

CASE LAW QUARTERLY

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CASE LAW QUARTERLY provides brief summaries of select appellate court decisions issued each quarter of the year that involve the guidelines and other aspects of federal sentencing. The list of cases and the summaries themselves are not intended to be comprehensive. Instead, this document summarizes only a few of the relevant cases, focusing on selected sentencing topics that may be of current interest. The Commission's legal staff publishes this document to assist in understanding and applying the sentencing guidelines. The information in this document does not necessarily represent the official position of the Commission, and it should not be considered definitive or comprehensive.

IN THE SPOTLIGHT THIS QUARTER . . .



United States v. Stitt, 139 S. Ct. 399 (Dec. 10, 2018). The Supreme Court held that burglary under the Armed Career Criminal Act includes burglary of a structure or vehicle that has been adapted or is customarily used for overnight accommodation, like a mobile home, recreational vehicle, trailer, or camping tent. The Court reached this conclusion based on the principle, first articulated in *Taylor v. United States*, 495 U.S. 575, 598 (1990), that the definition of a generic offense under the Armed Career Criminal Act (ACCA) should reflect the sense in which the offense was used in the criminal law of most states at the time the ACCA was enacted. At the time of the ACCA's enactment, the Court stated, most state burglary statutes covered vehicles and non-dwelling structures adapted or customarily used for habitation. The Court also noted that there is a risk of violent confrontation whether the intruder burglarizes a residential home, a mobile home, or another structure adapted for lodging. The decision, which arose out of cases consolidated from the Sixth and Eighth Circuits, was unanimous.

SUMMARY OF SELECT APPELLATE CASES FOR THE FOURTH QUARTER OF 2018—

FIRST CIRCUIT

United States v. Montanez-Quinones, 911 F.3d 59 (1st Cir. Dec. 21, 2018). The First Circuit affirmed the defendant's 109-month sentence for possession of child pornography, holding that the district court did not clearly err in applying an enhancement for knowing distribution. The court concluded that the §2G2.2(b)(3)(F) enhancement, as amended effective November 2016, does not require proof that the defendant intended to distribute child pornography as long as he knew that, by using a peer-to-peer file-sharing program, it was made accessible to others. The court stated that the district court reasonably inferred the defendant's knowledge both from its finding that he was "a sophisticated and long-time computer user" and from his storage of select files in his shared folder. It also held that the government did not breach the plea agreement by making statements regarding the "heinous" nature of the crime or inadvertently misstating the number of stipulated images.

United States v. Douglas, 907 F.3d 1 (1st Cir. Oct. 12, 2018). The First Circuit affirmed the defendant's conviction for using, carrying or brandishing a firearm in relation to a crime of violence, holding that his conspiracy to commit Hobbs Act robbery qualified as a crime of violence under the residual clause in 18 U.S.C. § 924(c). The court concluded that § 924(c)(3)(B) is not void for vagueness because the statute reasonably allows for a case-specific approach, considering real-world conduct, rather than a categorical approach. When applying this approach, the court noted, not all conspiracies to commit Hobbs Act robbery would constitute crimes of violence under § 924(c)(3)(B).

SECOND CIRCUIT

United States v. Guerrero, 910 F.3d 72 (2d Cir. Dec. 10, 2018). The Second Circuit vacated and remanded the defendant's 18-month sentence for illegal reentry, holding that his prior Arizona state drug conviction did not qualify as a felony drug trafficking offense under §2L1.2 of the

guidelines in effect at the time of the offense. The court held that the phrase “controlled substance” as used in the 2014 guidelines’ definition of “felony drug trafficking offense” referred exclusively to those substances controlled under federal law. Because the Arizona statute of conviction included additional substances not listed by the federal Controlled Substances Act, the court concluded that it was broader than corresponding federal law and did not qualify as a felony drug trafficking offense.

THIRD CIRCUIT

United States v. McCants, 911 F.3d 127 (3d Cir. Dec. 18, 2018). The Third Circuit affirmed the defendant’s convictions and 120-month sentence for possession of a firearm by a felon and possession with intent to distribute heroin, holding that his two prior New Jersey state convictions for second-degree robbery were crimes of violence under the career offender guideline. The court held, among other things, that New Jersey second-degree robbery was a predicate offense under both the elements clause in §4B1.2(a)(1) and the enumerated offense clause in §4B1.2(a)(2).

United States v. Schonewolf, 905 F.3d 683 (3d Cir. Oct. 4, 2018). The Third Circuit affirmed the defendant’s 40-month above-guideline sentence for revocation of supervised release. The court stated that *Tapia v. United States*, 564 U.S. 319 (2011), which held that the Sentencing Reform Act precludes courts from imposing or lengthening an imprisonment sentence to promote rehabilitation, applies to post-revocation sentences under 18 U.S.C. § 3583. Acknowledging a circuit split regarding the standard for determining whether a post-revocation sentence violates *Tapia*, the court held that a district court may consider rehabilitation in imposing a prison sentence, as long as it is not the primary consideration. It stated that the district court neither tailored its sentence length to a particular rehabilitation program nor imposed a longer sentence to ensure the defendant received drug treatment.

United States v. Abdullah, 905 F.3d 739 (3d Cir. Oct. 2, 2018). The Third Circuit affirmed the defendant’s 176-month career offender sentence for conspiring to distribute and possess with intent to distribute heroin and being a felon in possession of a firearm, holding that the defendant’s prior state conviction in New Jersey for third-degree aggravated assault with a deadly weapon is a crime of violence for purposes of §4B1.1. The court held that a conviction under the New Jersey statute qualifies as a crime of violence under the elements clause of §4B1.1(a)(1), upholding the career offender enhancement.

FOURTH CIRCUIT

United States v. Brown, 909 F.3d 698 (4th Cir. Nov. 29, 2018). The Fourth Circuit affirmed the defendant’s 60-month sentence for possession of a firearm by a felon, holding that the district court properly added two criminal history points under §4A1.1(d) because the defendant was under a “criminal justice sentence.” The court held that the defendant’s court-imposed period of “good behavior,” upon which a portion of a prior Virginia sentence was suspended, qualified as being under a “criminal justice sentence” because it was the functional equivalent of unsupervised probation.

United States v. Allen, 909 F.3d 671 (4th Cir. Nov. 28, 2018). The Fourth Circuit affirmed the defendant’s 77-month sentence for possession of firearms by a felon, holding that his prior conviction for using a communication facility to facilitate the crime of possession with intent to distribute drugs in violation of 21 U.S.C. § 843(b) qualified as a predicate “controlled substance offense” for purposes of §2K2.1(a)(2). Among other things, the court stated that the inclusion of § 843(b) as a “controlled substance offense” in Application Note 1 of §4B1.2, incorporated by reference into §2K2.1, was authoritative and controlling.

FIFTH CIRCUIT

United States v. Reyes-Contreras, 910 F.3d 169 (5th Cir. Nov. 30, 2018) (en banc). On rehearing *en banc*, the Fifth Circuit affirmed the defendant’s 41-month sentence for illegal reentry, holding that the defendant’s prior Missouri conviction for voluntary manslaughter qualifies as a crime of violence for purposes of the 16-level enhancement at §2L1.2(b)(1)(A)(ii) (2015). After considering how the Supreme Court’s decisions in *Shepard v. United States*, 544 U.S. 13 (2005), *United States v. Castleman*, 572 U.S. 157 (2014), and *Voisine v. United States*, 136 S. Ct. 2272 (2016) affect Fifth Circuit precedent, the court overruled, in whole or in part, several of its prior decisions. Citing *Shepard*, the court held that an indictment can be used to clarify ambiguities in a defendant’s plea to a crime of violence. Citing *Castleman*, it abandoned any distinction between direct and indirect force and, citing *Voisine*, it held that “use of force” may include crimes involving recklessness.

United States v. Graves, 908 F.3d 137 (5th Cir. Nov. 8, 2018) (as revised, Nov. 27, 2018). In a case involving possession of child pornography, the Fifth Circuit affirmed the court’s imposition of a \$5,000 special assessment, in addition to a 108-month sentence of imprisonment, based on the defendant’s future earning capacity. The court concluded, among other things, that the district court applied the correct legal analysis when it considered the fact that

the defendant was “employable” and would likely have an increase in earning capacity following his release from prison, stating that the analysis for special assessments is “forward-looking.”

United States v. Lewis, 907 F.3d 891 (5th Cir. Nov. 1, 2018). In a case involving a series of robberies, the Fifth Circuit vacated one count of conviction, and vacated and remanded the defendant’s 924-month sentence, holding that conspiracy to commit Hobbs Act robbery is not a predicate crime of violence for purposes of 18 U.S.C. § 924(c). Citing its recent decision in *United States v. Davis*, 903 F.3d 483 (5th Cir. 2018), the court stated that it does not qualify under the elements clause because conspiracy is “merely an agreement to commit an offense,” which does not require proof that the defendant used, attempted to use, or threatened to use force. It does not qualify under the residual clause, it stated, because that clause is unconstitutionally vague.

United States v. Bowens, 907 F.3d 347 (5th Cir. Oct. 24, 2018). The Fifth Circuit affirmed the defendant’s conviction and 400-month sentence for Hobbs Act robbery, conspiracy to commit Hobbs Act robbery, and firearms offenses, including using, carrying, or brandishing a firearm in furtherance of a crime of violence. Citing circuit precedent, the court reaffirmed that Hobbs Act robbery is a predicate crime of violence for purposes of 18 U.S.C. § 924(c). The court noted that its decision is consistent with similar holdings from the Second, Third, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits on the same issue.

United States v. Blount, 906 F.3d 381 (5th Cir. Oct. 18, 2018). The Fifth Circuit affirmed the defendant’s 188-month sentence for wire fraud. The court held, among other things, that the district court did not plainly err in applying the §2B1.1(b)(9)(C) enhancement for violation of a prior administrative order based on violation of a prior Financial Industry Regulatory Authority (FINRA) order, stating there was no authoritative precedent that the enhancement did not apply to FINRA orders.

United States v. Fuentes, 906 F.3d 322 (5th Cir. Oct. 11, 2018). The Fifth Circuit affirmed the defendant’s 5-year sentence for revocation of supervised release based on his continued refusal to submit to sex offender evaluation and treatment. The court held that imposition of the statutory maximum revocation sentence was not plainly unreasonable or plainly erroneous, even if the defendant’s original sentence no longer qualified for an enhanced penalty under the Armed Career Criminal Act (ACCA) after *Johnson v. United States*, 135 S. Ct. 2551 (2015). The court also noted that the defendant had not shown that his prior Texas conviction for indecency with a child no longer qualified as a predicate violent felony for purposes of the ACCA.

SIXTH CIRCUIT

United States v. Rockymore, 909 F.3d 167 (6th Cir. Nov. 20, 2018). On the government’s appeal, the Sixth Circuit affirmed the defendant’s 120-month sentence for being a felon in possession of a firearm and ammunition, holding that his prior state convictions in Tennessee for delivery of cocaine did not qualify as predicate serious drug offenses for purposes of the Armed Career Criminal Act (ACCA) enhancement. To determine whether the Tennessee convictions required a maximum sentence of ten years or more, the court stated, the ACCA mandates consideration of both of the relevant state sentencing statutes. Although the state’s felony-based statute authorized a sentencing range of 3-15 years, it stated, the range-based statute narrowed the permissible range based on the defendant’s criminal history. Noting the rule of lenity, the court agreed with the district court that the defendant faced only a 6-year maximum sentence for the prior convictions.

United States v. Havis, 907 F.3d 439 (6th Cir. Oct. 22, 2018). The Sixth Circuit affirmed the defendant’s 46-month sentence for being a felon in possession of a firearm, holding that his prior state conviction in Tennessee for selling or delivering cocaine was a “controlled substance offense” for purposes of the increased base offense level at §2K2.1(a)(4)(A). Rejecting the defendant’s challenges, the court explained that it was bound by its earlier decision in *United States v. Evans*, 699 F.3d 858 (6th Cir. 2012), which relied on guideline commentary at §4B1.2 to hold that the guideline definition of “controlled substance offense” includes attempt.

United States v. Richardson, 906 F.3d 417 (6th Cir. Oct. 11, 2018). On appeal from resentencing after remand, the Sixth Circuit affirmed the defendant’s conviction and 1,494-month sentence for aiding and abetting the use of a firearm during a crime of violence. The court held, among other things, that aiding and abetting Hobbs Act robbery is a crime of violence under 18 U.S.C. § 924(c)(3)(A), the force clause of § 924(c). It declined to reach the question of whether § 924(c)(3)(B), the residual clause, was unconstitutionally vague in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015), and *Sessions v. Dimaya*, 138 S. Ct. 1201 (2018). The court also affirmed the district court’s decision to reinstate the defendant’s original sentence, concluding it was procedurally and substantively reasonable.

SEVENTH CIRCUIT

United States v. Sanders, 909 F.3d 895 (7th Cir. Dec. 3, 2018). The Seventh Circuit affirmed the defendant’s sentence for several drug convictions, upholding the district court’s finding that her prior state conviction in California qualified as a felony drug conviction for purposes of the 10-

year mandatory minimum at 21 U.S.C. § 841(b)(1)(B). The court held that a defendant who commits a federal drug offense after a previous state felony drug conviction is subject to § 841's recidivist enhancement even though that prior offense was reclassified as a misdemeanor pursuant to California Proposition 47. Stating that the meaning of a federal statute should be dictated by federal law rather than state law, the court also rejected due process, equal protection, and Tenth Amendment federalism challenges to this principle.

United States v. Clark, 906 F.3d 667 (7th Cir. Oct. 18, 2018). In a case involving distribution of fentanyl, the Seventh Circuit affirmed the defendant's sentence of 71 months' imprisonment and five years of supervised release. First, the court held that an error in calculating the defendant's criminal history category, if any, was harmless because it had no effect on the sentence imposed, noting that the sentencing judge explicitly stated he would have imposed the same sentence regardless of his criminal history score. Second, the court held that the district court provided a sufficient explanation for imposing a longer supervised release term than recommended, noting that the district court was not required to give a separate justification for that part of the sentence.

United States v. Shelton, 905 F.3d 1026 (7th Cir. Oct. 3, 2018). In a case involving possession of firearms by felons, possession of stolen firearms, and cargo theft from a train, the Seventh Circuit affirmed the 120-month, 132-month, 150-month and 180-month sentences of the four defendants. Among other rulings, the court held that the district court did not impermissibly double count by applying three firearms enhancements, including enhancements for possession of stolen firearms under §2K2.1(b)(4)(A), firearms trafficking under §2K2.1(b)(5), and use or possession of firearms in connection with another felony offense under §2K2.1(b)(6)(B).

EIGHTH CIRCUIT

United States v. Gomez-Diaz, 911 F.3d 931 (8th Cir. Dec. 28, 2018). The Eighth Circuit affirmed the defendant's conviction for producing child pornography but vacated his 240-month sentence and remanded for resentencing. With respect to sentencing, the court held that the district court improperly applied a §3C1.1 obstruction of justice enhancement because it failed to make any specific findings concerning obstruction. The court stated that, although perjury may qualify as obstructive conduct, a sentencing court cannot apply the enhancement simply because the jury disbelieved the defendant's testimony. Instead, the court held, the sentencing court must conduct its own independent evaluation to determine whether the defendant committed perjury.

United States v. Reichel, 911 F.3d 910 (8th Cir. Dec. 28, 2018). The Eighth Circuit affirmed the defendant's convictions and 284-month sentence for wire fraud and fraud in connection with bankruptcy proceedings. Among other things, the court held that the district court properly calculated loss under §2B1.1(b)(1) at more than \$28 million, accounting for the total amount invested and lost. It also held that it was proper to include in the loss amount an unindicted co-conspirator's losses, which were not included in the amount of restitution ordered, because the restitution and loss amount inquiries are distinct. In addition, the court held that the district court properly applied enhancements for the defendant's use of sophisticated means under §2B1.1(b)(10)(C) and abuse of a position of trust under §3B1.3.

United States v. Mathis, 911 F.3d 903 (8th Cir. Dec. 27, 2018). The Eighth Circuit affirmed the defendant's 80-month sentence for being a felon in possession of a firearm. The court held that the district court properly applied a 4-level enhancement under §2K2.1(b)(6)(B) for possessing a firearm in connection with another felony where it found, based on evidence at sentencing, that the defendant had a gun with him throughout his commission of the Iowa felony offense of harboring a runaway child. The court also held that the district court did not err when it imposed an upward variance from the guideline range of 57-71 months.

United States v. Wisecarver, 911 F.3d 554 (8th Cir. Dec. 20, 2018). The Eighth Circuit affirmed the defendant's 480-month sentence for second-degree murder, holding that the upward departure and variance from the guidelines range of 210–262 months was substantively reasonable. The court held that the sentence did not create an unwarranted sentencing disparity under 18 U.S.C. § 3553(a)(6) because the sentencing court adequately explained that such a variance was warranted in this particularly "heinous" case involving the fatal abuse of a child over an extended period.

United States v. Williams, 910 F.3d 1084 (8th Cir. Dec. 17, 2018). The Eighth Circuit affirmed the defendant's convictions and 270-month sentence for Hobbs Act robbery, conspiracy to distribute and possess with intent to distribute marijuana, being a felon in possession of a firearm, and using and carrying a firearm during a drug trafficking offense. Although the district court committed plain error when it imposed a sentence on the conspiracy count exceeding the 60-month statutory maximum, the court stated, the defendant was not entitled to resentencing under the sentencing package doctrine. It explained that the error did not affect the defendant's substantial rights because he failed to demonstrate a reasonable probability that he would have received a more favorable sentence absent the error.

United States v. Kemp, 908 F.3d 1138 (8th. Cir. Nov. 16, 2018). The Eighth Circuit affirmed the defendant's 210-month sentence for conspiring to distribute methamphetamine and being a felon in possession of a firearm. Stating that the district court erred in calculating the defendant's advisory guideline range using the *Guidelines Manual* in effect on the date of his initial sentencing rather than the date of his resentencing, the court concluded the error was harmless because the record indicated the district court would have given the same sentence either way.

United States v. Perry, 908 F.3d 1126 (8th. Cir. Nov. 15, 2018). The Eighth Circuit affirmed the defendant's 15-year sentence under the Armed Career Criminal Act (ACCA) for being a felon in possession of a firearm. Among other things, the court held that two of the defendant's three prior violent felonies were committed "on occasions different from one another," as required for the enhanced ACCA sentence, where the two crimes were not committed simultaneously, involved different locations, different victims and distinct aggressions. The court also held that the defendant's prior state conviction in Minnesota for felony domestic assault categorically qualified as a violent felony under the ACCA's force clause.

United States v. Bagley, 907 F.3d 1096 (8th. Cir. Nov. 6, 2018). The Eighth Circuit affirmed the defendant's 154-month sentence for carjacking and using a firearm during a crime of violence but vacated and remanded the restitution order imposed. After concluding that an appeal waiver barred the defendant's challenge to his criminal history score, the court reviewed the restitution orders imposed for loss and injury from the defendant's crash of the stolen car. It held that the amount of restitution imposed for chiropractic care of a victim and for the death of a victim's dog were not properly based on the Mandatory Victims Restitution Act (MVRA), stating that the restitution awards were not supported by the evidence because they were based on estimates rather than actual losses.

United States v. Evans, 908 F.3d 346 (8th. Cir. Nov. 6, 2018). The Eighth Circuit affirmed the defendant's conviction and 30-year sentence for armed bank robbery, attempted carjacking, carjacking, and forcing a person to accompany him while attempting to avoid apprehension. Among other things, the court held that the district court properly applied an upward adjustment for obstruction of justice under §3C1.1 based on the defendant's conduct during trial, which included repeated outbursts, jumping onto counsel table, and lodging verbal attacks on the attorneys and the trial judge. The court stated that the district court could have reasonably concluded that the defendant's actions, along with his four motions for a mistrial, were intended to cause a mistrial.

United States v. Harris, 907 F.3d 1095 (8th. Cir. Nov. 5, 2018) (*per curiam*). The Eighth Circuit reversed and remanded for resentencing the defendant's 46-month sentence for being a felon in possession of a firearm. Disagreeing with the district court, the Eighth Circuit held that the defendant's prior state conviction in Missouri for second-degree domestic assault was not a crime of violence for purposes of the increased base offense level at §2K2.1(a)(4)(A). Because the Missouri domestic assault offense could be committed "recklessly," the court stated, it could not satisfy the force clause of §4B1.2(a)(1).

NINTH CIRCUIT

No notable cases identified.

TENTH CIRCUIT

United States v. Lymon, 905 F.3d 1149 (10th Cir. Oct. 2, 2018). The Tenth Circuit affirmed the defendant's 216-month sentence for selling heroin and being a felon in possession of a firearm. The court held that the district court had discretion under 18 U.S.C. § 3584 to impose sentences consecutively, notwithstanding §5G1.2's recommendation for concurrent sentences, which would have resulted in a sentencing range of 77 to 96 months. The court stated that the district court adequately explained its reasons for consecutive sentences when it found that the defendant was a repeat violent offender who posed a danger to the community and had no respect for the law.

ELEVENTH CIRCUIT

United States v. St. Hubert, 909 F.3d 335 (11th Cir. Nov. 15, 2018). The Eleventh Circuit affirmed the defendant's 384-month sentence for using and carrying firearms during crimes of violence in violation of 18 U.S.C. § 924(c). The court vacated a prior panel opinion in the case, *United States v. St. Hubert*, 883 F.3d 1319 (11th Cir. 2018), and issued a new opinion holding that, under its recent *en banc* decision in *Ovalles v. United States*, 905 F.3d 1231 (11th Cir. Oct. 4, 2018), the residual clause of § 924(c)(3)(B) is constitutional because it requires a conduct-based approach rather than a categorical approach. The court then held that both Hobbs Act robbery and attempted Hobbs Act robbery, the two crimes of violence upon which the defendant's § 924(c) convictions were predicated, qualify as crimes of violence under both the residual clause of § 924(c)(3)(B), and the force clause of § 924(c)(3)(A).

United States v. Hernandez, 906 F.3d 1367 (11th Cir. Oct. 26, 2018). The Eleventh Circuit affirmed the defendant's 240-month sentence for conspiracy to possess with in-

tent to distribute methamphetamine and heroin, upholding the district court's finding that he had a prior felony drug conviction for purposes of the 20-year mandatory minimum at 21 U.S.C. § 841(b)(1)(A). The court held that the Federal Rules of Evidence do not apply to hearings concerning the existence and applicability of prior felony drug convictions under 21 U.S.C. § 851(c), and that the government must prove such convictions beyond a reasonable doubt. Even though the district court wrongly applied a lesser burden of proof at the § 851(c) hearing in this case, the court concluded, the mistake was not plain error because it did not change the outcome of the proceedings.

United States v. Carthen, 906 F.3d 1315 (11th Cir. Oct. 25, 2018). The Eleventh Circuit affirmed the two defendants' convictions and 57-year sentences for Hobbs Act robbery and carrying firearms during crimes of violence in violation of 18 U.S.C. § 924(c). The court upheld imposition of mandatory minimum and consecutive sentences under § 924(c)'s penalty scheme, holding that, under Supreme Court and circuit precedent, additional § 924(c) counts charged in the same indictment are indeed "second or subsequent" even if they arose out of the same incident. The court also rejected an Eighth Amendment proportionality challenge, holding that the defendant failed to make any threshold showing of gross disproportionality. [Note: Congress made relevant changes to § 924(c) in the First Step Act, which became law on December 21, 2018.]

United States v. Jones, 906 F. 3d 1325 (11th Cir. Oct. 25, 2018). The Eleventh Circuit affirmed the defendant's sentence for drugs and possession of a firearm by a felon, holding that his prior Florida state conviction for second-degree murder categorically qualified as a violent felony for purposes of the enhanced mandatory minimum of the Armed Career Criminal Act (ACCA). Agreeing with the district court, the court held that even indirect physical force, such as the administration of poison, constitutes physical force and thus renders the prior offense a violent felony under the ACCA's elements clause.

Ovalles v. United States, 905 F.3d 1300 (11th Cir. Oct. 9, 2018) (per curiam). On remand from an *en banc* Eleventh Circuit decision, the court affirmed denial of the defendant's motion to vacate her 18 U.S.C. § 924(c) conviction and sentence. Stating that the *en banc* opinion confirmed the panel's earlier holding that the defendant's attempted carjacking conviction qualified as a crime of violence under § 924(c)(3)(B)'s residual clause, the court reinstated its earlier holding that her conviction also qualified as a crime of violence under § 924(c)(3)(A)'s elements clause.

D.C. CIRCUIT

No notable cases identified.



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