SUPREME COURT OF FLORIDA

ROBERT LACY PARKER,

Petitioner,

v. Case No. 74,978

RICHARD L. DUGGER,

Respondent,
_____/

ROBERT LACY PARKER,

Appellant,

v. Case No. 78,700

STATE OF FLORIDA,

Appellee.
_____/

REPLY BRIEF OF APPELLANT ROBERT LACY PARKER

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I. NO WAIVER IS PRESENT HERE BECAUSE THE ORDER APPEALED FROM IN CASE NO. 78,700 DISMISSED THE MOTION BELOW SOLELY ON THE GROUNDS THAT IT WAS TIME-BARRED AND SUCCESSIVE.

The order appealed from in Case No. 78,700 dismisses the petition filed by Robert Parker pursuant to Rule of Criminal Procedure 3.850 solely on the basis that it was a successive petition and that it was outside the two-year limitation set forth in the Rule. The Court conducted no evidentiary hearing and did not discuss the facial sufficiency of the allegations and claims in the petition. In fact, the Court specifically declined to rule on the merits of the petition. See Order of August 28, 1991 (R. 607). Neither did the Court summarily deny the petition and attach portions of the record justifying such a result.[1]

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[1] The State incorrectly characterizes the order below as a "summary denial" Answer Brief of Appellee at 6, 7. The State's written motion below was clearly a motion to dismiss, although that portion of it which addressed the substance of the claims stated that they were "summarily deniable". R. at 592-93. The Court characterized its ruling as a denial, R. at 607, but clearly ruled only upon the arguments for procedural default contained in the first (procedural) section of the State's motion to dismiss. The Court expressly eschewed any analysis or ruling on the substantive arguments made by the State's motion to dismiss. To deny these claims on a summary basis would have required the Court to attach portions of the record justifying this result, *Wilson v. State*, 593 So. 2d 1216 (Fla. 2d D.C.A. 1992); *Wannamaker v. State*, 593 So. 2d 564 (Fla. 1st D.C.A. 1992), and also to include in the order a statement as to Parker's rights to appeal, which is omitted from the order. Florida Rule of Criminal 3.850(g).

If the Court intended a summary denial pursuant to the Rule, its failure to conduct an evidentiary hearing or to attach portions of the record limits the scope of review here to a determination whether, accepting the allegations as true, the moving papers show that appellant is entitled to no relief. *Debose v. State*, 580 So. 2d 638 (Fla. 5th D.C.A. 1991). This legal standard renders most of the State's factual arguments irrelevant.

The elaborate factual arguments submitted by the State do not remedy the trial court's failure to review the substance of the allegations, to conduct an evidentiary hearing, or to submit

Procedural default is the sole issue addressed by the Court's order. Under these circumstances, the issue on appeal in Case No. 78,700 is whether the claims presented below by appellant Parker are subject to a procedural default as successive or time-barred. The State has not chosen to address this issue, apparently recognizing that the unique factual circumstances of appellant Parker's representation on appeal and in post-conviction justify an ad hoc exception to the strict requirements of the Rule. That conclusion is correct, and issues of this kind should be addressed on a case by case basis and not as a matter of law or rule. *See Zeigler v. State of Florida*, 20 F.L.W. S167 (April 13, 1995).

Although this Court may address the facial sufficiency of the claims if it wishes and remand for an evidentiary hearing, the appropriate place for the initial evaluation of the claims to occur is in the Circuit Court, where the judge is familiar with the record and observed the testimony at trial. Although the State submits lengthy factual argument apparently designed to remedy the failure of the Circuit Court to review the record and attach portions (if any exist) which refute Parker's claims, the arguments urged in opposition to appellant's claims should be addressed in the first instance by the Circuit Court based initially on the record and ultimately on the results of an evidentiary hearing. The State disputes the logic and internal consistency of

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portions of the record in support of a summary denial. They do, however, suggest that there are significant issues of fact raised below as to Parker's competence to stand trial, the effectiveness of trial counsel's judgment in asserting a duress defense while ignoring intoxication, whether the mental health expert was sufficiently informed by trial counsel, and whether newly discovered evidence might have changed the outcome of Parker's trial.

appellant's claims, and seeks to have this Court, among other things, choose among competing psychological experts and resolve other weight of the evidence and credibility questions. These issues are not the grist of an appeal.

There is no waiver by appellant presented by the record here. In *Duest v. Dugger*, 555 So. 2d 849 (Fla. 1990), the waiver pertained to claims which were not briefed by appellant following an adverse ruling *after an evidentiary hearing* on their merits below. The issue here, by contrast, pertains to procedural defaults and possibly the facial sufficiency of claims (if the Court so chooses). Little benefit would accrue from the reargument in this Court by appellant of sworn factual matter already presented below in the subject claims, which are contained in the record and stand on their own. Even less benefit would accrue from the process implicitly proposed by the State, which would consist of factual debates over competing aspects of a cold record for review *ab initio* in this Court. The Rule and the normal division of responsibility between trial and appellate courts requires the initial review of the facial sufficiency of the petition, and the initial review of the record if the petition is found to be adequate, to occur in the Circuit Court, and that is what should be ordered here.

The only waiver presented by the record here is a waiver by the State of the arguments advanced in its brief. In the hearing on the State's motion to dismiss, appellant's counsel stated in two places, without contradiction by the State, his belief that the subject matter of the hearing which led to the order on appeal was

limited to issues of procedural default. R., Vol. 6, pp. 9, 35-36.[2] On pages 47-48 of the transcript, counsel for the State confirmed that the State's arguments were subject to that limitation: "I purposely did not address the merits of any of [appellant's] Counsel's claims regarding ineffective assistance of counsel because the claim is barred under Florida law under rule 3850 [sic]." Although the State later asserted in connection with the merits of the claims that "it's largely nonsense..." (which was the State's sole substantive argument at the hearing on the merits of the motion), the State's lawyer concluded his argument as follows: "...it's procedurally barred, it's barred under the two year rule and the claims themselves are individually barred and that's all the Court should address under Harris v. Reed and I won't belabor the point any further. Thank you." Id. at p. 48. At no time in the hearing did the State's counsel so much as adopt the substantive arguments directed to the claims in the State's motion (many of which differ from the State's arguments here, which were not in every instance presented to the Court below).[3]

The State is asking this Court to search the record for evidence sufficient to justify a summary denial of appellant's claims, which is not an appropriate task for this Court and is not the standard which governs the determination of the facial sufficiency of his claims on a motion to dismiss them. For

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[2] Page references herein to the transcript of the hearing of July 19, 1991 (volume 6 of the Record) are to the pagination originally inserted by the court reporter.

[3] The order entered below, which expressly states that it does not reach the substantive arguments, was proposed by counsel for the State and accepted verbatim by the Circuit Court.

example, the State argues the merits of the issue whether Parker was competent to stand trial, citing *186 pages* of his testimony, and the (assumed) opinion of his court-appointed psychiatrist, which is not in the record. Answer Brief at 12. The State pointedly ignores the statements of Dr. Brad Fisher, the psychiatrist who submitted an affidavit in support of the 3.850, who opines that there were substantial issues as to Parker's competence at the time of trial, R. 259-60, and the affidavit of Robert Link, the original trial counsel, who stated that he was unaware of and therefore did not inform the court-appointed psychiatrist of many of the facts which form the basis of Dr. Fisher's opinion. R. 263-64. The significance of those factors and the issues raised by Dr. Fisher as to Parker's competency at trial present issues of fact which cannot be evaluated without an evidentiary hearing, and if they are resolved in Parker's favor, significantly implicate trial counsel's conduct and present a clear issue of prejudice sufficient to invoke the Sixth Amendment.

The State also misconstrues the nature of the defense which was presented at trial when it asserts that duress was not the defense theory. The affidavit of Robert Link states that duress was the theory of the defense, R. 264-65, even though he knew that the same trial judge had refused a duress instruction in the trial of Parker's co-defendant, Tommy Groover. *Id.* The passage cited from the defense closing argument is irrelevant because it occurred after the charge conference, at a time when the theory of the defense had been abruptly changed by the rejection of the proffered duress instruction. Defense counsel requested no pre-trial charging conference. R. 265. Counsel's judgment is further called

into question by his failure to pursue the intoxication defense and by the fact that he did not fully appreciate his client's organic brain dysfunction or understand the medications he was taking before the trial occurred. R. 263-64. All of these points raise issues of fact as to prejudice and ineffectiveness. Finally, the appellant's intoxication on the night of the homicides could have been asserted to question his ability correctly to perceive, predict or resist the actions of his co-defendants, factors which are critical to an understanding of his presence at the scene of the crimes (and to his conviction on the Sheppard count).

Finally, the newly discovered evidence that the State tampered with testimony of key potential witnesses for the defense by keeping them heavily drugged in the months before the trial also presents issues of fact which require an evidentiary hearing (and will benefit from discovery as well). R. 340-41; *see also* R. 268. Appellant Parker could not have been expected to discover this evidence through diligence at the time of his trial or thereafter, because it is uniquely under the control of the State and will obviously not be willingly divulged. Whether or not this evidence can be expected to produce an acquittal on retrial is in part a function of what new facts emerge from discovery on this point, but the fact that co-defendants corroborate appellant's story and theory of the case would have been extremely significant, because the case against him was presented by only one witness (Billy Long) on one of the counts (Nancy Sheppard), which was the most serious in which he was implicated. Testimony is not "merely cumulative" when it supports the defendant's explanation in a case which otherwise reduces to a credibility contest between two co-

defendants. While Parker may still have been convicted of something in the Sheppard count, he may not have been convicted of first-degree murder.

II. TRIAL AND APPELLATE COUNSEL WAS INEFFECTIVE WHEN HE PERMITTED A PROCEDURAL DEFAULT ON A SUFFICIENCY OF THE EVIDENCE ISSUE WHICH MAY HAVE RESULTED IN A NEW TRIAL.

As the State has conceded, "appellate counsel did not challenge the sufficiency of the evidence supporting Parker's conviction" in connection with the first degree murder charge on Count II (Nancy Sheppard). That count went to the jury on a general verdict form with instructions that the jury could convict on either felony-murder or premeditated murder. The felony-murder instruction was based upon the State's theory at trial that the Sheppard homicide occurred in connection with the robbery of her necklace and ring by appellant Parker.

On direct appeal, this Court struck down the aggravating factor that the homicide occurred in the perpetration of another felony on the ground that the evidence "does not satisfy the standard of proof beyond a reasonable doubt on which the finding of an aggravating factor must be based." *Parker v. State*, 458 So.2d 750, 754 (Fla. 1984) (citation omitted). Obviously this standard of proof is the same as that which applies to a *conviction* of felony-murder. Appellate counsel did not raise the issue of whether the verdict was infirm because it charged two alternative theories, one of which was not supported by the evidence at trial. He failed to do so because he did not learn of the doctrine of *Stromberg v. California*, 283 U.S. 359 (1931), and its progeny, until after the direct appeal was over. R. 266. This argument was eventually raised in federal habeas but was rejected by the

Eleventh Circuit as procedurally barred because of counsel's failure to raise it in this Court on direct appeal. Counsel had preserved the issue at trial by objecting to both the general verdict form and the felony-murder instruction.

In this case, it is probable that the jury rested its verdict in Count II on the felony-murder instruction. For the jury to have accepted the theory of premeditated murder which the State contends is supported by substantial evidence, it would have had to credit the testimony of Billy Long, who stated that Parker instructed him to shoot Nancy Sheppard, told him he would be killed if he did not, and then slashed her throat after Long had shot her five times. The probability is that the jury rejected this testimony, and the proof is in their life sentence recommendation on the Sheppard count. Had they credited Long's testimony that Parker was in charge of events that night, a life recommendation on this third of three murders would have been highly unlikely. The trial judge obviously credited Long's testimony in Parker's case, and had no hesitancy in overriding the jury and issuing a death sentence.

This Court has in effect determined that there was not sufficient evidence to sustain a conviction for felony-murder on Count II. Examination of the record leaves a clear impression that absent the felony-murder instruction, which was based on insufficient evidence, there is a reasonable probability that Parker would have been convicted of a lesser offense than first-degree murder in Count II. The general verdict which the trial court permitted, over objection, is the source of this problem, which manifests itself in the capital context because of the jury's sentencing recommendation.

Parker has a constitutional right under the Florida constitution to be convicted by a jury and to be sentenced for the crime the jury convicted him of. If this crime was felony-murder, however, his conviction was and is invalid because the evidence was insufficient.

The State takes the position that this Court's mandatory review of the sufficiency of the evidence precludes the possibility of error in this case. The State apparently contends that because this Court found the evidence sufficient to sustain a conviction of first-degree murder, based upon a theory of premeditation, at a time when appellant was sentenced to death, that any potential confusion resulting from the general verdict is harmless.[4]

The State contends that "no prejudice can be shown from any failure to question the sufficiency of the evidence as to felony murder." Response to Petition for Habeas Corpus at 8. This begs the question, and fails to confront the real problem here, which is the *ambiguity* present in the record below. The *reason* that no prejudice can be *shown* is because the trial judge prevented the jury from clarifying the basis for its verdict with special interrogatories. Notwithstanding this difficulty, the record taken as a whole contains ample evidence to suggest that a significant problem is present here which is obviously prejudicial to appellant

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[4] The evidence cited by the State to support this conclusion, which is that trial counsel indicated that Parker knew Nancy Sheppard would be killed, Response to Petition for Habeas Corpus at 8, is not sufficient to support a conviction for premeditated murder, because Parker made this admission in the context of saying that he did not believe he could do anything to prevent it and that he did not want her to be killed.

Parker. Notwithstanding the presence in the record of evidence which might have justified a premeditated murder conviction, *if it had been accepted by the jury,* there is ample reason here to believe that the jury did *not* accept this evidence, and that it believed Robert Parker and not Billy Long.

If the trial court had correctly evaluated the sufficiency of the felony-murder evidence and withheld that instruction, and if petitioner's theory of the jury's decision and evaluation of the evidence is correct, Robert Parker would have been convicted of a lesser offense than first-degree murder in Nancy Sheppard's case.[5] The defect in the proceedings below was that the general verdict precludes anyone from knowing the real answer to this question. The defect in the prior proceedings in this Court was that appellate counsel failed to raise this issue so that this Court could evaluate it as a matter of federal or state constitutional law. Appellant Parker was and is prevented from *conclusively* showing prejudice by the underlying error which occurred at trial, but he should not now be precluded from relief and correction of that ambiguity by his former counsel's failure to raise the issue.

This Court should rule that the right to jury trial in a criminal case which is provided by the Florida Constitution requires the submission of special interrogatories to the jury in cases where a first degree premeditated and felony-murder are both

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[5] The jury did exactly that in Count III, by convicting Parker of third degree murder in the case of Jody Dalton, whose killing presented no felony-murder issue. In Count I, which pertained to Richard Padgett, but which did contain a felony-murder issue (kidnapping), the jury convicted Parker of first-degree homicide but recommended life, which may have reflected a felony-murder decision by the jury on that count.

charged or could be found. This is appropriate as a matter of court management and should be a doctrine of contitutional law in this State, to preserve the jury's function as finder of fact on contested issues, including credibility of witnesses. *Dudley v. Harrison, McCready & Co.*, 127 Fla. 687, 173 So. 820, 825 (1937).[6] This practice will prevent the problem raised by cases like this, in which the jury's sentencing recommendation justifies the conclusion that it disagreed with the trial court not merely on the weighing of aggravating and mitigating factors, but also on the

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[6] In this case, on this count, virtually everything depends on the resolution of the credibility contest between Robert Parker, who testified in his own defense, and Billy Long, the triggerman who shot Nancy Sheppard five times, bargained for a guilty plea to second-degree homicide, and was released after barely more than five years in prison. No one else who was present at the scene of the crimes testified. This credibility issue is arguably at the root of the discrepancy between the jury's original life recommendation and the trial judge's findings in the sentencing order: it is hard to believe that the jury could have recommended life if they saw the case as did Judge Olliff. This credibility issue has also been the basis for dramatically different judicial views of the capital sentencing issues, with some members of this Court (as well as members of other courts) apparently convinced to this day that the key issues pertaining to Parker's culpability, i.e., whether he was the mastermind of three drug-related homicides and controlled the actions of his co-defendants, were correctly described in Judge Olliff's sentencing order. See, e.g., *Parker v. State*, 643 So. 2d 1032, 1036 (Fla. 1994) (JJ. Overton, Grimes dissenting). This interpretation of the facts, which depends almost entirely on the view that Billy Long and not Robert Parker was credible, is strongly expressed in the trial court's sentencing order. There is no indication in the record that the jury made this judgment on the credibility issue, and strong circumstantial evidence that it did not.

The courts would be well-served, and the reliability of homicide convictions and sentencing determinations vastly improved, by a requirement that special interrogatories be submitted to juries to enable them to record, at least implicitly, their determinations on key credibility issues of this kind. On this record, only the trial judge's view of credibility is known, and a substantial possibility remains that Robert Parker was sentenced for a crime which there was not sufficient evidence to show he committed.

theory of guilt. A more certain and reliable result will be reached in cases of this kind, in which years of collateral litigation might have been avoided by the simple expedient of finding out whether the jury believed that Robert Parker was guilty only of felony-murder on Count II.[7] Throughout the long years of litigation over this case, there has been a significant issue whether the trial judge sentenced Robert Parker to death for a crime the jury did not believe he committed. That issue would not have arisen if special interrogatories had been submitted. A similar issue still plagues the case, because of the possibility that he is now sentenced to a mandatory twenty-five year term on the basis of a jury verdict which may have been based on insufficient evidence.

This problem has been recognized by at least four members of the United States Supreme Court. In *Schad v. Arizona*, 111 S. Ct. 2491 (1991), a case in which no single opinion gained a majority, four members of the Court (Justices White, Blackmun, Marshall and

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[7] There seems no doubt that *some* of the jurors must have relied on the felony-murder theory. Once that theory is invalidated for insufficiency of the evidence, a problem is also created with the requirement of jury unanimity: there is no basis in the record to believe that Robert Parker's jury would have been unanimous in convicting him of first degree murder if the only basis to do so had required the acceptance of the State's premeditation theory. While this problem may not present a cause for concern where both theories (felony-murder and premeditation) are supported by sufficient evidence, there is a clear reliability problem in cases where one theory is *not* supported by the evidence, as here. In an extreme case, this unreliability may lead to a discrepancy between the basis for the conviction and the sentence which may result in a death sentence, as it almost did for defendant Parker. This is no minor defect in a process which otherwise exerts every effort to ensure reliability.

Stevens) joined a dissent which held that the failure to require a special verdict resulted in an infringement of the accused's due process rights when the choice was between felony-murder and premeditated murder. The dissenters stated:

> Regardless of what the jury actually had found in the guilt phase of the trial, the sentencing judge believed the murder was premeditated. Contrary to the plurality's suggestion, ... the problem is not that a general verdict fails to provide the sentencing judge with sufficient information concerning whether to impose the death sentence. The issue is much more serious than that. If in fact the jury found that premeditation was lacking, but that petitioner had committed felony murder/robbery, then the sentencing judge's finding was in direct contravention of the jury verdict. It is clear, therefore, that the general jury verdict creates an *intolerable risk* that a sentencing judge may subsequently impose a death sentence based on findings that contradict those made by the jury during the guilt phase, but not revealed by their general verdict.

111 S. Ct. at 2511 (emphasis added; citation omitted). In this case, although the possibility of an erroneous death sentence has been eliminated, the possibility that appellant has been sentenced to a mandatory twenty-five year term based upon insufficient evidence has not.[8] The possibility cannot be eliminated on this record that petitioner's conviction was not based upon a unanimous jury's acceptance of any theory which was supported by sufficient evidence. This Court should determine that Florida constitutional law requires more.

The State's contention that *Griffin v. United States*, 112 S.

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[8] Although the jury was charged on lesser-included offenses, they were also instructed to convict appellant on the highest charge which the evidence supported, so that the offenses were not equal contenders. If they rejected the premeditation theory, they might logically have accepted a second or third-degree conviction, except for the fact that they were instructed, in effect, to find first-degree murder if they could.

Ct. 466 (1991), eliminates this issue as a matter of federal constitutional due process appears to be correct.[9] The reliability problem presented by these facts is not solved by depending on the jury to disregard theories which are not supported by sufficient evidence, however. In *Jackson v. State,* 648 So.2d 85 (Fla. 1994), this Court differentiated between errors of fact and law in the context of aggravation and mitigation:

> As the Supreme Court explained in *Sochor v. Florida*, 112 S. Ct. 2114, 2122, 119 L. Ed. 2d 326 (1992), while a jury is likely to disregard an aggravating factor upon which it has been properly instructed but which is unsupported by the evidence, the jury is "unlikely to disregard a theory flawed in law." See also *Griffin v. United States*, 502 U.S. 46, 112 S. Ct. 466, 474, 116 L. Ed. 2d 371 (1991) ("When jurors have been left the option of relying upon a legally inadequate theory, there is no reason to think that their own intelligence and expertise will save them from that error.").

685 So. 2d at 689. This analysis should not determine the outcome here. In a complicated case such as this, where there are three homicides and at least two underlying felonies charged, it is unreasonable to *presume* that the jury will correctly sort among the various theories which are charged and accurately determine which are supported by evidence and which are not. If this were uniformly possible, jury verdicts would never be overturned for insufficiency of the evidence. The point is made especially clearly here by the fact that an experienced trial judge believed there was sufficient evidence of robbery in connection with Count II to charge the jury on felony-murder, and *believed the evidence was sufficiently probative that robbery was established beyond a*

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[9] The *Griffin* case does not clearly address the issue of whether the federal right to a unanimous jury is infringed.

reasonable doubt and could be the basis of an aggravating factor. The trial judge's error has been corrected, although it is legally less significant because it pertained to only one of several aggravating factors. The jury's error, if it occurred, also requires correction, because if it is not fixed the petitioner may face years of unjustified imprisonment. All of this could have been prevented if a special verdict had been submitted, and appellate counsel was prejudicially ineffective for failing to address this issue on appeal. The rule of *Griffin* should be rejected and a different rule should be established as a matter of Florida constitutional law under Article I, Section 22. In a state which affords the jury the opportunity to provide a sentencing recommendation, the reliability of the process will be improved and the necessity for appellate and collateral litigation reduced, by the adoption of a rule requiring special verdicts in this situation.[10]

III. CONCLUSION

In Case No. 78,700, appellant Robert Lacy Parker prays for an order remanding this case to the Circuit Court in Jacksonville for a determination of the facial sufficiency of his 3.850 claims, or for an evidentiary hearing.

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[10] In addition, *Griffin* had not been decided in 1984, when Parker's original appeal was determined. He should have had a new trial on Count II based on the decisional law existing at that time. *See e.g., Zant v. Stephens*, 462 U.S. 862, 881, 1035 Ct. 2733, 2745 (1983); *see also United States v. Lester*, 749 F. 2d 1288, 1291 n.l. (9th Cir. 1984).

Petitioner also adopts the arguments at pp. 53-61 of his Amended Habeas Corpus Petition in support of the so-called *Stromberg* argument presented here.

In Case No. 74,978, petitioner Robert Lacy Parker prays for an order holding that his conviction on Count II of the indictment infringes his right to a jury trial and to due process of law under the Constitution of the State of Florida, because of the failure to require a special verdict to differentiate between premeditated and felony-murder, and remanding his case for a new trial on Count II.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply of Appellant Robert Lacy Parker was served by U.S. Mail on Barbara Yates, Esq., at the office of the Attorney General, The Capitol, Tallahassee, Florida 32399-1050, on this 22nd day of May, 1995.

Jonathan C. Koch

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