Supreme Court of Ohio Clerk of Court - Filed March 29, 2016 - Case No. 2015-1427

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
	:	Case No. 2015-1427
Appellant,	:	
	:	On Appeal from the Eighth
vs.	:	District Court of Appeals
	:	Case No. 101258
DEMETRIUS JONES,	:	
	:	
Appellee.	:	

BRIEF OF AMICI CURIAE CUYAHOGA COUNTY PUBLIC DEFENDER AND CUYAHOGA CRIMINAL DEFENSE LAWYERS ASSOCIATION IN SUPPORT OF APPELLEE

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INTEREST OF AMICI CURIAE

The Office of the Cuyahoga County Public Defender is legal counsel to more than one-third of all indigent persons indicted for felonies in Cuyahoga County. Under the circumstances, the Office is the largest single source of legal representation of criminal defendants in Ohio's largest county.

The Cuyahoga Criminal Defense Lawyers Association (CCDLA) is one of the largest professional organizations of criminal law practitioners in Ohio. The CCDLA meets regularly to provide a forum for material exchange of information concerning the improvement of criminal law, its practices and procedures. Through these meetings, and its active online community, the CCDLA promotes the study, research and advancement of knowledge of criminal defense law and promotes the proper administration of criminal justice.

INTRODUCTION

No one disputes that those suspected of having committed serious crimes, like sexual assault, should be investigated and, if the evidence is sufficient, indicted and prosecuted for those crimes. When, however, the case is investigated, but not prosecuted until decades later, the delay can and does hurt the accused's ability to mount a defense. The longer the delay, the more pronounced the handicap. That reality should not be controversial. Recently, Cuyahoga County has seen a dramatic increase in such delayed prosecutions. Many – in fact, most – of these recent prosecutions, like Mr. Jones's, involve lapses of nearly 20-years between the alleged incident and indictment.

This rash of near 20-year-old cases was a product of Project CODIS. CODIS refers to the Combined DNA Index System. The "Project" established an initiative which subjects all untested rape kits throughout Ohio to DNA testing. In Cleveland, police had amassed thousands of these kits over decades. All of these kits are now being tested. The so called "backlog" to which Amici Curiae Joyful Heart Foundation, et al. repeatedly refer, stems from the fact that, until the Project CODIS initiative, the Cleveland Police Department had little or no interest in developing the evidence those kits contained.

There are many reasons for that lack of interest. In some cases, the investigation faltered because the suspect could not be identified and located. In others, as in Mr. Jones' case, however, police knew exactly who the alleged perpetrator was. In fact, in a significant number of those cases, police, prosecutors, and even the grand jury, had fully vetted the matter contemporaneously with the incident, and concluded that there was insufficient evidence to substantiate that a sexual assault had occurred. But the alleged perpetrators' identities were never in question, so the DNA evidence developed 20-years later is rarely relevant to whether the matter constituted a sexual assault or rape.

Having warehoused more untested rape kits than any other county in Ohio, Cuyahoga County has litigated a majority of these near 20-year-old sexual assault cases. Amici have represented a substantial portion of those accused. Amici are, therefore, in a unique position to show that, at least in a certain class of cases, prejudice to the defense inuring from such delays is actual and far from speculative. The near-20-year delays Amici have seen, and the even longer ones anticipated going forward[1], not only implicate due process concerns, but they also undercut the right to notice, to confront and cross-examine the evidence, as well as the right to present a defense.

Perhaps paradoxically, those same delays make it easier for the State to secure a conviction. In many cases, the passage of time renders the allegations impenetrable. The delay has a disproportionate impact on the accused, who, having had no notice that he would face charges in the future, took no steps to collect and preserve exculpatory evidence at the time of the precipitating event. Often times his alibi and impeachment witnesses become unavailable. And, of course; memories fade or disappear altogether. At trial, the prosecution casts inconsistencies in the accused's account about the incident as lies and deems his testimony self-serving. Conversely, misstatements and inconsistencies in the complainant's testimony are readily attributed to, and excused by, the passage of time.

As we demonstrate further herein, if this Court adopts the analyses Appellant and its Amici propose, it will limit judicial discretion to grant pretrial dismissals based on prejudicial preindictment delay even when that remedy is clearly called for. It will also

[1] Effective July 16, 2015, the General Assembly enacted H.B. 6, which expanded the Statute of Limitations for rape to 25 years and up to 30 years where DNA evidence was involved.

enshrine a test that will lead to the conviction of innocent people; and, consequently, severely undermine confidence in the outcome of these prosecutions.

STATEMENT OF THE CASE AND FACTS

Amici defers to the Statement of the Case and Facts contained in Appellee's brief.

ARGUMENT

Actual prejudice stemming from the state's delay in prosecuting criminal charges occurs where evidence material to the accused's innocence for the underlying crime is lost because of that delay. When the accused demonstrates the loss of such evidence and the state offers no legitimate reason for the delay, the accused's rights to due process, notice, and his Sixth Amendment rights to a present a defense are violated and the case should be dismissed.

It has lately become clear that in decades past Cuyahoga County police and prosecutors often had little interest in pursuing rape cases. Collected rape kits were allowed to gather dust in police property rooms. Some investigations were closed before they hardly began, particularly where the complainant was not assertive about its pursuit. Over time, thousands of untested rape kits accumulated. Recently, however, due to the combined efforts of investigative journalists and the Ohio Attorney General, all of those previously warehoused rape kits are being tested.

In some cases the effort came too late – and charges resulting from the evidence recovered were dismissed, because they were filed beyond the then 20-year Statute of Limitations. See, *e.g., State v. Martin*, 8th Dist. Cuyahoga No. 100753, 2015-Ohio-761 (reversing defendant's conviction and directing the trial court to dismiss on statute of limitations grounds); and *State v. Porter*, 8th Dist. Cuyahoga No. 100745, 2015-Ohio-589 (reversing defendant's conviction and directing the trial court to dismiss on statute

of limitations grounds); and *State v. Gulley*, 8th Dist. Cuyahoga No. 101527, 2015 Ohio 3582 (dismissal affirmed).

We have statutes of limitation for good reasons. This Court has observed that statutes of limitations are enacted ". . . to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time[,] [ ] to minimize the danger of official punishment because of acts in the far-distant past. . . [and to] encourage[e] law enforcement officials to promptly investigate suspected criminal activity." *State v. Climaco, Climaco, Seminatore, Lefkowitz & Garofoli Co., L.P.A.,* 85 Ohio St. 3d 582, 586, 709 N.E.2d 1192, 1195 (1999) (internal quotations omitted). This Court has further noted that statutes of limitation are more directed at "discourag[ing] inefficient or dilatory law enforcement rather than to give offenders the chance to avoid criminal responsibility for their conduct." *Id.* Perhaps more importantly, the time limitation further seeks to enhance the reliability of evidence by keeping it "reasonably fresh, and therefore more trustworthy." *Id.*, quoting the Ohio Legislative Service Commission comment to R.C. 2901.13.

But with the dismissals necessitated under the 20-year Statute of Limitations, there ensued a call for expanding the Statute of Limitations period or eliminating it altogether. As of July 16, 2015, the Statute of Limitations for rape was expanded to 25 years, and 30 years in the event of a DNA match. This expansion, which now allows prosecutions for alleged misconduct up to 30 years old, requires this Court to take a fresh look at the constitutional claims resulting from extensive, and no doubt recurring, preindictment delay. In *State v. Luck*, 15 Ohio St.3d 150, 472 N.E.2d 1097, this Court held that -

> An unjustifiable delay between the commission of an offense and a defendant's indictment therefor, which results in actual prejudice to the defendant, is a violation of the right to due process of law under Section 16, Article I of the Ohio Constitution and the Fifth and Fourteenth Amendments to the United States Constitution.

Id. at paragraph two of the syllabus. Since then, this Court has acknowledged that a motion to dismiss for preindictment delay involves a two pronged analysis: 1) the defendant must present evidence establishing substantial prejudice stemming from the delay; and 2) the State then must show that the delay was justified. *State v. Walls*, 96 Ohio St. 3d 437, 2002-Ohio-5059, 775 N.E. 829, ¶51.

Cuyahoga County's Experience with delayed prosecutions under Project CODIS

Imagine being arrested and formally charged with a crime you did not commit, or a crime for which you had a good defense at the time of the offense and for some time thereafter. The police chose to arrest and charge you the day before the statute of limitations was set to run. You had no idea you were even being investigated up until the time of your arrest. Because of the lapse in time prior to your arrest, your ability to defend yourself from the charges brought against you has been severely hampered. Perhaps you had alibi witnesses or eyewitnesses that you could have called at trial to support your case if the prosecution had formally charged you at an earlier time--witnesses whose testimony would have all but confirmed your innocence. Due to the many years that have passed, however, those witnesses are either deceased, lost, or cannot remember anything from that far back. There are no other witnesses that you can call to support your defense and rebut the prosecution's case.

In Cuyahoga County this scenario has played out repeatedly in the past three years. Several of these delayed prosecutions exemplify the difficulties the accused faces

when mounting a defense to conduct he was alleged to have undertaken more than a generation ago.

- *State v. Cooper Powell*, 8th Dist. No. 102922, 2016 Ohio 1220. In 2014, following a DNA match, the accused was charged with rape stemming from an incident involving his now ex-wife, which allegedly occurred in 1994. The accused's ex-wife reported the incident promptly to police, a rape kit was taken at the hospital, and the accused was arrested two days later. The case was later closed when the complainant told the police she did not want to prosecute. Prior to trial the accused moved to dismiss arguing that the delay violated his right to due process. After finding that both the complainant and the accused suffer from mental illness, and neither could recall sufficient facts to either prosecute or defend, the court granted the dismissal. The Court of Appeals affirmed.

- *State v. Lynch*, CR-14-585501. In May of 1994, the complainant, who was then 11 years old, lived with the defendant and her mother. Complainant alleged that the defendant raped her, but recanted days later. The DNA recovered from the rape kit's testing is not a 100% match. Victim's mother was Defendant's alibi witness, and she died on June 10, 2014 (25 days after indictment). Defendant denied having sexual contact with complainant. Motion to dismiss was denied.

- *State v. Griffin*, CR-15-597048. Alleged rape occurred on July 7, 1995. The complainant provided a detailed description of her attacker, but the case was quickly closed. Since then, the complainant has suffered traumatic brain injury and remembers nothing about the alleged incident. The accused was not arraigned until July 13, 2015, but police had been investigating him for this incident for nearly a year beforehand. Ruling on Griffin's motion to dismiss on due process and statute of limitations grounds is pending.

- *State v. Leslie*, CR-15-593656. Case involves rape allegations from two complainants, both of which allegedly occurred in March of 1995. Both complainants identified the accused. In one of the cases, the accused was arrested and released. Both complainants signed forms refusing to prosecute. The detectives who interviewed them and confirmed their respective refusal to pursue the prosecution are not available. Both complainants are now deceased. In one of the cases, the accused's DNA was matched in 2006, but there was no prosecution until 2015. Accused filed a motion to dismiss on due process and statute of limitations grounds because he was not arraigned until well after statute of limitations had run. The motions to dismiss on due process grounds have been denied.

- *State v. Hatchell*, CR-13-579217. Hatchell was arrested and charged with rape in 1995. Because he was 17 years old at the time, his case was prosecuted in juvenile court, and he was found delinquent. Based on results from a post-trial polygraph, and the fact that the complainant's testimony was undercut by the information she originally provided to police, the court granted Hatchell's unopposed request for a new trial. In 1996, the State voluntarily dismissed the case. Based on the DNA match from the rape kit, however, Hatchell was indicted in October 2013. Hatchell moved to dismiss, arguing that the delay violated his right to due process – at this point all of the evidence from the juvenile court prosecution is unavailable, including the polygraph result that prompted the new trial, and the transcript of those proceedings. The court denied the motion to dismiss, but concluded that the juvenile court should have jurisdiction and ordered the matter transferred.

- *State v. Richardson*, CR-15-595965. In this case, the complainant alleged that the accused raped her in May of 1995, while they were on a date. At the time, both the complainant and her mother provided police with a statement and a rape kit was taken. Subsequently, the complainant told police she did not want to prosecute. Police closed the case without ever interviewing the accused. The accused asked the court to dismiss, arguing that critical impeachment and alibi witnesses were now unavailable and that the delayed prosecution was solely due to the prosecution's negligence.

- *State v. Jackson*, 8th Dist. No. 102394, 2015 Ohio 4274. Jackson was charged 18 years after two complainants alleged that in 1996 he had raped them. Both went to police and submitted to rape kit collection. Immediately after the allegations, police arrested and interrogated Jackson, then let him go. A prosecutor reviewed the cases and declined to pursue an indictment. Jackson's DNA was collected in 2003 and submitted to BCI in 2004. Nine years later, Feb. 2013, the rape kits collected in 1996 were submitted to BCI for testing. Three years later Jackson was indicted. During the 18 years that passed material exculpatory evidence was lost – the complainants' medical records, their personal property, as well as that of the defendant was lost, the locations of both the alleged rapes were destroyed, and the detectives who closed the cases were unavailable. Denial of motion to dismiss was affirmed.

- *State v. Exum*, CR-15-596889. The complainant alleged that she had been accosted and raped by a man she did not know while she was waiting for a bus to take her to work one afternoon in November of 1995. Police managed to locate and arrest the accused that very day. Police investigated the complainant's claim that she was on her way to work and, after interviewing her manager at the time, learned that she was not scheduled to work on that day and time. The case was presented to the

grand jury twice and both times it was no billed. Nearly 20 years later, after the DNA match, Exum was charged with rape and kidnapping. Exum argued that the delay hurt his right to present exculpatory evidence, because the complainant's former manager was now unavailable, as were the original investigating officers. Ultimately, the State dismissed the rape charges and Mr. Exum pleaded guilty to attempted abduction.

- *State v. Leon*, CR-14-590683. In October of 1994, the complainant appeared at Lutheran Hospital claiming to have been raped. Police attempted to follow up with her at her residence, where they met with someone claiming to be her roommate, who told them the complainant was unavailable. Attempts to further the investigation, however, failed. It turned out that the social security number and name the complainant provided the medical personnel was likely false. The detectives closed the case the next month. Notwithstanding an unidentifiable or possibly nonexistent victim, the State indicted Mr. Leon on rape charges in May of 2013 because of the DNA match. Nevertheless, no one was ever able to locate the complainant and her roommate. The doctor at Lutheran Hospital, who treated her has passed away, and the investigating detectives were unavailable. Although the State initially opposed Leon's motion to dismiss, it ultimately moved to dismiss the matter without prejudice.

- *State v. Dixon*, 8th Dist. Cuyahoga No. 102335, 2015-Ohio-3144. Mr. Dixon was first accused of rape in 1993. Following an investigation, police closed the case. He was indicted following the DNA match 20 years later. In moving to dismiss, Dixon argued that the delay had caused the loss of two witnesses who would have provided exculpatory evidence at trial. Both witnesses had testified at a parole revocation hearing addressing the rape allegations. One, his former girlfriend, provided favorable information about the accused's character. The other, Dixon's boss at the time of the alleged rape, testified about a conversation he had with the complainant that the sexual contact was consensual, and that she had fabricated the rape charge. Because the loss of this evidence was clearly prejudicial, the Court of Appeals affirmed the dismissal.

- *State v. Dickerson*, 8th Dist. Cuyahoga No. 102461, 2016-Ohio-807. Here the complainant alleged that in July of 1994, she was kidnapped by three men, and taken to a motel where two of them raped her. After the complainant reported the incident to police, Dickerson and his codefendant were awakened and arrested the next day in the motel room where the rape allegedly occurred. Police eventually closed the case, and records indicate that they did so at the complainant's request. Dickerson was indicted based on the DNA 20 years later. When it concluded that trial counsel was ineffective for failing to timely file a motion to dismiss based on prejudicial preindictment delay, the Court of Appeals noted the loss of several witnesses, including the accomplice, who rented the motel room and the clerk from whom he rented it. In addition, the officer who

> closed the case was also unavailable and he would have provided critical evidence concerning why the complainant requested the closure.

Although the cases summarized above are factually distinct, they share two characteristics – with each other and with Mr. Jones's case: 1) the accuseds's identities were never in doubt; and 2) the near-20-year delay in prosecuting the cases caused those accused to lose exculpatory evidence. According to this Court's current jurisprudence, the loss of specific identifiable exculpatory evidence caused by the prosecution's delay creates actual prejudice. *State v. Adams*, 144 Ohio St. 3d 429, 444, 2015-Ohio-3954, 45 N.E.3d 127; and *State v. Whiting*, 84 Ohio St.3d 215, 217, 1998 Ohio 575, 702 N.E.2d 1199 (1998).

Accepted standard for what constitutes exculpatory evidence.

As demonstrated above, these cases are largely fact-bound. Consequently, any preindictment delay prejudice analysis will necessarily be fact-intensive. Nevertheless, there is a clear standard that can be applied to those facts when ascertaining whether a delay causes the loss of exculpatory evidence so important that the prosecution violates due process. In *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), the US Supreme Court held that when the prosecution withholds exculpatory evidence from the defense, it violates due process where that evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. *Id*. at 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215.

The high court has since expanded what constitutes exculpatory evidence to include impeachment evidence as well as that material to guilt or punishment. *Strickler v. Greene*, 527 U.S. 263, 280, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999). The Court has found that exculpatory evidence is "material" under this analysis where –

> [T]here is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different . . . . [A] showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted in the defendant's acquittal.

Kyles v. Whitley, 514 U.S. 419, 433-34, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995). In so explaining, the Supreme Court reasoned that the

> [T]ouchstone of materiality is a "reasonable probability" of a different result, and that adjective is important. The question is not whether [a] defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A "reasonable probability" of a different result is accordingly shown when the government's evidentiary suppression undermines confidence in the outcome of the trial.

Id. at 434 (internal quotations and citations omitted). In this respect, the *Brady* due process rule complements the criminal defendant's Sixth Amendment right to a trial by an impartial jury and preserves the criminal trial as "the chosen forum for ascertaining the truth about criminal accusations." *Kyles,* 514 U.S. at 440, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995).

And it is the truth-seeking nature of the trial process that the *Brady* standard was intended to foster. That same truth-seeking concern is what drives the analysis for prejudicial preindictment delay and whether the delay warrants dismissal – either pre or post-trial. Amici recognize that "prejudice (or materiality) in the *Brady* context is a difficult test to meet . . . ." *Jamison v. Collins*, 291 F.3d 380, 388 (6th Cir. 2002). Such prejudice only occurs where "the nondisclosure is so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict." *Strickler*, 527 U.S. at 281, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (the question is whether the evidence puts the case "in such a different light [so] as to undermine confidence in the verdict").

While rigorous, this analysis provides a constitutionally sound framework through which the trial court can apply what promises to be a fact-intensive inquiry. Moreover, it will require the accused to demonstrate prejudice in a concrete and non-speculative way. Finally, applying the *Brady* materiality standard to the prejudicial delay analysis will help preserve the fairness and reliability of delayed prosecutions, while not unfairly hampering the State's ability to pursue them.

The backlog in untested rape kits is one of the State's own making

The brief Amici Joyful Heart Foundation, et al., have submitted makes much of the fact that BCI has been, and continues to be, diligently working its way through the backlog of untested rape kits that have provided the basis for these delayed prosecutions. A backlog is defined as an accumulation of tasks unperformed or materials not processed.[2] While Amici employ the word "backlog" some 83 times, they fail to credit its actual cause. Instead, Amici imply, falsely, that Cuyahoga County's failure to subject thousands of rape kids collected over decades to DNA testing was due to a lack of resources.[3]

As reflected in the cases identified above, however, often the kits were simply shelved because the police involved chose to not have them tested. The need for Project CODIS did not manifest itself all of a sudden. These rape kits accrued gradually over decades. Mr. Jones's case was not indicted because of evidence that was newly-discovered. Nor was his a case that fell through the cracks. Rather, the case was

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[2] http://www.merriam-webster.com/dictionary/backlog

[3] Undersigned also take issue with Amici Joyful Heart Foundation, et al.'s claim that that "data shows that sexual offenders will *often* go on to rape, burglarize, or kill other victims." (Amici Brief, p. 10) (emphasis added) That so called "data" derives, not from any data, but from a speech made by the Cuyahoga County Prosecutor. To the extent that such data exists, Amici have not provided it to this Court.

pounded into the cracks, because Cleveland Police sometimes chose not to pursue rape allegations.[4] In Jones's case, as in the others undersigned *Amici* have identified herein and continue to see, police ignored an allegation of rape against an identified suspect. That individual continued to live publicly in the Cleveland area only to be snatched up by police 20 years later and forced to account for his daily activity on a nondescript day in 1993; when Bill Clinton was President, George Voinovich was in this first term as Ohio Governor, and O.J. Simpson was still going through airports as spokesman for Hertz-Rent-a-Car.

The trial court has authority to dismiss a case for prejudicial preindictment delay before trial and should be able to do so where the record and interests of justice call for it.

According to the Attorney General, a dismissal for preindictment delay should only be ruled on post-trial. There are likely many instances where the Attorney General is correct. Sometimes the record will simply not be sufficiently developed for the court to make a determination about the specific exculpatory evidence lost and its impact on the case until after the trial. See, *State v. Keenan*, 143 Ohio St.3d 397,¶¶ 8-9, 2015 Ohio 2484, 38 N.E.3d 870. That such a circumstance is possible, should not make it a requirement. Certainly, neither this Court in *Luck* and *Whiting*, *supra;* nor the U.S. Supreme Court in *United States v. Marion*, 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971) and *United States v. Lovasco*, 431 U.S. 783, 97 S.Ct. 2044, 52 L.Ed.2d 752 (1977), articulated such a requirement when they acknowledged that prejudicial preindictment delay could violate the accused's State and Federal Constitutional Rights.

[4] http://www.npr.org/2015/05/19/407766821/reporting-on-rape-kit-backlog-leads-to-new-law-and-arrests-in-ohio

Moreover, such a restriction on the trial court's ability to address the issues before it unduly intrudes on the trial court's authority. As this Court has acknowledged:

> Trial judges are at the front lines of the administration of justice in our judicial system, dealing the realities and practicalities of managing a caseload and responding to the rights and interests of the prosecution, the accused, and victims. A court has the inherent power to regulate the practice before it and protect the integrity of its proceedings.

State v. Busch, 76 Ohio St.3d 613, 669 N.E.2d 1125, 1996 Ohio 82 (1996); citing *Royal Indemn. Co. v. J.C. Penney Co.,* 27 Ohio St.3d 31, 33-34, 501 N.E.2d 617 (1986) (internal quotations omitted). If the trial court recognizes, before the accused is forced to defend himself at a trial, that such an undertaking would be impossible due to the loss of exculpatory evidence, the trial court should be able to dismiss the case. Under the Attorney General's construct, the trial court would be required to preside over what it knows to be an unconstitutional sham proceeding. That simply cannot be the law.

CONCLUSION

For the foregoing reasons, Amici ask this Court to affirm the judgment below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Merit Brief of Amici Curiae Cuyahoga County Public Defender's Office, the Cuyahoga Criminal Defense Attorneys Association, and the ACLU of Ohio Foundation was served on all parties to this action via email or by regular U.S. Mail, postage pre-paid to their respective addresses on this the 29th day of March, 2016.

Erika B. Cunliffe

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