COA NO. 46084-0-II

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

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STATE OF WASHINGTON,

Petitioner,

v.

DAVID E. BLISS,

Respondent.

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MOTION FOR DISCRETIONARY REVIEW FROM THE SUPERIOR COURT FOR SKAMANIA COUNTY

SUPERIOR COURT CASE NUMBER 13-1-00054-5

HONORABLE JUDGE BRIAN P. ALTMAN

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# BRIEF OF PETITIONER

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ADAM NATHANIEL KICK
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Attorney for Petitioner

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P.O Box 790
240 N.W. Vancouver Ave.
Stevenson, Washington 98648

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## A. INTRODUCTION

The State of Washington, petitioner, through Prosecuting Attorney Adam N. Kick, is seeking reversal of the decision of the Superior Court for the County of Skamania suppressing one party consent recordings made pursuant to RCW 9.73.090(2) of statements made by the defendant, David Bliss.

## B. ASSIGNMENT OF ERROR

The Skamania County Sheriff's Office, pursuant to permission from Skamania County District Court Judge Ronald Reynier following the procedure provided for in RCW 9.73.090(2), made one-party consent recordings of statements made by the defendant, David Bliss to the victim in Skamania County Superior Court Cause Number 13-1-00054-5. The Superior Court erred in suppressing the recording and the substance of the recorded statements made by the defendant, David Bliss.

## C. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

May a County District Court Judge authorize the recording of a telephone call with one-party consent upon application and sworn affidavit of a law enforcement officer under RCW 9.73.090(2)?

## D. STATEMENT OF THE CASE

Under RCW 9.73.090(2), a "judge or magistrate" may authorize the recording of a conversation with one-party consent, "if there is probable cause to believe that the non-consenting party has committed, is engaged in, or is about to commit a felony." See Appendix One.

On July 30, 2013, Skamania County Sheriff Sgt. Monte Buettner applied via a sworn affidavit under RCW 9.73.090(2) for authorization to record a telephone conversation between the respondent, David E. Bliss, and his little sister Clairissa Bliss. Clerk's Papers (CP) page 23 - 26.

Clairissa Bliss gave permission for the call to be recorded. CP 25 - 27. Report of Proceedings (RP) page 3 – 4. The call was to concern allegations that David Bliss had sexually abused Clairissa Bliss starting when she was 7 or 8 years old. CP 24 - 26.

Authorization was granted by Skamania County District Court Judge Ron Reynier. CP 26 - 28. In granting authorization, Judge Reynier found probable cause that Bliss had committed the crime of Rape of a Child in the First Degree and/or Incest and that communications concerning those crimes would take place and

would be obtained as evidence through recording of telephone calls. Id. Judge Reynier also found that

> [n]ormal investigative techniques reasonably appear to be unlikely to succeed if tried, and interception and recording of expected communications and/or conversations will substantially aid and supplement normal investigative techniques...

Id.

The call was completed and recorded. Clairissa called from the sheriff's office in Skamania County, Washington, and David answered in Clark County, Washington. On the phone call, David Bliss made substantial admissions regarding sexual abuse of Clairissa when she was a small child. RP 27 – 28.

On February 5, 2014, Bliss moved to suppress the recording of and all references to the telephone conversation, arguing that the authorization was invalid. Briefs were submitted by both parties, and argument was heard on February 13, 2014. CP 5 – 35. Both parties later submitted supplemental briefs. CP 37 – 58.

On February 27, 2014, the Superior Court suppressed the recorded conversation and all references to it. CP 85 – 87. The Court ruled that County District Courts have no authority to grant authorizations under RCW 9.73.090(2) because they only have

authority specifically granted by the State Legislature, and no statute gives them this authority. CP 85 – 87.

The State sought discretionary review of the Superior Court's ruling suppressing the recorded statements, which was granted and this appeal follows. CP 59 – 61.

## E. A RGUMENT

### COUNTY DISTRICT COURTS HAVE STATUTORY AUTHORITY TO GRANT AUTHORIZATIONS TO RECORD WITH ONE-PARTY CONSENT UNDER RCW 9.73.090(2).

By the plain language of the statute, County District Court judges have authority to issue authorizations under RCW 9.73.090(2). That statute authorizes a "judge or magistrate" to grant authorizations. Id. "[D]istrict judges" are specifically defined as "magistrates," RCW 2.20.020(3). See Appendix One.

Furthermore, the Legislature has elsewhere given District Court judges authority to issue process out of his or her county. Under RCW 3.66.100, "Every district judge having authority to hear a particular case may issue criminal process in and to any place in the state." A search warrant, to which an RCW 9.73.090(2) authorization is analogous, "is a form of process [citation omitted]," State v. Davidson, 26 Wn. App. 623, 626, 613 P.2d 564 (1980).

In Davidson, the Court of Appeals cites RCW 3.66.100 for the law that while "[t]he boundaries of the county ordinarily define a district court's territorial jurisdiction in criminal matters [citation omitted]," nevertheless "[f]or the issuance of criminal process, the legislature has expanded this jurisdiction to the entire state if the district court has the authority to hear the case [citation omitted]," Davidson, 26 Wn. App. at 625.

While the charge here was a felony, the crime could have been heard in District Court, which has the authority to conduct preliminary hearings on felonies, CrRLJ 3.2.1(g). The Legislature has specifically granted the District Courts authority "to sit as a committing magistrate and conduct preliminary hearings in cases provided by law" and "concurrent with the superior court of a proceeding to keep the peace in their respective counties," RCW 3.66.060(2) and (3).

It is also well-settled that District Courts may issue search warrants related to cases even *when already filed* in Superior Court. In State v. Stock, 44 Wn. App. 467, 474, 722 P.2d 1330 (1986), the defendant argued that "once her case was filed in superior court, the district court lost jurisdiction to issue warrants in her case." Rejecting that contention, the Court of Appeals held that

"[b]oth the district and superior courts have the power to issue warrants," Id. Furthermore, the Court approved of the trial judge's interpretation as follows:

> "The rules that talk in terms of the fact that the Superior Court has jurisdiction over a matter once an Information is filed, relates to matters concerning the trial of the case itself, it does not deprive the District Justice Court of its jurisdiction which would parallel that of the Superior Court. District Courts can, upon proper application, issue search warrants and while, again, recognizing that it would have been preferable to have handed [*sic*] all discovery through the criminal rules relating to discovery, there is not, in this court's view, a basis to indicate the procedure utilized here was contralegal and, therefore, subject to suppression."

Id. at 475.

Finally, the Washington Privacy Act, contained in Revised Code of Washington Chapter 9.73, by its own language contemplates that District Court judges will issue authorizations allowed under the Act. The statute requires that

> [i]n each superior court judicial district in a county with a population of two hundred ten thousand or more there shall be available twenty-four hours a day at least one superior court *or district court judge* or magistrate designated to receive telephonic requests for authorizations that may be issued pursuant to this chapter.

RCW 9.73.220 (emphasis added). See Appendix Seven.

While Skamania County does not fall under this section of the statute due to its small population, nevertheless the statutory language does show that District Court judges are contemplated as having authority to issue authorizations under the Privacy Act in circumstances like the one presented in Bliss's case.

While in the argument above, the State analogizes a magistrate's authorization to make a one party consent recording to an authorization to search (a search warrant), it is not the case that an authorization under 9.73.090(2) is a search. It is well-settled that there are no Constitutional violations under either the State or federal Constitutions when one party has consented to the recording. See, e.g., State v. Pulido, 68 Wn. App. 59, 63 (1992), review denied, 121 Wn.2d 1018 (1993)(quoting State v. Salinas, 119 Wn.2d 192, 197 (1992))( "'where one party . . . consents to the contents of the conversation being recorded . . . there [is] no expectation of privacy and Const. art. 1, § 7 [does] not prevent the disclosure of the conversation.'") The Court in Pulido went on to hold "in line with the unanimous federal authorities, that '1-party consent' does not violate the Fourth Amendment," Id. at 64.

That distinction is important because absent the provisions of RCW 9.73.030 that requires both parties consent to record a

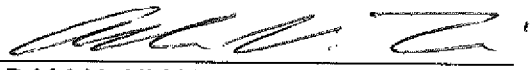
private phone call, there would be no restriction on the recording of the statements made by the defendant in this case. RCW 9.73.030 limits a person from legally making a recording of a private conversation without the other party's consent. It does not turn such a recording into a "search." So while analogizing a judge's authority to a search warrant can be helpful, it can also lead to a misapprehension about what is actually going on when a judge authorizes the recording under 9.73.090(2): it is authorizing the act of the recording, it is not authorizing a search. If there are any jurisdictional limitations to that authorization, it would logically only extend to where the actual recording of the conversation is taking place, not where the second party to the conversation is located.

## F. CONCLUSION

For the above reasons, the Court of Appeals should rule that District Court judges may authorize the recording of a telephone call with one-party consent upon application and sworn affidavit of a law enforcement officer under RCW 9.73.090(2), and reverse the decision of the Superior Court in this case suppressing the recorded statement of the defendant, David Bliss.

DATED this 8th day of October, 2014.

RESPECTFULLY submitted,

By: 

ADAM N. KICK, WSBA 27525
Prosecuting Attorney
Attorney for the Petitioner

**CERTIFICATE OF SERVICE**

Electronic service of this Motion for Discretionary Review was effected today via email upon opposing counsel:

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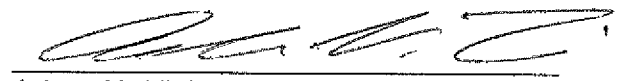

Adam N. Kick, WSBA # 27525
October 8, 2014
City of Stevenson, Washington

Appendix 1

***RCW 9.73.090***

## *Certain emergency response personnel exempted from RCW 9.73.030 through 9.73.080 — Standards — Court authorizations — Admissibility.*

(1) The provisions of RCW 9.73.030 through 9.73.080 shall not apply to police, fire, emergency medical service, emergency communication center, and poison center personnel in the following instances:

(a) Recording incoming telephone calls to police and fire stations, licensed emergency medical service providers, emergency communication centers, and poison centers;

(b) Video and/or sound recordings may be made of arrested persons by police officers responsible for making arrests or holding persons in custody before their first appearance in court. Such video and/or sound recordings shall conform strictly to the following:

(i) The arrested person shall be informed that such recording is being made and the statement so informing him or her shall be included in the recording;

(ii) The recording shall commence with an indication of the time of the beginning thereof and terminate with an indication of the time thereof;

(iii) At the commencement of the recording the arrested person shall be fully informed of his or her constitutional rights, and such statements informing him or her shall be included in the recording;

(iv) The recordings shall only be used for valid police or court activities;

(c) Sound recordings that correspond to video images recorded by video cameras mounted in law enforcement vehicles. All law enforcement officers wearing a sound recording device that makes recordings corresponding to videos recorded by video cameras mounted in law enforcement vehicles must be in uniform. A sound recording device that makes a recording pursuant to this subsection (1)(c) must be operated simultaneously with the video camera when the operating system has been activated for an event. No sound recording device may be intentionally turned off by the law enforcement officer during the recording of an event. Once the event has been captured, the officer may turn off the audio recording and place the system back into "pre-event" mode.

No sound or video recording made under this subsection (1)(c) may be duplicated and made available to the public by a law enforcement agency subject to this section until final disposition of any criminal or civil litigation which arises from the event or events which were recorded. Such sound recordings shall not be divulged or used by any law enforcement agency for any commercial purpose.

A law enforcement officer shall inform any person being recorded by sound under this subsection (1)(c) that a sound recording is being made and the statement so informing the person shall be included in the sound recording, except that the law enforcement officer is not required to inform the person being recorded if the person is being recorded under exigent circumstances. A law enforcement officer is not required to inform a person being recorded by video under this subsection (1)(c) that the person is being recorded by video.

(2) It shall not be unlawful for a law enforcement officer acting in the performance of the officer's official duties to intercept, record, or disclose an oral communication or conversation where the officer is a party to the communication or conversation or one of the parties to the communication or conversation has given prior consent to the interception, recording, or disclosure: PROVIDED, That prior to the interception, transmission, or recording the officer shall obtain written or telephonic authorization from a judge or magistrate, who shall approve the interception, recording, or disclosure of

communications or conversations with a nonconsenting party for a reasonable and specified period of time, if there is probable cause to believe that the nonconsenting party has committed, is engaged in, or is about to commit a felony: PROVIDED HOWEVER, That if such authorization is given by telephone the authorization and officer's statement justifying such authorization must be electronically recorded by the judge or magistrate on a recording device in the custody of the judge or magistrate at the time transmitted and the recording shall be retained in the court records and reduced to writing as soon as possible thereafter.

Any recording or interception of a communication or conversation incident to a lawfully recorded or intercepted communication or conversation pursuant to this subsection shall be lawful and may be divulged.

All recordings of communications or conversations made pursuant to this subsection shall be retained for as long as any crime may be charged based on the events or communications or conversations recorded.

(3) Communications or conversations authorized to be intercepted, recorded, or disclosed by this section shall not be inadmissible under RCW 9.73.050.

(4) Authorizations issued under subsection (2) of this section shall be effective for not more than seven days, after which period the issuing authority may renew or continue the authorization for additional periods not to exceed seven days.

(5) If the judge or magistrate determines that there is probable cause to believe that the communication or conversation concerns the unlawful manufacture, delivery, sale, or possession with intent to manufacture, deliver, or sell, controlled substances as defined in chapter 69.50 RCW, or legend drugs as defined in chapter 69.41 RCW, or imitation controlled substances as defined in chapter 69.52 RCW, the judge or magistrate may authorize the interception, transmission, recording, or disclosure of communications or conversations under subsection (2) of this section even though the true name of the nonconsenting party, or the particular time and place for the interception, transmission, recording, or disclosure, is not known at the time of the request, if the authorization describes the nonconsenting party and subject matter of the communication or conversation with reasonable certainty under the circumstances. Any such communication or conversation may be intercepted, transmitted, recorded, or disclosed as authorized notwithstanding a change in the time or location of the communication or conversation after the authorization has been obtained or the presence of or participation in the communication or conversation by any additional party not named in the authorization.

Authorizations issued under this subsection shall be effective for not more than fourteen days, after which period the issuing authority may renew or continue the authorization for an additional period not to exceed fourteen days.

[2011 c 336 § 325; 2006 c 38 § 1; 2000 c 195 § 2; 1989 c 271 § 205; 1986 c 38 § 2; 1977 ex.s. c 363 § 3; 1970 ex.s. c 48 § 1.]

## *Notes:*

**Intent -- 2000 c 195:** "The legislature intends, by the enactment of this act, to provide a very limited exception to the restrictions on disclosure of intercepted communications." [2000 c 195 § 1.]

**Severability -- 1989 c 271:** See note following RCW 9.94A.510.

**Severability -- 1970 ex.s. c 48:** "If a court of competent jurisdiction shall adjudge to be invalid or unconstitutional any clause, sentence, paragraph, section or part of this act, such judgment or decree shall not affect, impair, invalidate or nullify the remainder of this act, but the effect thereof shall be

confined to the clause, sentence, paragraph, section or part of this chapter so adjudged to be invalid or unconstitutional." [1970 ex.s. c 48 § 3.]

## *RCW 2.20.020*
## *Who are magistrates.*

The following persons are magistrates:

(1) The justices of the supreme court.

(2) The judges of the court of appeals.

(3) The superior judges, and district judges.

(4) All municipal officers authorized to exercise the powers and perform the duties of district judges.

[1987 c 202 § 103; 1971 c 81 § 9; 1891 c 53 § 2; RRS § 51.]

### *Notes:*

**Intent -- 1987 c 202:** See note following RCW 2.04.190.

## *RCW 3.66.100*
## *Territorial jurisdiction — Process — Limitation.*

(1) Every district judge having authority to hear a particular case may issue criminal process in and to any place in the state.

(2) Every district judge having authority to hear a particular case may issue civil process, including writs of execution, attachment, garnishment, and replevin, in and to any place as permitted by statute or rule. This statute does not authorize service of process pursuant to RCW 4.28.180 in actions filed pursuant to chapter 12.40 RCW, except in actions brought against an owner under chapter 59.18 RCW, or in civil infraction matters.

[2011 c 132 § 3; 1998 c 73 § 1; 1987 c 442 § 1101; 1984 c 258 § 701; 1961 c 299 § 121.]

### *Notes:*

**Court Improvement Act of 1984 -- Effective dates -- Severability -- Short title -- 1984 c 258:** See notes following RCW 3.30.010.

Issuance of process
infractions generally: RCW 7.80.020.
natural resource infractions: RCW 7.84.120.
traffic infractions: RCW 46.63.130.

# *RCW 3.66.060*
# *Criminal jurisdiction.*

The district court shall have jurisdiction: (1) Concurrent with the superior court of all misdemeanors and gross misdemeanors committed in their respective counties and of all violations of city ordinances. It shall in no event impose a greater punishment than a fine of five thousand dollars, or imprisonment for one year in the county or city jail as the case may be, or both such fine and imprisonment, unless otherwise expressly provided by statute. It may suspend and revoke vehicle operators' licenses in the cases provided by law; (2) to sit as a committing magistrate and conduct preliminary hearings in cases provided by law; (3) concurrent with the superior court of a proceeding to keep the peace in their respective counties; (4) concurrent with the superior court of all violations under Title 77 RCW; (5) to hear and determine traffic infractions under chapter 46.63 RCW; and (6) to take recognizance, approve bail, and arraign defendants held within its jurisdiction on warrants issued by other courts of limited jurisdiction when those courts are participating in the program established under RCW 2.56.160.

[2003 c 39 § 1; 2000 c 111 § 3; 1984 c 258 § 44; 1983 1st ex.s. c 46 § 176; 1982 c 150 § 1; 1961 c 299 § 117.]

## *Notes:*

**Court Improvement Act of 1984 -- Effective dates -- Severability -- Short title -- 1984 c 258:** See notes following RCW 3.30.010.

## *RCW 9.73.220*
## *Judicial authorizations — Availability of judge required.*

In each superior court judicial district in a county with a population of two hundred ten thousand or more there shall be available twenty-four hours a day at least one superior court or district court judge or magistrate designated to receive telephonic requests for authorizations that may be issued pursuant to this chapter. The presiding judge of each such superior court in conjunction with the district court judges in that superior court judicial district shall establish a coordinated schedule of rotation for all of the superior and district court judges and magistrates in the superior court judicial district for purposes of ensuring the availability of at least one judge or magistrate at all times. During the period that each judge or magistrate is designated, he or she shall be equipped with an electronic paging device when not present at his or her usual telephone. It shall be the designated judge's or magistrate's responsibility to ensure that all attempts to reach him or her for purposes of requesting authorization pursuant to this chapter are forwarded to the electronic page number when the judge or magistrate leaves the place where he or she would normally receive such calls.

[1991 c 363 § 9; 1989 c 271 § 203.]

### *Notes:*

**Purpose -- Captions not law -- 1991 c 363:** See notes following RCW 2.32.180.

**Severability -- 1989 c 271:** See note following RCW 9.94A.510.

# *RCW 9.73.030*
# *Intercepting, recording, or divulging private communication — Consent required — Exceptions.*

(1) Except as otherwise provided in this chapter, it shall be unlawful for any individual, partnership, corporation, association, or the state of Washington, its agencies, and political subdivisions to intercept, or record any:

(a) Private communication transmitted by telephone, telegraph, radio, or other device between two or more individuals between points within or without the state by any device electronic or otherwise designed to record and/or transmit said communication regardless how such device is powered or actuated, without first obtaining the consent of all the participants in the communication;

(b) Private conversation, by any device electronic or otherwise designed to record or transmit such conversation regardless how the device is powered or actuated without first obtaining the consent of all the persons engaged in the conversation.

(2) Notwithstanding subsection (1) of this section, wire communications or conversations (a) of an emergency nature, such as the reporting of a fire, medical emergency, crime, or disaster, or (b) which convey threats of extortion, blackmail, bodily harm, or other unlawful requests or demands, or (c) which occur anonymously or repeatedly or at an extremely inconvenient hour, or (d) which relate to communications by a hostage holder or barricaded person as defined in RCW 70.85.100, whether or not conversation ensues, may be recorded with the consent of one party to the conversation.

(3) Where consent by all parties is needed pursuant to this chapter, consent shall be considered obtained whenever one party has announced to all other parties engaged in the communication or conversation, in any reasonably effective manner, that such communication or conversation is about to be recorded or transmitted: PROVIDED, That if the conversation is to be recorded that said announcement shall also be recorded.

(4) An employee of any regularly published newspaper, magazine, wire service, radio station, or television station acting in the course of bona fide news gathering duties on a full-time or contractual or part-time basis, shall be deemed to have consent to record and divulge communications or conversations otherwise prohibited by this chapter if the consent is expressly given or if the recording or transmitting device is readily apparent or obvious to the speakers. Withdrawal of the consent after the communication has been made shall not prohibit any such employee of a newspaper, magazine, wire service, or radio or television station from divulging the communication or conversation.

[1986 c 38 § 1; 1985 c 260 § 2; 1977 ex.s. c 363 § 1; 1967 ex.s. c 93 § 1.]

## *Notes:*

**Reviser's note:** This section was amended by 1985 c 260 § 2 and by 1986 c 38 § 1, each without reference to the other. Both amendments are incorporated in the publication of this section under RCW 1.12.025(2). For rule of construction, see RCW 1.12.025(1).

**Severability -- 1967 ex.s. c 93:** "If any provision of this act, or its application to any person or circumstance is held invalid, the remainder of the act, or the application of the provision to other persons or circumstances is not affected." [1967 ex.s. c 93 § 7.]

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

| | | |
|---|---|---|
| STATE OF WASHINGTON,<br>Plaintiff, | ) | Cause No. 13-1-00054-5<br>Appeals No. 46084-0-II |
| v. | ) | **CERTIFICATE OF SERVICE** |
| DAVID E. BLISS,<br>Defendant. | ) | |

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**CERTIFICATE OF SERVICE**

I hereby certify that I served the foregoing Brief of Petitioner consisting of 20 pages on the following individual, by mailing or causing to be mailed true copies thereof, contained in a sealed envelope, with postage paid, addressed to trial attorney, Christopher R. Lanz, Attorney at Law, PO Box 1116, White Salmon, WA 98672, who agreed to accept service for his client, David E. Bliss. Said documents were deposited in the mail on the 9th day of October, 2014.

DATED this 9th day of October, 2014.

Pamela Bell
Legal Secretary
Skamania County Prosecutor's Office

# SKAMANIA COUNTY PROSECUTOR

## October 09, 2014 - 4:16 PM

**Transmittal Letter**

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Court of Appeals Case Number: 46084-0

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Affidavit

Letter

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# SKAMANIA COUNTY PROSECUTOR

## October 08, 2014 - 5:01 PM

**Transmittal Letter**

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Court of Appeals Case Number: 46084-0

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Statement of Additional Authorities

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Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

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**Comments:**

No Comments were entered.

Sender Name: Adam N Kick - Email: kick@co.skamania.wa.us

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