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Supreme Court of New Jersey

No. A-41-22 (087840)

	CRIMINAL ACTION
STATE OF NEW JERSEY, *Plaintiff-Respondent*, *v.* **WILLIAM HILL**, *Defendant-Respondent*.	ON A PETITION FOR CERTIFICATION FROM A FINAL JUDGMENT OF THE SUPERIOR COURT, APPELLATE DIVISION, DOCKET NO. A-4544-19 *Sat Below:* HON. THOMAS SUMNERS, P.J.A.D., RICHARD GEIGER, J.A.D., *and* RONALD SUSSWEIN, J.A.D. ON APPEAL FROM A JUDGMENT OF CONVICTION OF THE SUPERIOR COURT, LAW DIVISION, HUDSON COUNTY. INDICTMENT NO. 19-09-00946-I *Sat Below:* HON. MARK J. NELSON, J.S.C.

BRIEF OF AMICUS CURIAE AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY

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July 24, 2023.

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INTRODUCTION

The American Civil Liberties Union of New Jersey ("ACLU-NJ") respectfully submits this brief in support of defendant William Hill in this matter.

PRELIMINARY STATEMENT

> [A]s a general matter, our criminal law seeks to punish the vicious will. With few exceptions, wrongdoing must be conscious to be criminal. Indeed, we have said that consciousness of wrongdoing is a principle as universal and persistent in mature systems of criminal law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.

Xiulu Ruan v. United States, 142 S. Ct. 2370, 2376-2377 (2022) (internal citations and quotation marks omitted).

This case deals with an unusual statute that defines the critical element of a criminal offense not by the wrongful intent or motive of the defendant, but by the reaction of a third party to defendant's conduct, whether willfully wrong or not. It therefore is contrary to the defining principle of our criminal law jurisprudence described in *Xiulu Ruan*.

Moreover, the sole action by Mr. Hill that formed the basis of his witness tampering conviction was the credulous act of writing a letter to the victim professing his innocence. The jury was instructed that he could be convicted of

a third degree felony if by this simple communication "a reasonable person would believe" that the recipient would perjure themselves, withhold testimony or evidence, or otherwise obstruct justice. The statute does not require that Mr. Hill have subjectively intended any of these results. The recent United States Supreme Court decision in *Counterman v. Colorado* makes clear that without requiring subjective *mens rea*, such statutes are overbroad and offend the First Amendment.

Whether and how a third party will react to a person's conduct—conduct that may have been innocently intended—is a consequence that is neither known nor reasonably knowable to that person. The witness tampering statute at issue here makes it a crime if conduct of the defendant would cause a reasonable person to believe that a witness or informant would thereby give false testimony or otherwise obstruct a legal proceeding. This makes the defendant an insurer of a witness's own misconduct.

Because no one can know how his conduct will affect another, this statute fails to give fair notice of what the law forbids, and chills the legitimate expression of speech, and thus violates principles of free speech and due process of law contained in the United States and New Jersey Constitutions.

PROCEDURAL HISTORY AND STATEMENT OF FACTS[1]

Amicus ACLU-NJ adopts the Procedural History and Statement of Facts contained in Appellant William Hill's Amended Brief filed July 19, 2021.

As factual background for its legal argument, Amicus ACLU-NJ need only refer to one document in the record, the letter dated April 1, 2019, and received on or about April 8, 2019, which was the basis for the prosecution and conviction for witness tampering. Amicus lays out the text of that letter in full.

> Dear Ms. Zanatta
>
> Now that my missive had completed it's journey throughout the atmosphere and reached its paper destination, I hope and pray it finds its recipient in the very best of health, mentally as well as physically and in high spirits.
>
> I know you're feeling inept to be a recipient of a correspondence from an unfamiliar author, but please don't be startled, because I'm coming to you in peace. I don't want or need any more trouble.
>
> Before I proceed, let me cease your curiosity of who I be. I am the guy who has been arrested and charged with carjacking upon you. You may be saying I have the audacity to write to you and you may report it, but I have to get this off my chest. I am not the culprit of the crime.
>
> Ms. Zanatta, I have read the reports and watched your videotaped statement, and I am not disputing the ordeal you have endured. I

[1] For purposes of conciseness, the Facts and Procedural History sections are consolidated in this brief.

admire your bravery and commend your success for conquering a thief whose intention was to steal your vehicle. You go, girl. [smiley face]

Anyway, I'm not saying your eyes have deceived you. I believe you've seen the actor, but God has created humankind so close to resemblance, that your eyes will not be able to distinguish the difference without close examination of people at the same time, especially not while in the wake of such commotion you've endured.

Ms. Zanatta, due to a woman giving me the opportunity to live life instead of aborting me, I have the utmost regards for women. Therefore, if it was me you accosted, as soon as my eyes perceived my being in a vehicle belonging to a beautiful woman, I would have exited your vehicle with an apology for my evil attempts. However, I am sorry to hear about the ordeal you have endured -- you've had to endure, but unfortunately, an innocent man (me) is being held accountable for it.

Ms. Zanatta, I don't know [sic] what led you to selecting my photo from the array, but I place my faith in God. By his will the truth will be revealed and my innocence will be proven, but however, I do know he works in mysterious ways, so I'll leave it in his hands.

I must say that this mishap had caused me to lose what little I've attained (my job, my car and my possession within my residence). I have no more to lose except my freedom. The prosecutor for the state is trying to negotiate a plea offer with me but I'm not going to accept anything for something I didn't do for if I do, the culprit would get away with a free crime. I have no other option but to take this case to trial, it seems as if its the only way I will be cleared of this crime. If found guilty as charged at trial I'll face from 30 years to life behind bars for a crime I had no parts of. I have no children. I guess the name stops here. My deceased grandfather is a Senior, my deceased father is a Junior and I am the Third. I may not be deceased yet but life imprisonment is similar to being deceased

> *because I can't produce a "Fourth" to carry on my name.*[2]
>
> Ms. Zanatta, I'm not writing to make you feel sympathy for me. I'm writing as a respectful request to you. If it's me that you're claiming is the actor of this crime without a doubt, then disregard this correspondence. Otherwise, please tell the truth, if your wrong, or not sure 100 percent.
>
> Ms. Zanatta, I'm not expecting a response from you, but if you decide to respond and want to reply, please inform you (sic) of it. Otherwise, you will not hear from me hereafter until the days of trial.
>
> [Well][3] it's time I bring this missive to a close, so take care, remain focused, be strong, and stay out of the way of trouble.
>
> Sincerely,
>
> Raheem

Da29-30.

On October 2, 2019, William Hill was convicted of one count of carjacking in the first degree and one count of witness tampering in the third degree.

By letter dated May 5, 2022, the ACLU-NJ, together with the Attorney General's Office and the Association of Criminal Defense Lawyers, was invited

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[2] This paragraph was not read to the jury at trial.

[3] Appears as "But" in the trial transcript.

by the Appellate Division *sua sponte* to participate as *amicus curiae.* On January 23, 2023, the Appellate Division affirmed the convictions by published opinion. *State v. Hill*, 474 N.J. Super. 366 (App. Div. 2023). On May 9, 2023, this Court granted the petition for certification limited to the issue of whether the witness tampering statute, N.J.S.A. 2C:28-5, was overbroad.

ARGUMENT

I. THE WITNESS-TAMPERING STATUTE, N.J.S.A. 2C:28-5, IS OVERBROAD SINCE IT CRIMINALIZES SPEECH EVEN IF THE DEFENDANT HAD NO SUBJECTIVE INTENT TO THREATEN OR INTIMIDATE.

The witness tampering statute upon which Mr. Hill was indicted (Da002) and convicted, N.J.S.A. 2C:28-5, provides:

> a. A person commits an offense if, believing that an official proceeding or investigation is pending or about to be instituted or has been instituted, *he knowingly engages in conduct which a reasonable person would believe would cause a witness or informant* to:
>
> (1) Testify or inform falsely;
>
> (2) Withhold any testimony, information, document or thing;
>
> (3) Elude legal process summoning him to testify or supply evidence;
>
> (4) Absent himself from any proceeding or investigation to which he has been legally summoned; or
>
> (5) Otherwise obstruct, delay, prevent or impede an official

proceeding or investigation.

(emphasis added).

Amicus ACLU-NJ contends that as applied to Mr. Hill, this statute clearly violates the First Amendment principles recently announced in *Counterman v. Colorado,* 600 U.S. ___, 216 L. Ed. 2d 775 (2023).

It is first important to draw the distinction between the *mens rea* required for the act of communication itself, which the statute defines as "knowing," and the *mens rea* by which the defendant understood the threatening or coercive nature of that communication, which the statute defines in terms of a hypothetical reasonable person and not the defendant's own state of mind. *Counterman* addressed and clarified "the difference between awareness of a communication's contents and awareness of its threatening nature." *Counterman*, slip op. at 4 n.2. There is no dispute that Mr. Hill and Mr. Counterman both knowingly sent their communications aware of their contents. But Justice Kagan writing for the Court made clear that "The question in this case arises when the defendant . . . understands the content of the words, but may not grasp that others would find them threatening. Must he do so, under the First Amendment, for a true-threats prosecution to succeed?" *Id.* It is that latter issue, i.e. the defendant's awareness of the threatening nature of the

communication, to which the Court directed its entire constitutional analysis, and it is the issue presented here as well.

A. By Criminalizing a Communication Without Requiring that Defendant Have a Subjective Understanding that His Words Would Instill Fear of Impending Harm, the Witness Tampering Statute Violates the First Amendment.

Under N.J.S.A. 2C:28-5, a critical element of the crime, the consequences of the challenged act, is defined not by whether the defendant has the purpose or intent of coercing a witness to give false testimony, withhold evidence, or otherwise obstruct an ongoing proceeding or investigation. Rather, a defendant is held responsible for conduct—regardless of how he himself may have actually intended it—which a hypothetical "reasonable person" (represented in proxy by a jury) might perceive as having an effect on the state of mind of the victim such that it would cause her to testify falsely or obstruct a proceeding.

Counterman addressed a similar Colorado statute in which the jury was instructed to determine under an "objective 'reasonable person' standard" whether that reasonable person would have viewed the social media postings as threatening, and was not required to determine whether "Counterman had any kind of 'subjective intent to threaten.'" *Id.*, slip op. at 3 (quoting *C.W. In re R.D.*, 464 P.3d 717, 731 n.21 (Colo. 2020)). Because of the chilling effect on

legitimate expression such a relaxed requirement would cause, the Supreme Court struck down the statute as applied to Counterman, and held that "the First Amendment still requires proof that the defendant had some subjective understanding of the threatening nature of his statements." *Id.*, slip op. at 1; *see, id.* 4-5. "That rule is based on fear of 'self-censorship'—the worry that without such a subjective mental-state requirement, the uncertainties and expense of litigation will deter speakers from making even truthful statements." *Id.*, slip op. at 8 (quoting *New York Times v. Sullivan*, 376 U. S. 254, 279 (1964)).

Counterman's holding that the State must establish defendant's subjective understanding of the way his words will be perceived is enough to address the immediate issue before this Court. Mr. Hill's conviction for witness tampering was based on the "reasonable person" standard of N.J.S.A. 2C:28-5, which *Counterman* found was constitutionally insufficient. The conviction on that count of the indictment must be reversed.

Even without the recent guidance of *Counterman*, the witness tampering statute at issue here is analytically indistinguishable from the bias intimidation statute that was struck down this Court in *State v. Pomianek*, 221 N.J. 66

(2015).[4] In *Pomianek*, the defendant, in an apparent attempt at a practical joke, induced an African American coworker, Mr. Brodie, to enter a storage cage at their workplace, a public works garage, and by closing the sliding door, locked Brodie in the cage for three to five minutes. During time in which he was confined, Brodie and other coworkers heard the defendant say "Oh, you see, you throw a banana in the cage and he goes right in," by which Brodie concluded that defendant's conduct was "racial" in nature. Pomianek and another defendant were charged with various offences, including counts of bias intimidation, but were acquitted of all charges alleging that he falsely imprisoned or harassed Brodie either with the *purpose* to intimidate him or

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[4] Although this Court limited certification to the issue of First Amendment overbreadth, and *Pomianek* was ostensibly decided on Fourteenth Amendment vagueness grounds, the two doctrines have significant overlap. *Counterman* explained that the First Amendment requires *scienter* due to the "ambiguities inherent" in defining the unprotected category of speech, in order "to avoid the hazard of self-censorship." *Counterman*, slip op. at 7. The Court then cataloged ways in which those ambiguities could chill non-threatening expression, given "the ordinary citizen's predictable tendency to steer wide of the unlawful zone," including "the speaker's fear of mistaking whether a statement is a threat; his fear of the legal system getting that judgment wrong; his fear, in any event, of incurring legal costs." *Id.* In this context, the First Amendment evils of ambiguity that lead to a chilling effect are substantially the same as the due process evils of vagueness.

knowing that his conduct who do so.

Pomianek was convicted, however, under a provision of the bias intimidation statute that did not require *scienter*. Rather, N.J.S.A. 2C:16-1(a)(3) provided in pertinent part that a person who engages in enumerated predicate offenses commits the additional offense of bias intimidation:

> (3) under circumstances that caused any victim of the underlying offense to be intimidated and the *victim, considering the manner in which the offense was committed, reasonably believed* either that (a) the offense was committed with a purpose to intimidate the victim or any person or entity in whose welfare the victim is interested because of race, color, religion, gender, disability, sexual orientation, gender identity or expression, national origin, or ethnicity, or (b) the victim or the victim's property was selected to be the target of the offense because of the victim's race, color, religion, gender, disability, sexual orientation, gender identity or expression, national origin, or ethnicity.

N.J.S.A. 2C:16-1(a)(3) (emphasis added). Thus, like the witness tampering statute at issue here, the defendant's criminal liability depended not on his actual motive in engaging in the challenged conduct, but rather on how the victim perceived his motive in doing so.

Writing for a unanimous court, Justice Albin's opinion struck down the relevant portion of the statute as unconstitutional.

> [B]ecause N.J.S.A. 2C:16-1(a)(3) fails to give adequate notice of conduct that it proscribes, the statute is unconstitutionally vague and violates notions of due process protected by the Fourteenth

> Amendment. Defendant was convicted not based on what he was thinking but rather on his failure to appreciate what the victim was thinking.

Pomianek, 221 N.J. at 91. The same reasoning inexorably leads to the same result in this case. Mr. Hill has been held criminally liable not because he actually intended his April 1 letter to coerce the victim, Ms. Zanatta, to give false testimony or obstruct the ongoing proceedings, but rather because he failed to appreciate that a "reasonable person" might perceive that the victim might subjectively believe that this was his intent and act upon it accordingly by giving false testimony or obstructing the proceeding. No person of common intelligence could perform this feat without the possibility of good faith misjudgment, and criminalizing Mr. Hill's inability to do so violates basic tenets of due process. From a First Amendment perspective, the inherent ambiguities of the objective standard chill what may be completely legitimate attempts by the accused to communicate with victim to come to a fuller and mutually agreeable resolution and understanding of the dispute.

Imposing this requirement of clairvoyance on Mr. Hill to predict that unknown third persons in the future might perceive his otherwise completely legal conduct, sending the facially innocuous April 1, 2019, letter to Ms. Zanatta, as having such an effect on the victim's state of mind that it would

cause her to give false testimony, fails to give adequate notice of the proscribed conduct, and thus deprives him of procedural due process. "A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *FCC v. Fox TV Stations, Inc.*, 567 U.S. 239, 253 (2012). A "statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926).

B. In This Case, Judicial Surgery to Cure the Statute's Constitutional Infirmities is Not Appropriate.

Assuming that the Court agrees that N.J.S.A. 2C:28-5 as currently written violates the federal constitution, the question remains about the appropriate judicial remedy, and whether to read into the statute a subjective *mens rea* requirement, and if so, which one. Amicus respectfully suggests that this determination should be left to the Legislature and not made by the courts.

Counterman itself found that in the specific context of the stalking statute at issue, the First Amendment was satisfied by a subjective mental state of recklessness. *Counterman*, slip op. at 5, 11-12. The Court recognized, however,

that in other contexts it had held a higher showing of specific intent, i.e. purposeful or knowing, was constitutionally mandated.[5] *Id.* at 13-14. Before the Court determines which of these two standards is constitutionally required, it must first determine which of them, if either, the Legislature would have chosen. In the original witness tampering statute, the Legislature chose the objective "reasonable person" standard, which is qualitatively different from either of the subjective *mens rea* standards: reckless or intentional. For the Court to engage in the multiple conjectures of whether the Legislature would have chosen one or the other, or would have defined the offense in some completely different way, injects this Court into a legislative and policy-making role.

Amicus understands the witness tampering statute is an important prosecutorial tool and intended to maintain the integrity of the judicial system. "When necessary, courts have engaged in 'judicial surgery' to save an enactment that otherwise would be constitutionally doomed." *State v. Natale*, 184 N.J.

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[5] These issues are being raised in another case currently pending before this Court, *State v. Calvin Fair*, No. A-20-22 (086617), and in a supplemental amicus brief also being filed today by ACLU-NJ.

458, 485 (2005). One apparent solution would be for the Court to read into the statute a scienter requirement, such that the relevant language of N.J.S.A. 2C:28-5 would read: "he knowingly engages in conduct intending or knowing that the conduct would ~~which a reasonable person would believe would~~ cause a witness or informant to . . ."

A similar solution was initially implemented by the Appellate Division in *Pomianek*, but the Supreme Court rejected it as beyond the competence of the Judiciary. Such a revision was "not minor judicial surgery to save a statutory provision, but a judicial transplant," and "[r]ewriting the statute in that manner is ... beyond our authority." 221 N.J. at 91. At some point, excessive judicial revision of a statute, even if done in order to save it, raises separation of powers concerns.

> It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of government.

Kolender v. Lawson, 461 U.S. 352, 358 n.7 (1983) (quoting *United States* v. *Reese*, 92 U.S. 214, 221 (1876)).

Declining to engage in judicial surgery would not leave New Jersey without any remedy against witness tampering. The First Amendment

protections apply only when the underlying act is one of communication. The witness tampering statute covers a plethora of other actions, such as those involving physical force, that are not communicative in nature and thus would not raise First Amendment concerns. *See Counterman*, slip op. at 2-3 n.1 (noting that the Colorado stalking statute prohibited a number of actions, but the "prosecution based its case solely on Counterman's 'repeated . . . communications' with C.W.").

Creating a scienter requirement out of whole cloth in order to rescue the witness tampering statute does more than excise language that is constitutionally infirm. It displaces the Legislature's language and adds an element to the statute that the Legislature never contemplated. Judicial surgery may be used to excise constitutionally infirm statutory language if the remaining text can operate on its own. *See State v. Mortimer*, 135 N.J. 517, *cert. denied*, 513 U.S. 970 (1994) (excising constitutionally infirm language "ill will, hatred or bias" in defining *mens rea* element of harassment statute but leaving constitutionally valid language "purpose to intimidate"). But in this case, the Legislature made the constitutionally infirm language "which a reasonable person would believe would cause a witness or informant to . . ." as the exclusive pathway by which a defendant could be found criminally liable, and the statute cannot be

implemented without it. In such cases, it is the Legislature, and not the courts, that must decide what type of replacement statute, if any, is in the public interest.

II. THE APRIL 1, 2019, LETTER FROM DEFENDANT TO THE VICTIM CANNOT BE REASONABLY CONSTRUED AS AN ATTEMPT TO COERCE FALSE TESTIMONY OR WITHHOLD EVIDENCE.

In *Bose Corp. v. Consumers Union*, 466 U.S. 485 (1984), the Supreme Court explained "that in cases raising First Amendment issues [it has] repeatedly held that an appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'" *Id.* at 499 (quoting *New York Times Co. v. Sullivan*, 376 U.S. at 284–86). *Accord Ward v. Zelikovsky*, 136 N.J. 516, 536-37 (1994). Thus "Appellate judges in such a case must exercise independent judgment and determine whether the record establishes actual malice with convincing clarity." *Bose*, 466 U.S. at 526. Based on this constitutional standard, Mr. Hill cannot be found beyond a reasonable doubt to have violated the statute simply by sending the April 1, 2019, letter to Ms. Zanatta.

This rule is "is necessary 'because the reaches of the First Amendment are ultimately defined by facts it is held to embrace' and an appellate court must

decide 'whether a given course of conduct falls on the near or far side of the line of constitutional protection.'" *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.* 515 U.S. 557, 567 (1995) (quoting *Bose*, 466 U.S. at 503). Moreover, "the rule of independent review assigns to judges a constitutional responsibility that cannot be delegated to the trier of fact, whether the factfinding function be performed in the particular case by a jury or by a trial judge." *Id.* at 501.

It is first critical to note that the statute does not criminalize conduct that merely causes a witness distress, worry or alarm. By its terms, N.J.S.A. 2C:28-5 only prescribes conduct that a "reasonable person" would believe would cause a witness to give false testimony, withhold information, or otherwise seek to obstruct an ongoing proceeding. Needless to say, none of that happened here, and Ms. Zanatta testified at trial, leading to Mr. Hill's conviction.

Of course, it is not necessary to a conviction for witness tampering that the witness actually give false testimony or obstruct a proceeding, if the conduct of defendant made the risk of such behavior sufficiently likely. But Amicus has examined the April 1, 2019, letter carefully, and its full text is laid out at the beginning of this brief. There is simply no way to characterize the letter as anything other than a straightforward profession of innocence by Mr. Hill. The

following are excerpts:

> You may be saying I have the audacity to write to you and you may report it, but I have to get this off my chest. I am not the culprit of the crime.
>
> Ms. Zanatta, I'm not writing to make you feel sympathy for me. I'm writing as a respectful request to you. If it's me that you're claiming is the actor of this crime without a doubt, then disregard this correspondence. Otherwise, please tell the truth, if your wrong, or not sure 100 percent.
>
> Ms. Zanatta, I'm not expecting a response from you, but if you decide to respond and want to reply, please inform you (sic) of it. Otherwise, you will not hear from me hereafter until the days of trial.

There is no language in the text of this letter that could be rationally characterized as threatening, coercive or suggestive that Ms. Zanatta testify falsely. Perhaps one might accuse the tenor of Mr. Hill's letter of being unsophisticated, guileless, or perhaps excessively naïve, but it cannot be interpreted as coercive or threatening in a way that would allow a reasonable person to predict that Ms. Zanatta's reaction would be to offer *false* testimony or otherwise obstruct the prosecution.

Of course, Amicus does not ask the Court or juries to be naïve or credulous. Written communications can, depending on context, often convey meanings that are at odds with their facial text. Face-to-face communications are influenced by gestures, intonations, and a host of other nonverbal factors not

conveyed in the words themselves. Context can often communicate meanings that are intended although unexpressed.

But there is no such context here, other than the fact that the defendant sent the complaining witness a letter through the mail professing his innocence and requesting that she earnestly re-examine the strength of her recollection. While obviously, he would benefit if she recanted her prior identification, whether or not she was sincere, to conclude from that possibility that a jury could rationally find that the witness would feel coerced to give *false* testimony or obstruct the proceeding would mean that a jury could reached the same conclusion from virtually any communication imaginable.

CONCLUSION

For the reasons expressed herein, Amicus ACLU-NJ respectfully urges this Court to reverse the conviction of defendant William Hill based on N.J.S.A. 2C:28-5.

July 24, 2023.

Respectfully submitted,

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