

NC Judicial District 2 Bail Reform Project

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This report summarizes initiatives adopted in North Carolina's Second Judicial District and designed to promote public safety and a fair and effective pretrial justice system:

- (1) A new structured decision-making tool to better inform judicial officials' pretrial decisions and ensure compliance with constitutional and statutory requirements.
- (2) New first appearance proceedings for in-custody misdemeanor defendants.

Background

In 2015, former Chief Justice Mark Martin convened the North Carolina Commission on the Administration of Law & Justice to make recommendations to strengthen the state's court system. In 2016, that Commission released its report, including a recommendation that North Carolina embark on pilot projects supporting evidence-based pretrial justice reform.¹ Judicial District 30B became the state's first such pilot project, with reforms effective January 1, 2019. Early promising reports on the initiatives implemented in Judicial District 30B,² information distributed through the North Carolina Attorney General's Pretrial Release and Accountability Roundtables, and information about efforts to improve pretrial systems around the nation and in North Carolina interested judicial system leaders in the Second District. In 2019, the Senior Resident Superior Court Judge and Chief District Court Judge convened a committee to explore whether reforms were needed in the Second District and if so what reforms should be implemented. The committee included:

- Senior Resident Superior Court Judge
- Chief District Court Judge
- Elected District Attorney and office staff
- Public Defender and office staff
- Magistrates
- Clerks of Court and office staff
- Representatives from the Sheriffs' offices
- Representatives from the local police departments
- Detention center officers
- Judicial district administrative staff

Additionally, the project was supported by Jessica Smith, W.R. Kenan, Jr. Distinguished Professor, School of Government, The University of North Carolina at Chapel Hill. Smith's participation was made possible through a technical assistance award from the State Justice Institute. The SJI grant, administered by the National Center for State Courts and the Pretrial Justice Institute, funded ten days of Smith's time and state rate travel to and from the district.

¹ NCCALJ CRIMINAL INVESTIGATION AND ADJUDICATION COMMITTEE, PRETRIAL JUSTICE REFORM FOR NORTH CAROLINA (2016) (Report of the North Carolina Commission on the Administration of Law & Justice), https://nccalj.org/wp-content/uploads/2017/pdf/nccalj_criminal_investigation_and_adjudication_committee_report_pretrial_justice.pdf.

² See, e.g., Jamie Vaske & Jessica Smith, *Judicial District 30B Pretrial Justice Pilot Project Third Quarter 2019 Report* (2019), <https://cjlil.sog.unc.edu/files/2019/11/Third-quarter-implementation-results.pdf>.

Process

The committee met several times in 2019. Committee members were focused primarily on the negative consequences of unnecessary pretrial detentions for individuals charged with lower-level crimes. Specifically, those who are detained pretrial not because of risk but because they are too poor to pay money bonds imposed in their cases. Stakeholders reviewed research on the negative public safety impact of pretrial detention of such individuals and information on the cost of pretrial detentions and fairness issues associated with poverty-based pretrial detentions. They also considered the status of state and federal litigation challenging money-based bail systems and governing federal constitutional law and state statutes. Committee members understood the role of local jails to detain those defendants for whom no conditions of release can reasonably assure court appearance and public safety. However, they determined that unnecessary detention of low-risk individuals undermines public safety and the fairness and effectiveness of the local pretrial justice system. The committee adopted two reforms designed to address unnecessary pretrial detention of individuals who do not present any significant risk but who remain detained pretrial because they are unable to afford money bonds imposed in their cases. The two reforms include:

- (1) A new structured decision-making tool to better inform judicial officials' pretrial decisions and ensure compliance with constitutional and statutory requirements.
- (2) New first appearance proceedings for in-custody misdemeanor defendants.

The entire committee worked on the first initiative; a subcommittee, led by the Chief District Court Judge, did preliminary work and prepared a recommendation to the full committee on the second initiative.

After a consensus was reached on needed reforms, committee members approved detailed implementation plans. Those plans specified tasks required to be completed, and for each task, person(s) responsible, due dates, and other relevant information. Executing the implementation plans occupied most of the third quarter of 2019, and a training event for judicial branch employees and law enforcement personnel was held in December 2019. Both reforms take effect January 1, 2020.

Implemented Reform: New Structured Decision-Making Tool

The district's current Local Bail Policy includes a table setting suggested bond amounts based on the punishment class of the charged offense. Best practices recommend against the use of such tables.³ Additionally, stakeholders determined that although the current charge's offense class is relevant to the bail decision, other individualized factors regarding the defendant and the circumstances of the offense should be considered in assessing appropriate conditions of pretrial release and that consideration of additional factors is required by state law.⁴ Moreover there was some concern that the use of a bond table may push decision-makers towards a presumption of secured bond in contravention of state law, which requires release on a written promise, custody release, or unsecured bond unless the decision-maker finds that those conditions will not reasonably assure appearance; will pose a danger of injury to

³ AMERICAN BAR ASSOCIATION, ABA STANDARDS FOR CRIMINAL JUSTICE: PRETRIAL RELEASE, Standard 10-5.3(e) (3d ed. 2007) ("Financial conditions should be the result of an individualized decision taking into account the special circumstances of each defendant, the defendant's ability to meet the financial conditions and the defendant's flight risk, and should never be set by reference to a predetermined schedule of amounts fixed according to the nature of the charge."), https://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/pretrial_release.pdf.

⁴ G.S. 15A-534(c).

any person; or are likely to result in the destruction of evidence, subornation of perjury, or intimidation of witnesses.⁵ And finally, stakeholders wanted to develop an easily implemented tool to help judicial officials quickly identify those defendants who can be released on nonfinancial conditions, to reduce the occurrence of wealth-based incarceration of individuals who pose little risk to public safety or of flight. Although they considered empirical risk assessment tools (sometimes referred to as “algorithms”) for that purpose, they did not opt for such a tool. Instead, they adopted a new structured decision-making tool to better inform judicial officials’ pretrial decisions and conform with constitutional and statutory requirements.

The new decision-making tool, included in Appendix A and modeled on the tool adopted in Judicial District 30B, applies in all circumstances except where the statutes or the local bail policy require a different process or result. Key features of the new tool include:

- Expressly incorporating the statutory requirement that a judicial official “must” impose a written promise, custody release or unsecured bond (“nonfinancial conditions”) unless the official “determines that such release will not reasonably assure the appearance of the defendant as required; will pose a danger of injury to any person; or is likely to result in destruction of evidence, subornation of perjury, or intimidation of potential witnesses.”⁶
- Creating a presumption of nonfinancial conditions for persons charged with Class 3 misdemeanors.
- Providing an easily implemented checklist to quickly identify other low-risk defendants who can be released on nonfinancial conditions.
- Providing that for individuals charged with the most serious offenses, no presumption or screening applies; decision-makers proceed to the required statutory determination.
- Requiring documentation of reasons for imposing a secured bond.
- Requiring that ability to pay be considered when setting a secured appearance bond.
- Requiring detention bond hearings when a secured detention bond is imposed.
- Providing a maximum bond table.
- Preserving necessary discretion by allowing for deviations from *all* tool recommendations, provided that deviations are documented.

The new tool will be incorporated into the Local Bail Policy issued by the Senior Resident Superior Court Judge. To facilitate adoption of the new tool, a new form was created for use by magistrates (Appendix B).

Implemented Reform: First Appearances for In-Custody Misdemeanor Defendants

The district will provide new first appearance proceedings for in-custody misdemeanor defendants. State law requires a first appearance for in-custody *felony* defendants within 96 hours of being taken into custody or at the first regular session of the district court in the county, whichever occurs first.⁷ Because state law does not require first appearances for in-custody misdemeanor defendants, these defendants may sit in jail for weeks or more until their first court date. This can lead to scenarios where misdemeanor defendants are incarcerated pretrial when the charged offense cannot result in a custodial sentence upon conviction or where they are incarcerated pretrial for a longer period than they could receive in a custodial sentence if convicted. Additionally, stakeholders learned of research

⁵ G.S. 15A-534(b).

⁶ G.S. 15A-534(b).

⁷ G.S. 15A-601(c).

suggesting that pretrial detention of low-level defendants has negative public safety consequences and negative case outcomes for defendants. These reasons counsel in favor of first appearances for in-custody misdemeanor defendants, to ensure prompt judicial review of the magistrate's bond determination and a determination that detention is warranted because of pretrial risk as opposed to inability to pay financial conditions.

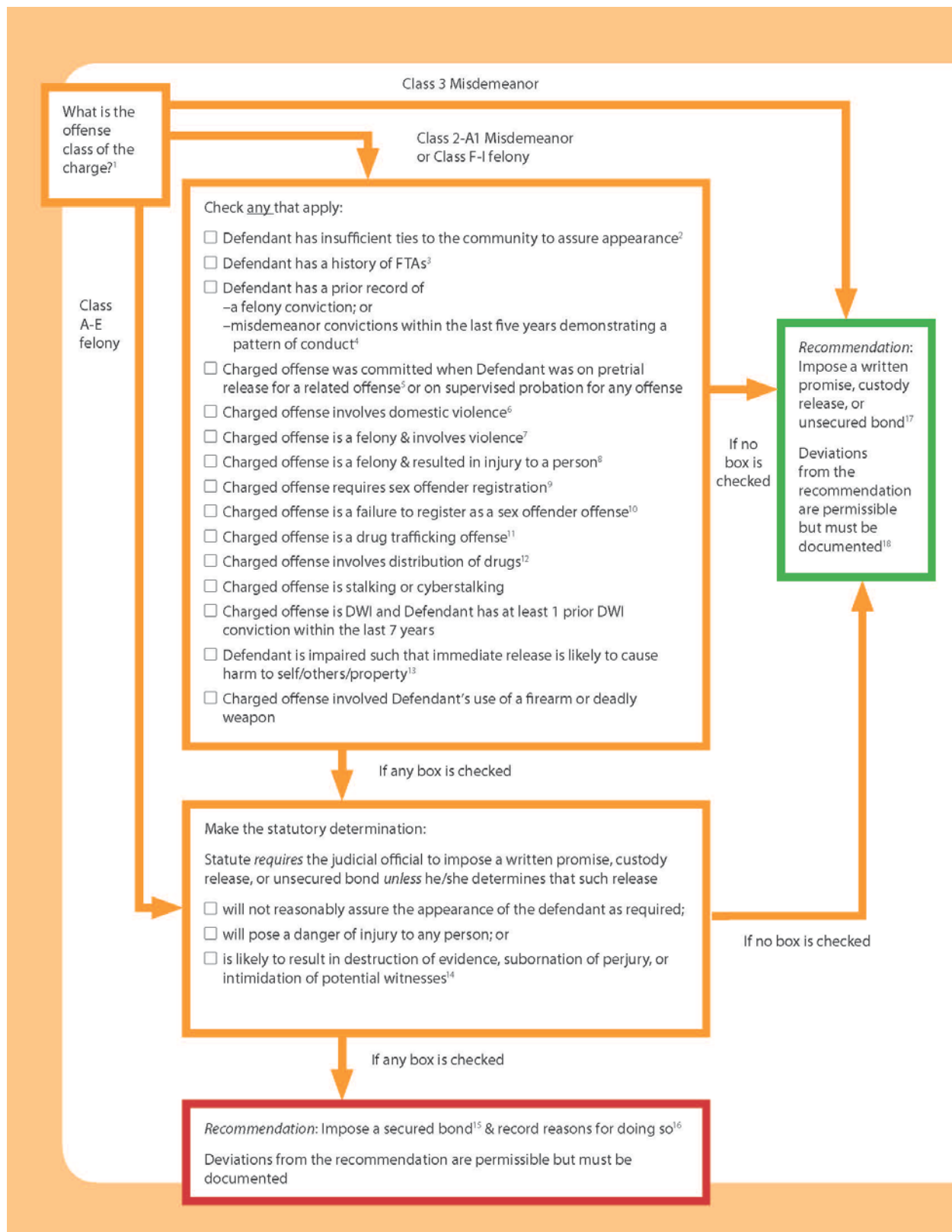
The new first appearances will be held weekly in three of the district's counties: Washington, Beaufort, and Martin. For the two counties—Hyde and Tyrrell—where district court is held only every other week, the appearances will be held on that schedule. To promote judicial efficiency, the new first appearances will be held at 2 pm in district court. The District Attorney's Office will make criminal history records available to the Public Defender's Office prior to the hearings. Assistant public defenders will meet with detained individuals prior to the first appearance, review criminal history records and represent defendants at the first appearance proceedings. An administrative order, issued by the Chief District Court Judge, will document procedures for the new first appearances.

Next Steps

The Senior Resident Superior Court Judge and Chief District Court Judge will conduct post-implementation check-ins with committee members. With the support of the Senior Resident, Smith has applied for grant funding to do an empirical evaluation of implemented reforms. The proposed evaluation includes both process and outcome evaluations to assess the fidelity of implementation, as well as the effects of the reforms on appearance rates, public safety, and jail stays.

JUDICIAL DISTRICT 2: DETERMINING CONDITIONS OF PRETRIAL RELEASE

Pursuant to Judicial District 2's Local Pretrial Release Policy, judicial officials must use the flowchart contained here, with accompanying footnotes and tables, when determining conditions of release in all cases except where the North Carolina General Statutes or Local Policy prescribe a different process or result.



1. If the matter is before a judge on the State's motion to increase conditions after the return of a habitual felon indictment, the judge should treat the offense at its "habitualized" offense Class level.
2. The mere fact that the Defendant is homeless and does not have a home address does not warrant checking this box; inquiry should be focused on the Defendant's connections to the community.
3. FTAs within the last 2 years are most relevant.
4. The pattern of conduct must relate to the present offense. For example: the current charge involves drug possession and the Defendant has 3 priors within the last 5 years for misdemeanor drug or drug paraphernalia possession.
5. This factor covers situations where the Defendant continues to engage in the same type of conduct (e.g., repeat larceny) or an escalating course of conduct (e.g., the defendant is charged with injury to real property while on pretrial release for communicating threats to the property owner).
6. An offense involves domestic violence when the relationship between the parties is one of the following:
 - o Current or former spouses
 - o Currently or formerly lived together as if married
 - o Currently or formerly in a dating relationship
 - o Have a child in common
 - o Parent (or one in parental role)/child
 - o Grandparent/grandchild
 - o Current or former members of the same household

Note: this list is drawn from G.S. 15A-534.1, the 48-hour domestic violence hold statute.
7. For example, robbery.
8. This factor applies when the offense involved harm to a person (e.g., assaultive conduct). It does not apply to offenses in which property is taken or harmed (e.g., larceny, embezzlement, obtaining property by false pretenses, etc.).
9. For a list of offenses requiring sex offender registration, see JAMIE MARKHAM & SHEA DENNING, NORTH CAROLINA SENTENCING HANDBOOK 2017-18 (UNC School of Government, forthcoming 2018).
10. See G.S. 14-208.11(a); JESSICA SMITH, NORTH CAROLINA CRIMES: A GUIDEBOOK ON THE ELEMENTS OF CRIME 268 (7th Ed. 2012) (discussing this offense).
11. See G.S. 90-95(h); NORTH CAROLINA CRIMES *supra* note 10, at 721-739 (discussing trafficking offenses).
12. For example, sale and delivery of a controlled substance and possession with intent to manufacture, sell, or deliver.
13. For defendants in impaired driving cases, follow impaired driving procedures. In all other cases if a secured bond is imposed only because of this factor and the defendant remains detained, conditions must be revised without consideration of this factor when the defendant's impairment no longer presents a danger of physical injury to himself or herself or others or of damage to property, but in any event, no later than 24 hours after secured bond was set.
14. G.S. 15A-534(b). When making this inquiry, judicial officials should consider whether pretrial restrictions (e.g., restrictions on travel, associations, conduct or place of abode, as well as abstention from alcohol consumption, as verified by the use of an approved continuous alcohol monitoring system), which can be imposed with a written promise, custody release or unsecured bond, can sufficiently mitigate pretrial risk. See G.S. 15A-534(a).
15. If a secured appearance bond is imposed: (1) the judicial official must consider—among other relevant factors—the defendant's ability to pay; and (2) the amount of the secured appearance bond should not exceed the amounts listed the tables shown below; if a secured bond is set in excess of these recommended maximums, reasons for doing so must be documented.

If a secured bond is used to detain ("detention bond"), a detention bond hearing that affords the defendant appropriate procedural protections must be held before a judge on motion by the defense.
16. See G.S. 15A-534(b) (when judicial official imposes secured bond instead of written promise, custody release or unsecured bond, the judicial official "must record the reasons for so doing in writing to the extent provided in the policies or requirements issued by the senior resident superior court judge").
17. Pretrial restrictions can accompany any pretrial condition. See G.S. 15A-534(a) & note 14 above.
18. A deviation is permissible if there is a risk of continuing felony-level criminal activity.

Maximum Secured Appearance Bond Amounts— Offenses Other Than Drug Trafficking

If a bond is set in excess of these recommendations, reasons for doing so must be documented.

Type of Offense	Maximum Secured Bond
Misdemeanor, Class 2	\$500
Misdemeanor, Class 1	\$1,000
Misdemeanor, Class A1	\$3,000
Driving While Impaired	\$5,000
Felony Class I	\$10,000
Felony Class H	
Felony Class G	\$25,000
Felony Class F	
Felony Class E	\$50,000
Felony Class D	\$70,000
Felony Class C	\$100,000
Felony Class B2	\$250,000
Felony Class B1	\$300,000
Felony Class A	No Bond Unless Set by a Judge
Fugitive Warrant	For Maximum bond amount, see maximum for the underlying offense
Governor's Warrant	No Bond
Parole Warrant	No Bond

Maximum Secured Appearance Bond Amounts—Drug Trafficking

If a bond is set in excess of these recommendations, reasons for doing so must be documented.

Punishment Class	Maximum Secured Bond
H	\$75,000
G	
F	
E	
D	\$150,000
C	\$250,000

Appendix B: Bail Explanation Form

JUDICIAL DISTRICT 2 MAGISTRATE BAIL EXPLANATION FORM

DIRECTIONS: This form applies when setting bail for initial offenses, OFAs, fugitive warrants, other warrants (i.e., governor's warrants, interstate compact), and probation violations.

Magistrate's Name		County	
Defendant's Name		Date	
Case #s			

Charge	Class A-E Felony (Yes/No)	Class 2-A1 Misdemeanor or F-I Felony	Class 3 Misdemeanor (Yes/No)
	No	No	No

STEP 1: OFA after FTA with conditions set by judge

- ☐ Yes
- ☐ Written Promise
 - ☐ Custody Release
 - ☐ Unsecured Bond \$ _____
 - ☐ Secured Bond \$ _____
- (FORM COMPLETE)
- ☐ No (Go to STEP 2)

STEP 2: Highest Charge

- ☐ Class 3 Misdemeanor (Go to STEP 3.5)
- ☐ Class 2-A1 Misdemeanor or Class I-F Felony (Go to STEP 3)
- ☐ Class A-E Felony (Go to STEP 4)

STEP 3: (check all that apply)

- ☐ Defendant has insufficient ties to the community to assure appearance
- ☐ Defendant has a history of FTAs
- ☐ Defendant has a prior record of
 - a felony conviction; or
 - misdemeanor convictions within the last five years demonstrating a pattern of conduct
- ☐ Charged offense was committed when Defendant was on pretrial release for a related offense or on supervised probation for any offense
- ☐ Charged offense involves domestic violence
- ☐ Charged offense is a felony & involves violence
- ☐ Charged offense is a felony & resulted in injury to a person
- ☐ Charged offense requires sex offender registration
- ☐ Charged offense is a failure to register as a sex offender offense
- ☐ Charged offense is a drug trafficking offense
- ☐ Charged offense involves distribution of drugs
- ☐ Charged offense is stalking or cyberstalking
- ☐ Charged offense is DWI and defendant has at least 1 prior DWI conviction within the last seven years
- ☐ Defendant is impaired such that immediate release is likely to cause harm to self/others/property
- ☐ Charged offense involved Defendant's use of a firearm or deadly weapon

If no box is checked, in STEP 3, go to STEP 3.5

If any box is checked in STEP 3, go to STEP 4

STEP 3.5:

- ☐ Follow bond policy recommendation and impose a
 - ☐ Written promise,
 - ☐ Custody release, or
 - ☐ Unsecured bond \$ _____ (form complete)
- ☐ Deviate from bond policy recommendation to impose a nonfinancial condition;
 - ☐ Secured bond \$ _____ if Deviate is checked, complete STEP 7 below)

From **STEP 2**

STEP 4: Make the statutory determination

Statute *requires* the judicial official to impose a written promise, custody release, or unsecured bond *unless* he/she determines that such release (Check any that apply and provide explanation for any checked box)

☐ will not reasonably assure the appearance of the defendant as required

Explanation:

☐ will pose a danger of injury to any person

Explanation:

☐ is likely to result in destruction of evidence, subornation of perjury, or intimidation of potential witnesses

Explanation:

If no box is checked in Step 4, go to step **3.5** above. If any box is checked in Step 4, go to **Step 5**.

STEP 5:

☐ Follow bond policy recommendation and impose a secured bond consistent with maximum bond tables (if this box is checked, make sure that reason is stated in STEP 4 § (Form is complete)

☐ Deviate from bond policy recommendation to impose a secured bond within maximum bond table amount and impose:

☐ Written Promise

☐ Custody Release

☐ Unsecured Bond \$

☐ Secured Bond \$ (if this box is checked, proceed to **STEP 6**)

STEP 6: Type of Deviation (check one)

☐ From recommendation to impose secured bond

☐ From maximum bond table

STEP 7: Reasons for deviating from local bond policy recommendation (check any that apply):

☐ NC General Statute 15A-534(d3) - Bond is doubled because an offender already is released on bond for a related crime.

☐ NC General Statute 15a-534(d2) - Probationer is charged with a new felony and is deemed to pose a danger to the public.

☐ NC General Statute 15A-534.6 - Offender is charged with manufacturing methamphetamine or has a pattern or regular use of methamphetamine

☐ Other:

(Form is complete)

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