, not to risk his believability.

The trial court's all out rejection of other non-statutory mitigating factors was error, as well. Franqui presented uncontradicted evidence from three independent sources that Franqui was a good worker. [TR 2492, 2497, 2520, 2532-2533] See, Holsworth v. State, 522 So.2d 348 (Fla. 1988); and Maxwell v. State, 603 So.2d 490 (Fla. 1992). Whether Franqui worked for a particular employer for six months or six years does not bear on the existence of this factor, although it may, of course, be relevant to weight. To reject it altogether, however, was wrong.

Exactly the same argument and reasoning applies to the factor

relative to Franqui's good conduct in prison. Franqui is not disqualified for consideration of the application of this factor merely because, as the state suggests and the trial court found, he was kept in a safety cell with no cellmates. Nor is it determinative that Franqui was not involved in any "extraordinary activity" while incarcerated. [R 597] There is no authority for the proposition that a capital defendant has to save a guard's life to be considered a good, well-behaved, or even model prisoner. Franqui presented evidence from two corrections officers, each familiar with Franqui's behavior for two and a half years, who raved about him. [R 488, 489] This was powerful support for this non-statutory mitigating factor and should have been weighed, not altogether rejected. The trial court again erred in dismissing it altogether.

The same kind of reasoning applies to the trial court's complete rejection of evidence of Franqui's mental problems. [TR 2512] The state suggests that such evidence was "contradicted by the father-in-law's testimony regarding what a great person Defendant was." [Appellee brief, at p. 52] Clearly, people with mental problems, even severe and disabling ones, can be "great people", too. To suggest otherwise is insensitive and unfair. Whether or not the trial court deemed this mitigating factor weak or strong, it was nevertheless obligated to find it and weigh it. Because it did not, reversal of Franqui's death sentence is compelled.

B.

Death is a Disproportionate Penalty to Impose on Leonardo Franqui in Light of the Circumstances of this Case and Constitutes a Constitutionally Impermissible Application of Capital Punishment.

The defendant respectfully relies on the arguments and authorities presented in his initial brief.

C.

The Death Penalty is Unconstitutional on its Face and as Applied to Leonardo Franqui and Violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution as Well as the Natural Law.

More and more, the people of the World are coming to recognize capital punishment for the unmanageable, expensive, unequal, unproductive, and morally bankrupt institution that it is. Executions in Saudi Arabia have recently stirred universal outrage and prompted new capital punishment challenges. South Africa has, in recent months, become the 55th country to end state-sanctioned killings. In abolishing the death penalty, President Nelson Mandela's African National Congress said:

> "Never, never and never again must citizens of our country be subjected to the barbaric practice of capital punishment."

How noble it would be for this Court to say the same thing regarding the citizens of our state.

Conclusion

Wherefore, based upon the foregoing arguments and authorities, the defendant Leonardo Franqui respectfully prays this Court to reverse his convictions and sentences. He prays for a new, separate, trial at which the he is afforded the right to exercise peremptory challenges and the jury is not contaminated by improper prosecutorial comments and irrelevant inflammatory evidence. He prays, too, for the vacation of his disproportionate and misapplied death penalty or, at least, for the grant of a new, fair, penalty preceeding before a jury correctly informed and properly instructed.

Respectfully submitted,

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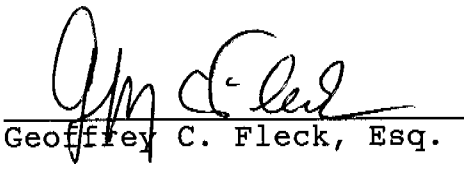
By: 
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Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief of Appellant was mailed to Randall Sutton, Esquire, the Office of the Attorney General, 401 N.W. 2d Avenue, Suite 820, P.O. Box 013241, Miami, Florida, 33101 this 19th day of September, 1995.

By: 
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