THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA	)	
	)	
v.	)	Criminal No. 01-455-A
	)	Hon. Leonie M. Brinkema
ZACARIAS MOUSSAOUI,	)	
a/k/a "Shaqil,"	)	
a/k/a "Abu Khalid al Sahrawi,"	)	
	)	
Defendant	)	

DEFENDANT'S OBJECTIONS TO GOVERNMENTS' PROPOSED JURY INSTRUCTIONS FOR THE ELIGIBILITY PHASE

The Defendant, by and through counsel, hereby submits his objections to the Government's proposed jury instructions for the eligibility phase.

1. Testimony of Defendant

The Government's proposed instruction "Testimony of Defendant" contradicts itself, would be misleading and confusing to the jury and is not a proper statement of the law. The initial sentence of the instruction is unobjectionable. It provides that "[a] defendant who wishes to testify is a competent witness and his testimony is to be judged in the same way as that of any other witness." This is a correct statement of the law and the defense agrees that

this instruction is appropriate in the event Mr. Moussaoui elects to testify.

However, the Government's proposed instruction then contradicts this first sentence in instruction the jury that "the defendant has in interest in the outcome of this case greater than that of any other witnesses, and you may consider that interest in weighing the credibility of his testimony" citing to *United States v. Figurski*, 545 F.2d 389, 392 (4th Cir. 1976). However, in *Figurski* the Fourth Circuit simply noted that a defendant may be convicted on the uncorroborated testimony of an accomplice and that, in that context, it was not reversible error to point out a defendant's vital interest in the outcome of the case. The Court in *Figurski* did not instruct the jury, as the Government now proposes that "the defendant has an interest in the outcome of this case greater than that of any other witnesses" and to do so would be not only inaccurate but also improper.

The Defense proposes to instruct the jury that "[t]he defendant has testified. You should treat this testimony just as you would the testimony of any other witness."

2. All Available Evidence Need Not Be Produced

Without citing any authority, the Government proposes to instruct the jury that the prosecution is not required to "call as witnesses all persons who may have been present at any time or place involved in the case ... Nor does the law require

the prosecution to produce as exhibits all papers and things mentioned in the evidence." This instruction is improper and may mislead and confuse the jury to focus on information not presented during the hearing. It also suggests other evidence may exist which the jury may consider. Finally, it also suggests, as written, that there is some difference in burden between the parties duty to place all the evidence before the jury and that the prosecution has the lesser duty in this regard. This instruction should not be given for these reasons.

3. Proof of Knowledge or Intent

The Government's proposed jury instruction on "Proof of Knowledge or Intent" would have the Court improperly invade the province of the jury by commenting on evidence and suggesting conclusions to draw therefrom. The instruction, after directing the jury that intent is ordinarily not directly proved, provides the additional commentary that the Court reminds the jury that Mr. Moussaoui "admitted as part of his guilty plea that he lied to federal agents with the intent 'to allow his al Qaeda 'brothers' to go forward with the operation to fly planes into American buildings.'" The jury is required to draw it's own conclusions and inferences based on the information presented, (see Government proposed instruction 6, "Information Introduced at Sentencing Hearing"), and the Statement of Facts should not be construed by the jury as the only definitive

evidence on the issues of knowledge or intent. (See proposed Defense instruction 13, "Impact of Defendant's Guilty Plea.")

4. Victims died as a direct result of the act

For purposes of defining "direct result" required under the FDPA for eligibility, the Government proposes the Federal Jury Practice Instructions for involuntary manslaughter and cites several cases for the proposition that Mr. Moussaoui's lies "need not be the only cause of the death as long as it played a substantial role in the death." Not one of these cases deals with the statutory language under 3591(a)(2)(C), the statute at issue here.[1]

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[1] *United States v. Bourgeious*, 423 F.3d 501 (5th Cir. 2005) (eligibility under FDPA, 3591(a)(2)(D) where the defendant systematically abused and tortured the victim); *Williams v. French*, 146 F.3d 203, 215 (4th Cir. 1998) (state death penalty case where defendant shot victims at short range); *United States v. Wall*, 349 F.3d 18, 24-25 (1st Cir. 2003) (drug distribution convictions, not a death penalty case); *United States v. Riggi*, 117 Fed. Appx. 142, 144 (2d Cir. 2004) (unpublished) (not error for court to instruct jury that jury that there was no dispute as to victims *cause* of death); *United States v Smith*, 164 F.3d 627, 1998 WL 709274 *4 (4th Cir. 1998) (unpublished) (affirming violations of aiding and abetting and arson, noting proximate cause is that "without which the result would not have occurred"); *United States v. Johnson*, 403 F.Supp.2d 721 (N.D. Iowa Dec. 16, 2005) (in affirming a death sentence under 18 U.S.C. § 848(e)(1)(A) which provides a death sentence for, intentional killing "or counsel[ing], command[ing], induce[ing], procur[ing], or caus[ing] the intentional killing of an individual and such killing results" the Court found no Eighth Amendment violation where the defendant was one "without whom none of the killings would likely have occurred"); *United States v. Swallow,* 109 F.3d 656 (10th Cir. 1997) (second degree murder conviction affirmed, no error in instruction that the jury had to find that the defendant had killed the victim).

Relying on this authority, the Government proposes to define "direct result" as requiring that the deaths were "a reasonably probable consequence of the defendant's act." And then, ignoring the statute, propose to define the required causal connection as a "substantial role." Finally, the Government proposes that, instead of the deaths being the result of Mr. Moussaoui's lies, the Government need only prove that it is "reasonably probably that, had the defendant told the truth..."

This proposed instruction is fatally flawed for a number of reasons. First, "reasonably probable" and "direct result" are not the same. The section of the FDPA upon which the Government relies requires that the victim die "as a direct result of the act." Obviously, Congress could have chosen to require that the victim die merely as a result of the act, rather than as a *direct* result of the act, but it did not. Therefore, the connection between the defendant's act and the resulting death must be proven to be absolute. If the death would have occurred by the action of some other force regardless of the act of the defendant, then no direct link has been established.

For guidance, the Model Penal Code[2]. Section 2.03 ("Causal Relationship

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[2] It should be noted that the Model Penal Code is often referred to by the courts, including the United States Supreme Court and the Fourth Circuit.

Between Conduct and Result [etc.]"), states, in part:

> (1) **Conduct is the cause of a result when:**
>
> **(a) it is an antecedent but for which the result in question would not have occurred;** and
>
> (b) the relationship between the conduct and the result satisfies any additional causal requirements imposed by the Code or by the law defining the offense.

(emphasis added). This is completely consistent with tort law on causation. See, for example that cited by the Government, *Smith*, 164 F.3d 627, 1998 WL 709274 *4 (4th Cir. 1998) (unpublished) (proximate cause is "[t]hat which, in a natural and continuous sequence, unbroken by any efficient intervening cause produces injury, **and without which the result would not have occurred** . . . ."); *Moyers v. Corometrics Medical Systems*, 2000 U.S. App. LEXIS 6177, *17 (4th Cir.) (emphasis added) (noting that Virginia Supreme Court has held that "the proximate cause of an event is that act or omission which, in natural and

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See, for example, *Holloway v. United States*, 526 U.S. 1, 11 n.11 (1999) (concerning intent); *Board of Commissions v. Brown*, 520 U.S. 397419 n.1 (1996)(Souter, J., dissenting)(concerning intent); *Ratzlaf v. United States*, 510 U.S. 135 (1994)(concerning wilfullness); 518 U.S. 37, 77 (1996)(concerning purposefulness); and even *Enmund v. Florida*, 458 U.S. 782, 800, n.23 (1982); *United States v. Carr*, 303 F.3d 539, 546 (4th Cir. 2002)(concerning knowingly and recklessly); *United States v. Hester*, 880 F.2d 799 (1989) (concerning knowledge).

continuous sequence, unbroken by an efficient intervening cause, produces the event, **and without which that event would not have occurred**, " quoting *Banks v. City of Richmond*, 232 Va. 130 (1986)(emphasis added)).

These principles are not limited to tort law but are fully adopted in the criminal law.[3] See, for example, *United States v. Ryan*, 9 F.3d 660 (8th Cir. 1993), in which the court approved the following jury instruction in an arson prosecution in which deaths resulted:

> The deaths of William Klein and Jospeh Wilt resulted from defendant's conduct of setting the fire if his conduct was a proximate cause of their deaths. Defendant's conduct was a "proximate cause" of their deaths if it was a substantial factor in causing them to die on January 1, 1990, **and they would not have died then except for the defendant's conduct.**

9 F.3d at 669 (emphasis added).

The court used these principles in *United States v. Hicks*, 217 F.3d 1038 (9th Cir. 2000), when, in discussing a sentencing enhancement, said:

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[3] "The notion of causation runs throughout the law – including criminal law – and it is generally understood to encompass two concepts. A defendant's conduct must generally be both the "cause in fact" and the "proximate cause" of some harm before liability is imposed. See Wayne R. LaFave and Austin W. Scott, Jr., 1 Substantive Criminal Law §3.12 at 393-99 (1986); *United States v. Neadle*, 72 F.3d 1104, 1119 (3d Cir. 1995)(Becker, Circuit Judge, dissenting and concurring).

> The Guidelines' "relevant conduct provision requires a defendant's sentence be based on "all harm that resulted from the acts or omissions" of the defendant. U.S.C.G. §1B1.3(a)(3). Like the other courts to consider this provision, we believe that the term "resulted from" establishes a causation requirement. See *United States v. Yeaman*, 194 F.3d 442, 457 (3d Cir. 1999) (Section 1B1.3(a)(3) establishes a causation requirement when determining actual loss."); *United States v. Molina*, 106 F.3d 1118, 1123-24 (2d Cir. 1997) (holding that causation is established for purposes of U.S.S.G. §1B1.2(a)(3) when the defendant "put into motion a chain of events that contained an inevitable and tragic result" of the relevant harm) (internal quotation marks omitted); *United States v. Fox*, 999 F.2d 483, 486 (10th Cir. 1993) (holding that causation is established for purposes of 1B1.3(a)(3) when the harm was a "direct result" or "flowed naturally" from the defendant's criminal misconduct); *see also, United States v. Guillette*, 547 F.2d 743, 749 (2d Cir. 1976) ("We find the principle of proximate cause embodied in [18 U.S.C. §241] through the phrase 'if death results.'").

217 F.3d at 1048.

Guillette also draws a distinction between "if death results" for purposes of §241 and direct result. *See Guillette*, 547 F.2d at 749. A Fourth Circuit case which helps make the point is *United States v. Piche*, 981 F.2d 706 (1992). There, the defendant had harassed a group of Asian men at a bar, killing one of them. He was convicted of conspiring to injure, oppress, threaten, etc., the Asian men with death resulting. Title 18, U.S.C. §§241 and 245(b)(2)(F). 18 U.S.C. §241 says, in

part: "and if death results from the acts committed in violation of this section . . . they shall be fined under this title, or imprisoned for any term of years, or for life, or both, or may be sentenced to death."

The defendant argued that the court's instruction on "death resulting" was error. The instruction told the jurors:

> The fifth and final essential element that the United States must prove is that the defendant's actions resulted in the death of Ming Hai Loo, also known as Jim Loo. In order for you to find the defendant guilty as to this portion of count one, you must find that Ming Hai Loo's death was a natural and foreseeable consequence of the acts committed by the defendant or a co-conspirator.
>
> It is not necessary for the United States to prove that the defendant intended Mr. Loo to die as a result of his actions. Nor need the United States prove that the defendant struck the blow that directly caused Mr. Loo's death. "If death results" does not mean "if death was intended" or "directly caused by the defendant." Rather, the statute is designed to deter the type of conduct that creates an unacceptable risk of loss or life.
>
> If you find that the defendant willfully engaged in a conspiracy, that the defendant or a co-conspirator committed acts during the course of the conspiracy which resulted in the victim's death, and the death was a natural and foreseeable result of the acts, you may find this final element has been established.

981 F.2d at 711. The significant thing about this instruction, upheld by the Fourth Circuit, is that it contrasts the language, "if death results", to the language, "directly caused by the defendant".

Additionally it's clear that Congress appreciates the difference between result and direct result as recently as 1987 by amending the definition of "displaced persons" from those moving as a "result" to those moving as a "direct result." See 42 U.S.C. § 4601 (6)(A)(i)(l); H.R. Conf. Rep. No. 100-27, at *246 (1987), available at 1987 WL 61451.[4]

The cases cited by the Government do not change the requirement of direct result.

Secondly, the Government's theory of eligibility in this case rests on the Defendant's lies, not his telling the truth. This issues has been briefed extensively to this Court by the parties and is again addressed *supra* at the discussion on the Government's proposed instruction on "Intentionally Participating in an Act." This instruction should not, as the Government proposes, relate the "direct result" to the act "had the defendant told the truth" as this is not an acceptable, nor is it the identified, theory of death eligibility of the Government.

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[4] Counsel notes for the Court that he mistakenly reported this amendment as occurring in 2006 during the Rule 29 motion. The amendment was made in 1987.

5. Information Introduced During Sentencing Hearing

In amending the Model Instructions cited, the Government's proposed instruction would focus the jury on the guilty plea by starting this instruction with the following, "In addition to the defendant's admissions made as part of his guilty plea and the stipulations agreed upon by the attorneys ...." With the exception of this sentence, the rest of the instruction is not objectionable. The Defense proposed instruction includes the following language: "[y]ou may consider information that was presented during the hearing", and thereafter tracks the Government's proposed language.

6. Credibility of Witnesses

The first two paragraphs of the Government's proposed instruction on "Credibility of Witnesses" are repetitive of it's proposed instruction on "Information Introduced During Sentencing Hearing." Both discuss the jury's consideration of what witnesses they believe and how to consider evidence. With those two paragraphs removed, the rest of the instruction is not objectionable. The Government also eliminated the last sentence from the Model Instructions cited which should be included, "You will then be in a position to decide whether the government has proven the threshold factor beyond a reasonable doubt."

7. Threshold Finding

The Defense has proposed an instruction on the "Threshold Aggravating Factor" which includes, in part, the information contained in the Government's proposed instruction on "Threshold Finding" as well as parts of the information contained in the Government's proposed "Intent" instruction. The Defense proposed instruction relates the intent definition to the language of the threshold finding in the statute.

The Government's proposed instruction on "Threshold Finding" includes unnecessary information on the second phase, "[d]uring the second phase, you will receive more information from the parties and then decide whether the defendant should be sentenced to death. ..." This information is potentially misleading and confusing to the jury and should not be included in the eligibility instructions. It invites the jurors to find Mr. Moussaoui death eligible so that they can receive more information.

8. Intentionally Participating in an Act

The Government's proposed instruction "Intentionally Participating in an Act" instructs the jury that lying can constitute an act as a matter of law and that a deceptive statement my constitute a lie, citing fraud cases. This proposed instruction also instructs the jury to consider "not only what he said, but also that

information that he tried to conceal," in an extension of the Government's theory of death eligibility, in violation of the Fifth Amendment and in an improper amendment of the indictment.

The Government also proposes to instruct the jury that although the jury decides whether Mr. Moussaoui lied, the Court reminds the jury of his statement of facts and that he is bound by this statement of facts. This would place undue emphasis on the statement of facts, which are elsewhere addressed in the proposed instructions and would improperly invade the province of the jury in a way that is potentially misleading and confusing.

The government's instruction improperly equates a lie with an omission or silence. To so instruct the jury would violate Mr. Moussaoui's constitutional rights to notice and indictment by a grand jury, his Fifth Amendment right against compelled self-incrimination, as well as the provisions of the FDPA. Counsel have briefed this matter extensively and to avoid being repetitious, would refer the Court to our previous filing on these issues. (Dkt.1694).

The Court should not instruct the jury that a lie can constitute an act. This fact is not relevant to the question of whether the lies in this case constitute an act which directly led to death for purposes of the FDPA. The cases cited by the Government are inapposite as none of them relates to the FDPA. *See e.g. United*

States v. Evans, 272 F.3d 1069 (8th Cir. 2002). The defendant in *Evans* ordered a witness to lie and that was included as an overt act of the conspiracy to violate the Mann Act. The Court held that a sentencing enhancement for obstruction of justice was not a violation of double jeopardy even though the instruction to lie was also an overt act. Likewise, in *United States v. Jake*, 281 F.3d 123 (3rd Cir. 2002), the defendant was charged with conspiracy to obstruct justice and attempted to have a witness lie to the grand jury concerning the purpose of the money that he had sent her and this was an overt act of the conspiracy to obstruct justice. In *United States v. Bullis*, 77 F.3d 1553 (7th Cir. 1996), the defendant's attempt to have an individual lie to investigators was enough to nullify the defendant's previous withdrawal from the conspiracy. And in *United States v. Admon*, 940 F.2d 1121 (8th Cir. 1991), the defendant lied to prevent discovery by law enforcement and to enable her to continue her involvement in the conspiracy. The Court noted that any act tending to carry on or to facilitate the carrying on of the unlawful activity, done after the interstate travel is completed, satisfies the overt act requirement for purposes of the particular statute, citing 18 U.S.C. § 1952(a) (1988). Again, these cases are not relevant to determining whether the lie in this case is an act which directly led to death and this instruction should not be included.

The "act" of which the government complains is not Moussaoui's lies, but his decision to stop talking. The cases cited by the Government for support of its theory that Mr. Moussaoui had an affirmative duty to tell the truth, as opposed to invoking his right to counsel or to remain silent without the threat of death are wholly and without exception inapposite. In *United States v. Brogan* federal agents asked the defendant whether he had received money or gifts from a real estate company knowing that the defendant had. *See Brogan*, 522 U.S. 398, 399-400 (1998). The defendant merely said "no." *Id.* The defendant was charged with a violation of 18 U.S.C. § 1001. The Supreme Court stated that criminal liability existed under 18 U.S.C. § 1001 for the mere denial or wrongdoing, the so-called "exculpatory no." The obvious difference between a conviction under § 1001 and the FDPA is that § 1001 specifically criminalizes "concealment" (it bears notice that § 1001 also distinguishes between a material false statement and concealment or coverup, a distinction the government overlooks when trying to equate a lie with a failure to tell the truth under the FDPA's "act" requirement) while the FDPA requires an "act" that directly leads to death. *See* 18 U.S.C. § 1001(a)(1) and (a)(2).

The Government also cites two fraud cases for the proposition that a deceptive statement may constitute a lie. *United States v. Gray*, 405 F.3d 227,

235-36 (4th Cir. 2005); *United States v. Colton*, 231 F.3d 890, 901 (4th Cir. 2000). Although this may be true in limited circumstances, as explained by the *Gray* and *Colton* courts, it is irrelevant for purposes of the FDPA. Both *Gray* and *Colton* contain limiting language revealing their lack of relevance for purposes of turning a lie into a failure to provide information for purposes of criminal intent under the FDPA. "Although simple nondisclosure generally is not sufficient to constitute fraud, the Supreme Court has noted that"mere silence is quite different from concealment," and in some cases "a suppression of the truth may amount to a suggestion of falsehood." *Gray* at 235-236 (citing *Stewart v. Wyoming Cattle Ranche Co.*, 128 U.S. 383, 388 (1888)). *Stewart* further defines the limits of this principle in the context of a contract action: "[I]f, with intent to deceive, either party to a contract of sale conceals or suppresses a material fact *which he is in good faith bound to disclose*, this is evidence of and equivalent to a false representation, because the concealment or suppression is, in effect, a representation that what is disclosed is the whole truth." *Id.* (Emphasis added.) "[T]he concealment or suppression is in effect a representation that what is disclosed is the whole truth. The gist of the action is fraudulently producing a false impression upon the mind of the other party; and if this result is accomplished, it is unimportant whether the means of accomplishing it are words or acts of the

defendant, or his concealment or suppression of material facts not equally within the knowledge or reach of the plaintiff." 128 U.S. at 388. This is all discussed in the context of a civil contract dispute over the sale of cattle.

In *Colton*, relying on tort law and again citing to *Stewart*, the Fourth Circuit explained that in defining what constitute fraud for purposes of common law, intentional deception may, in certain circumstances, be sufficient. 231 F.3d at 900. However, Mr. Moussaoui is not charged with fraud. So, while silence may constitute criminal conduct for purposes of fraud, this does not provide authority that one's constitutionally protected right to invoke silence may be equated with lying for purposes of defining an "act" under the FDPA. Also of importance in *Colton*, is the court's differentiation of common law fraud versus areas of the law where Congress has otherwise acted to define criminal conduct in a comprehensive way (e.g. with respect to securities fraud, citing *Chiarella v. United States*, 445 U.S. 222 (1980)). 231 F.3d at 902. "Given Congress's comprehensive and detailed regulation of the field of securities law, the Court was understandably reluctant to construe the securities fraud statute broadly." *Id.* Under the FDPA, Congress has defined that what is required for purposes of death eligibility as an "act" – not a failure to act, not an omission – but an act directly resulting in death. 18 U.S.C. § 3593. Thus, this is not an area of the law under

which common law principles of fraud liability are appropriately applied. The Court in *Colton* also explained as rationale for using a concealment as the basis for a fraud conviction that Congress intended the statute at issue to be "construed broadly" citing to Congressional history. *Id.* at 903. "Rather, our holding recognizes and adheres to the congressional intent and established precedent that the language of the bank fraud statute be broadly construed so as to reach anyone engaged in a scheme or artifice to defraud, including a scheme to actively conceal material information through deceptive conduct, with the intent to mislead and suppress the truth, even in the absence of an independent legal duty to disclose such information." *Id.* at 903. The Court went on to remark "[i]t is important to bear in mind that the government must also prove a defendant's intent to defraud and the materiality of the information concealed, i.e., what a reasonable financial institution would want to know in negotiating a particular transaction." *Id.,* n.5.

Colton also went on to distinguish silence from the conduct at issue which was "a conspiracy to perpetuate an elaborate and deceitful scheme reaping the conspirators approximately $1.6 million." *Id.* at 902.

These cases simply provide no authority for the proposition that the Government proposes. For these reasons, the Government's proposed instruction for "Intentionally Participated in an Act" should not be given to the jury.

The Defense has proposed instructions defining "Act" (14) and "Lies" (15).

9. Impact of the Defendant's Guilty Plea

Government's proposed instruction four, "Impact of the Defendant's Guilty Plea," focuses the jury on the "Statement of Facts" in determining whether Mr. Moussaoui's lied to agent at the time of his arrest led to death on September 11. The Government's constant focus during its presentation of its case in chief on the Defendant's Statement of Facts as providing the foundation for what witnesses say the Government "could have done" to prevent the attacks on 9/11 impermissibly amends the indictment from reliance on Mr. Moussaoui's lies to reliance on facts Mr. Moussaoui admitted as part of a guilty plea and violates Mr. Moussaoui's due process and Fifth Amendment rights as has been extensively briefed for this Court elsewhere. (Dkt.1694). This instruction also repeats the same information at least three times. Finally, the Government proposes to give the jury the indictment in this instruction, even after the Court has indicated that it will not provide the indictment to the jury.

The Defense has proposed an instruction relating to the Defendant's guilty plea that includes the following language:

> As I told you during my opening instructions, the defendant pled guilty to all charges alleged in the indictment. As a result, there is no issue in this case as to whether the defendant is guilty. In assessing

the import of the Statement of Facts, you may consider that the Statement of Facts was drafted by the Government and you may construe any ambiguities you find in the Statement of Facts against the government. The matters set forth in the Statement of Facts may be considered by you in light of all of the other evidence in the case and if you find that other evidence explains or supports any of the ambiguities you find in the Statement of Facts, you may make your own findings in that regard consistent with your role as judges of the facts.

10. Consequences of Deliberation

The Government's proposed "Consequences of Deliberation" instruction is unnecessary and focuses the jury on a potential selection phase which is misleading and confusing. The jury has already been informed about the phases of the process.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that by hand-delivery on this 27th day of March 2006, a true copy of the foregoing pleading was served upon AUSA Robert A. Spencer, AUSA David J. Novak and AUSA David Raskin, U.S. Attorney's Office, 2100 Jamieson Avenue, Alexandria, VA 22314.

/s/

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