IN THE SUPREME COURT OF FLORIDA

KHADAFY KAREEM MULLENS,

Appellant,

v.

STATE OF FLORIDA

Appellee.
_____/

CASE NO. SC13-1824
L.T. No. CRC 08-18029 CFANO

DEATH PENALTY CASE

ON APPEAL FROM THE CIRCUIT COURT
OF THE SIXTH JUDICIAL CIRCUIT,
IN AND FOR PINELLAS COUNTY, FLORIDA

SUPPLEMENTAL ANSWER BRIEF OF APPELLEE ADDRESSING HURST V. FLORIDA

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SUMMARY OF THE ARGUMENT

Mullens is not entitled to any relief due to the United States Supreme Court opinion in Hurst v. Florida, ___ U.S. ___, 136 S. Ct. 616 (2016) because he pled guilty as charged and subsequently waived penalty phase jury. Even if Hurst did apply, the trial court accepted his plea and adjudicated him guilty of multiple prior violent felonies. Accordingly, there was no Sixth Amendment error in the imposition of Mullens' death sentences.

Because he waived his right to have findings of fact made by a jury, Mullens is only entitled to relief if this Court finds that the only available sentence after Hurst is life in prison. There is no reasonable interpretation of Hurst to support the position taken by Mullens.

Mullens also asserts that Hurst is a finding that Florida's death penalty is unconstitutional, and he is therefore entitled to a life sentence pursuant to Section 775.082(2). That statute provides only that life sentences would be imposed if the death penalty itself has been ruled unconstitutional, and a plain reading of the statute does not support Mullens' strained interpretation. The United States Supreme Court has not held that death as a penalty violates the Eighth Amendment, but has only stricken Florida's current statutory procedures for implementation. Accordingly, Section 775.082(2) is not applicable.

In this case, any potential Sixth Amendment error would be harmless beyond any reasonable doubt, given Mullens' jury waiver and the convictions supporting the prior violent felony aggravating factor. Accordingly, Mullens' death sentences must be affirmed.

ISSUE

BECAUSE MULLENS HAS MULTIPLE CONVICTIONS FOR PRIOR VIOLENT FELONIES, THE UNITED STATES SUPREME COURT OPINION IN HURST V. FLORIDA DOES NOT APPLY

Mullens has filed a Supplemental Brief asserting that his death sentences should be stricken and he should be resentenced to life in prison due to the recent opinion in Hurst v. Florida, 136 S. Ct. 616 (2016). For the following reasons, Mullens' argument must be rejected, and the death sentences imposed in this case must be affirmed.

Initially, it is clear that Hurst cannot apply to him, because Mullens pled and was adjudicated guilty as charged to two counts of capital murder and one count of attempted first degree murder. His adjudication for a prior violent felony waived any Apprendi-based[1] claim. Mullens, represented by counsel, also waived penalty phase jury and asked the court to make the requisite factual findings. He therefore is only

[1] Apprendi v. New Jersey, 530 U.S. 466, 490 (2000): "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."

entitled to relief if this Court determines that all Florida death penalty convictions are rendered infirm as a consequence of Hurst. Naturally, Mullens advances that very argument. Hurst, however, only addressed the question of what factual findings are necessary to support a penalty enhancement; accordingly, Mullens is not entitled to relief.

Mullens asserts that Florida's law is facially invalid because Hurst requires that a jury enter specific, written factual findings to support the imposition of any death sentence. Mullens submits that Hurst determined that eligibility for the death penalty does not occur in Florida until the judge makes the ultimate determination that sufficient aggravating factors outweigh the mitigating factors to justify a sentence of death. Mullens also asserts that because Hurst concluded that the statute is facially invalid, he is entitled to be resentenced to life in accordance with Section 775.082(2), Florida Statutes, because the death penalty statute cannot be severed or re-written so as to render it constitutional. Unfortunately, Mullens misreads Hurst and seeks to apply it in the broadest possible way; examination of the Court's actual holding provides a clearer understanding of its application.

Contrary to Mullens' claim, Hurst did not determine Florida's death penalty to be unconstitutional. Hurst only invalidated Florida's procedures for implementation, finding

that they facially could result in a Sixth Amendment violation if the judge makes factual findings which are not supported by a jury verdict. Therefore, Section 775.082(2) does not apply. That section provides that life sentences *without parole*[2] are mandated "[i]n the event the death penalty in a capital felony is held to be unconstitutional," and was enacted following Furman v. Georgia, 408 U.S. 238 (1972), in order to fully protect society in the event that capital punishment as a whole for capital felonies were to be deemed unconstitutional, such as thereafter occurred in Coker v. Georgia, 433 U.S. 584 (1977), where the United States Supreme Court held that capital punishment was not available for the capital felony of raping an adult woman.

Although Mullens suggests that this Court used similar language to require the commutation of all death sentences to life following Furman in Donaldson v. Sack, 265 So. 2d 499 (Fla. 1972) (Supplemental Brief, p. 9), Mullens is misreading and oversimplifying the Donaldson decision. Donaldson is not a case of statutory construction, but one of jurisdiction. Based on our state constitution in 1972, which vested jurisdiction of capital cases in circuit courts rather than the criminal courts of record, Donaldson held that circuit courts no longer maintained jurisdiction over capital cases since there was no longer a

[2] Inmates convicted of capital crimes were otherwise eligible for parole pursuant to Section § 947.16(1), Florida Statutes.

valid capital sentencing statute to apply; no "capital" cases existed, since the definition of capital referred to those cases where capital punishment was an optional penalty. Donaldson observes the new statute (§ 775.082(2)) was conditioned on the invalidation of the death penalty, but clarifies, "[t]his provision is not before us for review and we touch on it only because of its materiality in considering the entire matter." Donaldson, 265 So. 2d at 505.

This Court's post-Furman determination to remand all pending death penalty cases for imposition of life sentences is discussed in Anderson v. State, 267 So. 2d 8 (Fla. 1972), a case which explains that, following Furman, the Attorney General filed a motion requesting that this Court relinquish jurisdiction to the respective circuit courts for resentencing to life, taking the position that the death sentences that were imposed were illegal sentences. There is no legal reasoning or analysis to explain why commutation of 40 sentences was required, but it is interesting to observe that this was before the time that either this Court or the United States Supreme Court had determined the current rules for retroactivity, as Teague v. Lane, 489 U.S. 288 (1989), and Witt v. State, 387 So. 2d 922 (Fla. 1980), were both decided later.

At any rate, there are several cogent reasons for this Court to reject the blanket approach of commuting all capital

sentences currently pending before this Court on direct appeal such as followed the Furman decision. Furman was a decision that invalidated all death penalty statutes in the country, with the United States Supreme Court offering nine separate opinions that left many courts "not yet certain what rule of law, if any, was announced." Donaldson, 265 So. 2d at 506 (Roberts, C.J., concurring specially). The Court held that the death penalty as imposed for murder and for rape constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution. The various separate opinions provided little guidance on what procedures might be necessary in order to satisfy the constitutional issues, and whether a constitutional scheme would be possible.

Hurst, on the other hand, is a specific ruling to extend the Sixth Amendment protections first identified in Ring to Florida cases. Mullens contends that the United States Supreme Court has determined that a defendant is not eligible for the death penalty under our sentencing scheme until the trial court enters written findings, concluding that sufficient aggravating circumstances outweigh the mitigating circumstances that apply (Supplemental Brief, p. 16). While the language quoted in Mullens' brief seems to support the position that the Hurst Court has misinterpreted Florida's law as to eligibility, other language in the opinion appears to limit the required jury

factfinding to the existence of one aggravating factor. For example, it is telling that Hurst does not expressly disturb Proffitt v. Florida, 428 U.S. 242 (1976), and only explicitly overrules Spaziano v. Florida, 468 U.S. 447 (1984) and Hildwin v. Florida, 490 U.S. 638 (1989), "to the extent they allow a sentencing judge to find an aggravating circumstance, independent of the jury's factfinding, that is necessary for imposition of the death penalty." Hurst, 136 S. Ct at 624.

By equating Hurst with Furman, Mullens reads Hurst far too broadly. Unlike Mullens, Hurst had no prior violent felony convictions. See Hurst v. State, 819 So. 2d 689 (Fla. 2002), footnote 3. Shortly after releasing the Hurst opinion the United States Supreme Court denied certiorari review of two direct appeal decisions, leaving intact this Court's denial of any Sixth Amendment error; both cases had sentences supported by prior violent felony convictions. See Fletcher v. State, 168 So. 3d 186 (Fla. 2015), cert. denied, 2016 WL 280859 (Jan. 25, 2016); Smith v. State, 170 So. 3d 745 (Fla. 2015), cert. denied, 2016 WL 280862 (Jan. 25, 2016). After Furman, there were no existing capital cases left intact. After Hurst, the United States Supreme Court has provided no express reason to disturb any capital sentence supported by prior convictions. The remedy for death row prisoners provided by Furman has therefore not been extended to pipeline defendants whose death sentences are

supported by a prior violent felony conviction.

Mullens' interpretation of Hurst improperly conflates a jury determination of facts necessary to impose a sentence of death with proportionality; the former, addressed in Hurst, determines the range of the permissible sentence. The latter addresses propriety and fairness of a death sentence within that permissible range, and has nothing to with the factual determinations necessary to support a death sentence enhancement. See, e.g., Porter v. State, 564 So. 2d 1060, 1064 (Fla. 1990). "It is necessary in each case to engage in a thoughtful, deliberate proportionality review to consider the totality of circumstances in a case, and to compare it with other capital cases. It is not a comparison between the number of aggravating and mitigating circumstances."

This Court's proportionality review has existed separate and apart from any Federal constitutional requirement and is not addressed or even implicated by Hurst. Indeed, the United States Supreme Court has held that proportionality review is not required for a capital sentencing scheme to be deemed constitutional. Pulley v. Harris, 465 U.S. 37, 44-45 (1984). As was argued in the State's Answer Brief, the facts of Mullens' case easily survive proportionality review; the fact that Mullens pled to the contemporaneous violent felonies supporting

his sentencing enhancement *and* waived a penalty phase jury excludes him from any possible benefit afforded by Hurst.

Mullens' claim that the trial court had no authority to weigh the relative merits of the aggravators and mitigators presented in his case is inconsistent with the recent United States Supreme Court decision in Kansas v. Carr, 136 S. Ct. 633 (2016), decided just over a week after Hurst. In Hurst, the United States Supreme Court acknowledged that the holding of Apprendi v. New Jersey, 530 U.S. 466 (2000), and Ring v. Arizona, 536 U.S. 584 (2002), concerned the factual findings necessary to make a defendant eligible for a sentence that was greater than that authorized by the jury's verdict.

In Apprendi, the United States Supreme Court examined whether the Sixth Amendment required a jury finding of a fact necessary to the imposition of a sentence that exceeded the statutory maximum for the offense of which he was convicted. The Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Id. at 490. At the time, the Court rejected the assertion that this holding would invalidate state capital sentencing schemes based on the belief that once a jury had found a defendant guilty of a capital offense, the statutory maximum for the crime was death. Id. at 497 & n.21.

Thus, the Court's focus was on facts necessary to authorize an increase of sentencing range; findings that influence the selection of a sentence within that range are not implicated.

Two years later, the Court addressed the implications of Apprendi for Arizona's capital sentence scheme based on the Arizona Supreme Court's holding that the United States Supreme Court had misunderstood how Arizona's capital sentence scheme worked and that an Arizona defendant was not eligible for a death sentence until an aggravator was found at the penalty phase. Ring, 584 U.S. at 595-96. Because Arizona had no jury involved in the penalty phase at all, the Court determined that Arizona's capital sentencing scheme was unconstitutional "to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty." Id. at 609. However, the Court did not alter the fact that the focus of this type of Sixth Amendment claim was on eligibility, not selection. In fact, the Court expressly noted that the claim being presented in that case was limited to an eligibility finding. Id. at 597 & n.4.

While the Court has altered the portion of the holding of Apprendi to cover findings that increase the sentencing range to which a defendant is exposed even if they did not change the statutory maximum, it has not changed the focus from findings that authorize a defendant to receive a sentencing enhancement.

Alleyne v. United States, 133 S. Ct. 2151, 2155, 2158 (2013) (applying Apprendi to factual findings necessary to impose a minimum mandatory term); Southern Union Co. v. United States, 132 S. Ct. 2344 (2012) (applying Apprendi to factual findings that increased the amount of a criminal fine); Cunningham v. California, 549 U.S. 270 (2007) (applying Apprendi to factual findings necessary to increase a sentence to an "upper limit" sentence); Blakely v. Washington, 542 U.S. 296, 303-05 (2004) (applying Apprendi to factual finding necessary to impose a sentence above the "standard" sentencing range even though the sentence was below the statutory maximum).

In fact, the Court recently reaffirmed that the Sixth Amendment right underlying Ring and Apprendi did not apply to factual findings made in selecting a sentence for a defendant after the defendant has been found eligible to receive a sentence within a particular range. Alleyne, 133 S. Ct. at 2161 n.2 ("Juries must find any facts that increase either the statutory maximum or minimum because the Sixth Amendment applies where a finding of fact both alters the legally prescribed range and does so in a way that aggravates the penalty. Importantly, this is distinct from factfinding used to guide judicial discretion in selecting a punishment 'within limits fixed by law.' Williams v. New York, 337 U.S. 241, 246 (1949). While such findings of fact may lead judges to select sentences that are

more severe than the ones they would have selected without those facts, the Sixth Amendment does not govern that element of sentencing."); see also United States v. O'Brien, 560 U.S. 218, 224 (2010) (recognizing that Apprendi does not apply to sentencing factors that merely guide sentencing discretion without increasing the applicable range of punishment to which a defendant is eligible).

Moreover, in Kansas v. Carr, 136 S. Ct. 633 (2016), the Court discussed the distinct determinations of eligibility and selection under a capital sentencing scheme. In doing so, the Court stated that an eligibility determination was limited to findings related to aggravating circumstances and that determinations regarding whether mitigating circumstances existed and the weighing process were selection determinations. In fact, the Court stated that such determinations were not factual findings at all. Instead, the Court termed the determinations regarding the existence of mitigating circumstances as "judgment call[s]" and weighing determinations "question[s] of mercy." Id. Specifically, the Court stated:

> Approaching the question in the abstract, and without reference to our capital-sentencing case law, we doubt whether it is even possible to apply a standard of proof to the mitigating-factor determination (**the so-called "selection phase" of a capital-sentencing proceeding**). It is possible to do so for the aggravating-factor determination **(the so-called "eligibility phase")**, because that is a purely factual determination. The facts justifying death set forth in

> the Kansas statute either did or did not exist—and one can require the finding that they did exist to be made beyond a reasonable doubt. Whether mitigation exists, however, is largely a judgment call (or perhaps a value call); what one juror might consider mitigating another might not. And of course the ultimate question whether mitigating circumstances outweigh aggravating circumstances is mostly a question of mercy—the quality of which, as we know, is not strained. It would mean nothing, we think, to tell the jury that the defendants must deserve mercy beyond a reasonable doubt; or must more-likely-than-not deserve it. It would be possible, of course, to instruct the jury that the facts establishing mitigating circumstances need only be proved by a preponderance, leaving the judgment whether those facts are indeed mitigating, and whether they outweigh the aggravators, to the jury's discretion without a standard of proof. If we were to hold that the Constitution requires the mitigating-factor determination to be divided into its factual component and its judgmental component, and the former to be accorded a burden-of-proof instruction, we doubt whether that would produce anything but jury confusion. In the last analysis, jurors will accord mercy if they deem it appropriate, and withhold mercy if they do not, which is what our case law is designed to achieve.

Kansas v. Carr, 136 S. Ct. 633, 642 (2016) (emphasis added).

In Florida, enhancement to include the possibility of a death sentence is authorized once the existence of one aggravating factor has been established. State v. Steele, 921 So. 2d 538, 543 (Fla. 2005) ("To obtain a death sentence, the State *must* prove beyond a reasonable doubt at least one aggravating circumstance"). Death is presumptively the appropriate sentence. State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973). As sentencing enhancement is a matter of state law, this

Court's determination controls. Ring, 536 U.S. at 603 ("the Arizona court's construction of the State's own law is authoritative").

Accordingly, any argument that Hurst also requires juries to find as a matter of fact that there are sufficient aggravating circumstances to outweigh the applicable mitigating circumstances is without merit. Hurst specifies that constitutional error occurs when a trial judge "alone" finds the existence of "an aggravating circumstance." Hurst, at 622. This Sixth Amendment error is necessarily one that can be avoided or prevented with the requirement of specific jury findings to support enhancement. While Mullens argues at length that this Court cannot re-write or sever the substantive statute, he misses the point that Hurst is a procedural ruling, and therefore a remedy is within the scope of ameliorative measures available to this Court.

Because the death penalty has not been constitutionally prohibited as a possible punishment in Hurst, Section 775.082(2) does not mandate a blanket commutation of death sentences as Mullens requests. This is especially true in light of this Court's inherent authority to fashion remedies "when confronted with new constitutional problems to which the Legislature has not yet responded." Galindez v. State, 955 So. 2d 517, 527 (Fla. 2007) (Cantero, J., concurring). See also In re Order on

Prosecution of Criminal Appeals by Tenth Judicial Circuit Public Defender, 561 So. 2d 1130, 1133 (Fla. 1990) (acknowledging "the inherent power of courts ... to afford us the remedy necessary for the protection of rights of indigent defendants," but warning that courts may not "ignore the existing statutory mechanism"). This Court has recognized that where a portion of a statute is deemed unconstitutional, the remainder may be salvaged. The essential test for doing so is to determine whether the "bad features" can be separated out without offending legislative intent. See Cramp v. Board of Public Instruction, 137 So. 2d 828, 830 (Fla. 1962).

Appellant correctly points out that Hurst affects the procedural portions of section 921.142 (Supplemental Brief, p. 15). He fails to recognize, however, that given his concession that the constitutional flaw identified in Hurst is procedural, this Court has the inherent authority to fashion a procedure that is both constitutional and consistent with the legislature's intent. See also Waldrup v. Dugger, 562 So. 2d 687, 693 (Fla. 1990) (holding that amendment to prison gain time statute could be excised out without destroying legislative intent). There is no dispute that the court has no legislative authority and therefore cannot re-write a substantive statute in order to render it constitutional. But there is no impediment to a court salvaging a condemned statute through the adoption of

procedural rules that satisfy any constitutional deficits that have been found.

Contrary to Mullens' argument, the practice in other states does not suggest that commutation of all non-final death sentences in Florida is necessary under Hurst. Appellant's reliance on the Colorado Supreme Court's decision to remand two pending pipeline cases for imposition of life sentences without parole under a similar Colorado statute is misplaced. First of all, the Colorado statute at issue is not identical to the Florida statute, as it is not triggered by an overarching determination that "the death penalty" is unconstitutional. Rather, the Colorado statute at issue in Woldt specifies that in the event the death penalty "as provided for in this section," is found to be unconstitutional, life sentences are mandated. Woldt v. People, 64 P.3d 256, 259 (Colo. 2003). Significantly, the Colorado Supreme Court was following its own death penalty jurisprudence and interpreting a Colorado death sentencing statute which initially required jury sentencing. Colorado amended its law in 1995 following Walton v. Arizona, 497 U.S. 639 (1990) to employ a three-judge panel to make both enhancement and selection determinations, but then returned to pure jury sentencing in 2003 following Ring. Defendants Woldt and Martinez were found eligible and sentenced by three-judge panels following the 1995 amendment, and the Colorado Supreme

Court held that their sentences violated the Sixth Amendment. The impact of that conclusion, with the resulting remand for imposition of life sentences, was based on rules of statutory construction that required the Court to decide between two competing and conflicting statutes.

In Arizona, the Arizona Supreme Court rejected blanket commutation, finding that the unconstitutional portion of the statute could be severed to preserve pending death cases. State v. Pandeli, 161 P.3d 557 (Ariz. 2007). This is the approach this Court should take. This Court has repeatedly recognized its obligation to uphold any portion of the statute, to the extent there is a reasonable basis for doing so, based on the rule favoring validity. Donaldson, 265 So. 2d at 501, 502-03; Driver v. Van Cott, 257 So. 2d 541 (Fla. 1972); Davis v. State, 146 So. 2d 892 (Fla. 1962).

There is no reading of Hurst which suggests that a Sixth Amendment violation necessarily occurs in every case when the statute is followed. In considering whether a new sentencing proceeding may be required by Hurst in a pending pipeline case, this Court needs to determine whether Sixth Amendment error occurred on the facts of that particular case; in Mullens' case, because he pled to the prior violent felony used to support a sentencing enhancement and also waived his right to a penalty phase jury, it seems plain that there was no constitutional

error of the type condemned by Hurst. If there was a Sixth Amendment violation, harmless error analysis requires us to address the impact of that error, and whether any prejudice to the defendant may have occurred. With this approach, this Court is respecting those death sentences which can be salvaged upon finding that any potential constitutional error was harmless, while protecting the Sixth Amendment rights of all defendants. Accordingly, this Court should reject Mullens' plea to remand this case for entry of a sentence of life imprisonment pursuant to Section 775.082(2), Florida Statutes.

The prior conviction exception to the Sixth Amendment findings required by Apprendi and Ring has not been disturbed in Hurst. Ring itself recognizes the critical distinction of an enhanced sentence supported by a prior conviction. See Almendarez-Torres v. United States, 523 U.S. 224 (1998) (permitting judge to impose higher sentence based on prior conviction); Ring, 536 U.S. at 598 n.4 (noting Ring does not challenge Almendarez-Torres, "which held that the fact of prior conviction may be found by the judge even if it increases the statutory maximum sentence"); Alleyne v. United States, 133 S. Ct. 2151, 2160 n.1 (2013) (affirming Almendarez-Torres provides valid exception for prior convictions). As Mullens has multiple contemporaneous murder and violent felony convictions which

authorized imposition of a death sentence, no Sixth Amendment error has been shown in this case.[3]

Even if further jury findings were required for sentencing, any error was harmless. As has been argued throughout, the fact that he admitted guilt as to three contemporaneous violent felonies is sufficient to avert any claim of prejudice. Mullens waived a penalty phase jury, and the trial judge in this case also found the prior conviction aggravating factor is supported by the unanimous jury verdict for aggravated battery from 2002. The remaining aggravators applied were: The capital felony was committed during an armed robbery, it was committed for the purpose of pecuniary gain (merged with the robbery aggravator), and the avoid arrest aggravator. As the sentencing enhancement applied in Mullens' case was established by the entry of a plea, the trial judge here properly followed state law and the sentence imposed here is not implicated by Hurst.

In this case, Mullens killed two witnesses and attempted to kill the third after completing an armed robbery of a St. Petersburg convenience store. The facts admitted by Mullens through the entry of a plea overwhelmingly demand imposition of the death penalty in this case. No reasonable factfinder could

[3] Mullens pled and was found guilty by the trial judge of two counts of capital murder and one count of attempted first degree murder. In addition, he had a 2002 conviction for aggravated battery (V6:904-908, V13:2702-2103).

disagree with the weighing decision eloquently outlined in the trial court's sentencing order. No possible constitutional error prejudiced Mullens on these facts. Accordingly, his death sentences should be upheld.

CONCLUSION

WHEREFORE, the State requests that this Honorable Court affirm the judgments and sentences imposed below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th day of February, 2016, I electronically filed the foregoing with the Clerk of the Court by using the Florida Courts E-Portal Filing System which will send a notice of electronic filing to the following: **Cynthia Dodge**, Assistant Public Defender, Public Defender's Office, Tenth Judicial Circuit, Post Office Box 9000 - Drawer PD, Bartow, Florida 33831, **appealfilings@pd10.org**, **cdodge@pd10.org** [and] **mlinton@pd10.org**.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

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