SUPRME COURT NO. 98269-4
COA No. 51732-9-II

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON,

STATE OF WASHINGTON,

Respondent,

vs.

KENNETH KYLLO,

Appellant.

RESPONSE TO PETITION FOR REVIEW

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I. IDENTITY OF RESPONDENT

The State of Washington, by and through the Cowlitz County Prosecuting Attorney's Office, respectfully requests this Court deny review of the February 11, 2020 unpublished opinion of Division II of the Court of Appeals' opinion in *State v. Kyllo*, 51732-9. This decision upheld the Petitioner's convictions for two counts of Possession of a Controlled Substance with Intent to Deliver.

II. ANSWER TO ISSUES PRESENTED FOR REVIEW

The Court of Appeals properly held that the Petitioner did not receive ineffective assistance of counsel. The Court of Appeals also correctly determined that the trial court did not abuse its discretion when it denied the Petitioner's motion to suppress evidence that the search warrant permitted police to search for him and controlled substances. Finally, the Court of Appeals properly rejected the Petitioner's challenges to the search warrant.

III. STATEMENT OF THE CASE

On April 19, 2017, detectives with the Cowlitz-Wahkiakum Narcotics Task Force applied for a search warrant for Super 8 Hotel room #203 in Kelso, WA. CP 1-7. The complaint and affidavit for the search warrant stated that within 72 hours of April 19, 2017, a reliable

confidential informant had been inside of room #203 and observed approximately eight ounces of heroin. CP 5-6. The informant informed the detectives that the heroin belonged to Ken Kyllo, the Petitioner. CP 5-6. The informant identified the Petitioner via a photograph from the police database. CP 6.

The reviewing magistrate approved the search warrant and authorized the detectives to search room #203 for the Petitioner, controlled substances, drug paraphernalia, computers, cell phones, books, documents, and weapons. CP 8-11. The warrant was executed on April 19, 2017. RP (2/15/18) at 89-90, 132, 162-63, 182-83. The detectives forcibly entered the hotel room after they were denied entry following the knock and announce procedure. RP (2/15/18) at 92-93, 183-85. Upon entry, the detectives found a male, identified as Thomas Wiggins, sitting at a table. RP (2/15/18) at 94. A female, identified as Nichole Williams, was seen standing between the two beds in the room. RP (2/15/18) at 94. Both Mr. Wiggins and Ms. Williams remained where they were as the detective entered the room. RP (2/15/18) at 95, 134, 186.

The Petitioner was also in the room and was seen in possession of a backpack. As soon as the detectives entered the room, the Petitioner fled towards a window. RP (2/15/18) at 185. Det. Thoma chased after the Petitioner while ordering him to stop. RP (2/15/18) at 186. The Petitioner

ignored Det. Thoma and threw the backpack out of the window. RP (2/15/18) at 187. Sgt. Khembar Yund, who was outside of the hotel room, observed the backpack fly out of the window and took possession of it. RP (2/15/18) at 163-64.

The room was secured and the detectives began their search. On the table where Mr. Wiggins had been seated, the detectives located methamphetamine, heroin, drug paraphernalia, and a pay/owe sheet. RP (2/15/18) at 101-02, 137-142. Also on the table were two wallets: one belonging to Mr. Wiggins and the other belonging to the Petitioner. Both wallets contained pay/owe sheets. RP (2/15/18) at 103-05. On one of the nightstands, the detectives located heroin, packaging material, and drug paraphernalia. RP (2/15/18) at 96-100.

In the backpack the Petitioner had discarded, the detectives located a large amount of heroin, $4,800 in cash, packaging material, and a digital scale. RP (2/15/18) at 191-201. The money was located within the same bag as the heroin – a smaller floral bag – that was inside of the backpack. RP (2/15/18) at 193-197. The heroin was packaged in nine separate bags, each weighing approximately one ounce. RP (2/15/18) at 196.

The Petitioner was charged by information with Possession of Methamphetamine with Intent to Deliver and Possession of Heroin with Intent to Deliver. CP 17-18. The case proceed to trial on February 15,

2018. The Petitioner's trial counsel made a motion in limine to exclude testimony that the detectives were executing a search warrant to look for the Petitioner and controlled substance, arguing that it was prejudicial. RP (2/15/18) at 61. The State argued that the jury was entitled to hear why the detectives were present and seeking entry into the hotel room, and why the Petitioner was their primary focus in a room of three people. The State informed the trial court that there would be no mention of an informant or any information that had established probable cause for the search warrant. RP (2/15/18) at 61-62. The trial court agreed and allowed the State to proceed with this evidence. RP (2/15/18) at 63. The Petitioner, likewise, agreed to the State's proposed limitation of the evidence. RP (2/15/18) at 63.

The detectives testified in regards to their presence at the hotel room and what they were looking for. The detectives also testified about the evidence they located and how it connected to drug trafficking. Det. Thoma testified that the Task Force seized the money found in the backpack for forfeiture proceedings. The Petitioner had contested the forfeiture, claiming that money was his, but not attributable to drug dealing. RP (2/15/18) at 203; RP (2/16/18) at 26. During the Petitioner's testimony, he denied being responsible for the methamphetamine and heroin in the hotel room. RP (2/16/18) at 82-83. He also denied claiming

ownership of the money found in the bag with the heroin, claiming that he was trying to "get a windfall" and get free money. RP (2/16/18) at 83, 87-91.

The Petitioner's trial counsel requested an unwitting possession instruction. RP (2/16/18) at 95. The unwitting possession instruction did not state that it was a defense to the crime of Possession of a Controlled Substance with Intent to Deliver; rather, it stated that it was a defense to Possession of a Controlled Substance. CP 39. The remaining jury instructions were standard and taken directly from the WPICs. The jury deliberated for approximately 80 minutes and returned with two guilty verdicts. RP (2/16/18) at 150.

The Petitioner was sentenced to 108 in prison and 12 months of community custody. RP 4/2/18 at 105; CP 47-57. The Petitioner filed a timely appeal. CP 167. The Court of Appeals upheld the Petitioner's convictions. He now petitions this Court for review.

IV. ARGUMENT

RAP 13.4(b) states that a petition for review will only be accepted by the Supreme Court if one of four conditions are met: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with a decision of another division of the Court of Appeals; or (3) If a significant

question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court. Neither in the petition for review nor in the decision from the Court of Appeals are there any issues that would fall under one of the four conditions as outlined by RAP 13.4(b). The Court of Appeals holding in this case is not in conflict with any decisions of either the Washington Supreme Court or another division of the Court Appeals. The holding also does not raise a significant question of law or involve an issue of substantial public interest.

A. The Petitioner did not receive ineffective assistance of counsel. Therefore, the Court of Appeals' holding is not in conflict with any decisions of the Washington Supreme Court or another decision of the Court of Appeals.

The Court of Appeals held that the Petitioner's trial counsel's decision to request and argue the unwitting possession defense was a legitimate trial tactic. The Petitioner proposed the unrelated instruction; thus, he is barred from claiming error on appeal under the Invited Error Doctrine. *State v. Bradley,* 141 Wn.2d 731, 736, 10 P.3d 358 (2000) (citing *State v. Neher*, 112 Wn.2d 347, 352-53, 771 P.2d 330 (1989)). However, the offering of an incorrect jury instruction can be reviewed by examining if the Petitioner was denied effective assistance of counsel.

Bradley, 141 Wn.2d at 736 (citing *State v. Aho*, 137 Wn.2d 736, 745-46, 975 P.2d 512 (1999)).

To establish ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that prejudice resulted from that deficiency. *Strickland v. Washington*, 446 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 225, 743 P.3d 816 (1987). Thus, one claiming ineffective assistance must show that in light of the entire record, no legitimate strategic or tactical reasons support the challenged conduct. *State v. McFarland*, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1995). Prejudice is not established unless it can be shown that "there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 335. There exists a strong presumption that counsel's representation was reasonable. *State v. Estes*, 188 Wn.2d 450, 458, 395 P.3d 1045 (2017).

The first prong of this two-part test requires the defendant to show "that his . . . lawyer failed to exercise the customary skills and diligence that a reasonably competent attorney would exercise under similar circumstances." *State v. Visitacion*, 55 Wn. App. 166, 173, 776 P.2d 986 (1989) (*citing State v. Sardinia*, 42 Wn. App. 533, 539, 713 P.2d 122, *review denied*, 105 Wn.2d 1013 (1986)). The second prong requires the

defendant to show "there is a reasonable probability that, but for the counsel's errors, the result of the proceeding would have been different." *Visitacion*, 55 Wn. App. at 173.

1. The Petitioner's trial counsel's decision was a legitimate trial strategy.

As the Court of Appeals concluded, the Petitioner's trial counsel's use of the instruction during closing shows that he had a legitimate tactical reason for asking for the instruction. He was able to argue his theory of the case and point to a specific instruction. This tactic did not actually shift the burden of proof. The Petitioner's trial counsel correctly noted that the State was required to prove each and every element of the crimes charges.

The cases relied upon by the Petitioner are distinguishable from the present matter. *State v. Carter,* 127 Wn. App. 713, 112 P.3d 561 (2005) is a firearm case involving constructive possession. The present matter involves controlled substances that the Petitioner was in actual possession. Next, the unwitting possession instructions in *Carter* and *State v. Newton,* 179 Wn. App. 1056 (2014) (unpublished), were incorrect statements of the law. In both of those cases, the juries were incorrectly instructed that the unwitting possession defense directly applied to the actual crimes that were charged. In other words, the jury instructions misstated the law when they stated that unwitting possession is a defense to Unlawful Possession

of a Firearm (*Carter)* or Possession of a Controlled Substance with Intent to Deliver. (*Newton*).

The unwitting possession instruction in the present matter was a correct statement of the law - it is a defense to the crime of Possession of a Controlled Substance. That specific crime was not in front of the jury; therefore, at most, the jury was instructed on a defense for an uncharged crime. The Petitioner's trial counsel's use of an unrelated instruction allowed him to establish his theory of the case and argue that the burden of proof remained with the State.

2. The Petitioner was not prejudiced by the unwitting possession instruction.

Even with the unrelated instruction, the Petitioner was not prejudiced because there is not a reasonable probability that, despite his trial counsel's error, the outcome of the trial would have been different. Although prejudice is presumed when an instruction misstates the law, a defendant is not entitled to a new trial if the error can be declared harmless beyond a reasonable doubt. *State v. Woods*, 138 Wn.2d 191, 202, 156 P.3d 309 (2007) (citing *State v. Caldwell,* 94 Wn.2d 614, 618, 618 P.2d 508 (1980)). An instructional error is harmless if it "in no way affected the final outcome of the case." *State v. Wanrow*, 88 Wn.2d 221, 237, 559 P.2d 548 (1977). "Juries are presumed to follow the court's

instructions." *State v. Kalebaugh*, 183 Wn.2d 578, 586, 355 P.3d 253 (2015) (citing *State v. Grisby*, 97 Wn.2d 493, 499, 647 P.2d 6 (1982)).

The Petitioner was not prejudiced by the instruction. The instruction itself did not reference the crimes that were actually charged; instead, it clearly stated that "A person is not guilty of *possession of a controlled substance* if the possession is unwitting. *Possession of a controlled substance* is unwitting if..." CP 21 (emphasis added). As stated above, this makes the present matter factually distinct from the cases relied upon by the *Carter* and *Newton* cases. At most, the jury was given an instruction that simply did not apply to the case.

The unrelated instruction was the only portion of the instructions as a whole that referenced the uncharged lesser crime of Possession of a Controlled Substance. The definitional instruction clearly defined the charged crimes as Possession of a Controlled Substance with Intent to Deliver. The two "to-convict" instructions clearly identified the charged crimes as Possession of a Controlled Substance with Intent to Deliver and properly listed out all of the essential elements. The verdict forms, likewise, clearly stated the charged crimes as Possession of a Controlled Substance with Intent to Deliver.

Additionally, the State's burden of proof was not relieved or reduced by any means. As stated above, the Petitioner was able to argue

that his possession was unwitting, thereby asking the jury to reject the State's evidence that he was in actual and/or constructive possession of the drugs. The unwitting possession instruction would have been applicable to the lesser crime of Possession of a Controlled Substance. However, a Possession of a Controlled Substance with Intent to Deliver charge requires the State to prove the additional element of *intent to deliver*. Thus, the State was still required to prove beyond a reasonable doubt that the Petitioner possessed methamphetamine and heroin, that he possessed those substances with the intent deliver them, and that these acts occurred in Washington.

Since juries are presumed to follow the instructions given to them by the court, we can presume that the jury did not consider the instruction detailing an affirmative defense for an uncharged crime. Nor did the inclusion of this instruction have any effect to negate or diminish the State's burden. Therefore, we can conclude beyond a reasonable that the jury verdicts would have been the same without the error. Thus, despite a presumption of prejudice, the Petitioner was not actually prejudiced by the unrelated instruction.

A. The Court of Appeals correctly held that the trial court did not abuse its discretion when it denied the Petitioner's motion to suppress evidence that the search warrant permitted police to search for him and controlled substances. Therefore, there is no significant question of law.

1. Standard of review.

The standard of review when examining the trial court's ruling to exclude or admit evidence at trial is abuse of discretion. *State v. Swan,* 114 Wn.2d 613, 658, 790 P.2d 610 (1990); *Reese v. Stroh*, 128 Wn.2d 300, 310, 907 P.2d (1995). A trial court's decision will be reversed only if no reasonable person would have decided the matter as the trial court did. *State v. Castellanos*, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997). Proper objection must be made at trial to a perceived error in admitting or excluding evidence and failure to do so precludes raising the issue on appeal. *State v. Guloy*, 104 Wn.2d 412, 421 705 P.2d 1182 (1985).

2. The testimony was relevant and its probative value was not outweighed by a risk of prejudice.

The Court of Appeals correctly held that the trial court's admission of the evidence was not an abuse of discretion. The testimony at issue was limited to three things: (1) search warrant; (2) drugs, and (3) the Petitioner. The testimony did not detail any facts that established probable cause for the search warrant. Rather, the evidence focused on explaining why the detectives were present at that particular hotel room, on that particular day and time, looking for two specific things.

The Petitioner argues that this testimony permitted the jury to convict on "grounds of official suspicion." The jury convicted the

Petitioner based upon the actual facts of the case - he was seen in possession of a backpack, was seen throwing that backpack out of a window, the backpack contained a large amount of heroin and the Petitioner's money, the room was littered with additional drugs and drug trafficking paraphernalia, and the Petitioner had a pay/owe sheet in his wallet. In other words, the Petitioner was convicted based upon the direct observations of the detectives.

All evidence is prejudicial. This does not automatically require a finding that it outweighs the probative value. The Petitioner has not shown that the trial court abused its discretion in admitting this evidence. The testimony at issue here was introduced to provide the basis for the detectives' presence, something the jury should be entitled to hear.

B. The Court of Appeals' rejection of the Petitioner's challenges to the search warrant are not in conflict with other decisions and does not raise a significant constitutional question.

1. The Search Warrant Was Not Stale.

An affidavit or search warrant can be stale, and thus lack probable cause to search and seize evidence, in two ways: (1) "the passage of time is so prolonged" between an officer's or informant's observations of criminal activity and the presentation of the affidavit to the magistrate "that it is no longer probable that a search will reveal criminal activity"; or (2) a delay in the execution of the search warrant "may render the

magistrate's probable cause determination stale." *State v. Lyons*, 174 Wn.2d 354, 275 P.3d 314 (2012).

> [c]ommon sense is the test for staleness of information in a search warrant affidavit . . . [t]he information is not stale for purposes of probable cause if the facts and circumstances in the affidavit support a commonsense determination that there is continuing and contemporaneous possession of the property intended to be seized.

State v. Maddox, 152 Wn.2d 499, 506, 98 P.3d 1199 (2004).

In order to make a commonsense determination as to whether the information is stale, the magistrate shall look at the totality of the circumstances to include "the nature of the criminal activity, the length of the activity, and the nature of the property to be seized." *Maddox*, 152 Wn.2d at 506; *Lyons*, 174 Wn.2d at 361 ("Among the factors for assessing staleness are the time between the known criminal activity and the nature and scope of the suspected activity."). Consequently, "[t]he amount of time between the known criminal activity and the issuance of the warrant is only one factor and should be considered along with all the other circumstances. . . ." *State v. Petty*, 48 Wn. App. 615, 621, 740 P.2d 879 (1987); *State v. Hall*, 53 Wn. App. 296, 300, 766 P.2d 512 (1989) ("The

tabulation of the number of days is not the deciding factor; rather, it is only one circumstance to be considered with all the others. . . .").

Evaluating the entire affidavit and making commonsense inferences from the information contained therein is important because, "[a]n affidavit lacking the timing of the necessary observations might still be sufficient if the magistrate can infer recency from other facts and circumstances in the affidavit." *Lyons*, 174 Wn.2d at 361-62. Moreover, "even information which is stale standing alone may still provide probable cause if it is confirmed by other more recent information." *Petty*, 48 Wn. App. at 622.

Here, in making commonsense inferences from the information provided in the search warrant affidavit, it was still probable that evidence of criminal activity would be found within the hotel room at the time the search warrant was executed. The gap in time between the last reported criminal activity in the affidavit and when the search warrant was executed is minimal considering the criminal activity and the nature of the of the evidence sought. The warrant was issued on April 19. The probable cause for the warrant was based upon information Det. Thoma obtained from the informant on April 19. The informant told Det. Thoma that within 72 hours, he/she had observed approximately eight ounces, or one-

half pound, of heroin inside the hotel room. The search warrant was executed on April 19. The information was not stale.

2. The search warrant was supported by probable cause.

Article I, section 7 of the Washington Constitution requires that the issuance of a search warrant be based upon of a determination of probable cause. *State v. Vickers*, 148 Wn.2d 91, 108, 59 P.3d 58 (2002); CrR 2.3(c). "Probable cause is established when an affidavit supporting a search warrant provides sufficient facts for a reasonable person to conclude there is a probability the defendant is involved in the criminal activity." *Vickers*, 148 Wn.2d at 108; *State v. Clay*, 7 Wn. App. 631, 637, 501 P.2d 603 (1972). Whether probable cause is established is a legal conclusion that is subject to de novo review. *State v. Chamberlin*, 161 Wn.2d 30, 40, 162 P.3d 389 (2007). Great deference is given to the magistrate's determination of probable cause, and will only be disturbed if its decision to issue a warrant was based upon an abuse of discretion. *Vickers*, 148 Wn.2d at 108. "The [issuing judge] is entitled to make reasonable inferences from the facts and circumstances set out in the affidavit." *State v. Emery,* 161 Wn. App. 172, 202, 253 P.3d 413 (2011). "Doubts concerning the existence of probable cause are generally resolved in favor of issuing the search warrant." *Vickers*, 148 Wn.2d at 108-09.

> For an informant's tip (as detailed in an affidavit) to create probable cause for a search warrant to issue: (1) the officer's affidavit must set forth some of the underlying circumstances from which the informant drew his conclusion so that a magistrate can independently evaluate the reliability of the manner in which the informant acquired his information; and (2) the affidavit must set forth some of the underlying circumstances form which the officer concluded that the informant was credible or his information was credible.

State v. Jackson, 102 Wn.2d 432, 435, 688 P.2d 136 (1984) (citing *Aguilar v. Texas*, 378 U.S. 108, 114, 84 S.Ct. 1509, 1514, 12 L.Ed.2d 723 (1964) and *Spinelli v. United States*, 393 U.S. 410, 413, 89 S.Ct. 584, 587, 21 L.Ed.2d 637 (1969)). In other words, the warrant affidavit "must demonstrate the informant's (1) 'basis of knowledge' and (2) 'veracity.'" *State v. Taylor*, 74 Wn. App. 111, 116 872 P.2d 53 (1994) (quoting *Jackson*, 102 Wn.2d at 437).

The 'basis of knowledge' prong requires that the informant have personal knowledge of the facts asserted to establish probable cause." *State v. Casto*, 39 Wn. App. 229, 233, 692 P.2d 890 (1984). As the Court of Appeals noted, the ownership of the drugs was not at issue; rather, the issue was "whether the contraband would be found in the hotel room at the time of the search." The affidavit clearly established that the informant personally saw approximately eight ounces, or one-half pound, of heroin with the hotel room. The affidavit also established that the informant had

personal experience with heroin, specifically what heroin looks like, how it is typically packaged, and approximate weights based upon visual observations. The affidavit "provides precisely the type of underlying factual data from which a magistrate could reasonably conclude that [heroin] would be present." *Casto*, 39 Wn. App. at 234. The basis of knowledge prong was clearly met.

3. Although The Search Warrant Was Overbroad, The Evidence Was Still Admissible Under The Severability Doctrine.

A warrant can be overbroad either because it fails to describe with particularity items for which probable cause exists or because it describes items for which probable cause does not exist. *State v. Maddox,* 116 Wn. App. 796, 805, 67 P.3d 1135 (2003). The probable cause for the search warrant established that the informant observed approximately eight ounces of heroin and the Petitioner within the hotel room. The State agreed with the Petitioner that the warrant was overbroad and should have been limited to drugs, paraphernalia, and items and/or documents showing identification and/or ownership.

The Severability Doctrine "does not require suppression of anything seized pursuant to the valid parts of the warrant. *Id.* at 807 (citing *State v. Perrone,* 119 Wn.2d 538, 556, 834 P.2d 611 1992)). This doctrine applies when at least five requirements are met: (1) lawfully authorized

entry into the premises; (2) the warrant must include one or more particularly described items for which there is probable cause; (3) the part of the warrant supported by probable cause must be significant when compared to the warrant as a whole; (4) the officers must have found and seized the disputed items while searching for the items supported by probable cause; and (5) the officers must not have conducted a general search. *Maddox*, 116 Wn. App. at 807-09.

The warrant validly authorized a search of the hotel room for drugs. The defect of the warrant was limited to searching for items listed in C, D, H, I, and J of the warrant, rather than an invalid entry into the premises. Since the probable cause was limited to drugs, the authority to search for drugs was a significant part of the warrant. Each piece of evidence that was seized and presented at trial was found while the detectives were searching for drugs. The packaging material was located in dresser drawers. The scales were found in the backpack that contained over one-half pound of heroin. The $4,800 in cash was found in the backpack with the heroin. The pay/owe sheet was found in the Petitioner's wallet. These pieces of evidence were found in places, locations and manners in which drugs can be contained, held, or secreted. Any additional items that were seized were not used at trial. Therefore, all five

factors of the Severability Doctrine are met and the evidence was properly admitted at trial.

4. The Petitioner Did Not Receive Ineffective Assistance Of Counsel.

The Petitioner has not established that he received ineffective assistance of counsel. As detailed above, the affidavit for search warrant clearly established the CI's basis of knowledge. The warrant was not stale. And although the warrant was overbroad, the evidence was still admissible at trial. Therefore, the Petitioner's trial counsel did not fail to exercise customary skills and diligence that a reasonably competent attorney would exercise under similar circumstances. Instead, the Petitioner's trial counsel recognized that there was no issue to preserve.

V. CONCLUSION

For the reasons stated above, the State respectfully requests this Court deny Kyllo's petition for review.

Respectfully submitted this 22nd day of April, 2020.

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CERTIFICATE OF SERVICE

I, Julie Dalton, do hereby certify that the opposing counsel listed below was electronically served RESPONSE TO PETITION FOR REVIEW via the Division II portal:

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on April 22, 2020.

Julie Dalton
Julie Dalton

COWLITZ COUNTY PROSECUTING ATTORNEY'S OFFICE

April 22, 2020 - 10:01 AM

Transmittal Information

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