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UNDER SEAL

STATE OF WISCONSIN v. STEVEN AVERY
Case No. 05-CF-381

Defendant's Memorandum Opposing Uncharged Misconduct Evidence

Unsealed
per Order
dated 03-23-07

SEALED

STATE OF WISCONSIN CIRCUIT COURT MANITOWOC COUNTY

STATE OF WISCONSIN,

Plaintiff,

v.

Case No. 2005-CF-381

STEVEN A. AVERY,

Defendant.

DEFENDANT'S MEMORANDUM OPPOSING UNCHARGED MISCONDUCT EVIDENCE

I.

INTRODUCTION

The evidence of Steven Avery's past misconduct, real or alleged, that the state wishes to offer is old and scant in probative value. Some of it also is unfairly prejudicial. Avery asks the Court to deny all nine of the state's motions *in limine* to admit evidence under WIS. STAT. § 904.04(2). This memorandum explains Avery's request.

II.

FACTS

In short, the nine areas of other bad acts that the state seeks to explore at trial are:

A. Physical violence and threats against Avery's first wife, Lori Avery. Any physical violence necessarily dates to 1985 or earlier, and threats date to 1993 and earlier. The state claims this evidence is probative of intent, motive, and plan to kill Teresa Halbach in 2005.

B. Physical violence against Avery's current girlfriend, Jodi Stachowski. This dates to 2004 and allegedly involves slapping, hitting, throwing Stachowski to the ground, and choking her. The state claims this evidence is probative of intent, motive, and plan to kill Teresa Halbach.

C. Animal cruelty, specifically dousing a cat with gas or oil and throwing it in a bonfire, in 1982. The state claims this evidence is probative of intent, motive, and plan to kill Teresa Halbach in 2005, as well as probative of the identity of Halbach's killer.

D. Forcing Sandra Morris off the road in early 1985 while armed with a rifle, and angry about Morris' claims that he had been exposing himself to her at the

roadside. The state claims this evidence is probative of intent, motive, and plan to kill Teresa Halbach in 2005, as well as probative of the identity of Halbach's killer.

E. Possessing a firearm in 1985. This is the Sandra Morris incident again. This time, the state wants to offer the evidence to show knowledge, presumably on the felon-in-possession count.

F. Forcible sexual assault of a 17-year old in 2004. This is the alleged incident that Brown County District Attorney John Zakowski, serving as special prosecutor, to date has declined to charge. The state claims it proves intent, motive, and plan to kill Teresa Halbach in 2005.

G. Forcible sexual assault of another woman, then aged 18 or 19, in 1982 or 1983. Once more, the state claims this proves intent, motive, and plan to kill Teresa Halbach in 2005.

H. Having sex one to five times a day with Stachowski, prior to her incarceration for drunk driving. The state claims that this evidence is probative of motive to kill Teresa Halbach.

I. A telephone conversation that Avery allegedly had with a former girlfriend of his nephew, Bryan Dassey, on October 30, 2005. Avery purportedly asked her, "Would you like to come over and have a little fun? We can have the bed hit the wall real hard." The state claims that this evidence is probative of Avery's intent, motive, and plan to kill (or rape?) Teresa Halbach the next day.

III.

ARGUMENT

Avery faces five charges of first degree intentional homicide, first degree sexual assault, kidnaping, false imprisonment, and mutilation of a corpse related to Teresa Halbach's assumed death on October 31, 2005. He faces a sixth charge of being a felon in possession of a firearm on November 5, 2005. Although the state has insisted in arguments over Avery's bail that it has a very strong case against him, it now looks for support to seven separate areas of Avery's prior misconduct and two instances of his character (frequency of sexual intercourse, telephone proposal to have sex), ranging from well over 20 years before the charged acts to the day before.

Wisconsin courts generally exclude proof of other bad acts. *State v. Edmunds*, 229 Wis. 2d 67, 79, 598 N.W.2d 290, 296 (Ct. App. 1999) ("As a general rule, evidence of prior bad acts is not admissible because of the risk that the jury will find the defendant had bad character in general and then convict him/her of the specific crime being tried, as a punishment for being a 'bad person'"); WIS. STAT. § 904.04(1). At most, only one of the six charges against Avery loosens the general rule excluding uncharged acts under this state's "greater latitude" rule: the first degree sexual assault count. Even that one is debatable. While the Wisconsin Supreme

Court wrote in *State v. Davidson*, 236 Wis. 2d 537, 555, 613 N.W.2d 606, 615 (2000), of a greater latitude rule in "sexual assault cases," the *Davidson* court hastened to add a qualification. It appended to the phrase "sexual assault cases" the explanatory clause "particularly cases that involve sexual assault of a child." *Davidson*, 236 Wis. 2d at 555, 613 N.W.2d at 615; *see also id.* at 559, 613 N.W.2d at 617 ("especially those [sexual assault cases] involving crimes against children"). And every case that *Davidson* discussed in support of the greater latitude rule from its beginning concerned a sexual assault of a child. *Id.* at 555-60, 613 N.W.2d at 615-17. Teresa Halbach, of course, was an adult in her mid-20's. This case does not square with the facts of most cases that apply the greater latitude rule, or with the likely reasons for the rule.[1]

The proponent of other acts evidence bears the burden of proving its admissibility under Wisconsin's three-step test. *State v. Sullivan*, 217 Wis. 2d 768, 774, 576 N.W.2d 30, 33 (1998). Later, an appellate court decides whether the circuit court exercised appropriate discretion. That means the circuit court must examine the relevant facts, apply a proper standard of law, and use a demonstrably rational

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[1] Wisconsin courts have provided remarkably little reasoned justification for the greater latitude rule. Avery assumes, though, that the lesser ability of children to recount articulately crimes against them (or to report those crimes at all) and the perception that adults who are sexually interested in children tend to act on that interest repeatedly as they lose the struggle with libido might explain why these crimes warrant a relaxed evidentiary rule, but other crimes do not.

process to reach a conclusion that a reasonable judge could reach. *Sullivan*, 217 Wis. 2d at 780-81, 576 N.W.2d at 36.

The three steps that *Sullivan* requires are: first, "determine whether the other acts evidence is offered for a permissible purpose" under § 904.04(2), which provides an illustrative (not an exhaustive) list. *Sullivan*, 217 Wis. 2d at 783, 576 N.W.2d at 37. Second, decide whether the other acts evidence is relevant. *Id.* at 785, 576 N.W.2d at 38. And third, decide whether the danger of unfair prejudice substantially outweighs probative value. *Id.* at 789, 576 N.W.2d at 39-40; WIS. STAT. § 904.03.

The second step, relevance, itself has two components. A circuit court must (a) decide "whether the evidence relates to a fact or proposition that is of consequence to the determination of the action; and (b) assess probative value, "that is, whether the evidence has a tendency to make a consequential fact more probable or less probable than it would be without the evidence." *Sullivan*, 217 Wis. 2d at 785-86, 576 N.W.2d at 38. Although Wisconsin has no general rule on the required degree of similarity between the other acts and the charged offense, *id.* at 787, 576 N.W.2d at 39, "[t]he probative value of the other acts evidence . . . depends on the other incident's nearness in time, place and circumstances to the alleged crime or to the fact or proposition sought to be proved." *Id.* at 786, 576 N.W.2d at 38. "The stronger the similarity between the other acts and the charged offense, the greater

will be the probability that the like result was not repeated by mere chance or coincidence." *Id.* at 786-87, 576 N.W.2d at 38.

Within that framework, Avery now undertakes to "clearly articulate" his reasons for excluding the state's proffered evidence by applying "the facts of the case to the analytical framework," as the *Sullivan* court bid him to do. *Id.* at 774, 576 N.W.2d at 33.

A. ***Threats and Violence Against Lori Avery.*** Intent would be a proper purpose for other bad acts evidence as to the first degree murder charge here, and intent admittedly is in issue. But the Lori Avery evidence founders on probative value. It fails the second-step requirement of relevance. The Lori Avery evidence is notably remote in time. Any physical violence necessarily dates back at least 20 years, before Avery went to prison in 1985. The written and telephonic threats came while he was in prison, but before Judge Hazelwood's ruling in 1993. Even that latest date was 12 years before Teresa Halbach died.

The Lori Avery evidence also is dissimilar to the charged crimes. Choking, hitting, and punching a spouse are very different than restraining a casual acquaintance to a bed and then either stabbing or shooting her.[2] Nothing suggests

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[2] Those are the two methods of killing that Brendan Dassey has attributed to Avery. On May 13, Dassey changed dramatically the details of those claims – how many stab wounds, where on Halbach's body, in what basic location the stabbing occurred at all, and how many rifle shots Avery fired. For purposes of this memorandum, Avery sets aside those considerable discrepancies (continued...)

that Avery intended to murder Lori Avery in the early 1980's. By contrast, if the jury believes that he stabbed and shot Teresa Halbach in 2005, nothing would suggest anything other than an intent to kill. So the old evidence of domestic abuse involving Lori Avery would not prove intent here, and the two intents would not even be the same. In other words, the Lori Avery evidence does not relate to "a fact or proposition that is of consequence to the determination of the action." *Sullivan*, 217 Wis. 2d at 785, 576 N.W.2d at 38.

Less still would the Lori Avery evidence bear on plan or motive. Avery cannot conceive how the state would construct a 20+ year plan culminating in Teresa Halbach's murder, from domestic abuse involving Avery's ex-wife. More importantly, the state offers no such linkage, and that in the end is the state's burden. Avery also cannot fathom how abusing Lori Avery in the early 1980's would give Steven Avery a motive to murder Teresa Halbach more than two decades later. The state's silence suggests that it, too, is stumped.

Finally, written threats made to and about Lori Avery have no bearing on intent, plan or motive in this case. There is no evidence that Avery ever threatened Teresa Halbach, in writing or otherwise. Avery had reason, real or

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[2](...continued)
with Dassey's March 1 statement (and the even greater discrepancies between both his March 1 and May 13 statements and his February 27 and earlier statements). Avery also sets aside the inadmissibility of evidence of stabbing or shooting unless Dassey testifies at Avery's trial.

imagined, to be angry at his ex-wife: a divorce; her conduct with their children; and his estrangement from the children because he was imprisoned. He had no reason to be angry at Teresa Halbach. The two situations are entirely dissimilar. So nothing about the old threat evidence makes any material fact here more or less probable.

B. ***Violence Against Jodi Stachowski.*** The state proposes to offer physical violence evidence concerning Stachowski for the same reasons it tenders the Lori Avery evidence. Again, the state can meet the first step of the *Sullivan* test as it does with the Lori Avery proffer.

The Stachowski evidence also has the advantage of being nearer in time to Halbach's death.[3] But there the probative value ends. As with Lori Avery, there is no evidence that Avery intended to kill Stachowski. If he did as the state alleges, there is no chance that he meant to do anything other than kill Halbach, by contrast. The intents are different. Again, then, the Stachowski evidence does not relate to a fact of consequence.

The acts also are dissimilar, further reducing probative value. Domestic slapping, punching and choking are not at all what the state contends Avery did to Halbach: stabbing and shooting someone who was a casual acquaintance at most.

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[3] Although the state does not say, the Stachowski evidence presumably falls between about June 2004, when Stachowski and Avery began to date, and mid-summer 2005, when Stachowski went to jail. So the proffered incidents arose perhaps 3-16 months before the crimes alleged here.

They are nearer in time than the Lori Avery episodes, but no nearer in circumstance. The Stachowski evidence is not probative of intent.

In the same way as the Lori Avery evidence, the Stachowski evidence is not probative of plan or motive, either. On those points, the Stachowski evidence is altogether a *non sequitur*.

Finally, even assuming that there is some slight probative value of the Stachowski evidence on the question of intent, that is outweighed substantially by the danger of unfair prejudice. WIS. STAT. § 904.03; *Sullivan*, 217 Wis. 2d at 789-90, 576 N.W.2d at 39-40. The import of the Stachowski evidence is that Avery is a brutish sort who hits his girlfriend; a bad man. In a case featuring already inflammatory allegations of restraint, rape, torture, murder, and burning of a corpse, that suggestion of a brute who simply deserves punishment well could sway the jury to a conviction on an improper notion of propensity. If the Court got to the third step of *Sullivan*, then, this evidence would fail there.

C. ***Animal Cruelty.*** Twenty-three years before he allegedly raped and murdered Teresa Halbach, a 20-year old Steven Avery threw a cat into a fire after soaking it in flammable liquid. That episode is so remote in time and dissimilar to the actual allegations here that it has no probative value on intent, plan, or motive. For the same reasons, it is less probative still on the issue of identity (or *modus operandi*), for which courts require similarity that is so close that the earlier

acts amount to an "imprint" or "signature" of the culprit. *State v. Scheidell*, 227 Wis. 2d 285, 304, 595 N.W.2d 661, 671 (1999) ("When the state seeks to admit identity evidence of other crimes, it must show 'such a concurrence of common features and so many points of similarity between the other acts and the crime charged that it can reasonably be said that the other acts and the present act constitute the imprint of the defendant;'" quoting *State v. Fishnick*, 127 Wis. 2d 247, 263-64, 378 N.W.2d 272, 281 (1985)).

Obviously, the animal cruelty case was not near in time to these alleged offenses. And neither are the circumstances even close, upon careful (or even casual) examination. Teresa Halbach is a human being; the earlier case involved a cat. No one alleges here that Avery poured any flammable liquid on Halbach, or any liquid at all. No one alleges that he put her in a fire while alive. No one alleges that he took any pleasure in watching her burn. Here, the allegation is that burning was the method Avery chose to dispose of a body and conceal evidence of a murder. Burning had no independent purpose of its own, on the state's evidence.

A bonfire is the only real point of similarity between the two incidents. That is too little. Many rural and farm properties maintain burn pits and fires are common. This evidence flunks the second step of *Sullivan*.

Were this 1982 episode probative at all of a proper fact in dispute, its slight probative value would be greatly outweighed by the danger of unfair

prejudice. The 1982 facts were and are sensational and disgusting. Many people have an admirable soft spot in their hearts for cats in particular, or for dependent, cute animals that are common pets (and therefore often anthropomorphized)[4] in general. The apparent wanton cruelty and senselessness of the 1982 allegations would distract and shock jurors, raising the specter that they would convict Avery more easily because they could view him as inhuman or a monster. There is patent unfairness and prejudice in evidence that at once tends to anthropomorphize and thus cause empathy for a victim cat, and to dehumanize and thus reduce empathy for the human being who is the accused. Avery's jurors should not be tempted to the false conceit that they can impute to a cat more human qualities than they can impute to Avery. This evidence fails the third step of *Sullivan*, as well.

D. ***Endangering Safety While Armed.*** Almost 21 years before Teresa Halbach's disappearance and death, Avery endangered Sandra Morris's safety by ramming her car, forcing it off the road, and confronting her with a rifle. Avery allegedly was angry about accusations he believed she had made that he had exposed himself to her.

This evidence, too, fails the second facet of *Sullivan's* second step, relevance. The Morris incident is remote in time. It also is dissimilar in conduct:

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[4] An interesting, if in the end unanswerable, question is whether Avery would have been charged at all if the animal involved had been a barn rat or a common snake. Legally it should not have mattered. Factually, it might have.

Avery did not even purportedly run Halbach's car off the road, he did not confront her with a rifle, and there is no evidence that he was mad at her or had any quarrel with her behavior. Likewise, there was no claim in 1985 that Avery then set out to bind, rape, torture, or kill Sandra Morris. There is no claim that he attempted to lure her to a secluded area, as the state claims he did to Halbach. These are quite dissimilar situations, and separated by more than two decades' time.

The Morris incident also runs into problems under *Sullivan's* third step, WIS. STAT. § 904.03. If it has any slight probative value on the question of intent more than 20 years later, or plan or motive, that easily is outweighed substantially by its unfair prejudice. Moreover, this evidence would lead to other evidence necessary for explanation and context and therefore would distract the jury and needlessly complicate the trial. Avery pled guilty or no contest to the Morris charge — but only after his wrongful conviction for the 1985 rape and on the expectation that he would get a concurrent sentence (which he did). His failure to contest the Morris charge must be understood in that context. He was a man whom the system had failed, who was bitter, who by reason of immediate personal experience quite understandably doubted the ability of juries to spare the innocent, and who was giving up hope. If the Court admitted the Morris incident, it also would have to allow this evidence of context. But the Morris evidence itself is a game not worth the candle.

E. ***Possessing Rifle in 1985.*** The state contends that this evidence proves knowledge, presumably as to the felon-in-possession charge only (although the state does not say). Knowledge might play two substantive roles, conceivably, in a felon-in-possession charge: knowledge that a firearm was possessed; and knowledge that its possession was unlawful. But the second of these is not an element of the offense under WIS. STAT. § 941.29, *see* WIS. JI-CRIM. 1343, so it washes out on the first facet of relevance, part of *Sullivan's* second step. *Sullivan*, 217 Wis. 2d at 786, 576 N.W.2d at 38.

That leaves simple knowledge of a gun's possession. The January 1985 incident has no tendency to make it more likely that Avery knew he possessed a gun in November 2005. The state does not contend that the two guns are the same. It does not contend that they came from the same place, or were found in the same place. The old evidence is remote, yes, but not remotely relevant.

F. ***Forcible Sexual Assault of 17-year Old in 2004.*** The allegation involving M.A. probably is the closest call of the nine areas of other conduct that the state wishes to offer. But it still is not admissible.

Intent, motive and plan are permissible purposes for uncharged misconduct evidence in a sexual assault case. So the first step of *Sullivan* is not in dispute.

The second step is. Although this alleged incident is not remote in time (at least compared to many of the incidents the state seeks to offer), the hard question is how having sex with a 17-year old in the summer of 2004, by forcing her hands over her head, would make it more likely that Avery intended to rape Teresa Halbach in October 2005, let alone show that he had any plan or motive to do so. Genuine dissimilarities separate the M.A. allegations from the Halbach claims. The ages are different and familiarity with the victim is very different.[5] M.A. was not bound or tied to a bed; nothing close to that, even if Avery forced her hands over her head. The state also does not claim that Avery had repeated sexual encounters with Halbach.

Perhaps more striking is another dissimilarity. It may be, now after Brendan Dassey's May 13, statement that the state does not contend that Avery had sex with Teresa Halbach at all. The first degree sexual assault charge here is as party to a crime, and Dassey may be saying now that he does not know whether Avery had sex with Halbach, but that Avery urged him to rape her. If so, that is a substantial difference from the M.A. allegation. That Avery may have had illicit sex himself does not tend to make it more likely that he encouraged his nephew to do the same, but desisted himself.

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[5] M.A. allegedly is a relative of Avery.

Finally, there is a separate relevancy objection. If a jury were to believe that Avery (or Dassey, with Avery's encouragement) stripped naked a near-stranger, tied or shackled her to a bed, and had sexual intercourse with her despite her protests and efforts to free herself, the jury could not possibly entertain a doubt that the act was intentional. In that sense, intent will not be in issue at all here. The issue will be whether the assault happened.

Again, Avery concedes that this item is the closest call. But in the end, the M.A. evidence is not relevant to an issue actually in dispute. Were there probative value, it would be outweighed substantially by danger of unfair prejudice. The M.A. allegation involves incest, which makes it especially volatile and likely to influence a jury unfairly. It should not come in.

G. ***Forcible Sexual Assault of Young Adult in 1982-83.*** The remoteness in time of the J.A.R. allegation makes it an easier call to exclude. These allegations date to 22 or 23 years before the Halbach offenses. They can say nothing about what someone intended more than two decades later. Neither can they support a claim of a 20-year plan in the making that would culminate with Teresa Halbach, or support a motive to do anything to the wholly unrelated Halbach.

The J.A.R. allegations also share all of the dissimilarities that appear in the M.A. allegations, except that J.A.R. does not appear to be related to Avery. Further, the J.A.R. claims involve Avery's own assaultive conduct, not the very

different claim that he encouraged another man to rape her in his presence for voyeuristic or other reasons.

H. ***Frequency of Sex.*** The state of Wisconsin frequently is zealous in asserting the inadmissibility of any evidence bearing on the sexual conduct of the complaining witness in a criminal case, under the rape shield law. WIS. STAT. § 972.11(2). Avery notes the irony, therefore, in the state's claim that his most basic consensual sexual conduct[6] with his adult girlfriend should be offered to this jury to help it decide whether he raped and murdered another woman entirely. Even greater is the irony that Jodi Stachowski, who is an innocent witness here at most, should have her consensual sexual conduct put on display at the state's urging.

Section 972.11(2) does not protect the accused or a witness other than the complainant, but this evidence is inadmissible all the same. It is not offered for a permissible purpose; it is not relevant to any such purpose; and it would be altogether more unfairly prejudicial than probative even assuming it could climb the first two steps. This evidence founders on all three of the *Sullivan* factors.

First, the consensual sexual habits of boyfriend and girlfriend provide no motive to rape or murder a near-stranger. A girlfriend is an appropriate sexual

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[6] Discovery materials contain evidence of Teresa Halbach's consensual sexual activity and suggestions of her sexual practices. Two months ago or more, defense counsel assured the prosecution that Avery would not attempt to offer that evidence. In that regard, the defense also invited the state to release one potential item of evidence belonging to Halbach that the police had acquired. If Avery hoped for parallel decency from the state in response, evidently on this topic he was to be disappointed.

partner; a casual acquaintance is not. Nothing suggests that Avery ever sought out Teresa Halbach as a sexual partner, or took any step in that direction. Even she did not suggest this, when she made comments to co-workers at AUTO TRADER magazine about her reservations concerning Avery or his family. Stachowski and Halbach had no known connection to one another, so there is no linkage that would have provided Avery any motive to act out as to Halbach with Stachowski in mind (for revenge, to provoke jealousy, or for any other reason) – let alone to rape or kill Halbach.

Second, Avery's preferred sexual frequency has no tendency to make it more likely that he raped or killed Halbach, or had a motive to do so. Implicitly, the state's argument must be that men with a strong sex drive or an active libido more likely are rapists. The argument is mistaken, in a word. It would follow from the state's implicit reasoning, for example, that women with a strong sex drive or an active sex life are less likely to be rape victims. That corollary is just as mistaken, at best. More importantly here, the linkage of logical relevance is missing entirely.

Third, it is hard to imagine much that would be more unfairly prejudicial to Avery – and to Stachowski, who was in jail when Teresa Halbach disappeared and could not have had anything to do with her death – than to present public testimony on his consensual sex life in an effort to persuade a jury to

convict him of rape and murder. WIS. STAT. § 904.03. Indeed, this is the sort of evidence that summons the Court's power under § 904.03 to avert a "waste of time."

I. ***Suggestive Telephone Proposal.*** If the state's proffer is correct, Avery had the poor manners to make a randy suggestion to his nephew's former girlfriend in one short telephone conversation that she initiated. The comment itself was the type that might be overheard thousands of times every Saturday night in Wisconsin's nightclubs and gin mills as the hour approaches 2:00 a.m. There is no suggestion that Avery committed any crime in making this licentious proposal, or even that it would have been illegal for the young woman to accept it.

Not every bar-time Lothario is a rapist or a murderer. Almost none of them are one or the other. Without belaboring the point, then, this evidence is inadmissible for every reason that proof of Avery's sex life with Stachowski is improper. Smutty it is; proper of purpose, probative of material fact, or fair it is not.

IV.

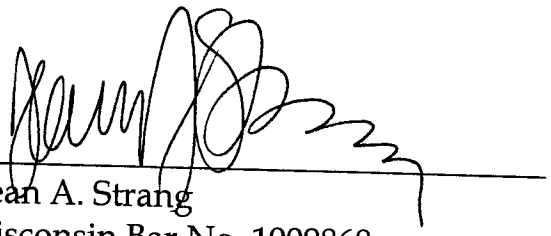
CONCLUSION

Steven Avery asks the Court to deny the state's nine motions to admit old, weak evidence of other misconduct. The state should try Avery on the crimes it charged here, not on long past allegations either once adjudicated or never charged.

Dated at Madison, Wisconsin, June 26, 2006.

Respectfully submitted,

HURLEY, BURISH & STANTON, S.C.



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