### **Legal History of Medical Aid in Dying: Physician Assisted Death in U.S. Courts and Legislatures University of New Mexico September 23, 2017**

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## Thank

YOU



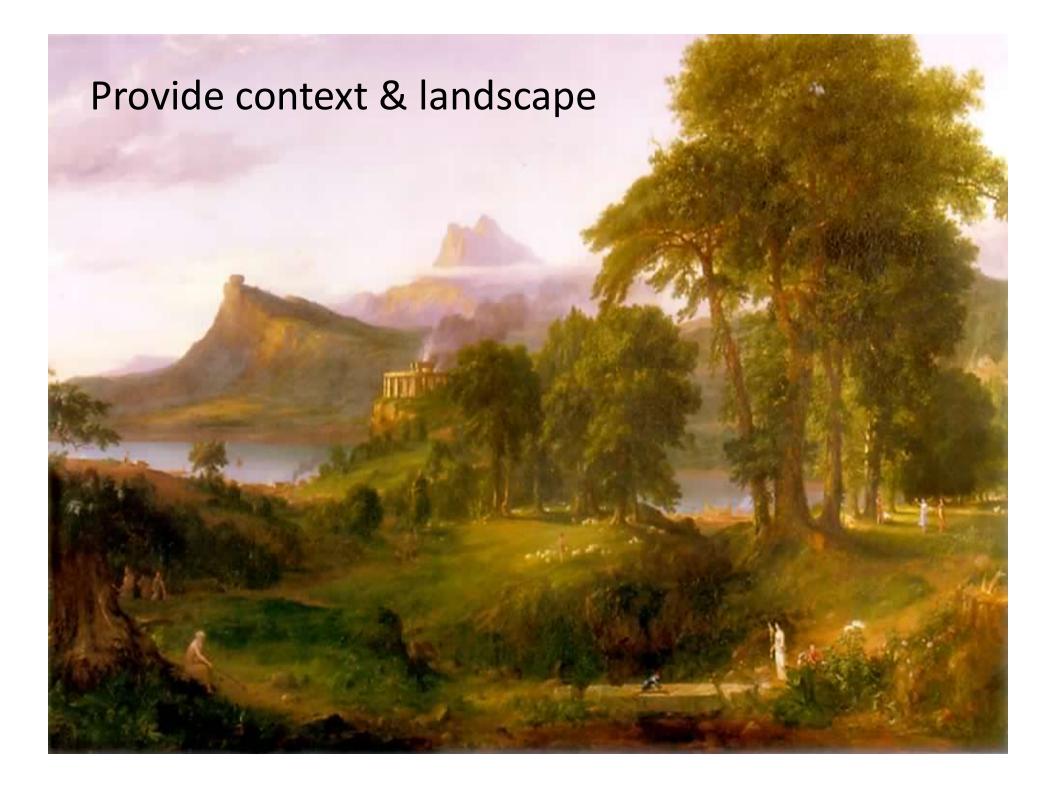
#### MEDICAL FUTILITY Practice of treating patients with little hope is debated

September 18, 2008 - Albuquerque Journal

Winthrop Quigley

Opposite issue Pleasure to be back

# Ny job



### No legal arguments

### No policy arguments

### Just legal history

### Objective in Morris:

### **Clarify legality** of MAID in New Mexico

## Who else? Where? How?

## Roadmap

# Assisted suicide criminal statutes

Right to refuse treatment

## Paths to MAID

## legalization



#### **Statutory Approaches**

### **Ballot** initiatives

Legislation

**Litigation Approaches** Federal constitution State constitution Statutory interp.

### **Other Approaches**

Limit prosecutorial discretion

Jury nullification

### Not covering "all" law re MAID

Only affirmative efforts to permit



### Advocate & innovator

>20 years

## Criminal

## Assisted

## Suicide



## Across USA, since 1800s, helping someone commit suicide is a crime



"assisted suicide prohibitions are **deeply** rooted in our nation's legal history"



NMSA § 30-2-4 "Assisting suicide consists of . . . aiding another in the taking of his own life . . . fourth degree felony."

#### AS laws = obstacle to MAID

#### AS laws = obstacle to RTD

# Right http://www.endigenative.com/active.com

## to die



## 1950s & 1960s

#### Mechanical ventilators

Dialysis

Feeding tubes







## appellate cases

## Right to refuse treatment

even if life-sustaining

### Nancy Cruzan 1990



## 1977 RTDA

### 1995 UHCDA

### Is this "assisted suicide"?

## Chill from

## NMSA § 30-2-4

#### NMSA § 24-7A-13(B)(1)

"Death resulting from the withholding or withdrawal of health care . . . does not . . . constitute a suicide ... "



### No such clarity re MAID

## MAID = ASAS = felonyMAID = felony

#### Enough background onto the pathways

## Pathway 1

## Litigation US Constitution

## Due process

## Equal protection

1<sup>st</sup> Amendment

#### DOCTOR DEATH

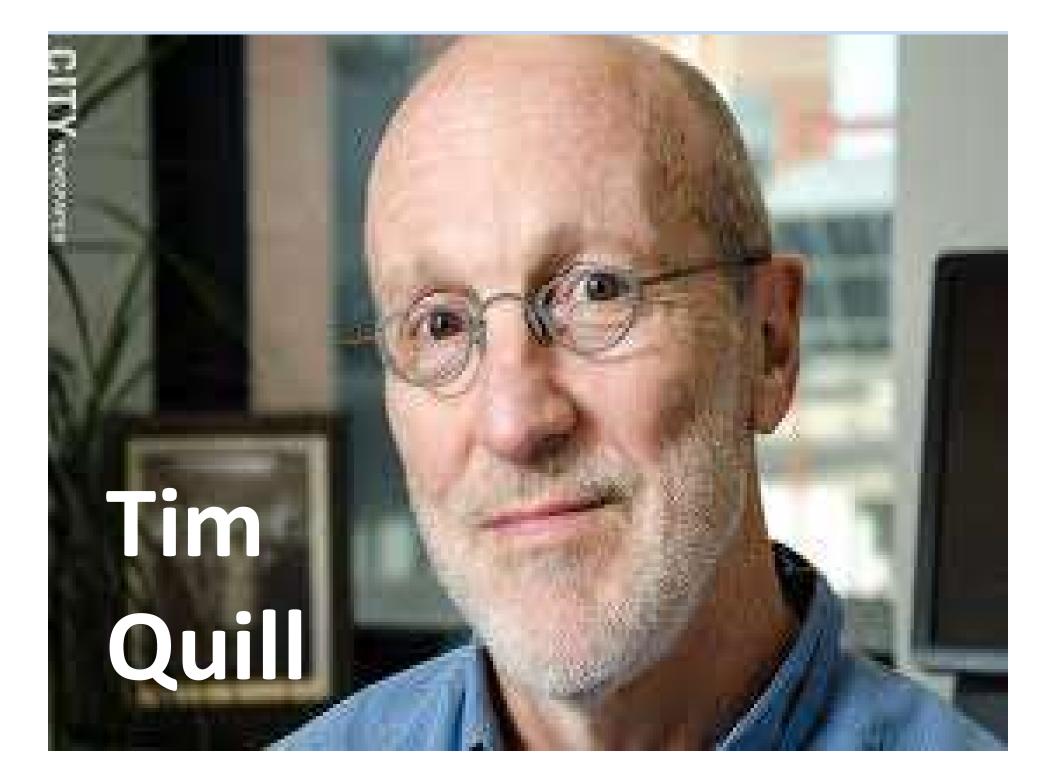
back on his suicide crusade. Is he an angel of mercy or a murderer?



#### Harold Glucksberg

#### D. Ore. (1994) Υ 9<sup>th</sup> Cir. (1995) N 9<sup>th</sup> Cir. EB (1996) Υ **SCOTUS (1997)** N





#### NDNY (1994) N 2d Cir. (1996) Υ **SCOTUS (1997)** N

# >15

## appellate judges

2d Cir + 9<sup>th</sup> en banc + 9<sup>th</sup> panel dissent + SCOTUS dissents + other

### 1997: no US Const. right

Federal constitutional rights in other countries



#### Sue Rodriguez 1993

#### Jim Wakeford 2001

WWW.Canna

Jannabis Culture Ma

## Kay Carter Feb. 2015



#### EOL in Canada – MAID

- First 9 months...
  1324/195,000 = 0.68%
  Numbers increasing in Ontario
  - July-Dec 2016- 31/month
  - Jan-Jun 2017- 60/month
- Highly variable by region

#### Medically assisted deaths in Canada

TOTAL	1,324	
QUEBEC	469	0/FC. 10, 2015 - DEC. 9, 2016
ONTARIO	365	JUNE 17, 2016 - MARCH 31, 2017
B.C.	285	AME 17, 2014 - PEB. 28, 2017
ALBERTA	100	JUNE 17, 2016 - MARCH 31, 2017
MANITOBA	37	JUNE 17, 2014 - MARCH 31, 2017
N.S	31	JUNE 17, 2016 - MARCH 31, 2017
SASK.	21	JUNE 17, 2015 MARCH 31, 2017
N.B.	9	Ame 17, 2016 - 0EC. 31, 2014
N.L.	7	JUNE 17, 2016 - MARCH 21, 2017
PEI	0	JUNE 17, 2016 - MARCH 21, 2017
N.W.T.	0	
NUNAVUT	0	
YUKON		ment per decige, sight event papetarier ments confidenceing cologins

#### Julia Lamb

edDyi

Vlar





MINSALUD

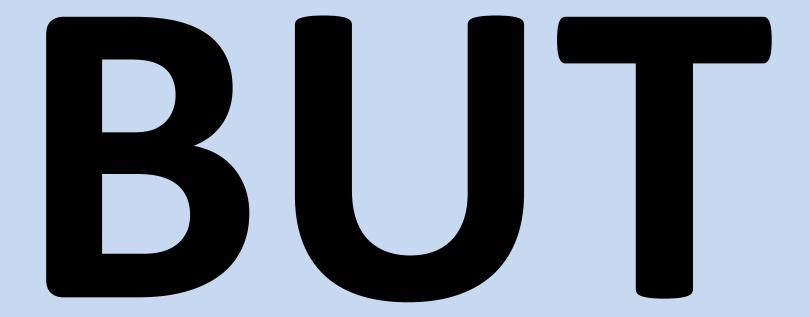
Fecha actual: Domingo, 17 de septiembre de 2017 | Sign In



Mapa del sitio Funcionarios Zona Interactiva English Version

Inicio	Ministerio	Salud	Protecci	ión social	Normativa	Servicios al ciudadano	Transparencia
Centro	de comunica	ciones	Normativ	a Resoluci	ones		
sterio de	Salud y Protección So	ocial > Norm	ativa Resolucion	es			
ipo c	de Norma	)					
Boletines	s jurídicos		√ Año	Name	Descripción		pri
<b>.</b>	ministrativos	D	Año : 20	<b>17</b> (60)			
Decret Res	oluciones	þ	Año : 20	<b>16</b> (143)			
Circula			•Año : 20	<b>15</b> (150)		- 71	
Notas Acuero	externas los	_	2015		Por la cual s lineamientos	e di	

# Ovidio González Baymler Naranjo





#### Robert Stransham-Ford Dec. 2016



JANUARY 17-23 2015 • www.listener.co.nz • \$4.30 inc gst

#### I want to be able to say goodbye well

Why this young lawyer is fighting for the right to die with dignity

#### Back to USA

# No federal constitutional right

Focus to states

## Pathways 2 & 3

State

statutes

71

## **Ballot initiatives**

## Legislation

#### Ballot

#### initiatives

# STATES THAT ALLOW THE INITIATIVE PROCESS

**Early failures** 1988 California 1991 Washington 1992 California Michigan 1994

#### Problem Legalize both euthanasia and medical aid in dying

# **Self** ingestion

Patient takes the final overt act





#### U.S. DISTRICT COURT DISTRICT OF OREGON

#### Injunction 1994 to 1997

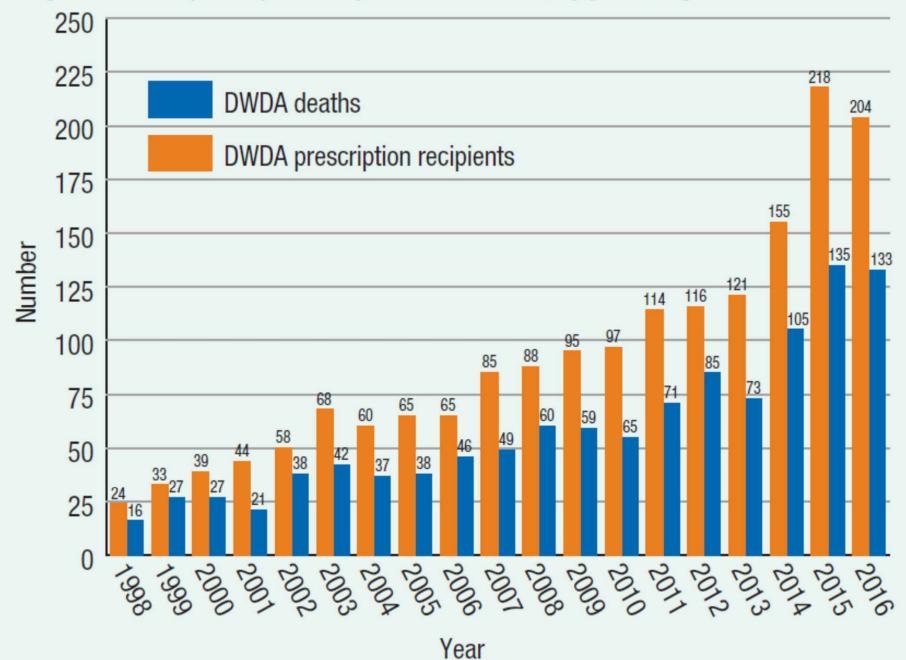




#### >> Oregon Death with Dignity Act

#### Data summary 2016





#### Figure 1: DWDA prescription recipients and deaths\*, by year, Oregon, 1998–2016

	2016		1998-2015		Total	
Characteristics	(N=133)		(N=994)		(N=1,127)	
Lethal medication						
Secobarbital (%)	86	(64.7)	582	(58.6)	668	(59.3)
Pentobarbital (%)	0	(0.0)	386	(38.8)	386	(34.3)
Phenobarbital (%)	39	(29.3)	17	(1.7)	56	(5.0)
Other (combination of above and/or morphine) (%)	8	(6.0)	9	(0.9)	17	(1.5)
End of life concerns <sup>4</sup>	(N=133)		(N=994)		(N=991)	
Losing autonomy (%)	119	(89.5)	906	(91.6)	1,025	(91.4)
Less able to engage in activities making life enjoyable (%)	119	(89.5)	888	(89.7)	1,007	(89.7)
Loss of dignity (%) <sup>5</sup>	87	(65.4)	680	(78.8)	767	(77.0)
Losing control of bodily functions (%)	49	(36.8)	475	(48.1)	524	(46.8)
Burden on family, friends/caregivers (%)	65	(48.9)	408	(41.3)	473	(42.2)
Inadequate pain control or concern about it (%)	47	(35.3)	249	(25.2)	296	(26.4)

## Track record Documented

Solid

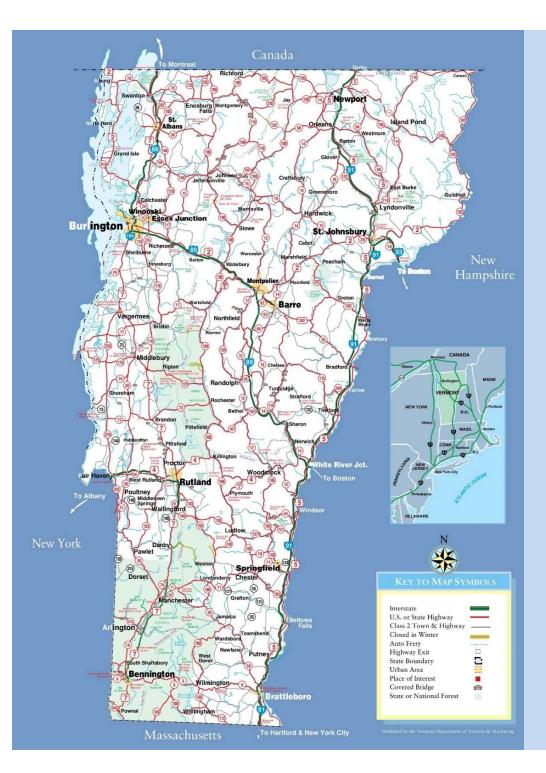






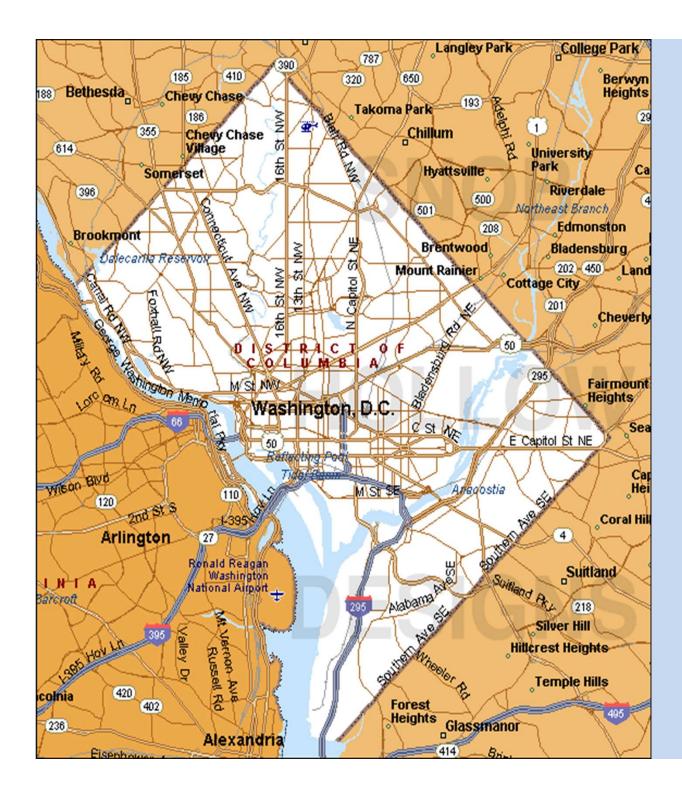


#### Legislation



#### May 2013

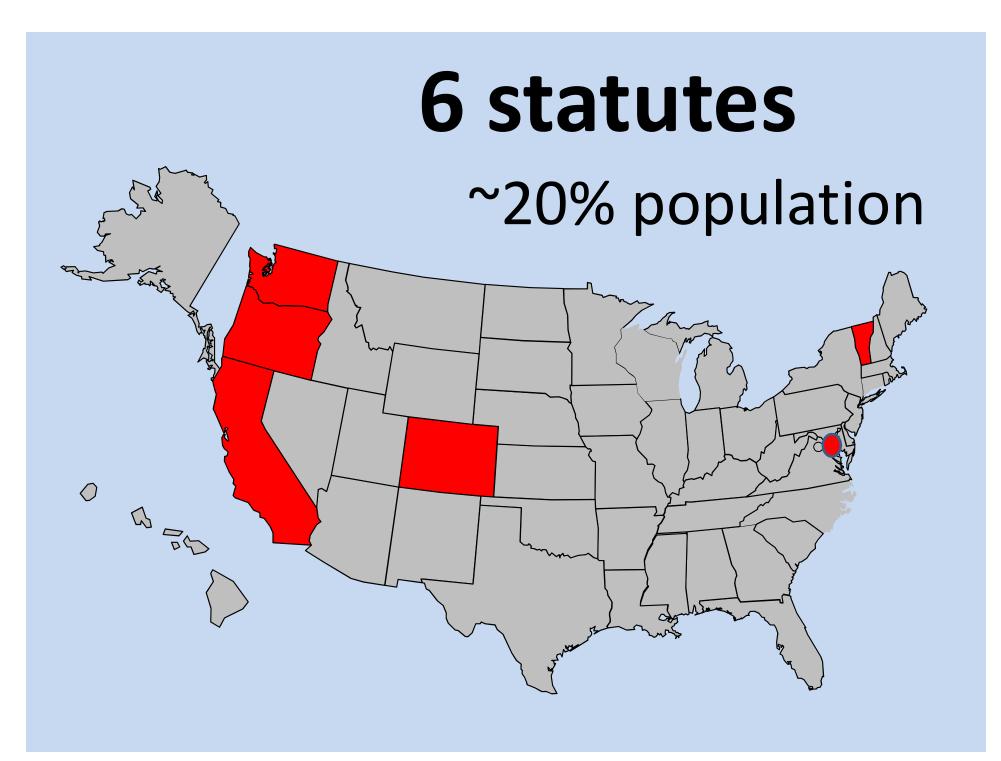




## Feb. 2017

### Enacted

## 3 initiatives 3 bills



## Statutes in other countries





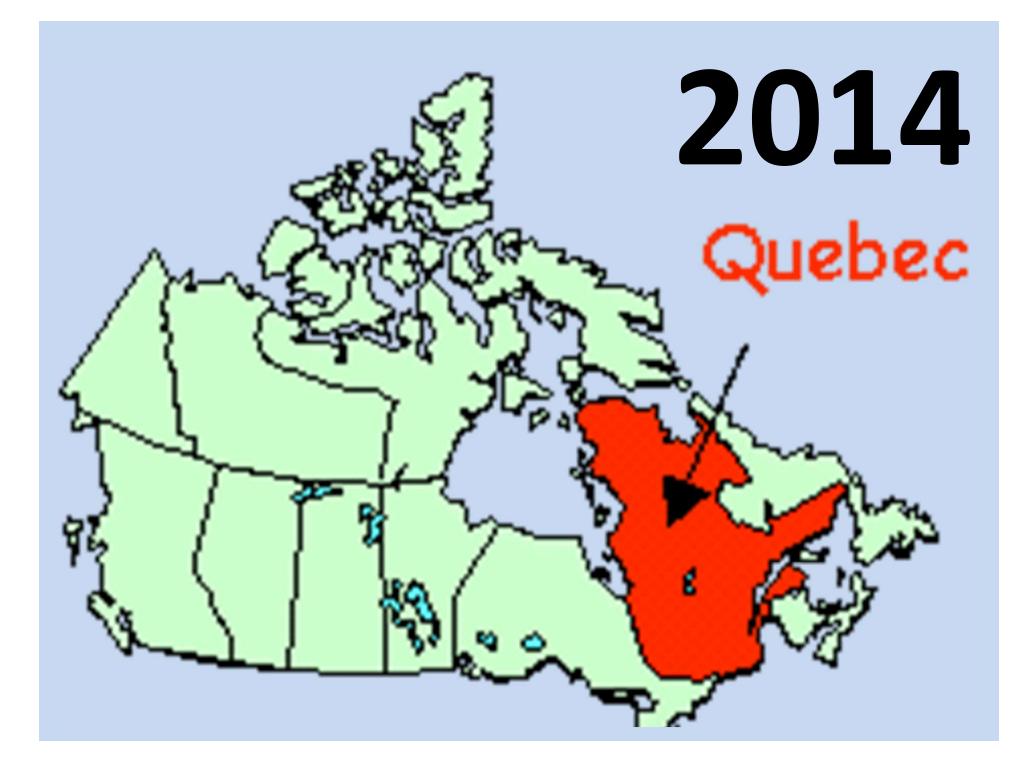
#### The U.S. House of Representatives COMMITTEE ON APPROPRIATIONS

Chairman Rodney Frelinghuysen

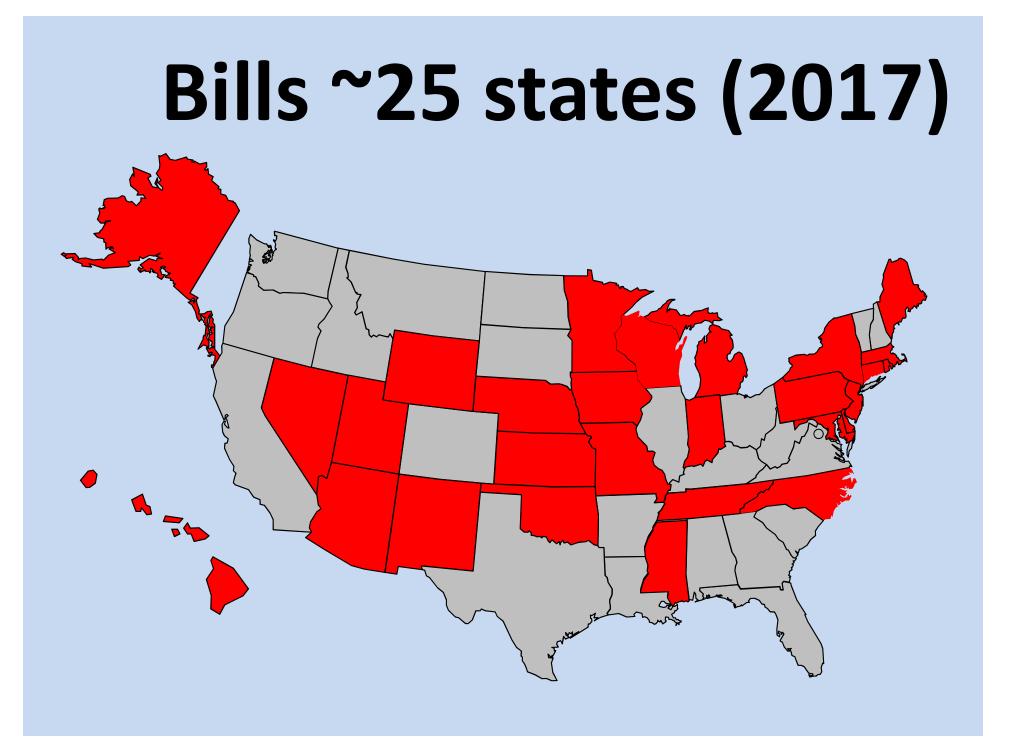
2017

No money shall be drawn from the Treasury but in Consequence of Appropriations made by Law" US Constitution Article 1, Section 9, Clause 7





## Ongoing





HOUSE BILL 171

53RD LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2017

INTRODUCED BY

Deborah A. Armstrong and Bill McCamley

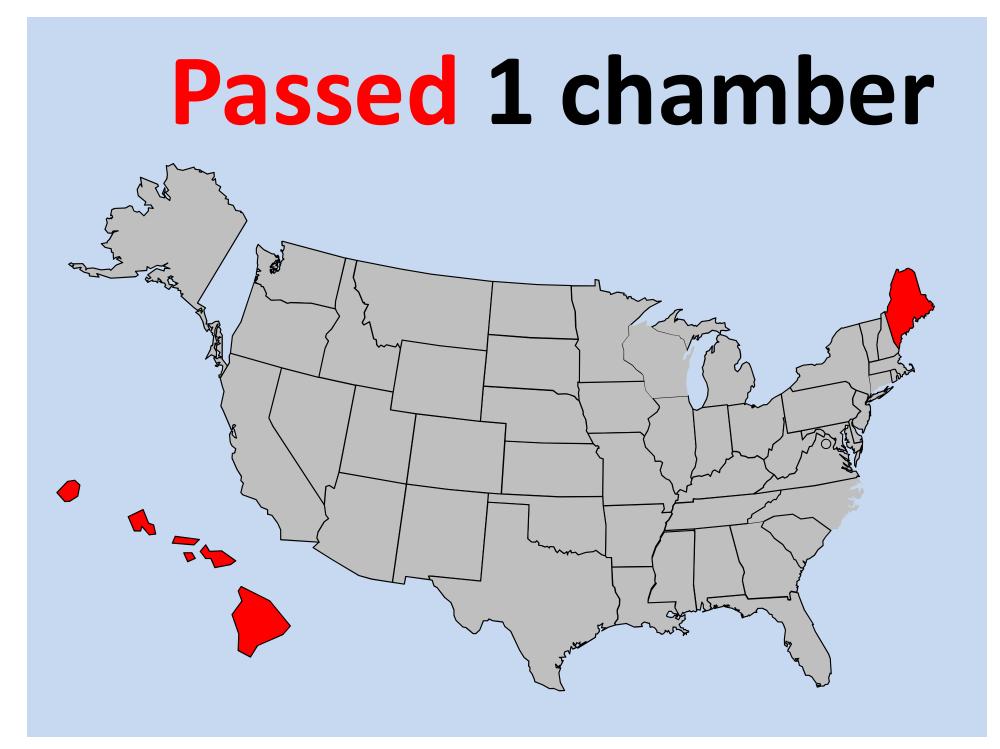
and Elizabeth "Liz" Stefanics

SENATE BILL 252

53RD LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2017

INTRODUCED BY

Elizabeth "Liz" Stefanics and Deborah A. Armstrong



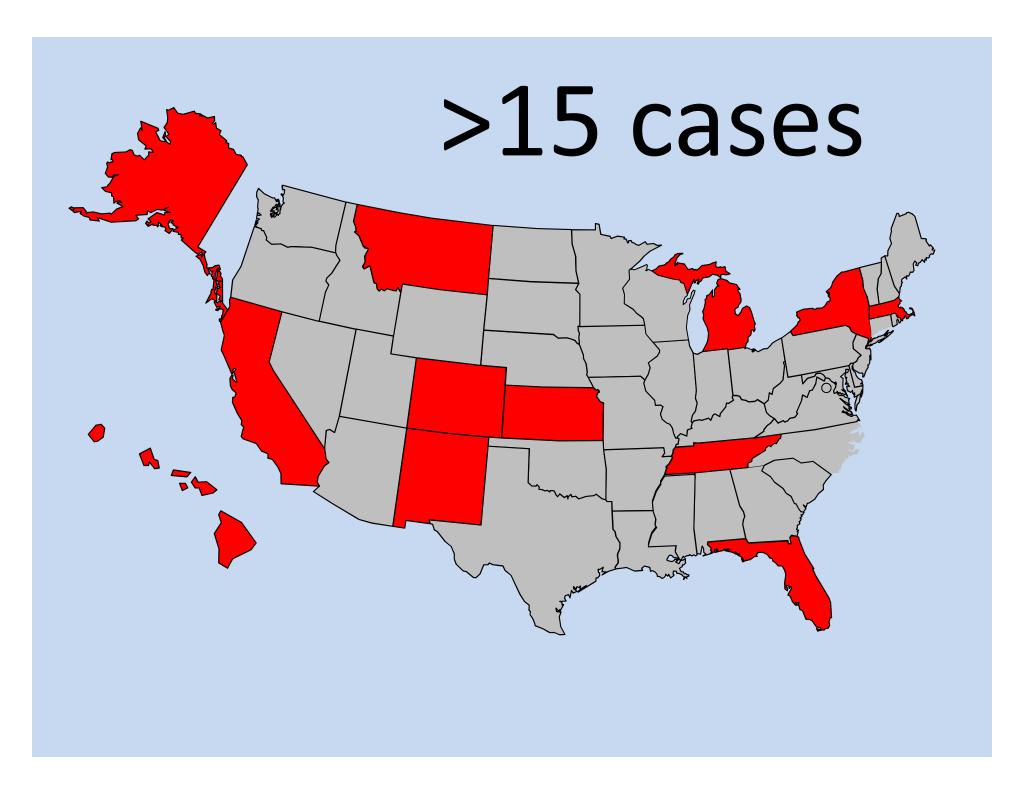


#### Pathway 4

Litigation

state constitution

107

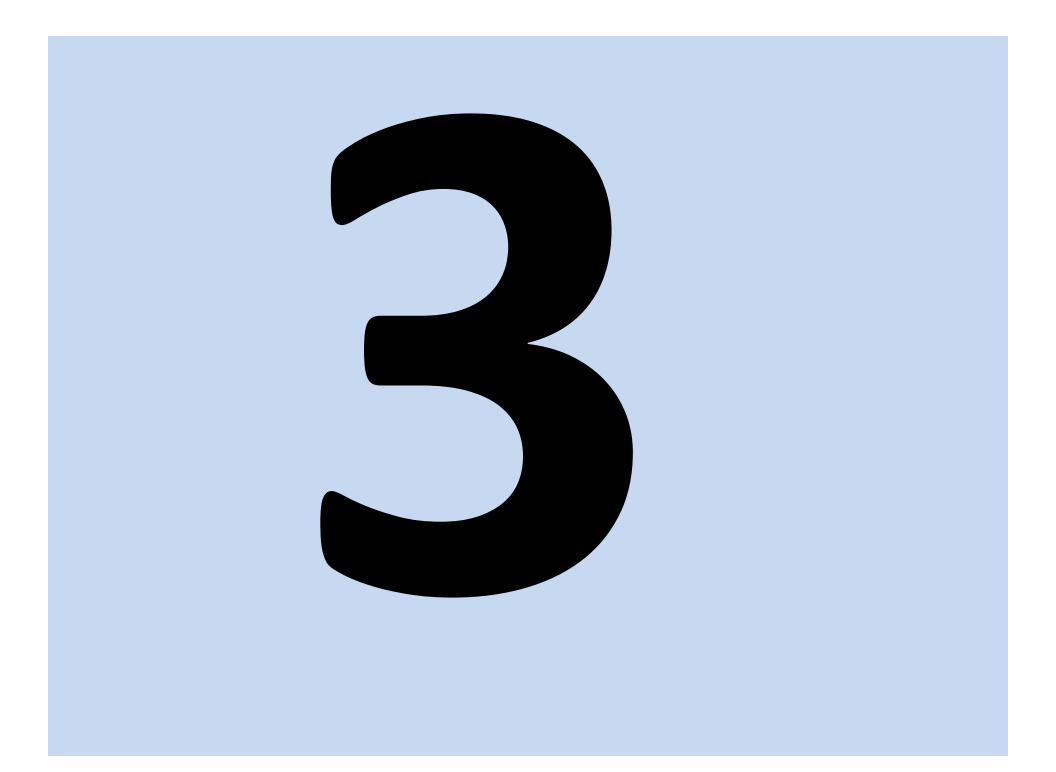


# No "lasting"

### SUCCESS

### Trial court win

### Appellate loss

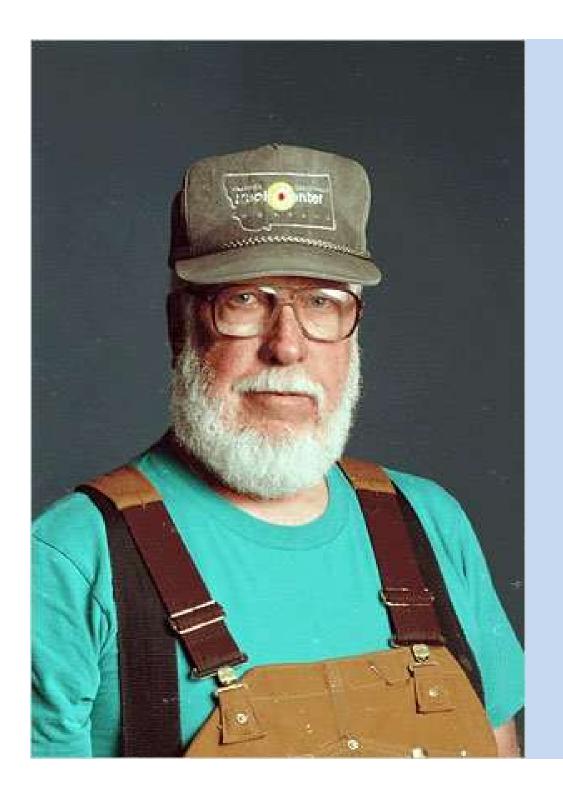






Mclver wins FL DCT

Reversed FL SCT

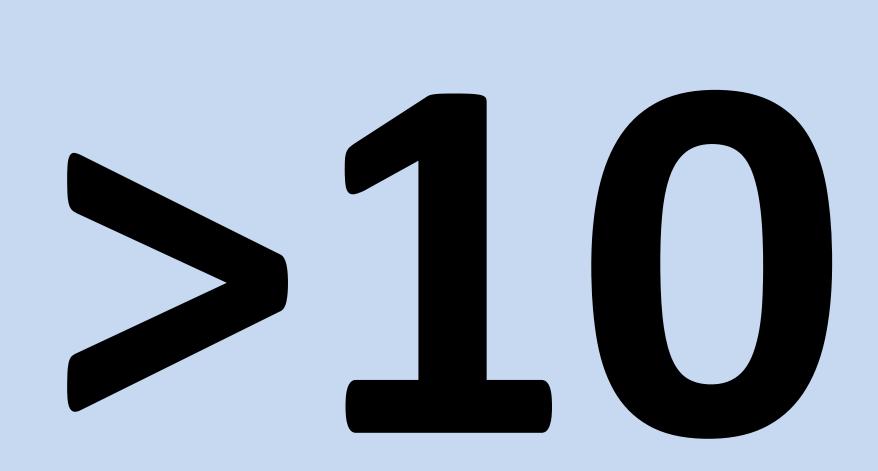


Baxter wins MT DCT

#### Not reached MT SCT

### Trial court loss

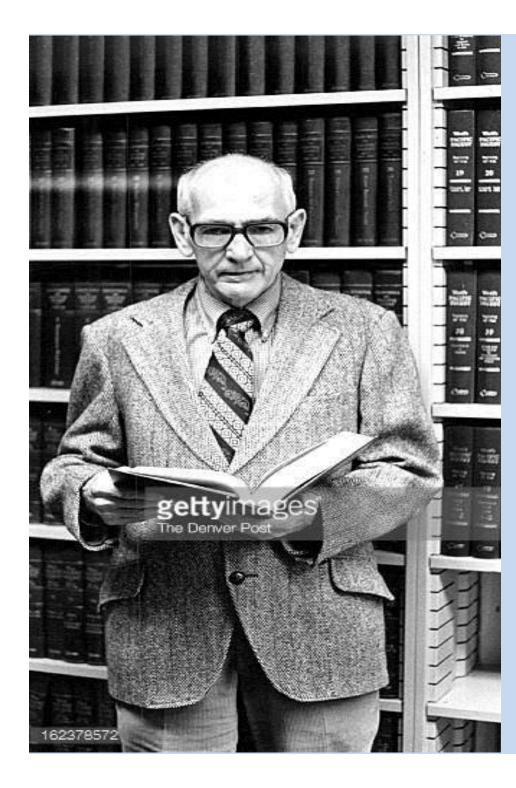
### Appellate loss





#### Thomas Donaldson





#### Robert Sanderson Colo. 2000

## Kevin Sampson

A

R

# Most recently

#### Christie White



#### Christie O'Donnell

### John Jay Hooker

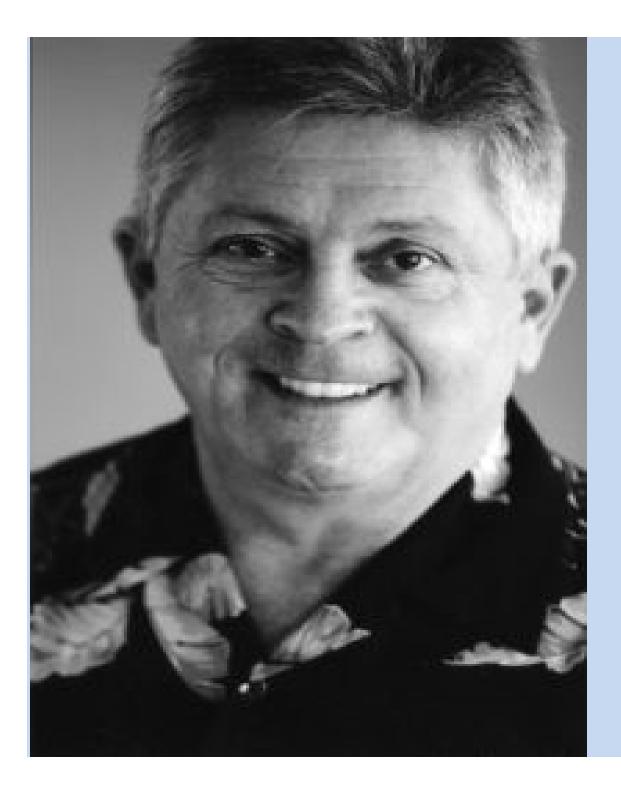
### Sara Myers

### State constitutional right App. courts **Trial courts** 3

App J's = 1 FL + 1NMApp + 2 MI + others

# Active

### Cases



#### John Radcliffe **HI**



#### Jennifer Holm Iowa

# Pathway 5

### Litigation

### State statute

### Aid in Dying Assisted

# suicide

#### George Bailey



#### MAID is different

### But still legally "assisted suicide"

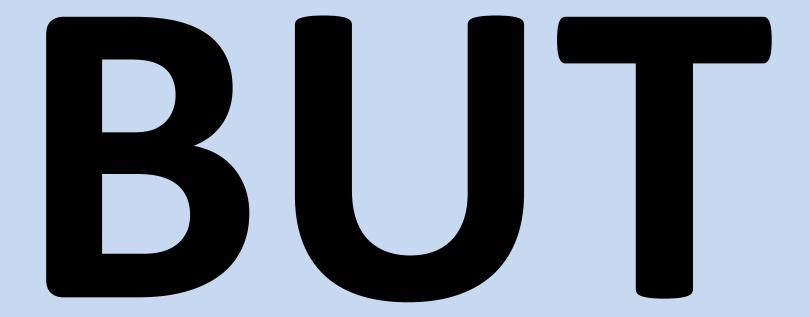


### Often included with state con. law claims (e.g. NM, NY)

But never accepted



#### Lucretia Seales June 2015







#### Mont. Code Ann. 45-2-211

"consent of the victim to conduct charged . . . is a defense"

## AS statute not apply

1

Trial court 0

Appellate

# Pathway 6

Limit

prosecutorial discretion

#### Not decriminalized

## But guidance on MAID without penalty





### Debbie Purdy

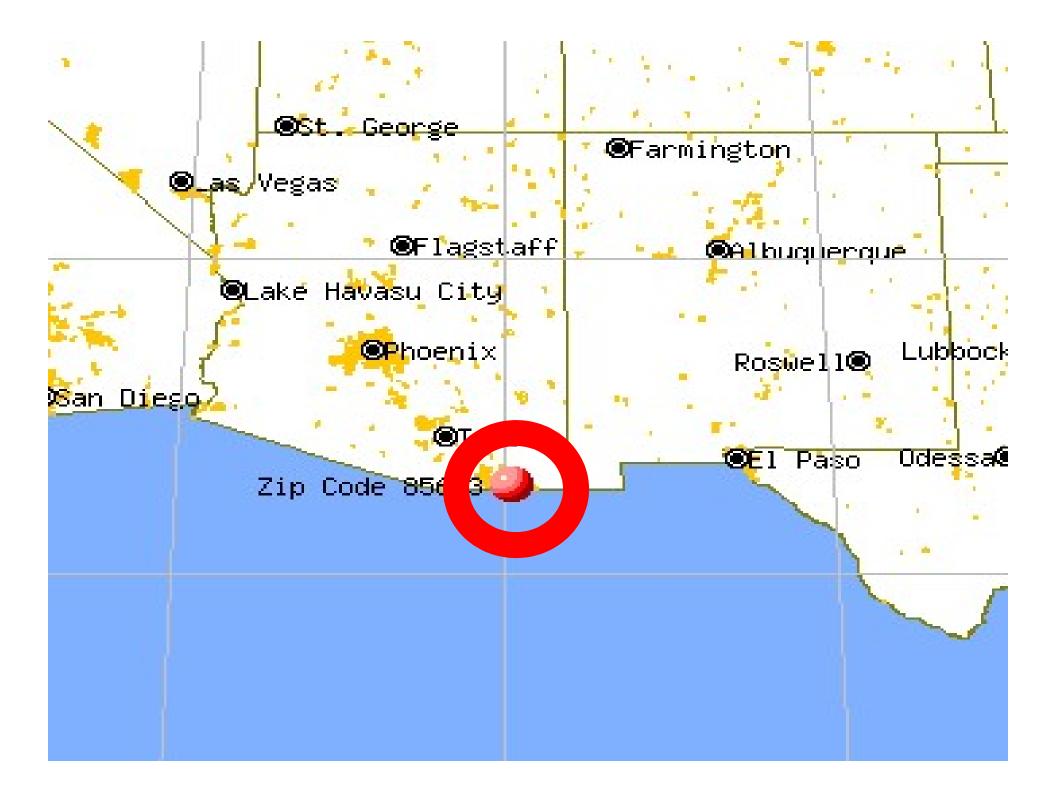
SHAUN CURRY / GETTY





factors that will influence whether or not someone is prosecuted for assisting suicide





"urges prosecutorial discretion by the Cochise **County Attorney in** de-prioritizing cases . . . imminent death . . . intolerable suffering."

# Pathway 7

# Jury nullification

#### Not decriminalized

#### But de facto immunity



## The NEW ENGLAND JOURNAL of MEDICINE



# Death and Dignity — A Case of Individualized Decision Making

Timothy E. Quill, M.D.

N Engl J Med 1991; 324:691-694 March 7, 1991 DOI: 10.1056/NEJM199103073241010





## Conclusion



## pathways

## Set aside

# 3 pathways

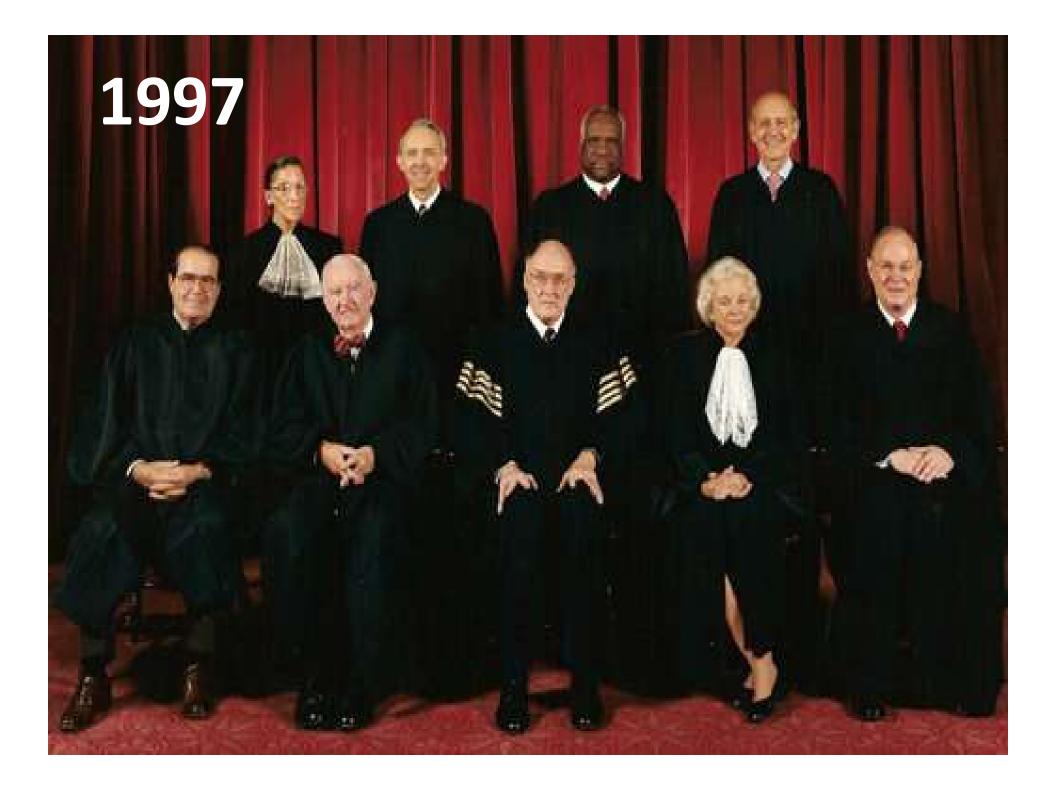
### No ex ante guidance

Prosecutorial

discretion

Jury nullification

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	Succeed	Fail
Ballot	3	>7
Bill	3	>200
AS not apply	1	>5
State const.	0	15

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