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IN THE SUPREME COURT FOR THE STATE OF NEVADA

LISA ANN NASH,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Case No. 76098

APPELLANT LISA ANN NASH'S OPENING BRIEF

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NRAP 26.1 Disclosure

Pursuant to NRAP 26.1, the undersigned counsel of record certifies that the following are persons and entities described in NRAP 26.1(a) that must be disclosed. These representations are made in order that the Court may evaluate possible disqualification or recusal. Appellant Lisa Ann Nash is an individual who was represented in Clark County District Court by Steve Evenson, Esq.

DATED this 4th day of February, 2019.

RISTENPART LAW, LLC

By: /s/ Theresa Ristenpart

Attorney for Appellant

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I. JURISDICTIONAL STATEMENT

The District Court for the Eighth Judicial District entered a judgment of conviction against Lisa Nash for Child Abuse, Neglect or Endangerment on May 7, 2018. (APP 008-009) Appellant filed a timely notice of appeal on June 6, 2018. (APP 001-002) The court has jurisdiction over this final order in a criminal case based upon the timely filing of the notice of appeal. *See* NRAP 4(b)(1)(A); NRS 177.015(3).

Lisa Nash is out of custody currently serving a term of probation.

II. ROUTING STATEMENT

This case is not presumptively assigned to the Court of Appeals as it is a direct appeal from a judgment of conviction based on a jury verdict for several category B felonies. *See* NRAP 17(b)(2)(A). As this is an error correction case in which no novel issues are presented, Appellant Nash does not object to having the case assigned to the Court of Appeals. *See* NRAP 17(d).

III. STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the district court erred by admitting vague and unsubstantiated allegations of prior bad acts?
2. Whether the district court committed plain error by issuing an incomplete jury instruction regarding the definition of neglect or maltreatment pursuant to NRS 432B.140?
3. Whether Appellant's Sixth Amendment right to confrontation was violated by the admission of mental health and medical reports through a third party?
4. Whether there was sufficient evidence to support the convictions?

IV. STATEMENT OF THE CASE

On August 10, 2015, the State filed an Information charging Ms. Lisa Ann Nash (Ms. Nash) with one count of Child Abuse, Neglect or Endangerment (Category B Felony – NRS 200.508(1) – NOC 55226). APP 0010-0011.

On September 10, 2015, the State filed an Amended Information charging Ms. Nash with six counts of Child Abuse, Neglect or Endangerment (Category B Felony – NRS 200.508(1) – NOC 55226); one count of Battery Constituting Domestic Violence (Category C felony- NRS 200.481; 200.485; 33.018 – NOC 54740); and one count of Coercion (Category B Felony- NRS 207.190 – NOC 53159), alleging that on or between April 1, 2014 and July 31, 2014, at and within Clark County, State of Nevada, the Defendant committed these acts, including allegations of Defendant yelling and/or screaming at S.S. and causing and/or directing S.S. to act like an animal; strangulation of S.S.; Defendant shoving the face of S.S. into the ground and/or slamming the face of S.S. into the floor; Defendant yelling and/or

screaming at S.S. and causing and/or directing S.S. to run up and down stairs;
Defendant slapping or hitting S.S. about the head and/or face and/or body;
Defendant straddling S.S. and preventing her from getting up or moving; Defendant
slapping and/or smacking and/or hitting S.S. about the head and/or face and/or body
and/or poking S.S. with a knife; Defendant yelling and/or screaming at S.S. and
causing and/or directing S.S. to run up and down stairs and/or threatening to push
S.S. down the stairs. APP 0012-0015.

Ms. Nash was arrested on July 24, 2014 and her initial arraignment was August
18, 2015, where she pled not guilty. APP 0002-0007.

Jury trial lasted for five (5) days from September 11, 2017 through September
15, 2017. APP 0002-0007. The jury found Ms. Nash guilty of three (3) counts of
Child Abuse, Neglect or Endangerment (Category B Felony – NRS 200.508(1) and
one (1) count of Battery Constituting Domestic Violence (Misdemeanor- NRS
200.481; 200.485; 33.018 – NOC 54740). APP 00013-00016. The jury acquitted
Ms. Nash of the allegations of Coercion and three (3) counts of Child Abuse,
Neglect or Endangerment. APP 0008-0009.

Ms. Nash was sentenced on April 23, 2018 and the Judgment of Conviction
was filed on May 7, 2018. Ms. Nash was sentenced to nineteen (19) to forty-eight
(48) months in the Nevada Department of Corrections, to run concurrently, sentence
suspended, placed on Probation not to exceed three years (3) for each of the felony
Child Abuse, Neglect or Endangerment charges; and was sentenced to credit for

time served for the misdemeanor Battery Constituting Domestic Violence charge.
APP 0008-0009.

On June 6, 2018, Ms. Nash filed a timely Notice of Appeal in the Eighth
Judicial District Court. APP 00001-00006.

V. STATEMENT OF RELEVANT FACTS

The Appellant, Ms. Nash, is the biological aunt to the alleged victim, Shaylyn Shelton. Shaylyn was living with Ms. Nash because she was going through a process with the State of Maryland and the State of Nevada to be adopted by Ms. Nash. APP 0327-0328. Shaylyn is the daughter of Ms. Nash's brother, Darrell Nash, whose four (4) children were taken away by Child Protective Services (CPS) in 2002 by the State of Maryland when Shaylyn was four (4) years old. They were taken away primarily due to filthy living conditions. APP 0606-0608.

In 2005, the State of Maryland CPS contacted Ms. Nash to adopt all four (4) children, which Ms. Nash accepted; however, after receiving the records on Shaylyn, she saw how many issues Shaylyn had and believed it would be too great of an undertaking in conjunction with her three (3) children whom she was raising in her home already. Additionally, Ms. Nash was still doing military service. She had to deny the adoption of all four (4) children. APP 608-609.

The State of Maryland CPS contacted Ms. Nash again around 2010-2011 and informed her that the other three (3) siblings of Shaylyn had been adopted out, and that only Shaylyn remained in foster care. They asked Ms. Nash if she would take Shaylyn and Ms. Nash accepted. APP 0610.

It took almost four (4) years to get Shaylyn to Ms. Nash's home in Las Vegas to live with her, due to the requirements between the States of Nevada and Maryland. APP 061. At the time, Ms. Nash also had her daughter, Megan Nash, aged 15, and her son, Chay Douglas, aged 24, living with her. APP 0606. In 2014, Shaylyn came to Nevada to live with Ms. Nash for seven (7) months, prior to allegations of child abuse/neglect. APP 0301.

Sometime during the month of April 2014, and on July 2, 2014, Megan Nash took four (4) partial videos on her phone of alleged incidents between Shaylyn and Ms. Nash. APP 0359-0360.

From March 2014 to April 2015, Megan Nash dated Lonny Hennessey, aged 16. APP 0470. Around the end of June, first week of July 2014, Ms. Nash caught Lonny and Megan in her room with the door locked. She knocked and they opened the door. They were lying on the floor under a blanket. APP 0534-0536; APP 0645-646. Ms. Nash told them to get up, that it was not acceptable behavior. Lonny challenged Ms. Nash and Ms. Nash kicked Lonny out of her house. Lonny continued to disrespect Ms. Nash on the way out of the house. After he was out of the house, he made a physically aggressive stance toward Ms. Nash and attempted

to enter the home again. Ms. Nash kicked him out permanently. APP 0646-647; APP 0534-0536. Lonny's father came to Ms. Nash's house and admonished her for kicking out his son. APP 0648. Megan continued to date Lonny. Megan and Ms. Nash had issues regarding her continuing to date Lonny. APP 0534-535.

On July 21, 2014, while Ms. Nash was out of the house, Megan had Lonny over. Chay, aged 24 at the time, was present as well. Lonny and Chay got into a physical altercation. APP 0480; APP 0534; APP 051. Lonny and Megan left to go to Lonny's house. (APP 0511-512) Megan called her father, Richard Nash, who lived in California at the time. APP 0364-366. Ms. Nash and Mr. Nash have a contemptuous relationship; and Megan's father had not been to Las Vegas to visit Megan since her fourteenth birthday. APP 0649-651. Megan sent the partial videos to her father and he helped Megan plan how to report Ms. Nash to the police for alleged abuse. APP 0364-366.

Megan, Lonny, Lonny's parents, Lonny's sister, Lonny's aunt and Richard Nash were all at Lonny's house when Lonny's aunt called 911 to report Ms. Nash for alleged child abuse. APP 0366.

On June 21, 2014, Las Vegas Metropolitan Police (LVMPD) responded to a report involving allegations of child abuse by Megan Nash. APP 0282-0283. Megan showed the officers videos she had taken on her phone from April 2014 and July 3, 2014. APP 0283-0284. Police asked Megan to write a statement. Lonny's aunt, Lonny's sister, Lonny's mom and Richard Nash were present when Megan

wrote her statement. APP 0393. In Megan's trial testimony, she states that she was influenced by her father and all of Lonny's family. APP 0394.

Megan testified that she overexaggerated and embellished because she was mad at her mom. APP 0363-364. Megan states that Police and State counsel never asked her any follow-up questions after she gave them her written statement, including anytime prior to trial. APP 0372-37. At trial, Megan states that the allegations in her written statement were false. APP 0377-378; APP 0362-363; APP 0368. Megan attempted to withdraw her written statement with the District Attorney, but they refused. APP 0532.

In trial, the State moved to admit the refuted statement for relevance as prior inconsistent statements given. Defense counsel opposed on the basis that part of the statement is hearsay. The Judge admitted the statement, stating the State met the burden to show that it is extrinsic evidence and goes toward the credibility of the witness. APP 0440-0449.

After speaking with Megan Nash and watching the videos, LVMPD went to the home of Lisa Nash, who was home with Shaylyn. Police spoke with Ms. Nash and Shaylyn. APP 0284-286. Police called paramedics to perform a body check on Shaylyn. APP 0286-0287. No injuries were discovered. APP 0291.

The reported officer testified that Shaylyn "seemed to be a happy-go-lucky young lady." APP 0288. LVPD contacted Child Protective Services (CPS) to perform their own investigation into the abuse or neglect allegations. APP 0287-

0288. CPS responded to the scene and watched the videos. APP 0324. CPS interviewed Shaylyn first, then Lisa Nash. Lisa Nash was arrested and CPS took Shaylyn into their custody. APP 0325-0326. CPS worker Shanna Davis testified that during her time with Shaylyn, she appeared happy. APP 0497-498.

Shaylyn was reported as having behavioral, cognitive and mental issues by the State of Maryland. Many diagnoses had been thrown around, including bipolar to anxiety to mood disorder. There were reports from the facilities Shaylyn had been at, but no medical records were presented and the true issues were unknown. APP 0612-613. At trial, over defense objection, Nevada CPS testified that their records showed that Shaylyn operated at the level of an eight-year old child. APP 0339 – 0249. Additionally, Nevada CPS testified that Shaylyn had PTSD, ADD, ADHD, Asthma, was emotionally and developmentally disturbed and had a history of sexual abuse. Nevada CPS stated Shaylyn was on psychotropic drugs, but did not know what type. Nevada CPS did not know the doctor or doctors that made any of the alleged determinations. APP 0331-334. No medical reports were proffered.

After the arrest of Lisa Nash on July 24, 2014, Shaylyn was returned to foster care in Maryland on July 25, 2014 and adoption procedures were terminated. APP 0496, 0528.

Shayln herself testified that she understood Lisa Nash was trying to help her lose weight and that she never felt like she was being abused. APP 0310. Shaylyn,

Megan, and Lisa Nash all testified that Lisa, a military veteran, had been using physical training to help Shaylyn lose weight in order to be able to go to horse camp and improve her health. APP 0310, 0353, 0629.

VI. ARGUMENT

1. THE DISTRICT COURT ERRED BY ADMITTING MEGAN NASH’S WRITTEN STATEMENT CONTAINING VAGUE AND UNSUBSTANTIATED ALLEGATIONS OF PRIOR BAD ACTS.

An appellate court reviews a district court's decision to admit or exclude prior-bad-act evidence under an abuse of discretion standard. *Newman v. State*, 129 Nev. 222, 226 (2013).

Nev. Rev. Stat. § 48.045(2) prohibits the use of evidence of other crimes, wrongs or acts to prove the character of a person in order to show that the person acted in conformity therewith. Such evidence may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. *Id.* “The use of uncharged bad act evidence to convict a defendant [remains] heavily disfavored in our criminal justice system because bad acts are often irrelevant and prejudicial and force the accused to defend against vague and unsubstantiated charges.” *Bigpond v. State*, 128 Nev. 108, 115 (2012) (quoting *Tavares v. State*, 117 Nev. 725, 730 (2001)). “A presumption of inadmissibility attaches to all prior bad act evidence.” *Id.* (quoting *Rosky v. State*, 121 Nev. 184, 195 (2005)).

"[T]o overcome the presumption of inadmissibility, the prosecutor must request a hearing and establish that: (1) the prior bad act is relevant to the crime charged and for a purpose other than proving the defendant's propensity, (2) the act is proven by clear and convincing evidence, and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice." *Newman v. State*, 129 Nev. 222, 230-31 (2013) quoting *Bigpond*, 128 Nev. at 117.

Here, the district court, over defense objection, admitted Megan Nash's entire prior written witness statement as evidence under the theory that it was evidence of Megan's credibility. APP 0440-0449. "The bottom line extrinsic evidence of a witness' capacity or motive to testify is not collateral in this court's determination and it's not subject to those limitations set out in NRS 50.056, Subsection 3, which talks about that." APP 00446.

The statement includes an allegation from Megan this "abuse" happens two to three times a month. There were no specifics, nor timeframe given in the written statement. Again, over defense objection and without a hearing, the district court allowed in these unspecified prior bad act allegations as the State argued that they had a three-month time period in their criminal information alleging the abuse occurred between April and July, 2014. APP 0041 – 0042. Based upon Megan's statement, a juror would believe that Appellant Nash was engaged in repeated and multiple abusive acts over a long period of time.

The district court abused its discretion by admitting vague prior bad act evidence without first having a hearing to establish if relevant and proven by clear and convincing evidence.

2. THE DISTRICT COURT COMMITTED PLAIN ERROR BY ISSUING AN INCOMPLETE JURY INSTRUCTION REGARDING THE DEFINITION OF NEGLECT OR MALTREATMENT PURSUANT TO NRS 432B.140.

A district court has broad discretion in settling jury instructions, and this court reviews a district court's decision for an abuse of discretion. *Crawford v. State*, 121 Nev. 746, 748 (2005). This court reviews an instructional error absent an objection for plain error. *Rossana v. State*, 113 Nev. 375, 382 (1997); *Green v. State*, 119 Nev. 542, 545 (2003). In doing so, this court examines whether an error occurred, “whether the error was plain,” and “whether the error affected the defendant's substantial rights.” *Green*, 119 Nev. At 545. “[T]he burden is on the defendant to show actual prejudice or a miscarriage of justice.” *Id.*

Here, the district court instructed the jury in instruction #6 that:

“Negligent treatment or maltreatment” of a child occurs if a child has been abandoned, is without proper care, control, and supervision for the well-being of the child because of the faults or habits of the person responsible for the welfare of the child or the neglect or refusal of the person to provide them when able to do so. APP 0931.

In 2014 the time of the alleged treatment, NRS 432B.140 defined “neglect or maltreatment” as:

Negligent treatment or maltreatment of a child occurs if a child has been abandoned, is without proper care, control and supervision **or lacks the subsistence, education, shelter, medical care or other care necessary** for the well-being of the child because of the faults or habits of the person responsible for the welfare of the child or the neglect or refusal of the person to provide them when able to do so.¹ (emphasis added)

The State, in settling jury instructions, made it very clear that it “elected to proceed under negligent treatment or maltreatment [sic] theory.” APP 0746. The State purposely omitted the phrase “or lacks the subsistence, education, shelter, medical care or other care necessary” in its proposed jury instruction. APP 0744.

The phrase “lacks the subsistence, education, shelter, medical care or other care necessary” helps define for a jury what behavior, or lack thereof, rises to the level of neglect and maltreatment. To omit this phrase effectively lessened the State’s burden of proof. Shaylyn testified that she always had enough to eat and that her aunt took good care of her. Without a complete instruction and the perspective of comparison as to behavior that rises to the level of neglect/maltreatment, the jury is left guessing as to what would constitute neglect and maltreatment pursuant to NRS 432B.140.

This error substantially affected Appellant’s rights as negligent treatment/maltreatment was the only theory the State argued it was proceeding under.

¹ The 2015 amendment, effective October 1, 2015, added “has been subjected to harmful behavior that is terrorizing, degrading, painful or emotionally traumatic”; and substituted “or supervision” for “and supervision.”

The State argued it believed “the evidence, the video, was is that the Defendant was not providing Shaylyn Shelton the proper care and control, based upon NRS 432(b).” APP 0748. As such, the District Court committed plain error by issuing an incomplete jury instruction regarding the definition of neglect and maltreatment which significantly affected Appellant’s substantial rights.

3. THE APPELLANT’S SIXTH AMENDMENT RIGHT TO CONFRONTATION WAS VIOLATED BY THE IMPROPER ADMISSION OF MENTAL HEALTH AND MEDICAL REPORTS THROUGH A THIRD PARTY.

In *Ramirez v. State*, the Nevada Supreme Court held:

The Sixth Amendment to the United States Constitution provides that “in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” U.S. Const. amend. VI. The Sixth Amendment's guarantee of the right of an accused to confront accusatory witnesses is a fundamental right that is made obligatory on the states by the Fourteenth Amendment. *Pointer v. Texas*, 380 U.S. 400, 403, 13 L. Ed. 2d 923, 85 S. Ct. 1065 (1965). Further, the United States Supreme Court has held that “confrontation means more than being allowed to confront the witness physically. ‘Our cases construing the [confrontation] clause hold that a primary interest secured by it is the right of cross-examination.’” *Id.*

Ramirez v. State, 114 Nev. 550, 557 (1998).

In this case, over defense objection, Nevada CPS testified from their records that Shaylyn operated at the level of an eight-year old child. APP 0339 – 0249.

Additionally, Nevada CPS testified that Shaylyn had PTSD, ADD, ADHD, Asthma, was emotionally and developmentally disturbed and had a history of sexual abuse. Nevada CPS stated Shaylyn was on psychotropic drugs, but did not know what type. Nevada CPS did not know the doctor or doctors that made any of the alleged determinations. APP 0331-334. No medical reports were proffered. On cross examination, CPS worker Balinda Jackson-Gordon (CPS Jackson) admitted that she did not know when the reports were authored or by whom and that she had not read everything in the record. APP 00336.

It is clear that the jury placed a lot of weight on this testimony about Shaylyn's mental competency as demonstrated by the jury question "Was Shaylyn aware of what had happened?" in reference to the alleged incidents. APP 0335. The District Court allowed CPS Jackson, who had no specialized medical or diagnostic training, to testify:

"She experienced what she experienced in the household. As far as why she was removed, I'm not sure of that. I don't know if she was mentally able to cognitively understand what had taken place. She has been diagnosed with having the mental capacity of someone that is 8, so I don't know if she understands the full degree of what is going on." APP 0335.

This testimony regarding prior medical diagnosis and evaluations was inadmissible hearsay that was being used to prove the truth of the matter asserted: that Shaylyn had lower mental cognitive capabilities.

The State capitalizes on this and labels Shaylyn as "special needs" with a lesser IQ. APP 0824. The State repeatedly argues in closing argument that

Appellant's behavior was even more heinous and child abuse because Shaylyn was a special needs child who had multiple mental diagnoses. APP 0824, 0872, 0874, 0876.

The State was able to introduce damaging and severely prejudicial inadmissible hearsay against Ms. Nash through a third-party. In effect, the State was allowed to use CPS worker Jackson as an expert witness against Ms. Nash without affording Ms. Nash the opportunity to cross-examine the original evaluators or mental health professionals about Shaylyn's actual diagnosis or level of mental competency. It was also highly improper for the district court to allow this third-party CPS worker Jackson to opine, based upon those unsubstantiated records, that Shaylyn was not able to cognitively understand things.

The admission of prejudicial and unsubstantiated medical testimony through the CPS worker violated Ms. Nash's constitutional right to confrontation and, as such, this error warrants a reversal of the convictions.

4. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE CONVICTION.

The standard of review for sufficiency of the evidence upon appeal is whether the jury, acting reasonably, could have been convinced of the defendant's guilt beyond a reasonable doubt. *Edwards v. State*, 90 Nev. 255, 258-59 (1974). Where there is substantial evidence to support the jury's verdict, the verdict will not be upset on appeal. *Bolden v. State*, 97 Nev. 71, 73 (1981).

In evaluating the sufficiency of the evidence, the reviewing court will view the evidence in the light most favorable to the State to determine whether sufficient evidence was presented to establish guilt beyond a reasonable doubt as determined by a rational trier of fact. *See Origel-Candido v. State*, 114 Nev. 378, 381 (1998); *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781 (1979).

Here, if all the improper and highly prejudicial evidence had not been admitted, a jury, acting reasonably, would not have convicted Ms. Nash. There was no evidence of physical injury. There was no evidence of mental injury. The defense argued that the two video clips, which only partially depicted what occurred, fell within corporal punishment, particularly the use of physical training to discipline. The reporting police officer and social workers testified that Shaylyn was happy. APP 0288, 0497-0498. Shaylyn herself testified that she understood Lisa Nash was trying to help her lose weight and that she never felt like she was being abused. APP 0310.

With the improper admission of Megan's unspecified allegations of prior persistent abuse happening two to three times a month and the State's argument that Shaylyn was particularly vulnerable given her special needs and low IQ, no reasonable jury would have found that Lisa Nash's actions amounted to felonious child abuse or neglect.

VII. CONCLUSION

Lisa Nash relies on the foregoing to respectfully request that this Court vacate the Judgment filed against her in the Eighth Judicial District, Clark County.

Respectfully Submitted this 4th day of February, 2019.

By: /s/Theresa Ristenpart, Esq.
Theresa Ristenpart, Esq.
Appellant Counsel for Lisa Ann Nash

CERTIFICATE OF COMPLIANCE WITH NRAP 32(a)

Certificate of Compliance with Formatting Requirements, Volume Limitation,
Typeface Requirements, and Type Style Requirements in Case Number 76124.

1. This brief complies with the type-volume limitations of Nevada R. App. P. 32(a)(7)(B) because:

This brief contains 4742 words, excluding the parts of the brief exempted by Nevada R. App. P. 32(a)(7)(C).

2. This brief complies with the typeface requirements of Nevada R. App. P. 32(a)(5) and the type style requirements of Nevada R. App. P. 32(a)(6) because:

This brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point font and Times New Roman type style.

I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the

accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

By: /s/Theresa Ristenpart, Esq.

Theresa Ristenpart, Esq.

Appellant Counsel for Lisa Ann Nash

Dated this 4th day of February, 2019.

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of RISTENPART LAW, LLC and that on the 28th day of January, 2019, a true and correct copy of the **Lisa Ann Nash's Opening Brief** was e-filed and e-served on all registered parties to the Nevada Supreme Court's electronic filing system as listed below:

Steven S. Owens
Clark County District Attorney

Adam Laxalt
Attorney General State of Nevada

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document to the following non-CM/ECF participants:

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