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Sentencing Narcotics Cases below the Statutory Minimum

Astry Novi Lidarti

Pringsewu District Court, Indonesia, Email: astrynovilidarti@gmail.com

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<p>keywords:</p> <p>Consideration, Criminal, Minimum, Narcotics</p> <p>DOI :</p> <p>https://doi.org/10.25041/ip.v4i1.2988</p>	<p><i>Law number 35/2009 on Narcotics establishes a specific minimum punishment. Despite this, instances occur where judges impose sentences below these mandated minimums, leading to concerns about legal certainty and the potential for undermining justice. This article investigates how judges account for legal certainty when imposing sentences below the stipulated minimum for narcotics offenses. The research adopts both normative and empirical legal methodologies, utilizing literature reviews, document analysis, case studies, and interviews with key informants. The findings suggest that judges often justify lesser sentences based on several factors: the defendant's status as a drug user rather than a distributor, negative urine test results, possession of only a small amount of narcotics, and lack of evidence proving involvement in narcotics sales or intermediary activities. In their rulings, judges integrate these considerations with the applicable narcotics laws and the factual circumstances presented during the trial. Consequently, such decisions to impose sentences below the statutory minimum are grounded in well-considered legal reasoning, contributing to legal certainty in the judicial process.</i></p>

A. Introduction

Criminal proceedings aim at ensuring justice for those seeking it. Judges play a pivotal role in this process and must possess strong legal analytical skills, along with a commitment to honesty, morality, and ethics. Unlike public prosecutors, who advocate on behalf of victims,



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and defense attorneys, who represent the interests of their clients, judges are required to remain impartial, focusing solely on upholding justice within the trial.¹

The Indonesian legal system allows judges considerable latitude in sentencing due to its alternative approach. This flexibility enables them to interpret laws based on the unique circumstances of each case. Presently, various laws and regulations specify minimum sentences that reflect the dual goals of rehabilitation for convicts and crime prevention in society. The establishment of such minimum sentences aims to minimize sentencing disparities and underscore the seriousness of offenses.² Criminal disparity refers to the unequal application of sentences for similar crimes or crimes that differ in nature, as seen in Law Number 35 of 2009 concerning Narcotics.³

Article 1, paragraph (1) of the Criminal Code mandates that all criminal laws must be based on written laws, ensuring that punishments are legally justified. The severity of a sentence is thus determined by the judge, who considers the motives and consequences of the offender's actions. This is particularly relevant in deciding the type of imprisonment. However, when certain laws explicitly dictate minimum sentences for specific offenses, judges must adhere to these guidelines. An example of this is found in Article 112, paragraph (1) of the Narcotics Law, which prescribes minimum penalties for particular narcotics-related offenses.⁴

The judge must adhere to the stipulations of the law, particularly regarding the enforcement of mandatory minimum sentences. Nonetheless, the role of a judge extends beyond simply acting as a mouthpiece for the law; they are tasked with interpreting the law in the context of individual cases and reflecting societal values. Numerous regulations exist to direct judges in their duty to adjudicate cases judiciously. A significant challenge arises when the facts present several mitigating factors for the defendant in specific types of crimes, such as narcotics offenses.

While the law clearly mandates a specific minimum punishment, in practice, this minimum can be adjusted based on specific legal grounds. This adjustment often leads to a legal dilemma involving a tension between the principles of justice and legal certainty. An illustrative example of this is found in "Decision Number 49/Pid.Sus/2022/PN Kot," concerning the defendant Widi Catur Pamungkas Bin Maryanto (deceased). The defendant faced alternative charges under the Narcotics Law: Article 114 paragraph (1) threatened with life imprisonment or a minimum of five years and a maximum of 20 years imprisonment and a fine ranging from Rp1,000,000,000 (one billion rupiah) to Rp10,000,000,000 (ten billion rupiah); or Article 112 paragraph (1) with a sentence range of four to twelve years and a fine between Rp800,000,000 (eight hundred million rupiah) and Rp8,000,000,000 (eight billion rupiah).

Upon deliberation, the Panel of Judges considered both mitigating and aggravating factors relating to the defendant. While the charges presented by the Public Prosecutor aligned generally with the Judges' views, there was disagreement regarding the specific duration of imprisonment and the amount of the fine to be imposed. In their rationale, the Judges determined that the defendant was guilty under Article 127 paragraph (1) letter a of the Narcotics Law. However, given the negative result of the defendant's urine test and the absence of charges under Article 127 paragraph (1) letter a by the Public Prosecutor, the sentence was set below the prescribed minimum. This decision was influenced by the Virtual Technical

¹ A. Muliadi, "Peran Politik Hukum Dalam Penegakan Hukum Yang Berkeadilan," *Jurnal Hukum Adil* 2, no. 2 (2011): 160.

² Erna Dewi, *Sistem Minimum Khusus Dalam Hukum Pidana* (Semarang: Pustaka Magister, 2013).

³ Muladi, *Hak Asasi Manusia, Politik, Dan Sistem Peradilan Pidana* (Semarang: Badan Penerbit Universitas Diponegoro, 2002).

⁴ Wibi Eka Prabowo, Muhammad Yamin Lubis, and Muhammad Arif Sahlepi, "Analisis Yuridis Penjatuhan Pidana Minimum Oleh Hakim Dalam Tindak Pidana Korupsi (Studi Putusan Mahkamah Agung Nomor 762 K/Pid.Sus/2020)," *Jurnal Ilmiah METADATA* 4, no. 3 (December 3, 2022): 215–28, <https://ejournal.steitholabulilmi.ac.id/index.php/metadata/article/view/243>.

Guidance on Judicial Administration provided by the Head of the Supreme Court of the Republic of Indonesia to all four judicial environments across the country: "In the practice of the Defendant who buys or controls or possesses narcotics but has the criteria as a user, and the Public Prosecutor's indictment does not contain the charge of Article 127 paragraph (1) letter an of Law Number 35 the Year 2009 concerning Narcotics, with consideration of a sense of justice. There is no indication that the Defendant is distributing the narcotics; the Judge may impose a sentence below the special minimum provisions while still imposing a fine."

Furthermore, "section A number 1 of Supreme Court Circular Letter No. 3 the Year 2015", states that:

"Judges deciding and examining cases must be based on the Indictment of the Public Prosecutor (Article 128, paragraphs 3 and 4 of *KUHAP*). If the prosecutor charges Article 111 or Article 112 of Law No. 35 of 2009 concerning Narcotics (Narcotics Law), but based on the legal facts revealed in the trial, Article 127 paragraph (1) letter an of the Narcotics Law is proven, the defendant is proven to be a user. The amount is relatively small (*SEMA* 4 of 2010), then the judge decides according to the indictment but can deviate from the special minimum criminal provisions by making sufficient considerations." The novelty of this research is on the examination of the imposition of punishment under the special minimum in narcotics cases based on the consideration of the judge's decision and the facts of the trial.

Given the background described, it is essential for *SEMA* to adhere to legal provisions. The primary purpose of *SEMA* is to address any legal gaps and to function with regulatory authority akin to law. Thus, to understand the foundational reasoning behind judges imposing certain minimum sentences in the context of legal certainty, this article is written. To tackle the issues discussed herein, both normative juridical and empirical juridical methods are employed, involving the review of court decisions and societal observations. Data for this article has been gathered through literature reviews, case studies, document analyses, and interviews with knowledgeable sources.⁵

B. Discussion

1. Basis of Judges' Legal Consideration in Imposing Punishment under Special Minimum in Narcotics Case

The application of special minimum punishments, although absent in the Criminal Code, is commonly seen in other legislations such as the Narcotics Law. This follows the principle of "*lex specialis derogat legi generali*," where specific laws supersede general laws. The rationale behind enforcing special minimum punishments is to mitigate disparities in judicial decisions that can arise when judges interpret sentencing guidelines differently in similar cases.⁶

However, the use of special minimum punishments can also create tensions between the principles of justice, benefit, and legal certainty.⁷ While the intent of positive law is to uphold legal certainty, there may be instances where such enforcement clashes with the notion of justice. This is particularly evident in narcotics cases, where judges may opt to prioritize justice over legal certainty, potentially leading to perceived injustices if the punishment imposed seems disproportionate to the crime committed.

To analyze the considerations, judges take into account when deciding criminal cases, various theoretical frameworks can be utilized. According to the balance theory, judges should

⁵ Herlambang P. Wiratraman, "The Challenges of Teaching Comparative Law and Socio-Legal Studies at Indonesia's Law Schools," *Asian Journal of Comparative Law* 14, no. S1 (2019): S229–44, <https://doi.org/10.1017/ASJCL.2019.15>.

⁶ Oheo K. Haris, "Telaah Yuridis Penerapan Sanksi Di Bawah Minimum Khusus Pada Perkara Pidana Khusus," *Jurnal Ius Constituendum* 2, no. 2 (November 3, 2017): 240–57, <https://doi.org/10.26623/JIC.V2I2.663>.

⁷ Ari Wibowo and Ivan Agung Widiyasmoko, "Pertimbangan Hakim Dalam Penjatuhan Pidana Di Bawah Minimum Khusus: Studi Perkara Tindak Pidana Narkotika," *Undang: Jurnal Hukum* 4, no. 2 (November 21, 2021): 345–69, <https://doi.org/10.22437/UJH.4.2.345-369>.

weigh the interests of all parties involved alongside the statutory mandates when making their decisions. Additionally, the theory of "ratio decidendi"⁸ suggests that judges ought to reflect on the philosophical underpinnings of the laws they apply, aiming to achieve fair enforcement that satisfies all parties concerned.⁹

In making their decisions, judges are required to provide thorough and well-founded considerations. These deliberations must be documented in writing and presented during public trials. The essence of a judge's decision acts as the "crown" of the judicial process, necessitating a comprehensive evaluation of juridical, philosophical, and sociological factors.¹⁰ Drawing on the case research from the "Kota Agung District Court Number: 49/Pid.Sus/2022/PN Kot," the criteria judges considered when imposing a sentence below the prescribed minimum include:

- 1) "The defendant is only a user or abuser of these drugs;
- 2) The defendant consumed the narcotics only for himself;
- 3) The urine test result was negative;
- 4) The amount of narcotics used is relatively small; and
- 5) There is no indication that the defendant sold, brokered, exchanged, or delivered narcotics."

The aforementioned criteria considered by the judge in this case primarily focus on the defendant's personality and the nature of the crime. Factors such as the defendant's reasons for drug use are taken into account, reflecting the absence of structured sentencing guidelines in the Criminal Code. The need for sentencing guidelines is particularly acute for judges¹¹, as these serve as essential tools to ensure fair and consistent judicial decisions across similar cases.

In the specific instance of "Decision Number: 49/Pid.Sus/2022/PN Kot," the judge's decision to impose a sentence below the statutory minimum was guided by *SEMA* No. 03 of 2015.¹² This directive permits judges to diverge from mandatory minimum sentences under Articles 111 or 112 of the Narcotics Law when the defendant is merely a user possessing a relatively small quantity of drugs. The definition of "a relatively small amount" is further clarified by *SEMA* No. 04/2010, which specifies quantity limits for various substances, including methamphetamine (1 gram), MDMA (4 grams or 8 pills), heroin (1.8 grams), cocaine (1.8 grams), cannabis (5 grams), and other listed substances in similar small amounts.

Despite the flexibility provided by *SEMA*, *SEMA* does not hold the authority of law but functions primarily as a technical guideline for judicial discretion. Originating from the principle of "*free ermessen*" (discretionary decision-making), *SEMA* is intended to address gaps and weaknesses in the enforcement of existing laws by the judiciary. It is a policy tool used by the Supreme Court to enhance legal operations where legislative provisions may fall short. Thus, conceptually, *SEMA* should not enable deviations from the explicit legal mandates established in the Narcotics Law. Its role is to guide, not to override, the legal standards set by

⁸ Leszek Leszczyński, "Implementing Prior Judicial Decisions as Precedents: The Context of Application and Justification," *International Journal for the Semiotics of Law* 33, no. 1 (March 1, 2020): 231–44, <https://doi.org/10.1007/S11196-019-09674-9/METRICS>.

⁹ Valian Trisnanto Budi N and Zainab Ompu Jainah, "Analisis Pertimbangan Hakim Dalam Menjatuhkan Putusan Terhadap Pengedar Narkotika Jenis Sabu Dalam Warung (Studi Putusan Nomor: 375/Pid.Sus/2020/PN.Gns)," *Jurnal Pendidikan Dan Konseling (JPDK)* 4, no. 4 (July 14, 2022): 1066, <https://doi.org/10.31004/JPDK.V4I4.5384>.

¹⁰ Nanda Setya Laksana and Achmad Sulchan, "The Law Enforcement On Pornographic Cases," *Law Development Journal* 3, no. 3 (August 12, 2021): 555–63, <https://doi.org/10.30659/LDJ.3.3.555-563>.

¹¹ Richard S. Frase, "Forty Years of American Sentencing Guidelines: What Have We Learned?," *https://doi.org/10.1086/701503* 48, no. 1 (January 1, 2019): 79–135, <https://doi.org/10.1086/701503>.

¹² Mahkamah Agung RI, "Surat Edaran Mahkamah Agung Tentang Pemberlakuan Rumusan Hasil Rapat Pleno Kamar Mahkamah Agung Tahun 2015 Sebagai Pedoman Pelaksanaan Tugas Bagi Pengadilan" (2015).

the legislation, ensuring that its application aligns with the broader objectives of justice and fairness in the judicial process.¹³

The judge's role extends beyond merely imposing a sentence; they are tasked with delivering decisions that are as fair and equitable as possible. A legally and convincingly proven guilt necessitates a punishment that is proportional to the crime committed, striking a balance between the act and its consequences. Within this framework, deviation from the mandatory minimum criminal provisions can be seen as an expression of judicial independence, where judges have the autonomy to interpret and apply the law based on the specifics of each case.¹⁴

Juridical analysis of criminal actions concludes once guilt is determined, but the sentencing phase involves a deeper, deliberative process. Maroni emphasizes that "Judges must adhere to the applicable sentencing standards, but they have the discretion to decide on a fair sentence based on their conscience and fairness from the defendant's, not the result after the defendant's guilt is established, the sentence will be decided based on the judge's conscience and the justice they believe in".¹⁵

Harifin A. Tumpa highlights that "judges are required to enforce the law including the minimum criminal provisions, although this is not a rigid and non-binding rule for judges. Of course, a judge is not only the spokesperson of the law, but must also consider the social sense of justice".¹⁶

In the case of the "Kota Agung District Court Decision Number: 49/Pid.Sus/2022/PN Kot," the imposition of a punishment below the statutory minimum reflects the application of progressive legal principles. Progressive law recognizes that judges are not solely confined by the literal interpretation of legal texts; they must also consider the veracity of trial facts and broader societal values in their decisions. According to legal scholar Chairul Huda, while judges are generally expected to sentence within the established minimum and maximum boundaries, they are entitled to depart from these limits if the mandatory minimum is deemed excessively harsh. This flexibility is crucial for aligning legal outcomes with societal justice, ensuring that the punishment not only fits the legal criteria but also resonates with the community's sense of fairness and equity.¹⁷

2. The judges' Consideration in Imposing Punishment under Special Minimum in Review of the Principle of Legal Certainty

An essential aspect of achieving fair judicial decisions (*ex aequo et bono*) and legal certainty is the quality of a judge's legal reasoning. It is crucial that judges consider cases carefully and thoroughly to benefit both the parties involved and society at large. Inadequate considerations can lead to decisions being overturned by higher courts.¹⁸

Judicial reasoning must incorporate relevant theories and empirical research that bridge the gap between theoretical constructs and practical applications. Judges act as instruments of law

¹³ Kajian Putusan Nomor and Riki Yuniagara, "Penggunaan Sema Nomor 7 Tahun 2014 Dalam Penolakan Peninjauan Kembali," *Jurnal Yudisial* 13, no. 2 (January 11, 2021): 202, <https://doi.org/10.29123/JY.V13I2.411>.

¹⁴ Helmi Muammar et al., "Analisa Peraturan Mahkamah Agung Nomor 1 Tahun 2020 Tentang Pedoman Pemidanaan Kaitanya Dengan Asas Kebebasan Hukum Dalam Tindak Pidana Korupsi," *Widya Pranata Hukum: Jurnal Kajian Dan Penelitian Hukum* 3, no. 2 (September 27, 2021): 91, <https://doi.org/10.37631/WIDYAPRANATA.V3I2.412>.

¹⁵ Hasil Wawancara Dengan Maroni Selaku Akademisi Hukum Pidana Fakultas Hukum Universitas Lampung, 28 Desember 2022.

¹⁶ Penerapan Asas Keadilan et al., "PENERAPAN ASAS KEADILAN, KEPASTIAN HUKUM DAN KEMANFAATAN DALAM PUTUSAN HAKIM TINDAK PIDANA KORUPSI," *Gorontalo Law Review* 3, no. 2 (October 28, 2020): 181, <https://doi.org/10.32662/GOLREV.V3I2.987>.

¹⁷ Mardian Putra Frans, "Implementasi Pidana Dibawah Minimal Dalam Kasus Narkotika Berdasar Perspektif Hukum Progresive," *SUPREMASI: Jurnal Hukum* 4, no. 2 (April 1, 2022): 183, <https://doi.org/10.36441/SUPREMASI.V4I2.652>.

¹⁸ Mukti Arto, *Praktek Perkara Perdata Pada Pengadilan Agama* (Yogyakarta: Pustaka Pelajar, 2004).

enforcement, tasked with upholding legal certainty through their decisions. In making these decisions, judges should consider various factors including the *modus operandi*, the impacts of the offense, the defendant's demeanor in court, and any reconciliation efforts with the victim.

A specific point of contention arises in narcotics cases concerning sentencing. Typically, judges might opt for sentences below the statutory minimum. For instance, in cases where it is established during the trial that the defendant is a drug user, yet "Article 127 of the Narcotics Law" is not invoked, the judge may impose a lighter sentence. Frequently, this occurs when the Public Prosecutor charges the defendant under "Article 112 of the Narcotics Law" but omits charges under "Article 127 paragraph (1) letter an of the Narcotics Law", even though evidence confirms the defendant's drug use.

In the "Decision of the Panel of Judges of the Kota Agung District Court Number: 49/Pid.Sus/2022/PN Kot," the judges imposed a sentence below the statutory minimum because, based on legal facts presented at the trial, the defendant was proven to be a drug abuser rather than a dealer. This situation is covered under Article 127 paragraph (1) of the Narcotics Law, justifying the deviation from the minimum penalties typically sought in the Public Prosecutor's indictment.

This decision is underpinned by legal certainty, as the judges integrated the provisions of the Narcotics Law with "SEMA No. 3 of 2015 jo. SEMA No. 1 of 2017 jo. SEMA No. 3 of 2018." Despite the Public Prosecutor not charging the defendant under "Article 127 paragraph (1) letter an of the Narcotics Law," the judges chose to impose a lighter sentence, relying on their judicial discretion and the legal facts at hand.

Juridically, this approach endows the decision with legal certainty. Maroni contends that the imposition of a sentence below the specified minimum in cases of narcotics abuse aligns with legal certainty, as it reflects the judicial mandate outlined in Article 5 of the Judicial Power Law. This law compels judges to actively seek, explore, and uncover legal values within society through jurisprudential inquiry, aligning their decisions with societal norms and values as demonstrated at trial.¹⁹

Zakky Ikhsan Samad supports this view, emphasizing that the decision by the Kota Agung District Court, which deviates from the standard minimum penalties, is legally certain because it was based on the provisions of the Narcotics Law and relevant SEMA guidelines. He notes that SEMA guidelines, though not obligatory, generally guide judicial reasoning to ensure consistency and prevent disparities in sentencing. They provide a framework for judges to interpret cases of drug abuse reasonably, particularly when there is evidence suggesting usage but no positive urine test at the time of arrest, as stipulated in SEMA No. 4/2010 and SEMA No. 3/2011. These guidelines help maintain a standardized approach across different levels of the judicial process, from initial hearings to cassation, fostering a shared understanding among the judiciary.²⁰

In the decision of the Kota Agung District Court Number: 49/Pid.Sus/2022/PN Kot, the imposition of a sentence below the specified minimum has been a topic of considerable discussion. According to Maroni, such decisions can indeed have a deterrent effect, premised on the notion that the defendant is perceived as a good person deserving leniency, which aligns with selective justice principles. Furthermore, Maroni argues that imposing a sentence below the minimum does not necessarily encourage others to commit similar offenses, believing they will also receive lighter sentences. This is because not all defendants will qualify for such leniency; it is contingent upon specific case circumstances. Zakky Ikhsan Samad concurs with Maroni, emphasizing that a sentence below the certain minimum is unlikely to incite further

¹⁹ Hasil Wawancara Dengan Maroni Selaku Akademisi Hukum Pidana Fakultas Hukum Universitas Lampung, 28 Desember 2022.

²⁰ Hasil Wawancara Dengan Zakky Ikhsan Samad Selaku Hakim Pada Pengadilan Negeri Kota Agung, 19 Januari 2023.

narcotics offenses, given that penalties still include fines and are dependent on the charges laid out.²¹

From a research perspective, the decision to impose a sentence below the special minimum in narcotics cases exhibits legal certainty. The judges base their decision on both the juridical facts presented during the trial and statutory provisions of the Narcotics Law in conjunction with the Judicial Power Law, *SEMA* No. 3 of 2015 jo. *SEMA* No. 1 of 2017 jo. *SEMA* No. 3 of 2018. Sociologically, the judges also consider community legal values, recognizing narcotics abuse as a significant social issue, thus justifying the imposition of a sentence even if it is below the minimum recommended by the indictment.

Philosophically, the judges consider the broader purpose of punishment. In their view, punishment should not only reprimand but also serve an educational role, both for the defendant and the broader community. This perspective underlines the philosophical dominance in the decision-making process, aimed at rehabilitating the individual and deterring the community from similar offenses. Zakky Ikhsan Samad argues that the juridical, sociological, and philosophical considerations must be viewed as a cohesive unit, though the juridical aspect remains paramount since guilt must be established first. While the decision does not compromise legal certainty, broader challenges persist in the enforcement of narcotics law in Indonesia. The Narcotics Law does not fully address the interests of offenders, the community, or the state comprehensively, leading to inconsistencies in how narcotics abusers are treated legally. Additionally, the complexity of narcotics crime *modi operandi* requires robust legal instruments and a uniform understanding of normative provisions among enforcers.²²

To enhance the effectiveness of prosecuting drug trafficking offenses, it is essential to reformulate the substance, structure, and culture of narcotics law enforcement. This includes adjusting the Narcotics Law to better accommodate the complexities of drug abuse operations and fostering a common understanding among law enforcers regarding the objectives of punishment. This approach seeks to clarify the rationale behind punishment and its intended outcomes, ensuring that legal actions align more closely with the purposes they serve.

C. Conclusion

The imposition of a sentence below the special minimum in narcotics cases is often justified by factors such as the defendant's status as a narcotics user, personal consumption of narcotics, negative urine test results, small quantities of narcotics involved, and no evidence of the defendant's involvement in selling or facilitating the sale, purchase, exchange, or delivery of narcotics. The judge's decision in these instances is guided by "*SEMA* Number 3 of 2015 jo *SEMA* Number 1 of 2017 jo *SEMA* Number 3 of 2018". However, it is crucial to note that overriding the special minimum sentencing provisions stipulated in the Narcotics Law with *SEMA* guidelines may not be appropriate.

With respect to the principle of legal certainty, the judge's decision to impose a sentence at the special minimum, as detailed in the "verdict of Kota Agung District Court Number: 49/Pid.Sus/2022/PN Kot", achieves legal certainty. The judge's reasoning reflects a thoughtful consideration of both the facts presented during the trial and the relevant provisions of the Narcotics Law, supported by *SEMA*. Thus, even though the defendant was not charged under "Article 127 paragraph (1) letter a of the Narcotics Law", the judge's discretionary deviation from the special minimum sentencing provisions was justified.

To ensure legal certainty, it is essential that any exceptions allowing judges to deviate from the special minimum sentencing requirements in narcotics cases be explicitly defined within

²¹ Hasil Wawancara Dengan Maroni Selaku Akademisi Hukum Pidana Fakultas Hukum Universitas Lampung, 19 Januari 2023.

²² "Hasil Wawancara Dengan Zakky Ikhsan Samad Selaku Hakim Pada Pengadilan Negeri Kota Agung."

the Narcotics Law itself. This would provide a clearer framework for judges, ensuring that the interpretations and applications of the law remain consistent and that decisions are made considering the charges laid by the Public Prosecutor.

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