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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SANTA CLARA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, v. ANTOLIN GARCIA-TORRES, Defendant.	Criminal Case No. 213515 PEOPLE'S OPPOSITION TO DEFENDANT'S MOTION FOR SEVERANCE

The defendant has moved for severance of Count 1, the kidnap and murder of Sierra LaMar, from Counts 2-4, the attempted kidnappings of Cyndi Lundy, Annette Walters and Eva Orozco, each in a Safeway parking lot. The defendant has failed to meet his burden of establishing that joinder of the charges would result in a "substantial danger of prejudice" requiring severance. *See People v. Soper* (2009) 45 Cal.4th 759, 773.

Because the People have extensively briefed the question of cross-admissibility[1/], which ordinarily dispels any notion of prejudice [*id.* at 775], the People will not repeat those arguments here. However, prior to addressing the defendant's motion in detail, it must be noted that the

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1/ The briefing is found in the People's Trial Memorandum filed with this Court on August 29, 2016 at pp. 18-36.

defense's statement of facts is inadequate as it is missing substantial relevant facts to joinder and cross-admissibility. The People refer the Court to its statement of facts in its trial memorandum.

A. Legal Standard

There is no federal constitutional right to severance. The California Constitution enshrines the right of the People to establish that criminal cases may be joined. Ca. Const. art. I, sec. 30(a) (Prop 115, passed 6/5/1990). To that end, and passed in the same initiative, the People enacted Penal Code section 954.1 which states:

> In cases in which two or more different offenses of the same class of crimes or offenses have been charged together in the same accusatory pleading, . . . evidence concerning one offense or offenses need not be admissible as to the other offense or offenses before the jointly charged offenses may be tried together before the same trier of fact.

Pen. Code §954.1. The Penal Code does permit a trial court to grant severance; however there is a strong presumption that joined charges be tried at the same time. *People v. Soper* (2009) 45 Cal.4th 759, 771-772; *Alcala v. Superior Court* (2008) 43 Cal.4th 1205, 1220. It cannot be over emphasized that the California Supreme Court has made clear that the Legislature, and the People, have prescribed joint trials and the court legitimately prefers them. *People v. Geier* (2007) 41 Cal.4th 555, 578, *People v. Stanley* (2006) 39 Cal.4th 913, 933; *People v. Ochoa (*1998) 19 Cal.4th 353, 408–409; *People v. Mason* (1991) 52 Cal.3d 909, 935; *Frank v. Superior Court* (1989) 48 Cal.3d 632, 639; and *People v. Bean* (1988) 46 Cal.3d 919, 939-940. While the defendant ignores resource considerations, the benefits to the People in conservation of scarce judicial resources weighs strongly in favor of denying severance and is a legitimate consideration for this Court. *Soper*, *supra*, 45 Cal.4th at 774.

The burden is on the defendant to establish to this Court that "there is a substantial danger of prejudice requiring that the charges be separately tried." *Soper*, *supra*, 45 Cal.4th at 773. The defendant bears the burden because, in part, the problem of confusing the jury with collateral matters – such as the defendant escaping punishment for other crimes – does not arise in joined charges. *Id.* In fact, the defendant "must make a *stronger* showing of potential prejudice than would be necessary to exclude other-crimes evidence in a severed trial." *Soper, supra*, 45 Cal.4th

at 774 (quoting *Alcala, supra*, 43 Cal.4th at 1222 n.11, emphass in original). When evaluating whether the defendant has established a substantial danger of prejudice requiring severance, "a trial court may *not* grant severance, where the statutory requirements for joinder are met, solely on the ground that evidence in the joined cases is *not* cross-admissible." *People v. Zambrano* (2007) 41 Cal.4th 1082, 1129 n.10 (emphases in original).

On appellate review, only if the defendant can make a "clear showing of prejudice" establishing an abuse of discretion by the trial court will the ruling be overturned. *Alcala, supra,* 43 Cal.4th at 1220. Review is limited to the record in existence when the ruling is made as opposed to what might later come out during the trial. *People v. Merriman* (2014) 60 Cal.4th 1, 37. As a result, this Court should not speculate regarding what the record might look like at the end, but rather evaluate the motion on the record as it stands.

B. Proper Joinder Under Penal Code section 954

Here, the cases meet the statutory requirements for joinder and the defendant has properly conceded that the charges are properly joined. Because the defendant apparently only concedes they are properly joined as being of the same class of crimes, a brief discussion of this issue will follow to support both prongs, although only one is required for joinder.

"The *prosecution* is *entitled* to join offenses under the circumstances specified in [Penal Code] section 954. *Soper, supra,* at 773 (quoting *People v. Ruiz* (1988) 44 Cal.3d 589, 605, emphases in original). Penal Code section 954 expresses a legislative preference for joint trials of similar offenses and sets forth two separate statutory bases for joinder. *People v. Miller* (1990) 50 Cal.3d 954, 987. The offenses must either be "offenses of the same class of crimes" or "different offenses connected together in their commission." Pen. Code §954.

People v. Simon (2016) 1 Cal.5th 98, rather summarily disposed of the issue by stating: "[b]ecause murder, rape, robbery, and kidnapping are all assaultive crimes against the person, the [joined offenses] both involved 'offenses of the same class of crime,' thus satisfying the statutory requirements for joinder under section 954." *Simon*, 1 Cal.5th at 19 fn.9.

In *People v. Matson* (1974) 13 Cal.3d 35, the defendant was charged with raping Mrs. H. and burglarizing the apartment of Miss G. *Id.* at 37. Mrs. H. was moving out of her apartment, leaving the door ajar and making numerous trips to her car. *Id.* at 38. During these trips she encountered the defendant, who appeared to be searching for a dog. *Id.* After packing her car and making her way back to her apartment, the defendant reappeared and forced her into the bedroom where he raped her. *Id.* Eleven days later, Miss G. made numerous trips to the apartment from her car, closing the door but never locking it. *Id.* She saw a man walk past her and upon reentering her apartment found him standing behind the door. *Id.* Miss G. ran from the apartment. *Id.* The court ruled that joinder was proper because the offenses had several elements of substantial importance in common and were therefore offenses connected together in their commission - most notably the modus operandi of lying in wait for lone women leaving their apartments unlocked while making repeated trips to load or unload their cars at night. *Id.* at 39.

Here, there is no question that the crimes are of the same class of crimes because they both involve the intent to kidnap and are assaultive in nature. Additionally, the crimes are connected together in their commission because, as exhaustively explained in the People's trial memorandum discussing Evidence Code section 1101, the events share several common characteristics demonstrating the defendant's motives, as well as the common scheme and plan to stalk vulnerable women in order to isolate them for the commission of further criminal acts.

C. Cross-Admissibility

As noted, the People have extensively briefed the question of cross-admissibility. The fact of cross-admissibility ordinarily dispels "any suggestion of prejudice" and is a sufficient reason in itself for this Court to deny severance. *Alcala*, *supra*, 43 Cal.4th 1205, 1220. Because there is no question that the burden rests on the defendant in this severance motion, the burden to demonstrate lack of cross-admissibility also rests upon the defendant. *Soper*, *supra*, 45 Cal.4th 759, 773; *Alcala*, *supra*, 43 Cal.4th at 1222 n.11. It should be noted that two way cross-admissibility is not required. *People v. Hartsch* (2010) 49 Cal.4th 472, 493. It is also emphasized that cross-

admissibility is not required to avoid severance, and Penal Code section 954.1, enacted as part of Prop 115, makes that clear.

The People will discuss defendant's 1101(b) arguments first, in keeping with the order of the People's cross-admissibility briefing on the matter.

1. Section 1101(b)

With respect to the defendant's argument on common scheme or plan, his articulation of the facts is woefully inadequate. First he suggests that there was no crime against Cynthia Lundy. Curiously, defendant never made that argument under Penal Code 995(a)(1)(B). The defendant additionally ignores the known facts of stalking of Ms. Lundy before he pulled on her car handle so hard he fell backwards. The defendant further ignores the known facts that, deterred from that attack, he went to another Safeway and attacked Annette Walters with a stun gun. The defendant ignores the state of the evidence and the probable cause finding of the grand jury by stating that it is unknown whether the attacker of Ms. Lundy and Ms. Walters is the same person. As the defendant is fully aware, the grand jury came to a different conclusion and "with evidence admitted under section 1101, the jury must determine whether the defendant committed the act in question." *People v. Cottone* (2013) 57 Cal. 4th 269, 287. "There is no requirement that it must be conceded, or a court must be able to assume, that [a] defendant [is] the perpetrator in both sets of offenses." *Soper*, *supra*, 45 Cal.4th at 778. It is the jury that determines the accuracy of the defendant's involvement in the other acts evidence, and if they find that evidence lacking, they must disregard it. *Id.* This is true even in a death penalty case. *People v. Leon* (2015) 61 Cal.4th 569, 599.

Curiously, defendant trots out *People v. Earle* (2009) 172 Cal.App.4th 372 in his evidence code 1101(b) discussion when the quote from *Earle* was with respect to its 1108 discussion. Nonetheless, *Earle* came to the conclusion that the commission of indecent exposure does not rationally support the inference that someone has a propensity to commit rape. Regardless of the analysis of *Earle* on this point - which is nothing more than an application of Evidence Code section 352 - it is not the fact pattern here. The present case is about the attempted (or completed) kidnappings of females, one of which has never been seen again; not indecent exposure leading to

a propensity to commit a sexual offense, and therefore, a propensity to rape. To read *Earle* any further, which counsel implies that this Court should by requiring a degree of similarity, would run afoul of the command of a superior tribunal, the California Supreme Court, in *Merriman , supra* 60 Cal.4th at 41-42, as well as *People v. Loy* (2011) 52 Cal.4th 46, 63, both of which note that similarity is not required under 1108. See also *People v. Jones* (2012) 54 Cal.4th 1, 50.

The defendant fails to address identity or the doctrine of chances, and only cursorily addresses motive and intent. In his cursory discussion of motive and intent, counsel simply says that the motive and intent of the suspect is unknown. Is counsel suggesting that there must be proof beyond a shadow of a doubt before other crimes evidence is admissible? Certainly he cites to no case that holds as much. As noted above *Cottone*, *Soper* and *Leon* hold to the contrary. *See also People v. Rogers* (2013) 57 Cal.4th 296, 330-331, *People v. Foster* (2010) 50 Cal.4th 1301, 1332. Counsel repeatedly states that no crime occurred despite the grand jury's findings of probable cause. While counsel is free to argue to the jury such things, it does not assist this Court's inquiry to assume no evidence in support of the charges when a grand jury determined that there is such evidence. Penal Code 995(a)(1)(B) provided the defendant the right to challenge the sufficiency of the evidence regarding identity, intent, whether there was an attempted kidnapping during the commission on an attempted carjacking, or any of the other elements he now claims are entirely lacking.

The defendant's arguments do not address the vast majority of the cross-admissibility of the evidence under 1011 for motive and intent, as well as common scheme and plan, identity, and the doctrine of chances and ignore critical facts more fully discussed in the trial memorandum. As it is his burden to show lack of cross-admissibility, the defendant's motion fails.

2. Section 1108 - *People v. Villatoro* (2012) 54 Cal.4th 1152

The defendant incorrectly states that *People v. Villatoro* (2012) 54 Cal.4th 1152 holds that "it is improper to consider evidence of uncharged sex offenses as propensity in determining whether the defendant committed a charged murder, *even when the alleged murder occurred during an alleged rape.*" [Def.'s Severance at 5:7-9.] *Villatoro* holds no such thing and was not a murder

case so it never addressed the question the defendant now asserts it resolved. Rather, *Villatoro* expressly held that **concurrently** charged sex offenses may be considered as propensity evidence for other charged sex offenses. *Villatoro*, 54 Cal.4th at 1159-1167. Nothing about the majority holding in *Villatoro* suggests that defendant's propensity to commit a sexual assault shown by the evidence in the Safeway attacks cannot be considered in the determination of a sexual offense felony murder theory, or the murder itself.

Evidence Code section 1108 permits the admission of sexual offenses without the limitations found in Evidence Code section 1101. EC §1108(a). This is true, even as in the case here, where the underlying theory for felony murder is an attempted sex crime listed in section 189. *People v. Story* (2009) 45 Cal.4th 1282, 1289-1295. Despite the plain language found in section 1108, the defendant attempts to suggest that somehow the evidence can only be admitted on the question of the sexual offense, but not on the question of the murder. Section 1108 places no such restriction, nor does case law, and indeed, it would be illogical to preclude such a consideration. When a defendant has a propensity to commit a qualifying sexual offense and during the commission of a charged sexual offense (the murder of Sierra), he kills, section 1108 permits the evidence to be used without limitation, in part because similarity, or any other 1101(b) factor, is not required under EC §1108. *Jones, supra,* 54 Cal.4th at 50.

Defendant's quote from Justice Corrigan is from her **dissent** from the majority's reasoning. Additionally, Justice Corrigan was using a hypothetical set of facts that were not before the Court. Therefore, *Villatoro* did not present the question that defendant suggests it resolves. His authority is anything but given that it is a dissent expressing dicta on a hypothetical fact pattern. Regardless, the defense argument - not particularly salient to their severance motion because it assumes admissibility for the sexual offense - would be illogical since the reason Sierra was killed, and her body was spirited away, was to hide the sexual offense that he committed. Should the jury determine this is what happened, these facts cannot be separated from each other.

Regardless, even if the defendant (and Justice Corrigan) is correct, this issue is resolved with proper instruction, not exclusion of the evidence or severance.

3. Section 1108 - *People v. Jandres* (2012) 226 Cal.App.4th 340

As in *Villatoro*, the defendant also misapprehends *Jandres*. In *Jandres*, the Court of Appeal found that the jury could have concluded the evidence was sufficient to constitute a sexual offense under section 1108. However, the problem was that the jury was **not instructed** on the elements of the qualifying sexual offense, a fact which the Attorney General conceded. The People agree that in order for the jurors in this case to consider the Safeway attacks a sexual offense under section 1108, they must be so instructed. The defendant's comment that "the appellate court observed that evidence authorized by section 1108 is limited to sexual offenses, which excludes attempted kidnapping such as the Safeway incidents" [Def.'s Severance at 5:17-19], is belied by the facts and holding of *Jandres*. In *Jandres*, the Court found that the sexual conduct of the defendant that included an attempted kidnapping could have been found by the jury to be a sexual offense. The defendant's additional suggestion that *Jandres* requires the prior sexual offense to be charged is simply false.

D. Severance Is Not Compelled Even If Not Cross-Admissible

The California Supreme Court, recognizing the clear language of Penal Code section 954.1, noted that **if it is determined** that the evidence would not be cross-admissible then they would move on to:

> consider three additional factors, any of which — combined with our earlier determination of absence of cross-admissibility—might establish an abuse of the trial court's discretion: (1) whether some of the charges are particularly likely to inflame the jury against the defendant; (2) whether a weak case has been joined with a strong case or another weak case so that the totality of the evidence may alter the outcome as to some or all of the charges; or (3) whether one of the charges (but not another) is a capital offense, or the joinder of the charges converts the matter into a capital case.

Soper, *supra*, 48 Cal.4th at 775. In other words, the additional three factors are not part of the analysis unless the trial court determines that the evidence would not be cross-admissible. *See also Alcala, supra*, 43 Cal.4th at 1227.

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1. *Extreme Disparity* and Inflaming the Jury

The defendant's argument in this area is cursory and factually flawed. To ensure that this Court has the necessary facts and authority to deny the defendant's motion, the People will address relevant arguments whether or not the defendant has made them.

It is the defendant's burden, and he must show, an "extreme disparity" between the alleged inflammatory and non-inflammatory offenses. *Belton v. Superior Court* (1993) 19 Cal.App.4th 1279, 1284. Even assuming the crimes against Sierra are inflammatory, because Sierra's body has never been found and the exact manner in which she was killed is not known, the potential for an extreme disparity of inflamed passions of the jury are substantially minimized. The jury in this case, with respect to the crimes against Sierra, will hear about human cells, DNA, statistics and social media accounts; they will not be looking at gruesome photos of what the defendant actually did in this case. Keeping the jury's attention (and awake) during portions of this testimony seems a more likely than the testimony regarding Sierra's death being unusually inflammatory when compared to the Safeway attacks.

Additionally, it can hardly be argued that the stalking of women who are alone in parking lots in order to attack them and take them to an isolated location for further criminal activity is significantly less (or more) inflammatory than the crimes against Sierra. The jury is just as likely to – and indeed in determining motive and intent they will be asked to – consider what the defendant was planning to do to the Safeway victims (and Sierra). In reality, because the Safeway victims will testify, the Safeway attacks carry an additional weight to make them quite comparable even though Sierra was killed.

While it is true Sierra was younger than the Safeway victims, she was not especially so given that Ms. Orozco was eighteen years old at the time she was attacked and the defendant was then seventeen. Because of the passage of time since the crimes, no one will appear especially vulnerable or young when presented to the jury in person. It would be a different question if Sierra were walking to her school bus as a sixth grader, instead of a sophomore in high school.

In other motions (e.g. the change of venue), the defendant argued that Sierra's disappearance has been a highly publicized event. While true, so were the Safeway attacks at the time. Indeed, it was the publicity of those events that triggered the memory of Sgt. Leon when investigating Sierra's murder to call up Morgan Hill Police Department and ask for the evidence in those cases to see if the cases were linked. Fingerprint examination revealed that they were.

The defendant has argued elsewhere that the crimes against Sierra cause people to feel insecure in their homes and gives them pause about whether to allow their children to walk or take the bus to school. This is no doubt true, but the idea of adult women ages 18 to 47 being attacked in a grocery store parking lot, with no obvious motive – other than to sexually assault them – is no less inflammatory. A review of the testimony of Cyndi Lundy at the grand jury reveals a chilling tale: she perceived the threat as defendant was many yards away, only to watch him pick up the pace as he approached her; she fled to her car and slammed her door shut as defendant pulled on the door handle trying to get to her. Ms. Lundy's testimony will reveal the power of that moment and, like the other Safeway attacks, will show that even though Lundy, Walters and Orozco were not killed, the testimony is chilling and will serve to put those charges on an equal footing with the crimes against Sierra.

On this prong, the sum total of defendant's argument consists of the following statement: "The government is attempting to try the Safeway incidents along with the alleged murder of Ms. Lamar to inflame the passions of the jury by claiming he is a predator who assaults and kills women." [Def.'s Severance at 9:24-26.] Putting aside the defendant's questionable inference regarding the government's motives, what is plainly true is that the government's motives have no bearing on whether severance is warranted. The issue is whether "some of the charges are particularly likely to inflame the jury against the defendant" [*Soper*, *supra*, 48 Cal.4th at 775]; an argument that the defendant has fully ignored despite his burden to show the contrary.

2. Quantum of Evidence

"It is always . . . possible to point to individual aspects of one case and argue the one is stronger than the other." *Soper*, *supra*, 45 Cal.4th at 781. Imbalance in the evidence does not

warrant a severance and indeed severance is not mandated when "joinder makes it more difficult for a defendant to avoid conviction" when compared with separately tried charges. *Id.* The significance of this point is underlined by the fact that this prong is only considered when the evidence is **not** otherwise cross-admissible. *Soper*, *supra*, 48 Cal.4th at 775; *Alcala, supra*, at 43 Cal.4th at 1227 ; *People v. Ybarra* (2016) 245 Cal.App.4th 1420, 1435. In other words, even cases where one case is stronger than the other and the evidence is not cross-admissible, severance is not mandated.

Just as with questions regarding disparities in whether some of the joined crimes may unusually inflame the passions of the jury when compared with those that do not, when arguing the alleged prejudicial spill-over effect, the defendant must show an "extreme disparity" in the strength of the evidence with respect to the charges. Instead of addressing this prong, the defendant simply argues that because there is no body, the murder charge is weak. However, the production of a body is not required for conviction on a murder charge. *People v. Ruiz* (1988) 44 Cal.3d 589, 610-611; *People v. Manson* (1977) 71 Cal.App.3d 1, 42-43.

To be blunt, the defendant's factual account is non-existent as he does not address the relative strength of the charges. In addition, his factual description is cursory and inadequate to assist this Court in the analysis of this prong. As it is the defendant's burden for this motion, the People do not intend to attempt to craft their argument for them in order to contradict it with the facts. The People will respond to this argument should the defendant choose to make it.

3. Capital Case Joined with non-Capital Case

The defendant summarily states the obvious, that this is a capital case joined with a non-capital case. He says no more. However, even assuming the offenses are not cross-admissible, this fact does not establish an unduly prejudicial spill over necessitating severance. If it did, the cases would establish that this prong is sufficient by itself. The cases say no such thing. There is no heightened scrutiny for a capital charge being joined with other charges. *Alcala*, *supra*, 43 Cal.4th at 1229 n.19. In fact, a review of several California Supreme Court cases where this factor was present shows that this factor has not weighed heavily on the Court.

For example, in *People v. Arias* (1996) 13 Cal.4th 92, despite the fact that this prong was present, the court did not address it at all despite what might appear to be a compelling fact pattern for the defense. Arias, during the course of a robbery of a Beacon gas station in Sacramento, CA, stabbed and killed John Waltrip for no particular reason as the victims were attempting to comply with the demands for money. As part of the same prosecution, a couple of weeks after the murder, the defendant produced a gun while exchanging insurance information after a minor traffic accident with Judy N. along the side of a road in Sacramento County. Because Judy N. had insufficient cash in her purse, the defendant thereafter forced her into his car and they proceeded to drive looking for an ATM. During the drive, the defendant ordered Judy N. to take her clothes off, including her jeans, pantyhose and underwear. During the ordeal, the defendant forced Judy to digitally penetrate herself and he did the same. Eventually the defendant forcibly raped and sodomized Judy in an isolated area in Yolo County. Defendant thereafter forced Judy to drive him back to Sacramento in order to withdraw more money from her bank account. Judy, seeing a security guard nearby as the defendant was waiting in line for the ATM, grabbed her jeans and ran out of the car yelling that the defendant had a gun. Defendant then stole a truck at gunpoint from Linda McCord; however, he was arrested shortly thereafter in the stolen truck after having crashed it. Arias was jointly tried for the robbery murder, the sexual assaults and robberies of Judy N., and the robbery of Linda McCord. The Supreme Court in *Arias* cited the additional three factors, and addressed each one, except the one prong that may have weighed in the defendant's favor: a capital case joined with a non-capital case. In fact, despite its presence, it was not mentioned.

The Supreme Court in *People v. Hartsch* (2010) 49 Cal.4th 472 similarly cited the additional three prongs and analyzed them. Despite the presence of a capital offense being joined with a non-capital offense, the Supreme Court in the totality of its discussion on this prong stated: "Defendant fails to establish any other factor demonstrating the need for a severance." *Id.* at 494. *Hartsch* involved the defendant's murder of three people on two separate occasions and an additional non-capital shooting at an inhabited dwelling.

Also, in *People v. Davis* (1995) 10 Cal.4th 463, the California Supreme Court cited the additional three prongs discussed above. While acknowledging the trial court's consideration of the fact that the case was joining a capital charge with non-capital charges, the Court endorsed the trial court's implicit ruling – expressly acknowledged in *People v. Balderas* (1985) 41 Cal.3d 144, 173 – that such a fact alone was not sufficient without sufficient evidence of the other two. *Davis* at 508-509. *Davis* involved the requested severance of a rape, kidnapping and murder of Dawn Holman from the sexual battery and assault with the intent to commit rape/sodomy on Suzanne H.

Similarly, *People v. Stitely* (2005) 35 Cal.4th 514 summarily affirmed a trial court's denial of severance while assuming, as the trial court apparently did, that the joined rape was not cross-admissible with a rape murder. As in *Hartsch* and *Arias*, the Supreme Court did not even mention this prong except to the extent that it endorsed the trial court's conclusion that the first-hand account of the surviving victim did not make the charges more or less compelling or inflammatory when compared to the evidence of the defendant's involvement in the murder. *Id.* at 532-533.

E. Conclusion

Severance requires more than the absence of cross-admissibility; it also requires a combination of the remaining factors in defendant's favor to compel severance. As noted, there is cross-admissibility of the evidence. However, even if there were not, there is not a gross disparity in the weight of the evidence or emotional facts that would improperly cause the jury to convict the defendant.

The People respectfully request that the defendant's motion to sever be denied.

DATED: September 7, 2016

Respectfully Submitted,

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