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NO. 56206-1-1  
Consol. With NO. 43255-9-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

DALE SCHWAB,

Appellant.

---

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

The Honorable Kenneth L. Cowser

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APPELLANT'S REPLY BRIEF

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A. ARGUMENT.

Although the superior court below repeatedly requested the prosecutor to provide *any* authority to “unvacate” a vacated conviction, the deputy prosecutor could never produce any authority to do so. 2/17/05RP at 7. On appeal, the State, at best, can only reiterate each and every claim rejected by the court below.

Despite the deputy prosecutor’s argument below that this Court’s PRP ruling, vacating the murder conviction and remanding for “further lawful proceedings consistent with *Andress* and *Hinton*,” the superior court correctly ruled this Court’s remand order for further “lawful proceedings consistent with *Andress* and *Hinton*,” had “nothing to do with reinstatement of a vacated judgment for manslaughter.” 2/24/05RP at 3-4, 6. The superior court found the language in the PRP Order remanding for further lawful proceedings did not grant the court authority to reinstate a previously vacated manslaughter conviction and to do so would be “overruling [the Court of Appeals]” or at least modifying a Court of Appeals decision. 2/24/05RP at 10-11. The court even recognized *State v. Strauss*, 119 Wn.2d 401, 832 P.2d 78 (1992), held it had not authority to reinstate a vacated conviction.

The prosecutor argued *State v. Ward*, 125 Wn. App. 137, 104 P.3d 61 (2005), applied. 2/24/05RP at 4. The superior court correctly dismissed the State's argument, concluding *Ward* was not helpful, since in that case the Court of Appeals had not vacated the defendant's first degree manslaughter conviction, while in Mr. Schwab's case the first degree manslaughter was vacated by the Court of Appeals. 2/24/05RP at 4-5, 7. Judge Cowser distinguished *Ward*, because in that case the manslaughter charge was "still alive" while the manslaughter conviction in Mr. Schwab's case was extinct and could not be revived. 2/24/05RP at 7.

The State on appeal can do no better than the deputy prosecutor below – he can find absolutely no authority for the trial court to reinstate the vacated conviction.

1. THE TRIAL COURT LACKED AUTHORITY TO REINSTATE A CONVICTION VACATED BY THIS COURT.

When a conviction is "vacated," it is wiped away forever, and cannot be "reinstated" later. See, *Chaves v. Reno*, 1999 U.S. Dist. Lexis 21151 (D. Mass. 1999) (holding vacated convictions are convictions that no longer exist). Here, this Court vacated Mr. Schwab's manslaughter conviction in 1999. 98 Wn.App. 179, 190, 988 P.2d 1045 (1999). When the mandate was issued in that

case, the superior court vacated the manslaughter conviction and since the year 2000, that conviction was wiped away forever.

A trial court may not reinstate invalidated findings or vacated convictions, as the Washington Supreme Court noted:

The State has failed to present any authority for the proposition that under these circumstances, a trial court may ignore an appellate court's determination on remand and reenter the same findings which the appellate court had earlier invalidated. The trial court on remand was bound by the law of the case. The court lacked the authority to enter the same findings that the Court of Appeals had earlier invalidated.

(Emphasis added.) *State v. Strauss*, 119 Wn.2d 401, 413, 832 P.2d 78 (1992). “A [trial] court is without power to modify, alter, amend, set aside or in any manner disturb or depart from the judgment of the reviewing court as to any matter decided on appeal.” *Commonwealth v. Williams*, 877 A.2d 471, 2005 PA Super 217, 9 (Pa. Super. 2005). Because this Court vacated a conviction, the superior court was bound by the law of the case and lacked authority to reenter the vacated conviction.

This case is directly on point with *State of Nebraska v. White*, where a second degree murder conviction was reversed based on an erroneous “to convict” jury instruction (“malice” not listed as element in jury instruction) and remanded for a new trial.

257 Neb. 943, 944, 601 N.W.2d 731 (1999). When the prosecutor tried to now charge Mr. White with second degree felony murder as an alternative theory, the Nebraska Supreme Court found a double jeopardy violation and remanded the case again. 257 Neb. at 945. But before the third remand, a change in the law demonstrated that the Supreme Court's first decision would no longer be the same decision if entered today (malice not an element of the offense and not needed in the "to convict" instruction). 257 Neb. at 945. The State moved for reinstatement of the original conviction. 257 Neb. at 945. The trial court granted the motion. *Id.*

The Nebraska Supreme Court reversed the trial court's reinstatement of the original conviction based on the law of the case doctrine. 257 Neb. at 946. The Nebraska Supreme Court ruled the trial court lacked any authority to reinstate a vacated conviction. *White*, 257 Neb. at 946.

The State ignores precedent and without any authority or support for its position merely claims when this Court subsequently vacated Mr. Schwab's second degree felony murder conviction, the decision "did not alter the validity of the jury verdict finding the defendant guilty of manslaughter" such that the trial court could properly enter judgment and sentence on the 1999 verdict. This

Court must reject the State's awkward argument which is unsupported by any authority.

The State then reiterates the argument it lost at superior court – *State v. Ward* gives the trial court authority to reinstate a vacated conviction. BOR at 7-8. Although the State claims the “situation in the present case is essentially the same,” the differences between the cases drive a stake through the State's argument. As discussed below, the *Ward* decision does not impact Mr. Schwab's case because of the following differences:

- Mr. Ward was only convicted of one crime,
- No double jeopardy violation existed,
- A reviewing court never vacated a conviction,
- In *Ward*, RAP 12.2 allowed modification of the disposition on review in the interests of justice, and
- Mr. Ward's conviction was never final, since a mandate was never issued,

a. No double jeopardy violation occurred in *Ward* because Mr. Ward was only convicted of one crime. In *Ward*, the defendant was charged with second degree felony murder and second degree intentional murder. 125 Wn.App. at 140. A jury found the defendant guilty of second degree felony murder and first degree manslaughter as a lesser included offense of second degree intentional murder. *Id.* On September 3, 2002, the

sentencing court entered a judgment and sentence solely on the second degree felony murder conviction. *Id.*

On October 24, 2002, *Andress* was decided.

On appeal in Mr. Ward's case, Mr. Ward argued *Andress* made his second degree felony murder conviction invalid. 125 Wn.App. at 141. This Court agreed and vacated the felony murder conviction. *Id.* Mr. Ward next claimed he cannot be tried or sentenced for first degree manslaughter because jury had found him guilty of that offense and the verdict *should have been vacated, or was vacated by operation of law.* 125 Wn.App. at 144.

This Court disagreed, first finding that Mr. Ward was not convicted and sentenced to both offenses, therefore there was no violation of double jeopardy, and therefore the trial court did not have to vacate the manslaughter charge. *Id.* Because there was no vacated manslaughter conviction, there was no revival of a vacated manslaughter conviction. This Court then exercised its authority to take any action required in the interest of justice under RAP 12.2 and remanded the case to the trial court to enter judgment and sentence on the manslaughter charge. 125 Wn.App. at 147.

But in the instant case, two convictions for the same offense occurred, which this Court determined was a double jeopardy violation and therefore vacated the manslaughter conviction. *State v. Schwab*, 98 Wn.App. 179, 180, 188-89, 988 P.2d 1045 (1999). Unlike the situation in *Ward* where there was no double jeopardy violation, Mr. Schwab was convicted and sentenced to manslaughter and this Court had to vacate the manslaughter conviction. 98 Wn.App. at 188-89.

b. Unlike *Ward*, the interests of justice exception to RAP 12.2 does not apply. In *Ward*, the *Andress* decision was rendered while Mr. Ward was appealing his sentence. This Court vacated the *Andress* violation and exercised its authority under RAP 12.2 to remand the case to the trial court to enter judgment and sentence on the manslaughter charge. 125 Wn.App. at 147, citing RAP 12.2. RAP 12.2 is entitled "Disposition on Review" and permits a reviewing court to affirm the trial court's decision on immediate review but also precludes relitigation of issues already decided by the appellate court:

The appellate court may reverse, affirm, or modify the decision being reviewed and take any other action as the merits of the case and the interest of justice may require. Upon issuance of the mandate of the appellate court as provided in rule 12.5, the action taken or decision made by

the appellate court is effective and binding on the parties to the review and governs all subsequent proceedings in the action in any court, unless otherwise directed upon recall of the mandate as provided in rule 12.9, and except as provided in rule 2.5(c)(2). After the mandate has issued, the trial court may, however, hear and decide postjudgment motions otherwise authorized by statute or court rule so long as those motions do not challenge issues already decided by the appellate court.

Accordingly, in *Ward*, this Court had authority under RAP 12.2 to “modify the decision being reviewed” as the interests of justice required because the rule allows a reviewing court to modify a decision on direct review and take action as the interest of justice may require.

The difference between *Ward* and *Schwab* is that in Mr. Schwab’s case, the manslaughter conviction was not on direct review – it was not a “disposition on review” and RAP 12.2 does not authorize this Court or the superior court to reinstate a vacated conviction from 1999. Instead, RAP 12.2 actually precludes this Court and the superior court from relitigating the settled issue – vacation of the manslaughter conviction. RAP 12.2.

The superior court was correct in rejecting the State’s claim that *Ward* authorized reinstating the vacated verdict, finding *Ward* “not helpful” and indicating why. 2/24/05RP at 4-5, 7. In fact, *State v. Strauss* demonstrates exactly why RAP 12.2 could apply to *Ward*

but not Mr. Schwab. In *Strauss*, the Washington Supreme Court recognized that once a mandate is issued, the appellate court decision becomes effective and binding and governs all subsequent proceedings in the action in any court. 119 Wn.2d 401, 412, 832 P.2d 78 (1992), citing RAP 12.2. This Court must reject the State's argument that *Ward* controls, as the holding of *Strauss* demonstrates the error of the State's argument that RAP 12.2 or *Ward* control in this case on appeal.

c. Unlike Mr. Schwab's manslaughter conviction, Mr. Wards conviction was not final. Although RAP 12.2 does not address final convictions, the rule does refer to RAP 12.5 defining "mandate" and providing the timeline for the mandate process. RAP 12.2 also refers to RAP 12.9, "Recall of Mandate," which allows this Court to recall the mandate. The State has withdrawn its request to recall the mandate, and now claims the motion to recall mandate is moot and does not argue further on appeal.

Importantly, the Washington Supreme Court has addressed the finality of a decision upon mandate pursuant to the Rules of Appellate Procedure. In *State v. Hanson*, 151 Wn.2d 783, 790, 91 P.3d 888 (2004), the Supreme Court noted that RAP 12.7 defines when a case is final – upon the finality of a decision by an appellate

court. Under RAP 12.7(a), this Court “loses the power to change or modify its decision (1) upon issuance of its mandate in accordance with rule 12.5, except when the mandate is recalled as provided in rule 12.9 . . . . Here, the 1999 *Schwab* decision was final – a mandate issued, and neither the superior court or this court has authority to modify the decision, especially without a recall of the mandate, which the State will not discuss on review.

d. *Taflinger* and *Byrd* similarly do not assist the State’s argument. The State argues *Taflinger v. State*, 698 N.Ed.2d 325 (Ind. App. 1988) addressed a comparable situation to the instant case. BOR at 6. In *Taflinger*, the defendant was convicted of attempted murder and neglect of a dependent child, but sentenced only to attempted murder to avoid a double jeopardy violation. 698 N.E.2d at 326. On appeal, the attempted murder conviction was reversed, and on remand the State refiled the neglect charges. 698 N.Ed.2d at 326. The State then filed a motion to reinstate the previously dismissed neglect conviction, which the trial court granted and then sentenced Mr. Taflinger on the neglect conviction. *Id.*

The Indiana Court of Appeals affirmed, ruling the neglect charge was factually a lesser included offense of attempted murder

and the trial court properly dismissed the lesser offense at the initial sentencing. *Id.* at 327. The Court found Mr. Taflinger was already convicted of the lesser included neglect of a dependent child and double jeopardy did not bar resentencing on that conviction. *Id.* at 328.

Mr. Schwab's case is not similar at all. First, as argued in the proceeding section concerning *Ward*, the initial sentencing court did not sentence Mr. Taflinger twice for the same offense, and unlike the *Schwab* case, neither the superior court nor the appellate court had vacated the remaining conviction. Instead, in *Taflinger* the lesser included neglect offense was dismissed before sentence was imposed. 698 N.E.2d at 326. Moreover, in Mr. Schwab's case, first degree manslaughter is not a lesser included offense to second degree felony murder. See *State v. Gamble*, 154 Wn.2d 457, 464, 114 P.3d 646 (2005), citing *State v. Tamalini*, 134 Wn.2d 725, 730, 953 P.2d 450 (1998).

Importantly, as the Supreme Court in *Gamble* correctly decided and all parties before the Supreme Court agreed, the Court of Appeals vacate the second degree felony murder conviction with instructions for the trial court to enter a conviction of first degree manslaughter and reversed the Court of Appeals. *Id.*

at 470. The decision was based on the fact that manslaughter is not a lesser included offense. 154 Wn.2d at 469. Accordingly, *Taflinger* does not assist the State's argument and this Court should reject the State's assertion the Indiana Court's decision had a comparable situation to the instant case.

The last case the State cites for its proposition a prior vacated conviction can be reinstated is *Byrd v. United States*, 500 A.2d 1376 (D.C. App. 1985), *modified en banc*, 510 A.2d 1035 (D.C. App. 1986). In a procedurally complicated case, the appellant argued he may not be convicted of and receive concurrent sentences for first degree felony murder and first degree premeditated murder. 500 A.2d at 1377. The Court agreed, but felt constrained by earlier holdings. *Id.* The Court remanded the case to the superior court to decide which murder conviction should be vacated. 500 A.2d at 1389. In a footnote not part of the holding and nothing more than *dicta*, the Court merely informed the trial court in the decision that if the remaining murder conviction was later subjected to a successful collateral attack, the trial court had permission to favorably consider a government motion to reinstate the vacated murder conviction.

The facts of *Byrd* are not similar to the facts in Mr. Schwab's case. First, it is not the Court of Appeals that vacated any conviction – in fact, the Court specifically left that decision to the lower court. Second, the issue was not ripe and no holding on whether the superior court could reinstate its future vacated conviction was made. Thirdly, in a unique procedural case, the Court merely informed the trial court that it may review the State's potential motion to reinstate a conviction the superior court once vacated. Certainly, the law of the case doctrine as it applies to Mr. Schwab's case -- lower court lacks authority to relitigate issues the Court of Appeals addressed – is not the same as a reviewing court informing a superior court it could reconsider its own decision on a subsequent motion.

To this very day, the State has utterly failed to cite any authority whatsoever to support its argument that a superior court can reinstate a conviction a reviewing court has vacated. Mr. Schwab, instead, has cited RAP 12.2, 12.5, 12.7, 12.9, *State v. Strauss*, and the Nebraska case, *Nebraska v. White*, 257 Neb. at 945-96, all which correctly prohibit the superior court from reinstating a vacated conviction.

2. THE LAW OF THE CASE DOCTRINE PREVENTS APPELLATE COURTS FROM REDECIDING ISSUES AFTER A CONVICTION IS FINAL

a. The Rules of Appellate Procedure prohibit this

Court from modifying decisions after a mandate is filed. RAP

12.7(a) states the Court of Appeals “loses the power to change or modify its decision (1) upon issuance of mandate in accordance with rules 12.5, except when the mandate is recalled as provided in rule 12.9, (2) upon acceptance by the Supreme Court of review of the decision of the Court of Appeals, or (3) upon issuance of a certificate of finality as provided in rule 12.5(e) and rule 16.15(e).”

See §A(1)(c), *supra*. The State never addresses the Rules of Appellate Procedure in its Brief of Respondent except for RAP 2.5(c) (discussed below), hoping this Court will simply ignore the mandates of the rules. Mr. Fine should fully understand the importance of finality in litigation, since his own name is attached to at least 15 appellate decisions requesting court’s not to decide

issues following the mandate.<sup>1</sup> This Court should reject the State's sudden invitation to relitigate issues already decided and exercise discretion which the Rules of Appellate Procedure squarely prohibit.

The State, rather than focus on any authority this Court may have to alter its published decision, argues instead that the law of the case doctrine would not apply here because "this court's decision on the original appeal has already been set aside, at his request." BOR at 11. The State can cite no authority for this position and the argument is baseless. This Court vacated a conviction in 1989, that appeal was mandated in 1989, and the decision was final. The State's attempt to analogize this case to sentencing cases is ludicrous, because Mr. Schwab's appeal does

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<sup>1</sup> See e.g., *Shumway v. Payne*, 136 Wn.2d 383, 400, 964 P.2d 349 (1998) (Mr. Fine arguing Shumway's personal restraint petition should be dismissed as untimely since filing beyond one year of final conviction and RAP 18.8(b) expresses a public policy preference for the finality of judicial decisions over the competing policy of reaching the merits in every case); *In re Pers. Restraint of Well*, 133 Wn.2d 433, 946 P.2d 750 (1997) (Mr. Fine arguing finality of conviction should preclude late PRP review); *In re Pers. Restraint of Johnson*, 131 Wn.2d 558, 567, 933 P.2d 1019 (1997) (Mr. Fine argues but Supreme Court rejecting idea that traditional principles of res judicata and finality apply to PRPs); *State v. Linton*, 122 Wn.app. 73, 80-81, 93 P.3d 183 (2004) (Mr. Fine arguing State can retry defendant on hung charge, but this Court ruling "The public interest in the finality of criminal judgments is so strong that an acquitted defendant may not be retried even though "the acquittal was based upon an egregiously erroneous foundation", citing *Fong Foo v. U.S.*, 369 U.S. 141, 143, 82 S. Ct. 671, 7 L. Ed. 2d 629 (1962)).

not concern a sentencing plan or an expectation of finality in a sentence.

The State's second argument that this Court can reconsider a prior decision when the governing law has changed or the decision is clearly erroneous similarly fails. First, when this Court issued its decision in 1989, the decision was correct – double jeopardy barred two murder convictions for the same offense. That decision was not “clearly erroneous” as the State claims. BOR at 12-13. Neither RAP 2.5(c) or *Folsom v. Spokane County*, 111 Wn.2d 256, 264, 759 P.2d 1196 (1988), are instructive since this Court made no error in 1989 when it vacated the manslaughter conviction based on the double jeopardy violation and the conviction was final when the mandate was issued.

The State's argument that RAP 2.5(c)(2) permits this Court to reconsider prior appellate decisions is meritless. RAP 2.5(c) specifically restricts the law of the case doctrine only in situations when the “same case is again before the appellate court following a remand.” First, this is not the “same case . . . again before the appellate court” -- this case is not about a double jeopardy violation of being twice convicted for one offense as it was in *State v. Schwab*. Second, this is not the same case before the appellate

court *following a remand*. The language, “following a remand” means that when the superior court decides an issue after the appellate court renders a decision, and that issue is again brought up on appeal, this Court under RAP 2.5(c)(2) can re-decide the opinion of the law at the time of the later review. But this appeal is not before this court following remand from the 1999 decision. Instead, this appeal occurs five years later and addresses issues never raised in the first appeal. RAP 2.5(c)(2) simply does not apply to this case.

Similarly, the State’s argument that when a change of law occurs, this Court should be allowed to alter its earlier decision is contrary to the holding of the case it cites, *Coffel v. Clallam County*, 58 Wn.App. 517, 521, 794 P.2d 513 (1990). The *Coffel* Court ruled, “The court should also decline to follow a previous decision of its own or of a higher court if the controlling law changes *between the time the decision was entered and the time the case is tried on remand.*” *Id.* at 521. The State has either simply ignored the second half of the *Coffel* holding or has intentionally tried to lead this Court astray. In this case, obviously any “change in law” did not occur between this Court’s 1999 decision and the time of the trial court’s order correcting the judgment in sentence on April

13, 2000. CP 54-55. Moreover, as the Supreme Court has repeatedly announced, it did not announce a “change in law” but rather as a matter of first impression interpreted what the 1976 amendment to second degree felony murder statute meant since its inception. *Hanson*, 151 Wn.2d at 787 (Court notes none of the prior case law dealt with the issue in *Andress*).

If this Court accepts the State’s argument that it can simply reconsider prior appeals already mandated, such an argument should equally apply to the hundreds of defendants seeking relief after their cases are mandated with exceptional sentences, so that these defendants may receive the benefits of the “change of law” announced in *Washington v. Blakely*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), without concern for retroactivity application. Others would also like to recall certain mandates for many child hearsay cases so that defendants would be permitted to benefit from *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). See *In re Pers. Restraint of Markel*, 154 Wn.2d 262, 265, 111 P.3d 249 (2005) (holding “because *Crawford* does not apply retroactively to cases on collateral review, and because the Markels’ sentencing does not raise a *Blakely* issue, their personal restraint petitions must be dismissed.”)

Should this Court accept the State's bold new stance, the Washington Appellate Project asks this Court to publish the decision in this case in order for the hundreds of people deprived of relief under *Blakely* and *Crawford* can now seek relief. This office would appreciate a quick decision on this issue – let us know when you have opened up the floodgates and we will begin preparing arguments for hundreds of defendants entitled to relief because of a change of law. The State's position is simply without any support of law.

Lastly, the State's third argument, that this Court's PRP ruling vacating the second degree felony murder conviction for "further lawful proceedings" must be rejected. This Court obviously added the language because the *Andress* Court vacated the conviction with the same language. The State's argument that instead this Court with the use of the language actually gave the superior court permission to unvacate a conviction is simply without any merit and was properly rejected by the superior court.

B. CONCLUSION.

The trial court lacked authority to reinstate a conviction in 2005 that this Court held must be vacated in 1999 and which the trial court amended the judgment and sentence in 2000 in

compliance with this Court opinion. At the superior court level and on appeal, the State can present absolutely no authority for its position that Mr. Schwab's vacated manslaughter conviction can simply be reinstated. Mr. Schwab requests this Court to follow binding precedent and the Rules of Appellate Procedure and reverse the trial court's 2005 order reinstating his 1999 conviction with instructions to vacate his convictions and dismiss his case with prejudice.

DATED this 24<sup>th</sup> day of January, 2006.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'J. B. Saunders', written over a horizontal line.

JASON B. SAUNDERS (24963)  
Washington Appellate Project (91052)  
Attorneys for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
V.	)	COA NO. 56206-1-I
	)	
DALE SCHWAB,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

I, MARIA RILEY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

ON THE 24<sup>TH</sup> DAY OF JANUARY, 2006, I CAUSED A TRUE AND CORRECT COPY OF THE **APPELLANT'S REPLY BRIEF** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- SNOHOMISH COUNTY PROSECUTING ATTORNEY  
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**SIGNED** IN SEATTLE, WASHINGTON THIS 24<sup>TH</sup> DAY OF JANUARY, 2006.

X \_\_\_\_\_ 

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STATE OF WASHINGTON  
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