UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee, v. Anthony P. BALLAN Machinist's Mate Second Class Petty Officer (E-5) U.S. Navy, Appellant.	**APPELLANT'S BRIEF ON SPECIFIED ISSUE** Crim.App. No. 201000242 USCA Dkt. No. 11-0413/NA

TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES:

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Issue Presented

ALTHOUGH THE CRIME OF INDECENT ACTS WITH A CHILD TO WHICH APPELLANT PLEADED GUILTY WAS NOT A LESSER INCLUDED OFFENSE OF THE CHARGED CRIME OF RAPE OF A CHILD AND THUS HAD NOT BEEN FORMALLY REFERRED TO TRIAL BY COURT-MARTIAL BY THE CONVENING AUTHORITY, WHETHER APPELLANT WAIVED SUCH IRREGULARITY BY PLEADING GUILTY UNDER A PRETRIAL AGREEMENT TO INDECENT ACTS WITH A CHILD IN VIOLATION OF ARTICLE 134, WHERE NEITHER THE PRETRIAL AGREEMENT NOR APPELLANT'S PLEA AT ARRAIGNMENT EXPRESSLY SET FORTH EITHER POTENTIAL TERMINAL ELEMENT FOR AN ARTICLE 134 CLAUSE 1 OR 2 SPECIFICATION, BUT BOTH ELEMENTS WERE DISCUSSED AND ADMITTED DURING THE PROVIDENCE INQUIRY.[1]

[1] This Court ordered briefing only on this issue.

Statement of Statutory Jurisdiction

MM2 Anthony Ballan's approved court-martial sentence included a punitive discharge. Accordingly, the Navy-Marine Corps Court of Criminal Appeals (NMCCA) had jurisdiction pursuant to Article 66(b)(1), Uniform Code of Military Justice.[2] The statutory basis for this Court's exercise of jurisdiction is Article 67(a)(3), UCMJ.[3]

Statement of the Case

Pursuant to his pleas, the Appellant was convicted of one specification of indecent acts with a child,[4] one specification of sodomy with a child under the age of 12,[5] and eight specifications of indecent acts with another,[6] in violation of Articles 120, 125, and 134, UCMJ.[7] Members sentenced Appellant to 25 years confinement, a dishonorable discharge, and forfeiture of all pay and allowances.[8] The convening authority approved the sentence as adjudged, suspended all confinement in excess of 20 years pursuant to a pre-trial agreement (PTA), and,

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[2] 10 U.S.C. §886(b)(1).
[3] 10 U.S.C. §867(a)(3).
[4] Appellant pleaded not guilty to the original charge of rape of a person under the age of 12, and instead pleaded guilty to indecent acts with a child as a lesser-included-offense. Joint Appendix (JA) at 15.
[5] Appellant pleaded by exceptions and substitution. JA at 15.
[6] Appellant pleaded not guilty to the original charge of indecent liberties with a child, and instead pleaded guilty to indecent acts with another as a lesser-included-offense. JA at 15-16.
[7] 10 U.S.C. §§ 920, 925, and 934 (2005).
[8] Record at 1036.

with the exception of the dishonorable discharge, ordered the sentence executed.

In its January 27, 2011 opinion, NMCCA set aside and dismissed the findings of guilt to Specifications 6, 7, and 8 under Charge III, and reassessed the sentence to 24 years confinement.[9] On March 28, 2011, Appellant filed a petition for review. This Court granted review and specified issue II on June 2, 2011.

Statement of Facts

MM2 Ballan was charged with raping a child under Article 120, UCMJ,[10] but pleaded guilty under a PTA[11] to the crime of indecent acts with a child in violation of Article 134, UCMJ.[12] The convening authority did not refer an indecent acts charge to the court-martial.[13] Instead, the PTA MM2 Ballan pleaded guilty under simply provided that MM2 Ballan would plead "NOT GUILTY" to the specification under Article 120, but "GUILTY to the lesser-included-offense (LIO) of indecent act with a child."[14] The PTA did not set forth either potential terminal element for an Article 134 clause 1 or 2 specification, although both

[9] JA at 1-5; *United States v. Ballan*, No. 201000242, slip op. (N-M. Ct. Crim. App. Jan. 27, 2011) (unpublished).
[10] JA at 6.
[11] Appellate Exhibit V; JA at 8 (for portion of PTA dealing with Charge I).
[12] JA at 15.
[13] JA at 6.
[14] JA at 8 (emphasis in the original).

elements were discussed and admitted to during the providence inquiry[15] and included in the stipulation-of-fact.[16] Still, the military judge never explained to MM2 Ballan that he was pleading guilty to an offense that was not on the charge sheet before the court.[17]

Summary of Argument

Resolution of the specified issue boils down to the application of two recent cases decided by this Court: *United States v. Girourd*[18] and *United States v. McMurrin*.[19] Both cases raise the threshold issue of whether the accused's constitutional rights under the Fifth and Sixth Amendments were waived or forfeited. A waived issue leaves no error to correct on appeal,[20] while a forfeited issue is reviewed for plain error.[21] Here, MM2 Ballan forfeited, rather than waived, his rights, and this Court should review the issue for plain error.

A. The error is the conviction for an offense not charged.

MM2 Ballan was erroneously convicted of indecent acts with a child because: (1) he was convicted of an offense that is not an LIO of the offense charged and he was not properly notified

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[15] JA 27, 34-35.
[16] JA at 37-38.
[17] JA 9-26.
[18] 70 M.J. 5 (C.A.A.F. 2011).
[19] 70 M.J. 15 (C.A.A.F. 2011).
[20] *United States v. Campos*, 67 M.J. 330, 332 (C.A.A.F. 2009).
[21] *Id.* (citations omitted).

of the convicted offense; and (2) even if this Court finds that the PTA constructively charged indecent acts with a child, the Government still failed to provide sufficient notice because the charge in the PTA failed to state an offense and failed to provide notice of what must be defended against.

Having established an erroneous conviction in violation of Appellant's due process rights, the next issue is whether MM2 Ballan knowingly and intelligently waived those rights.

B. The record establishes that MM2 Ballan did not waive his due process rights.

In order for MM2 Ballan's waiver to be effective it must be knowing and intelligent. It was not, for two reasons. First, as in *Girouard* and *McMurrin*, it was impossible for MM2 Ballan to intentionally relinquish his known due process rights given that the rights were not known. At the time of conviction, indecent acts with a child was assumed to be an LIO of rape. But after his conviction, the legal landscape changed when this Court returned to the strict elements test.[22] Second, MM2 Ballan's guilty plea does not trump the presumption against waiver of constitutional rights because the record fails to establish that MM2 Ballan understood his rights and intentionally waived them.

[22] *United States v. Jones*, 68 M.J. 465 (C.A.A.F. 2010).

Argument

MM2 Ballan forfeited, rather than waived, his rights, and this Court should review the issue for plain error.

A. Standard of review.

This Court reviews forfeited issues for plain error.[23] Forfeiture is the "failure to make a timely assertion of a right."[24] "A forfeiture is basically an oversight; a waiver is a deliberate decision not to present a ground for relief that might be available in the law."[25] In determining whether a particular circumstance constitutes a forfeiture, this Court considers whether the failure to raise an objection at trial constituted an intentional relinquishment of a known right.[26]

B. MM2 Ballan was erroneously convicted of indecent acts with a child.

Prior to discussing waiver of rights in Section C, it is important to first address the erroneous conviction, as waiver only applies if a certain right was violated in the first place.

MM2 Ballan's conviction of indecent acts with a child was erroneous because: (1) he was convicted of an offense that is not an LIO of the offense charged and he was not properly

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[23] *Campos*, 67 M.J. at 332 (citing *United States v. Harcrow*, 66 M.J 154, 156 (C.A.A.F. 2008)).
[24] *United States v. Olano*, 507 U.S. 725, 733 (1993).
[25] *Campos*, 67 M.J. at 332 (citing *United States v. Cook*, 406 F.3d 485, 487 (7th Cir. 2005)).
[26] *Campos*, 67 M.J. at 332 (citing *Harcrow*, 66 M.J at 156 (citing *Olano*, 507 U.S. at 733-34)).

notified of the convicted offense; and (2) even if this Court finds that the PTA constructively charged indecent acts with a child, the Government still failed to provide sufficient notice because the charge in the PTA failed to state an offense and failed to provide notice of what must be defended against.

1. MM2 Ballan was convicted of an uncharged offense that is not an LIO of the charged offense.

In order for an offense to be an LIO it must meet the elements test.[27] The offense of indecent acts with a child is not an LIO of rape because it fails to meet this test. Specifically, the terminal elements included in indecent acts with a child are not elements of the charged offense of rape. In *Girouard*, this Court found that the Due Process Clause of the Fifth Amendment forbids convicting an accused of an offense with which he has not been charged.[28] The PTA did not constructively charge MM2 Ballan with indecent acts with a child, because none of the parties – including the convening authority – intended for the PTA to change the rape charge.

[27] *United States v. Jones*, 68 M.J. 465, 469-70 (C.A.A.F. 2010).
[28] *United States v. Girouard*, 70 M.J. 5, 10 (C.A.A.F. 2011) (citing *United States v. Marshall*, 67 M.J. 418, 421 n.3 (C.A.A.F. 2009)).

2. Even if this Court finds that the PTA constructively changed the charge, the PTA still fails to state an offense.

Both the Fifth and Sixth Amendments ensure that an accused has the right to receive fair notice of the charged offenses.[29] MM2 Ballan's Fifth and Sixth Amendment rights were violated by the Government's failure to provide adequate notice because the specification in the PTA failed to state an offense; the specification did not allege the terminal elements and failed to provide notice of what must be defended against.

Under Supreme Court precedent, a charge is constitutionally required to contain "the elements of the offense charged and fairly inform[] a defendant of the charge against which he must defend. . . ."[30] MM2 Ballan's PTA failed to expressly or by implication allege the terminal elements and this Court has found that omitting an element of an offense from a charge results in a fatal deficiency.[31] This deficiency is categorical, and is therefore equally fatal in not-guilty and guilty pleas alike. As the Court of Military Appeals explained in *United States v. Petree*, "[t]he sufficiency of the specification to

[29] *See Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000).
[30] *United States v. Resendiz-Ponce*, 549 U.S. 102, 108 (2007).
[31] *United States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F. 2006) (a facially deficient specification cannot be saved by reference to proof at trial).

allege an offense may be raised at any time and a plea of guilty does not preclude an attack upon its validity."[32]

In sum, MM2 Ballan's conviction of indecent acts with a child violates his due process rights because he was not charged with that offense, making adequate notice impossible. Having established error, the next issue is whether MM2 Ballan waived these due process rights.

C. MM2 Ballan forfeited, rather than waived, his rights.

Error occurs when there is deviation from a legal rule unless the rule has been waived.[33] Waiver, unlike forfeiture, extinguishes error.[34] An accused is presumed not to have waived a constitutional right, "and for a waiver to be effective it must be *clearly established* that there was an *intentional* relinquishment or abandonment of a *known* right or privilege."[35] In *Olano*, the Supreme Court recognized that the ability to waive a particular right, and the defendant's involvement in the waiver, was dependent on the right at stake: "[w]hether a particular right is waivable; whether the defendant must participate personally in the waiver; whether certain procedures are required for waiver; and whether the defendant's choice must

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[32] *United States v. Petree*, 23 C.M.R. 233, 236 (C.M.A. 1957) (citations omitted).
[33] *United States v. Olano*, 507 U.S. 725, 732-33 (1993).
[34] *Id.* at 733-34.
[35] *United States v. Harcrow*, 66 M.J. 154, 157 (C.A.A.F. 2008) (emphasis added) (citations and quotations omitted).

be particularly informed or voluntary, all depend on the right at stake."[36]

MM2 Ballan did not waive his due process rights because: (1) it was impossible for him to intentionally relinquish his known due process rights; and (2) his guilty plea does not trump the presumption against waiver of constitutional rights because the record fails to establish that MM2 Ballan understood his rights and intentionally waived them.

1. It was impossible for MM2 Ballan to intentionally relinquish his known due process rights.

The record establishes that MM2 Ballan forfeited his rights given that *United States v. Jones*[37] was decided after his trial.

Girouard and *McMurrin* both raise the threshold issue as to whether either appellant waived, or rather merely forfeited, their constitutional rights under the Fifth and Sixth Amendments. In *McMurrin*, the issue was whether the appellant waived these rights by failing to object to the military judge, who *sua sponte* raised — and convicted on — the LIO. And in *Girouard*, the issue was whether waiver occurred when the appellant requested an instruction on the LIO. In both cases, this Court found that it was impossible for either appellant to have waived their due process rights given that *Jones* was decided after their trials, the President had determined

[36] *Olano*, 507 U.S. at 733.
[37] 68 M.J. 465 (C.A.A.F. 2010).

negligent homicide to be an LIO of murder and involuntary manslaughter and listed as such in Manual for Courts-Martial (MCM),[38] and prior cases recognized negligent homicide as an LIO to murder and involuntary manslaughter.[39]

This Court should apply the reasoning from *Girouard* and *McMurrin* to MM2 Ballan's appeal and equate MM2 Ballan's guilty plea to forfeiture. Like Girouard and McMurrin, MM2 Ballan could not have "intentional[ly] relinquish[ed] or abandon[ed] … a known right"[40] given that *Jones* had not been decided at the time of his court-martial. And just as in *Girouard* and *McMurrin*, the President had determined indecent acts with a child to be an LIO of rape which was listed in the MCM[41] and prior cases recognized indecent acts as an LIO to rape.[42]

While admitting guilt is not necessarily a trial strategy akin to a request for an instruction, it is clear in this record that no one in the courtroom — including the military judge — understood the error. Under these circumstances, this Court must find that MM2 Ballan did not knowingly waive his due process rights. Any argument that MM2 Ballan understood and waived his due process rights would be spurious at best; it

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[38] *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.), Part. IV, ¶¶ 43d(2)(c), 44d(2)(b).
[39] *See United States v. Girouard*, 70 M.J. 5, 10 (C.A.A.F. 2011); *United States v. McMurrin*, 70 M.J. 15, 17 (C.A.A.F. 2011).
[40] *Harcrow*, 66 M.J. at 156 (quoting *Olano*, 507 U.S. at 732-33)).
[41] *See* MCM, Part IV, ¶ 45d(1)(c).
[42] *United States v. Schoolfield*, 40 M.J. 132 (C.M.A. 1994).

would have been impossible for MM2 Ballan to intentionally waive rights that were unknown to him, his defense counsel, the military judge, and the convening authority.

Moreover, it is the Government's responsibility to determine what offense to bring against an accused. Aware of the evidence in its possession, the Government is presumably cognizant of which offenses are supported by the evidence and which are not. As in this case, there may be a genuine question as to whether one offense as opposed to another is sustainable. In such a case, the prosecution may properly charge both offenses for exigencies of proof.[43] Clearly, the evidence would not support rape of a child in this case, and this problem could have been easily avoided by charging in the alternative, thus providing MM2 Ballan with proper notice.

2. The record fails to rebut the presumption against the waiver of constitutional rights.

Undoubtedly, the Government will attempt to argue that MM2 Ballan's decision to plead guilty under a PTA waived the error. The Government may even attempt to analogize this case to *United States v. Wilkins*.[44] Such an analogy would be misplaced. Wilkins was charged with larceny, in violation of Article 121, UCMJ, but pleaded guilty to receiving stolen property, in violation of Article 134, UCMJ. Before accepting Wilkins'

[43] *United States v. Villareal*, 52 M.J. 27, 31 (C.A.A.F. 1999).
[44] 29 M.J. 421 (C.M.A. 1990).

pleas, the military judge delved into an in-depth inquiry to establish that Wilkins understood that he was entering a plea to an offense that was not before the court.[45] The record of trial in *Wilkins* clearly established that Wilkins understood his right not to be convicted of a charge not before the court, but he intentionally waived his rights in order to receive the benefit of the PTA. *Wilkins* is distinguishable from this case, as the record here does not establish waiver.

Clearly, *Wilkins* would have satisfied the rule laid out by the Supreme Court in *Olano*. In *Olano*, the Supreme Court stated that the ability to waive a particular right, and the defendant's involvement in the waiver, was dependent on the right at stake.[46] Constitutional rights require the highest level of scrutiny when determining whether a defendant must participate personally in the waiver and whether the defendant's choice must be particularly informed or voluntary.[47] Thus, there is a presumption against the waiver of constitutional rights.[48]

The rights at stake in this case are constitutional. The military judge in MM2 Ballan's case failed to conduct any inquiry akin to the query conducted in *Wilkins*. After MM2

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[45] *Id.* at 422.
[46] *United States v. Olano*, 507 U.S. 725, 733 (1993).
[47] *See id.*
[48] *United States v. Girouard*, 70 M.J. 5, 10 (C.A.A.F. 2011) (citing *United States v. Harcrow*, 66 M.J. 154, 157 (C.A.A.F. 2008)).

Ballan entered pleas, the military judge went through the standard plea inquiry for a charge properly before the court.[49]

Notable, MM2 Ballan did knowingly waive certain constitutional rights, such as, his rights against self-incrimination and to confront witnesses against him;[50] but that does not establish he waived every due process right. There was no discussion on the record about the indecent acts specification constituting a new charge, no discussion demonstrating that MM2 Ballan understood and voluntarily waived his due process rights protecting him against pleading guilty to a charge not before the court and to notice.[51]

Thus, viewed in light of the presumption against the waiver of constitutional rights,[52] this Court must treat this case as if there was an amendment to the charge absent an objection from MM2 Ballan.

3. Even if the PTA constructively altered the charge, the record still fails to clearly establish waiver.

The Government will likely argue that the PTA provided MM2 Ballan with notice because it constructively altered the charge before the court-martial to indecent acts with a child. The

[49] Record at 600-91. Before MM2 Ballan entered his pleas, the record only demonstrates that during an Article 39(a), UCMJ, session: (1) that a member was stuck in traffic; (2) there was a discussion about the order of witness; (3) and the defense requested a 1-day continuance based on discovery grounds and plea negotiations. JA at 9-17.

[51] *See Olano*, 507 U.S. at 733.
[52] *Harcrow*, 66 M.J. at 157 (citations and quotations omitted).

Court of Military Appeals did find in *United States v. Wilkins*, discussed above, that the convening authority's entry into a PTA was the functional equivalent of an order by the convening authority to refer the new charges to court-martial for trial.[53] But *Wilkins* is again distinguishable from the facts here for two reasons. First, the convening authority did not intend for the PTA to constructively refer the Article 134, UCMJ, offense to trial. And second, the PTA failed to expressly set forth the terminal elements for an Article 134, UCMJ, offense.

In this case, the convening authority did not intend for the PTA to constructively refer the Article 134, UCMJ, offense to trial because he believed it was an LIO, not a new charge. Similarly, the defense counsel and MM2 Ballan did not consider the PTA as referring a new charge to trial. Even the military judge did not view the PTA as the functional equivalent of a new charge seeing he failed to discuss this new charge with MM2 Ballan to ensure he understood that he was pleading guilty to a charge not before the court. The facts of this case are distinguishable from *Wilkins*, where everyone in the courtroom understood that the convening authority's entry into the PTA was the functional equivalent of an order by the convening authority to refer a new charge to trial and the military judge thoroughly discussed the issue with the accused before accepting his pleas.

[53] *United States v. Wilkins*, 29 M.J. 421, 424 (C.M.A. 1990).

Still, even if this Court finds that MM2 Ballan and the convening authority agreed to change the charge, then the new specification still fails to state an offense. The PTA laid out the specification for the Article 120, UCMJ, offense, but then merely stated "NOT GUILTY, but GUILTY to the LIO of indecent act with a child."[54] MM2 Ballan's pleas cannot be construed as waiver because he simply pleaded "Not Guilty, but Guilty to the charge of indecent acts with a child"[55] which only parroted the PTA.

The Government will likely point to the stipulation-of-fact[56] and MM2 Ballan's providence inquiry[57] in an attempt to establish notice and waiver. Although the stipulation-of-fact and the providence inquiry establish the factual predicate to convict for indecent acts with a child, affirming a conviction where the Government failed to provide proper notice is inconsistent with the principles established by this Court in *United States v. Medina*.[58] Additionally, this Court has found that a facially deficient specification cannot be saved by reference to proof at trial.[59] Thus, the plea inquiry and

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[54] JA at 8 (emphasis in the original).
[55] JA at 15.
[56] JA 37-38.
[57] JA at 29-35.
[58] 66 M.J. 21 (C.A.A.F. 2008).
[59] *United States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F. 2006) (citations omitted).

stipulation-of-fact cannot be construed to establish notice or waiver.

However, if the facts of this case were different — for example, the accused was charged with a crime, but agreed to plead guilty to a different crime under a PTA that contained all the elements to the different offense and the accused, defense counsel, convening authority, and the military judge understood that the accused was pleading guilty to a different offense — then the argument that the accused was on notice has merit.[60] But the facts of this case consist of a charge sheet that differs from the PTA, a PTA which does not contain all the elements to the crime, and a stipulation-of-fact and providence inquiry that are too far removed from the charging documents. Accordingly, MM2 Ballan's rights to notice were violated, and the record fails to demonstrate that he intentionally relinquished these rights.

Because of the presumption against waiving a constitutional right, and due to the fact that the record fails to establish that MM2 Ballan intentionally relinquished a known right, this Court must find that MM2 Ballan forfeited his right against the court constructively altering the elements of the charging documents.

[60] *See United States v. Wilkins*, 29 M.J. 421 (C.M.A. 1990).

D. MM2 Ballan's conviction was prejudicial.

The prejudicial error is wrapped around the salient fact that MM2 Ballan should have been given an opportunity to plead guilty to the actual LIO of rape — assault consummated by a battery.[61] In the context of a plain error analysis, MM2 Ballan has the burden of demonstrating that: (1) there was error; (2) the error was plain or obvious; and (3) the error materially prejudiced a substantial right.[62] Having fulfilled the first two prongs above, the remaining question is whether MM2 Ballan suffered prejudice to a substantial right.

The facts established at trial demonstrate that the only proper LIO for the charged offense was assault consummated by a battery. The maximum confinement for the offense of indecent acts with a child is 7 years, while the maximum confinement for assault consummated by a battery upon a child under 16 years is 2 years.[63] Thus, the prejudicial error at trial resulted in MM2 Ballan being convicted of an offense which had a maximum confinement that was 5 years greater than the actual LIO of the greater offense.

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[61] MCM, Part IV, ¶ 45d(1)(a).
[62] *United States v. Girouard*, 70 M.J. 5, 11 (C.A.A.F. 2011) (citing *United States v. Powell*, 49 M.J. 460, 463-65 (C.A.A.F. 1998)).
[63] MCM, App. 12. at A3-5.

Conclusion

This Court should set aside the findings on the Sole Specification of Charge I because: (1) MM2 Ballan is presumed not to have waived a constitutional right; and (2) the record of trial fails to show that MM2 Ballan intentionally relinquished his known due process rights. Further, this Court should authorize a rehearing on sentencing considering that NMCCA set aside the findings to Specification 6, 7, and 8 under Charge III and therefore the sentencing landscape has dramatically changed.

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CERTIFICATE OF FILING AND SERVICE

I certify that this brief was delivered electronically to the Court, and that copies were delivered electronically to the Appellate Government Division and to Code 40 on August 11, 2011. I also certify that I caused the Joint Appendix in this case to be delivered, in paper form, to the Court and the government on the same day.

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