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Larimer County District Court  
Honorable Terence A. Gilmore  
Case Number 01CR465

THE PEOPLE OF THE  
STATE OF COLORADO

Plaintiff-Appellee,

v.

JASON L. PECCI,

Defendant-Appellant.

▲ COURT USE ONLY ▲

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Case Number: 05CA2168

**OPENING BRIEF OF DEFENDANT-APPELLANT**

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## **INTRODUCTION**

Mr. Pecci was the defendant in the trial court and will be referred to by name. Plaintiff-Appellee will be referred to as the prosecution. Numbers in parentheses refer to the page number of the single volume record on appeal.

## **STATEMENT OF THE ISSUES PRESENTED**

1. Whether the district court erred in refusing to hold a hearing on Mr. Pecci's postconviction motion alleging ineffective assistance of counsel.
2. Whether the district court erred in ruling that Mr. Pecci's guilty plea had not been entered into in violation of Crim.P. 11.

## **STATEMENT OF THE CASE**

On April 5, 2001, the Larimer County District Attorney's Office charged Mr. Pecci with Count I, first degree murder, a class one felony, and Count II, felony menacing, a class five felony. (129).

On September 13, 2001, Mr. Pecci pled guilty to amended Count I, second degree murder, a class two felony, in exchange for the dismissal of Count II. (273). There was no agreement concerning a recommended sentence. (*Ibid.*).

The district court accepted the plea (284), and on November 8, 2001, imposed the maximum sentence of forty-eight years imprisonment followed by a five-year period of parole. (238).

On June 7, 2005, Mr. Pecci filed his *Petition For Postconviction Relief Pursuant to Crim.P. 35(c)*, arguing: (1) that his trial attorney was ineffective for having failed to adequately investigate facts supporting a provocation defense; and (2) that he should be permitted to withdraw his guilty plea because the trial court failed to ensure that there was an adequate factual basis for it. (17-33). On September 13, 2005, the district court denied the petition without a hearing. (295).

This appeal followed.

### **STATEMENT OF THE FACTS**

Discovery produced by the prosecution alleged that on April 1, 2001, Mr. Pecci fired a single fatal shot to Marc Bender (“Mr. Bender”) in the parking lot of the Canyon Grill. The shooting occurred when Mr. Bender and Cari Pecci, Mr. Pecci’s wife, were leaving the Canyon Grill together after spending the evening at the bar. (46-7). Mr. Bender was extremely intoxicated (101). Mr. Pecci was upset at being publicly humiliated. (52).

Despite the fact that Mr. Pecci was visibly upset and holding a gun in his hand, Mr. Bender ignored Cari Pecci’s instructions that he leave the parking lot and return to the bar and, instead, he confronted Mr. Pecci. (47-9). As Mr. Bender, at six foot three and 230 pounds (102), moved towards Mr. Pecci, at five foot eight (77), Mr. Pecci fired a warning shot into the ground. (49, 96).

Immediately after the warning shot was fired Cari Pecci ran back into the bar.  
(49).

### **SUMMARY OF THE ARGUMENT**

The district court erred in refusing to hold a hearing on Mr. Pecci's motion for postconviction relief. Mr. Pecci asserted that trial counsel failed to adequately investigate a provocation defense. Mr. Pecci's allegation was supported by a wealth of evidence generated after his guilty plea that supports the conclusion that, had trial counsel engaged in a similar investigation before the plea, Mr. Pecci would have rejected the offer and gone to trial.

As such, Mr. Pecci's motion unquestionably entitled him to a hearing because, [t]o warrant a hearing, a defendant need only assert facts that, if true, would provide a basis for relief." *People v. Simpson*, 69 P.3d 79, 80 (Colo.2003). Nevertheless, the trial court denied the motion without a hearing for two reasons. First, the court ruled that counsel provided effective assistance because she was aware of the issue of provocation (ignoring the fact that Mr. Pecci's claim is not premised on an allegation of total ignorance, it is premised instead on the failure to investigate and develop the defense). Second, the court concluded that because there was conflicting evidence on the issue of provocation, Mr. Pecci could not show that the outcome of the proceedings would have been different (when all that

Mr. Pecci is required to prove is that he would have rejected the plea and gone to trial, not that he would have won, and not that there was an absolute lack of evidence that was bad for him).

The trial court also erred in ruling that there was an adequate factual basis for Mr. Pecci's guilty plea where Mr. Pecci's statements were fundamentally inconsistent and raised serious doubts about whether Mr. Pecci had "knowingly" committed the crime he pled guilty to.

### **ARGUMENT**

1. The District Court Erred In Refusing  
To Hold A Hearing On Mr. Pecci's  
Motion For Postconviction Relief.

a. Standard of Review. Because a trial court does not make any factual findings in deciding whether to hold an evidentiary hearing on a postconviction motion, but is instead required to accept the facts asserted as true, this Court should review the question of whether the court erred in refusing to conduct a hearing *de novo*. Compare *Simpson*, 69 P.3d at 81 ("[s]ince Respondent alleged facts which, if true, may have been sufficient to provide a basis for relief, the trial court should have conducted a hearing as required by Rule 35(c)") with *People v. Perry*, 68 P.3d 472, 477 (Colo.App.2002) ("[w]e give deference to the trial court's findings of fact after a Crim. P. 35(c) hearing").



b. Effective Assistance Of  
Counsel, Adequate Investigation, And  
Consultation With Experts.

The right to counsel entitles a defendant to the reasonably effective assistance of an attorney acting as his diligent and conscientious advocate.

U.S.CONST.amend.VI; COLO.CONST.art.II, §16; *Strickland v. Washington*, 466 U.S. 668 (1984); *People v. Norman*, 703 P.2d 1261 (Colo.1985); *People v. Dillon*, 739 P.2d 919 (Colo.App.1987).

In order to provide effective assistance of counsel, defense counsel must conduct “a pretrial investigation of sufficient thoroughness to develop potential defenses, to reveal weaknesses in the prosecution’s case, and to uncover all facts relevant to the issues of guilt and/or penalty.” *Dillon*, 739 P.2d at 922 (hearing showed that defense team did not interview several witnesses in possession of relevant facts, and did not explore potentially valuable leads).

In the context of guilty pleas, the adequate investigation of a case is essential to providing effective assistance of counsel because, “[i]n the absence of adequate pre-trial investigation -- both factual and legal -- knowledgeable preparation for trial is impossible [and w]ithout knowledgeable trial preparation, defense counsel cannot reliably exercise legal judgment and, therefore, cannot render reasonably effective assistance to his client.” *People v. White*, 514 P.2d 69, 71 (1973)

(vacating guilty pleas where defense counsel had not adequately investigated case). *Accord Hutchinson v. People*, 742 P.2d 875, 881 (Colo.1987); *see also People v. Davis*, 759 P.2d 742, 745 (Colo.App.1988) (counsel's performance in failing to investigate thoroughly the background of the key prosecution witness fell below the level of a reasonably competent attorney).

In addition, an “expert may be needed as a defense witness to establish a defense or to rebut a case built upon the powerful investigative arsenal of the state [and c]onsequently, it cannot be denied that a defense counsel's access to expert assistance is a crucial element in assuring a defendant's right to effective legal assistance.” *Hutchinson*, 742 P.2d at 881. *See also People v. Danley*, 758 P.2d 686, 688 (Colo.App.1988) (trial counsel's failure to obtain expert assistance for financial reasons is ineffective assistance of counsel).

To prevail on a claim of ineffective assistance of counsel where a defendant pleads guilty, the defendant must show: (1) that “counsel's advice was [not] within the range of competence demanded of attorneys in criminal cases”; and (2) that there “is a reasonable probability that, but for counsel's errors, the defendant would not have pleaded guilty and would have insisted on going to trial.” *People v. Garcia*, 815 P.2d 937, 941, 943 (Colo.1991). *See also Hill v. Lockhart*, 474 U.S. 52, 59-60 (1985) (same).

c. The Facts Alleged (And Amply Supported) By Mr. Pecci Required The Trial Court To Conduct A Hearing.

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In his postconviction motion, Mr. Pecci asserted that his trial lawyer was ineffective in that she “failed to investigate evidence that would support a provocation defense . . . [she] did not interview witnesses who had knowledge concerning the relationship between Jason Pecci and Cari Pecci . . . [she] failed to consult with psychological and forensic experts whose assistance was crucial to the development of a provocation defense at trial” and that, “[h]ad such investigation taken place, there is a reasonable probability that Mr. Pecci would have gone to trial and received, at the most, a conviction of class three felony based upon a provocation defense.” (20).<sup>1</sup>

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<sup>1</sup>Provocation, or heat of passion, is a defense that reduces the crime of second degree murder from a class two to a class three felony. §18-1-103(3)(b), C.R.S. (2005). The elements of provocation are: “(1) the act causing the death was performed upon a sudden heat of passion; (2) caused by a serious and highly provoking act of the intended victim; (3) which was sufficient to excite an irresistible passion in a reasonable person; and (4) between the provocation and the killing, an insufficient interval of time passed for the voice of reason and humanity to be heard.” *People v. Cassels*, 92 P.3d 951, 956 (Colo. 2004).

“A provocation instruction is warranted when a defendant shows some supporting evidence -- regardless of how incredible, unreasonable, improbable, or slight it may be -- to establish each factor.” *Ibid*.

These allegations, when accepted as true and viewed in light of the legal authority discussed above, would entitle Mr. Pecci to relief based on the ineffective assistance of counsel. Consequently, the trial court erred in refusing to conduct a hearing on Mr. Pecci's postconviction motion. *See Simpson*, 69 P.3d at 80 (“[t]o warrant a hearing, a defendant need only assert facts that, if true, would provide a basis for relief”).

To be sure, an evidentiary hearing is not required when “the motion, the files, and the record of the case *clearly establish* that the allegations presented in the defendant's motion are without merit and do not warrant postconviction relief.” *White v. District Court*, 766 P.2d 632, 634 (Colo.1988) (internal quotations omitted; emphasis added). *See also* Crim.P. 35(c)(3)(IV), (V) (unless the motion record establishes no entitlement to relief or the pleadings render a hearing unnecessary, the court “shall grant a prompt hearing on the motion” and “take whatever evidence is necessary for disposition of the motion”).

The record in this case, far from “clearly establishing” that the allegations made by Mr. Pecci are without merit, contain overwhelming evidence in support of those allegations and thus, a hearing on his motion was required.

For example, the initial discovery in the case indicated that Mr. Bender had spent more than seven hours prior to the shooting drinking at the Canyon Grill, had

a blood alcohol level of .219, and appeared intoxicated at the time of the shooting. (99, 101, 111). According to Cari Pecci, Mr. Bender “towered” over Mr. Pecci, and Cari Pecci believed that Mr. Bender’s dominating physical presence might have been a contributing factor in the shooting. (117, 111).

At one of their first meetings, Mr. Pecci informed his trial lawyer that Mr. Bender was acting “very aggressively” in the parking lot, and that even after Mr. Pecci had fired the warning shot into the ground, Mr. Bender pushed into him at which point the fatal shot was fired. (124). Mr. Pecci later described Mr. Bender as pushing him, “with his body, in a bulldozing fashion”. (129).

Separately, Mr. Pecci’s mother, Mary Ellen Pecci, provided trial counsel with information concerning Mr. Pecci’s mental health history and the emotional and psychological toll that his relationship with Cari Pecci was having upon Mr. Pecci in the days leading up to the shooting. (151-52). Mary Ellen Pecci also forwarded to trial counsel correspondence with a Professor of Psychiatry regarding whether Mr. Pecci’s mental health could be used as a potential defense. (154-56). Similarly, Cari Pecci advised trial counsel that Mr. Pecci “had this all bottled up inside” and he “[d]idn’t know how to deal w/ it until it exploded”. (158). Ironically, the day that Mr. Pecci pled guilty to murder in the second degree, Mary Ellen Pecci sent an e-mail to his trial lawyer asking if she was pursuing a

provocation defense and offering to pay for a psychological evaluation of her son to help substantiate the defense. (160).

All of these facts cried for investigation, yet trial counsel did virtually none. For example, while counsel obtained the records of Mr. Pecci's previous mental health therapy, she did not seek a psychological evaluation of her client. Had trial counsel conducted such an investigation, she would have uncovered substantial additional evidence supporting a provocation defense. Specifically, Mr. Pecci's postconviction counsel arranged to have Mr. Pecci evaluated by a well-respected forensic psychologist (Dr. Spencer Friedman) who, after a thorough evaluation (*see, generally*, 244-52), formulated opinions that are compelling support for a provocation defense. (*E.g.* 252) ("he was enraged to the point that he wasn't sure what he was thinking. . . . He had never previously been involved in aggressive or violent confrontations and he had no experience dealing with this type of interaction. . . . he likely felt overwhelmed, reactive, and frightened . . . [and] he certainly experienced [Mr. Bender's] behavior as provoking and intimidating.").

Had trial counsel interviewed Mike Mazza, the biological brother of Cari Pecci, she would have learned details concerning the nature of the relationship between Mr. Pecci and Cari Pecci that strongly support a provocation defense. For instance, Mr. Mazza opined that in the months preceding the shooting, Mr. Pecci

was deeply troubled, not only by Cari Pecci's affair with Mr. Bender, but that Cari Pecci was alternately denying the existence of the affair and flaunting the affair. (258). Based upon his intimate knowledge of both Cari Pecci and Mr. Pecci, Mr. Mazza opined that, given the circumstances of the Pecci's relationship and the incident at the Canyon Grill itself, Mr. Pecci would have felt provoked by Mr. Bender's actions. (258-59).

Had trial counsel consulted with a forensic expert in firearm ballistics (as postconviction counsel did with Joseph Snyder of Forensic Science Consultants) a forensic analysis could have been performed in an effort to provide additional support to a provocation defense. (*See* 256).

In short, the evidence offered in support of Mr. Pecci's motion for postconviction relief overwhelmingly supports the allegation that his trial lawyer was ineffective in failing "to investigate evidence that would support a provocation defense". (20).

When viewed in light of controlling legal principles, that evidence also provides compelling support for the allegation that, "[h]ad such investigation taken place, there is a reasonable probability that Mr. Pecci would have gone to trial". (*Ibid.*). This is particularly true given the fact that Mr. Pecci's plea to second degree murder with no recommendation concerning the appropriate sentence

exposed him to a maximum term of imprisonment of forty-eight years (the sentence he ultimately received), whereas a conviction for second degree murder coupled with a finding of provocation would have exposed him to a maximum sentence of only twenty-four years incarceration.

Mr. Pecci's own recollections of the events in question, when coupled with Dr. Friedman's expert opinion and the first-hand knowledge of Mr. Mazza, strongly support a finding that Mr. Pecci acted upon a heat of passion based on a subjective inquiry that considers evidence of the defendant's individual personality traits or defects. *See, e.g., People v. Dooley*, 944 P.2d 590, 593-94 (Colo.App.1997).

Similarly, given the fact that, on the night in question, as well as on prior occasions, Cari Pecci publicly flaunted her affections for Mr. Bender inside the Canyon Grill bar, (251-52), that Mr. Pecci was confronted by a man that was much larger than he and very drunk, that Mr. Pecci's attempt to defend himself by firing a warning shot into the ground had no discernable impact upon Mr. Bender, and that Mr. Bender physically confronted Mr. Pecci, all support the argument that the circumstances surrounding these events were sufficient to excite an irresistible passion in a reasonable person. *Dooley*, 944 P.2d at 594. The strength of that argument is enhanced immeasurably by Dr. Friedman's conclusion that, in his



“professional opinion . . . any reasonable person’s emotions and passions could have been inflamed by the set of variables and facts associated with these circumstances” (252), and by Mr. Mazza’s consistent lay opinion.

In sum, the evidence submitted in support of Mr. Pecci’s motion for postconviction relief strongly support the assertion that, had trial counsel investigated and developed facts and opinions supportive of a provocation defense – facts that unquestionably could have been discovered – there is a reasonable possibility that Mr. Pecci would have rejected the prosecution’s offer and insisted on going to trial. As such, the court should have held an evidentiary hearing on Mr. Pecci’s motion.

However, and notwithstanding the allegations set forth in Mr. Pecci’s postconviction motion and the evidence that supports those allegations, the trial court concluded that Mr. Pecci’s ineffective assistance claim failed, and did not even warrant a hearing, for two reasons, neither of which can withstand even superficial scrutiny.

First, the court noted that trial counsel “considered the potential use of the provocation defense” and pointed to the fact that the issue was raised by Mr. Pecci and his mother. (296). From this, the trial court concluded that counsel’s conduct fell “within the wide range of competency for a defense attorney”. (297).

But, Mr. Pecci has never claimed that his trial lawyer was ineffective because she was oblivious to the possibility of raising a provocation defense. On the contrary, Mr. Pecci has consistently claimed only that counsel was ineffective in failing to investigate and develop facts that would support the defense.<sup>2</sup> As to that claim, the trial court says nothing at all, and it certainly says nothing that could support the conclusion that the record “*clearly establish[ed]* that the allegations presented in the defendant’s motion are without merit.” *White*, 766 P.2d at 634 (emphasis added).

Second, the trial court ruled that, “prejudice does not exist” because Mr. Pecci had not shown “a reasonable probability that, but for counsel’s deficient performance, the result of the proceeding would have been different.” (298). The court based this conclusion on grounds that “there is significant evidence of deliberation and premeditation, which would support the charge of First Degree Murder, a Class 1 felony [and that t]hese facts additionally negate the effectiveness of the provocation defense.” (297).

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<sup>2</sup> See, e.g., *Affidavit of Joseph A. Gavaldon, Esq.* (292-94) (opining that any reasonably competent attorney practicing in Larimer County would have sought a psychological evaluation of Mr. Pecci, would have retained an expert to conduct ballistics testing, and would have interviewed witnesses concerning the shooting and the circumstances of Mr. Pecci and Cari Pecci’s relationship).

Neither of these observations can support denying Mr. Pecci a hearing on his postconviction motion. First, the court's conclusion that there was some evidence that could both support a finding of first degree murder and negate a provocation defense, while arguably relevant, is far from dispositive when considering the prejudice component of an ineffective assistance claim made in the context of a guilty plea. In order to show prejudice, Mr. Pecci need only establish that there "is a reasonable probability that, but for counsel's errors, [he] would not have pleaded guilty and would have insisted on going to trial." *People v. Garcia*, 815 P.2d 937, 943 (Colo.1991). It should go without saying that in *every* criminal prosecution in which a plea is offered by the prosecution and rejected by the defense, there is some evidence of either guilt or evidence that negates a possible defense, or both (because charges should never be filed in a case unless there is some evidence to support a conviction). Thus, the fact that there existed some evidence of guilt and evidence that negates a defense cannot, either as a matter of law or a matter of common sense, preclude the conclusion that there is a "reasonable possibility" that a defendant would have rejected a plea and insisted on going to trial. To say otherwise would establish a rule that, as a practical matter, would defeat every ineffective assistance claim advanced in the context of a plea bargain.

Finally, the trial court's ultimate conclusion that the record fails to establish that the "outcome of the proceedings would have been different" cannot be the basis for denying a hearing on Mr. Pecci's motion, because that standard does not apply to the claim asserted by Mr. Pecci. *Garcia*, 815 P.2d at 943.

For all of these reasons, the trial court erred in refusing to conduct an evidentiary hearing on Mr. Pecci's motion for postconviction relief.

2. The District Court Erred In Ruling  
That There Was An Adequate Factual  
Basis For Accepting Mr. Pecci's  
Guilty Plea.

a. Standard of Review. The question of whether a guilty plea was entered pursuant to the requirements of Crim.P. Rule 11 is an issue this Court reviews *de novo*. See *People v. Wilson*, 708 P.2d 792, 796-97 (Colo.1985) (independently reviewing the evidentiary record to determine whether defendant "knowingly" waived his rights when pleading guilty).

b. Mr. Pecci's Guilty Plea Was  
Entered In Violation Of Crim.P. Rule  
11.

A valid guilty plea waives substantially all of the fundamental procedural rights afforded an accused during a criminal proceeding. See *People v. Harrington*, 500 P.2d 360, 361 (Colo. 1972). A criminal defendant's waiver of

those rights is valid only if the defendant acted knowingly, intelligently, and voluntarily. *See id.* (citing *Johnson v. Zerbst*, 304 U.S. 458 (1938)). A court cannot accept a plea of guilty without first complying with the requirements of Crim.P. Rule 11. *See also* §16-7-207(2), C.R.S. (2005). Courts reviewing whether a defendant made a valid waiver under Crim.P. 11 must indulge every reasonable presumption against waiver. *See Harrington*, 500 P.2d at 361.

Crim.P. Rule 11(b)(6), requires a factual basis for all guilty pleas, and a trial court must ensure that a factual basis actually exists for the guilty plea. *People v. Worsley*, 553 P.2d 73, 74 (Colo. 1976) (the trial court has the duty to vacate the plea at the time of the sentencing hearing if there is doubt as to the credibility of the charge). Where the record demonstrates a reason to question the reliability of the factual basis, the Court must take steps to assure itself that there is, in fact, a factual basis for the plea. *People v. Denton*, 539 P.2d 1309, 1312 (Colo. App. 1975) (where defendant entered his plea “reluctantly” pursuant to a plea bargain, the court should have taken precautions to assure itself beyond question that there was a factual basis for the plea). These additional precautions include, at the time of sentencing, vacating the guilty plea and entering a not guilty plea. *People v. Carino*, 566 P.2d 1061, 1063 (Colo. 1977) (trial court has “the authority to vacate

the guilty plea and enter a not guilty plea if the charges were not supported by facts appearing in the record of all court appearances and in the pre-sentencing report”).

At the plea hearing in this case, the trial court discussed with Mr. Pecci the factual basis for his plea to murder in the second degree. The Court had a brief exchange with Mr. Pecci where Mr. Pecci admitted that he knowingly caused Mr. Bender's death. (276). The court determined that a factual basis existed for the plea based upon the statements of Mr. Pecci and the evidence presented at the preliminary hearing. (277).

However, after the plea hearing, Mr. Pecci in a written statement included as part of his presentence report, specifically stated that, “[i]n a heated debate with my now former wife I *recklessly* used a gun to illustrate how mad I was at her blatant transgression of an agreement we had made.” (129) (emphasis added). In addition, Mr. Pecci stated: “Her boyfriend halted our argument by interjecting himself between us and made contact with me by approaching and standing toe to toe. He pushed, with his body, in a bulldozing fashion and I responded by pulling the trigger of the gun as I stepped backwards, firing a bullet in to the ground. He continued to apply force, such that I had to step backward again. While stepping backward the second time I swung the gun up in an arc and shot Marc.” (129-30).

At sentencing, the trial court twice referred to the presentence report (232, 235), and the prosecution specifically argued about the statements made by Mr. Pecci and quoted above. (*See* 229). Mr. Pecci statement that he committed the crime recklessly directly conflicts with his statement at the plea hearing that he committed the crime knowingly. This, coupled with the generalized statements by Mr. Pecci concerning provocation, should have caused the trial court to inquire further into the factual basis for the guilty plea.

In rejecting the argument below, the trial court simply concluded that because Mr. Pecci stated that he “knowingly” committed the offense at sentencing, there was an adequate factual basis for the plea, and that the statements made by Mr. Pecci in the presentence report had no affect on his plea. (292). The court did not explain why that is so, nor did the court hazard an opinion about why Mr. Pecci’s fundamentally inconsistent statements about the nature of his conduct are insufficient to raise concerns about the factual basis for his plea.

Because the court failed to ensure that a sufficient factual basis existed for the guilty plea, the plea should be withdrawn as not knowingly, intelligently and voluntarily entered in violation of Crim.P. Rule 11.

### CONCLUSION

For the foregoing reasons, the trial court's order denying Mr. Pecci's motion for Postconviction relief should be reversed with instructions that an evidentiary hearing be held on Mr. Pecci's motion or, in the alternative, that this case be remanded to the trial court with instructions that Mr. Pecci be permitted to withdraw his plea.

Respectfully submitted,



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### CERTIFICATE OF SERVICE

I certify that on this 30<sup>th</sup> day of October, 2006, a copy of OPENING BRIEF OF DEFENDANT-APPELLANT was mailed to:

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