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ATTORNEY GENERAL OPINION NO. 89-6

TO: Richard A. Vernon, Director
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Per Request for Attorney General's Opinion

QUESTION PRESENTED:

What duty does the Idaho Department of Corrections and its employees have to protect staff members and inmates from inmates who are HIV positive, or who have ARC or AIDS, as a result of the state mandated testing of the prison population?

CONCLUSION:

The duty of the Idaho Department of Corrections to inmates and staff is to take reasonable measures to ensure their safety. No greater liability is created by reasonably restricting access to patient information. In fact, under some circumstances, failure to protect the confidentiality of such information could expose the department to liability.

ANALYSIS:

The Department of Corrections has a duty to the general inmate population, to employees of the prison and to HIV-infected inmates. Each duty has different elements that are based on statute, common law and common sense. This opinion will discuss each duty separately.

Duty to the General Inmate Population

The United States Constitution imposes upon the state affirmative duties of care and protection with respect to particular individuals in confinement. In Estelle v. Gamble, 429 U.S. 97 (1976), the United States Supreme Court recognized that the eighth amendment's prohibition against cruel and unusual

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punishment, made applicable to the states through the fourteenth amendment's due process clause, Robinson v. California, 370 U.S. 660 (1962), requires the state to provide adequate medical care to incarcerated prisoners. 429 U.S. at 103-104. The Court reasoned that because the prisoner is unable "by reason of the deprivation of his liberty to care for himself," it is only just that the state be required to care for him. Id., quoting Spicer v. Williamson, 191 N.C. 487, 490, 132 S.E., 291, 293 (1926). The Court, in Youngberg v. Romeo, 457 U.S. 307 (1982), extended this analysis beyond the eighth amendment setting, holding that incarceration does not deprive a person of all substantive liberty interests and that there is a right to personal security which constitutes a historic liberty interest protected by the due process clause.

Taken together, Estelle and Youngberg stand for the proposition that when the state takes inmates into its custody and holds them against their will, the Constitution imposes upon it a corresponding duty to assume some responsibility for their safety and general well being. To make an eighth amendment claim based upon failure to provide medical care, a plaintiff must show a deliberate indifference by prison authorities to serious medical needs of inmates. Liability "[r]equires, at a minimum, that the prison officials have realized that there was imminent danger and have refused -- conscientiously refused, knowingly refused -- to do anything about it." Duckworth v. Fransen, 780 F.2d 645, 653 (1985). The Supreme Court quoted the Duckworth standard with approval in Whitley v. Albers, 475 U.S. 312 (1986). Nonetheless, the penal institution is not an absolute insurer of the safety of the inmates. Parker v. State, 282 So.2d 483 (La. 1973). A prison authority is held to a standard of reasonable care; in order to hold the authority liable, the complainant must show foreseeable harm and failure to use reasonable care in preventing harm. Walker v. Foti, 530 So.2d 661 (La. App. 4th Cir. 1988).

The unnecessary exposure of inmates to communicable diseases, in particular, is a violation of the state's duty to care for the safety of the inmates and is prohibited by the eighth amendment. Wilson, et al. v. State of Idaho, 113 Idaho 563, 746 P.2d 1022 (Ct.App. 1987). See also, Rhodes v. Chapman, 452 U.S. 337 (1981); Madison County Jail Inmates v. Thompson, 773 F.2d 834 (7th Cir. 1985); Goodson v. City of Atlanta, 763 F.2d 1381 (11th Cir. 1985); and Blake v. Hall, 668 F.2d 52 (1st Cir. 1981). Thus, the Department of Corrections has an affirmative duty to protect the inmate population from the infection of HIV. One court has found that the failure to screen incoming prisoners

for communicable diseases was a violation of this duty. Lareau v. Manson, 651 F.2d 96 (2d Cir. 1981). The Federal Bureau of Prisons has begun mandatory testing of all federal prisoners for HIV antibodies. See, Federal Bureau of Prisons Operations Memo No. 73-87(6100), Human Immunodeficiency Virus Admission and Re-reliance Program (June 24, 1987).

The State of Idaho has likewise recognized this duty. Idaho Code § 39-604 states in part:

(1) All persons who shall be confined or imprisoned in any state prison facility in this state shall be examined for on admission, and again before release, and, if infected, treated for the diseases enumerated in Idaho Code § 39-601 [venereal diseases] and this examination shall include a test for HIV antibodies or antigens...

The only judicial construction to date of this particular statute and of the Department of Corrections' more general duty to provide reasonable care to protect inmates from AIDS occurred in December of 1988, when the Fourth Judicial District Court for the County of Ada heard an action brought by two inmates of the Idaho State Correctional Institution against the State of Idaho. The petitioners, in essence, alleged that the Department of Corrections had failed to exercise reasonable care by failing to have all inmates tested for communicable diseases and by failing to have those prisoners found to be infected with HIV segregated from the general population. The petition was dismissed after the court scrutinized the medical practices and regulations in place at the prison and found them adequate to prevent the unnecessary exposure of inmates to communicable diseases. The decision by Judge Dennard set forth the prison's practices as follows:

Since September of 1987, all incoming inmates have been specifically tested for HIV. This is part of an overall medical examination given by either Dr. Mutch or his physician's assistant, under his supervision. Medical histories are also taken. Each incoming inmate is giving [sic] a broad blood screen which can detect abnormalities that might suggest the presence of other infectious diseases. If, upon such examination and testing, there is a medical indication of possible infectious disease, further testing is administered as necessary to aid in the diagnosis of the disease. If an inmate has an infectious disease, he is given the appropriate medical treatment. If the

disease he has is infectious and the risk of infection to other inmates is high, he is isolated during the infectious stage, and then returned to the general inmate population. This would be the case with an infectious disease such as tuberculosis. Isolation for diseases such as the form of hepatitis which is transmitted only through the oral/fecal route, is not considered medically appropriate. The same is true for other forms of hepatitis which can be transmitted only through an exchange of blood serum, or bodily fluids, including through sexual intercourse. Infected inmates are counseled as to these risks of transmission, and are not isolated since quarantine is not considered medically appropriate in the general public population under the same medical circumstances.

Similarly, a person who tests positive for HIV, is not quarantined since there is no risk of transmission unless the infected inmate engages in the high risk activities of sharing needles during intravenous drug use, or homosexual conduct. Each inmate is specifically counseled as to these activities and their potential for transmitting the virus, not only by Dr. Mutch, but also by the local health authorities. They are told that if they engage in such activities, they will be isolated from other inmates. Each infected inmate is seen by Dr. Mutch on a regular basis, the frequency depending upon the inmate's condition. On each visit with Dr. Mutch, he gives the infected inmate a complete physical examination and questions him as to abstinence from the activities in which the virus can be transmitted. Dr. Mutch also seeks the input from the prison authorities on whether the inmate has engaged in any of these high-risk activities.

At present, the Department of Corrections, acting upon the medical advice of Dr. Mutch, its Acting Medical Director, has determined that inmates infected with HIV will be given appropriate medical treatment; they will be educated and counseled as to the risks and manner of transmitting the virus; they will be regularly monitored for compliance with directives not to engage in any high risk behavior; but will not be segregated from the general population unless medically appropriate on a case by case basis, or

unless the inmate ignores the admonition about prohibited behavior and engages in activities which may transmit the virus to other inmates.

Having set forth the prison's medical policies and practices, Judge Dennard next evaluated those policies and practices in light of contemporary medical knowledge of AIDS-related conditions:

This course of treatment is the same course of treatment provided for a member of the general public population. People outside of the prison who have HIV are not quarantined. In fact, disclosing the fact they are infected or treating them differently from non-infected persons is most often prohibited by the courts, rather than mandated. See Journal of the American Medical Association, Vol. 257, No. 3, Page 344, 'The Initial Impact of AIDS on Public Health Law in the United States-1986,' for a general discussion of legal issues raised by AIDS.

HIV cannot be transmitted through casual contact. It requires the exchange of bodily fluids which occurs primarily though [sic] the sharing of needles during intravenous drug use and through homosexual activity. Both activities are prohibited in a prison environment. Not only are inmates aware they will be disciplined for engaging in these prohibited activities, the department has also enacted regulations which inform inmates about these high risk activities and their relation to the transmission of AIDS. These regulations also spell out how inmates will be tested and treated for HIV, ARC and AIDS. It has been made clear, not only to the infected inmate, but also to the general inmate population, abstinence from these high risk activities is necessary to avoid HIV infection.

According to Mr. Murphy, the Director of the Department of Corrections, very few correctional facilities have opted to segregate all inmates infected with HIV, from the general prison population. The Federal Bureau of Prisons has determined that only HIV infected inmates who have exhibited predatory or promiscuous behavior, will be segregated from the general population. Bureau of Prisons, Control, Custody, Care, Treatment and Instruction of Inmates, 28 C.F.R. Part 541. It

appears that segregation is neither medically mandated, or [sic] the accepted standard in penal institutions, except for infected inmates who demonstrate a proclivity for engaging irresponsibly in high-risk activities.

The court concluded that the department's medical practices and regulations relating to AIDS are reasonable under the circumstances:

I therefore conclude, as a matter of law, that the present medical practices and regulations in place at the prison are adequate to prevent the unnecessary exposure of inmates to communicable diseases, including HIV, and that the conditions complained of by these petitioners are insufficient to state a claim of cruel and unusual punishment under the eighth amendment. I do not believe that contemporary standards of decency require that an inmate infected with HIV be segregated from other inmates unless that inmate has demonstrated a proclivity to engage in conduct which poses a high risk of transmission of the virus to other inmates. There is no segregation or quarantine of members of the general population except under those similar circumstances and I see no special circumstances by reason of a person's confinement in prison, to warrant different treatment of infected inmates. By reason of this conclusion, the writ of habeas corpus will be quashed and the petitioner's petitions are dismissed. I will grant petitioners leave, however, to reopen these proceedings in the event it can be shown that prison authorities have not promptly investigated and acted upon the information that came to light in the course of this hearing regarding the conduct of the HIV infected inmate presently under Mr. Mutch's care. If it is determined that this inmate has disregarded Dr. Mutch's directives about engaging in high-risk activities, then appropriate action on the part of the authorities to prevent any future occurrence of this conduct would be mandated under this decision.

Hays v. State, Case Nos. HC2799 and 2800, Ada County, M. Dennard (Memorandum Decision and Order, dated December 23, 1988).

This opinion accepts Judge Dennard's decision that the Department of Corrections' policy and practices, as followed in

November of 1988, are sufficient to provide the reasonable protection of inmates required by the Constitution of the United States.

Duty to Staff

Prison administrators are charged with the responsibility of ensuring the safety of prison staff, administrators and visitors as well as an obligation to take reasonable measures to guarantee the safety of inmates. Whitley v. Albers, 475 U.S. 312 (1986). However, absent a statute imposing such liability, a prison, like any other employer, is not an insurer and is liable only for negligence. Curtis v. Deatley, 104 Idaho 787, 663 P.2d 1089 (1983); Shirts v. Schultz, 76 Idaho 463, 285 P.2d 479 (1955).

The duty of the Department of Corrections to its staff is to take reasonable precautions to prevent the spread of communicable disease. What constitutes "reasonable" regarding HIV infection must be defined in relation to the probability of infection, the steps taken by the department to maintain control, and what alternatives may exist to current practice.

HIV cannot be transmitted through casual contact. It requires the exchange of bodily fluids, primarily through the sharing of needles during intravenous drug use and through homosexual activity. Hays v. State, p.11. The third and only other relevant method of transmittal in the prison environment is blood transfer through open wounds. Data from several United States studies suggest that the risk of HIV infection due to accidental needle sticking or puncture wounds is extremely small. The National Institute of Justice AIDS Bulletin, October 1987 reported that only three United States health workers (.005% of 666 persons) who were not in a high risk group tested positive for the HIV antibody after direct blood to blood contact. Prisons: Confidentiality of Medical Information Concerning AIDS, Nevada Att'y Gen. Op. No. 87-18 (1987), citing AIDS in Correctional Facilities: Issues and Options, National Institute of Justice (2nd Ed. May 1987).

Not surprisingly, the risk associated with open wound and mucous-membrane (e.g., eyes, nose, mouth) exposures is even lower, as reported in a Center for Disease Control surveillance study, where 172 health care workers had open wounds or mucous-membranes exposed to the blood of HIV infected patients. None of these workers became infected. E. McCray, The Co-operative Needlestick Surveillance Group: Occupational Risk

of AIDS Among Health Care Workers, New Eng. J. of Med., 314, 1127 to 1132 (1986). In a NIH study, no infections occurred among 229 health care workers with similar mucous-membrane exposures. Finally, in a study at the University of California, 34 health care workers with open wound or mucous-membrane exposures were tested and none were positive for HIV antibodies. D.K. Henderson, A.J. Saah, B.J. Zak, et al., Risk of Nosocomial Infection with HTLV-3/LAV in a Large Cohort of Intensively Exposed Health Care Workers, Annals of Internal Medicine, 104, 644 to 647 (1986). Four hundred thirty-five health care workers with non-needle stick exposures to HIV infected blood have been followed in prospective studies and none have become infected. Nevertheless, the Center for Disease Control has always believed that infection through such exposures is possible, although the risk is still considered extremely low. AIDS Bulletin, National Institute of Justice (October 1987).

A recent study conducted by the National Institute of Justice found that there were no known cases of AIDS, ARC or HIV seropositivity among correctional institution staff as a result of contact with inmates. Prisons: Confidentiality of Medical Information Concerning AIDS, Nevada Att'y Gen. Op. No. 87-18 (1987).

The National Institute of Justice has directly addressed the duty of correctional departments to their employees:

Departments are not legally required to ensure the absolute safety of their employees but only to adhere to a reasonable standard of care. Just as an agency would only be liable for a gunshot wound or other injury incurred in the line of duty if established safety procedures had been violated or the Department had been otherwise negligent, so in the case of HIV infection, such negligence would also need to be shown. (Of course, worker's compensation might well apply to either case, but would not entail the serious consequences of a finding of departmental liability.) The most obvious form of negligence would be failure to provide adequate training on precautionary measures against HIV infection. This would be a particular problem if the officer's infection could be shown to have resulted, even in part, from a failure to follow precautions.

AIDS in Correctional Facilities, 3rd Ed., National Institute of Justice, p.105 (February 1988).

Idaho Code § 20-209, "Control and Management of Penitentiary and Inmates," states in part, "(3) The State Board of Correction should provide educational and informational services to inmates housed in Idaho and to its department employees in order to assure that the transmission of HIV within correctional facilities is diminished." Thus, the Department of Corrections has a statutory duty to provide adequate training in the prevention of AIDS to its employees.

The Idaho Legislature may have provided a window of opportunity to go beyond current prison policy and inform staff of persons infected, under the rationale of self-protection:

[T]here is a need for certain individuals to know the patient's condition so that they may be protected from the disease or protect themselves and others closely associated with the patient.

Idaho Code § 39-609. To use this clause to justify disclosing the identity of HIV infected inmates, however, the Department of Corrections must show "there is a need" for such disclosure. This statutory provision must further be read in conjunction with the Idaho Legislature's other declarations of intent regarding the confidentiality of AIDS information:

It is the intent of this chapter to observe all possible secrecy for the benefit of the sufferer so long as the said sufferer conforms to the requirements of this chapter...

Idaho Code § 39-606.

[I]t is hereby declared to be the policy of this state that an effective program of preventing AIDS must maintain the confidentiality of patient information and restrict the use of such information solely to public health requirements...

Idaho Code § 39-609.

The state obviously recognizes the need for secrecy and has legislated its requirement. The Department of Corrections must show a specific need to release the information. Since the prison's practices in protecting the general inmate population have been found reasonable without the release of the names, Hays

v. State, supra, it would follow that these same practices are reasonable for the protection of staff.

The Nevada Attorney General concluded in Opinion No. 87-18, Prisons: Confidentiality of Medical Information Concerning AIDS, that disclosure must be limited to those "who have a legitimate medical need to know in connection with the prevention and control of AIDS." This does not include all correctional officers. Since mandatory testing has been performed upon entry to the prison only since September 1987, approximately 50% of the inmates have not been tested. See, Hays v. State, supra, p.13. The Nevada Attorney General warns that:

[A] list of inmates who have tested positive will not represent an accurate and complete list of the pool of those infected. In fact, such a list may indeed create additional risk to correctional officers because of the misleading nature of the information which may result in an unintentional disregard for prescribed safety precautions through a false sense of security.

Nevada Att'y Gen. Op. No. 87-18, supra.

Realistically, it is difficult to maintain the confidentiality of sensitive AIDS related information in prisons and jails; however, because of potentially serious consequences of unauthorized disclosure, it is essential that correctional authorities preserve confidentiality. No disclosure should be made except where clearly required by medical, safety, or institutional security considerations. Policies should be adopted and enforced which specify clearly who is permitted to receive information, what information is to be disclosed, and under what circumstances. Vague policies permitting disclosure to those with a "need to know" would not be sufficient. AIDS in Correctional Facilities, 3rd Ed., National Institute of Justice, p.108 (February 1988).

Duty to Infected Inmates

Idaho Code § 20-209, "Control and Management of Penitentiary and Inmates," states in part,

(2) The state board of correction is authorized to provide medical and counselling services to those inmates who have been exposed to the HIV (human immunodeficiency virus) which causes acquired

immunodeficiency syndrome (AIDS) or, who have been diagnosed as having contracted human immunodeficiency viral disease.

The language of this statute authorizes the Department of Corrections to treat HIV infected inmates. Moreover, the constitutional requirements under the eighth amendment, as previously cited, demand that reasonable treatment be given. The counseling of infected inmates has been determined to be one component of the reasonable course of action. See, Hays v. State, supra, pp. 9,10,11,13; Nevada Att'y Gen. Op. No. 87-18, supra, pp.134,144; AIDS in Correctional Facilities, 3rd Ed., National Institute of Justice, pp.39 et seq. (February 1988).

Another component of reasonable treatment of infected patients is maintenance of confidentiality. The safety of an AIDS infected inmate is at stake when his condition is disclosed. Disclosure may place an inmate in a very difficult and dangerous situation in the institution. As stated in 54 Clev. Clinic J. of Med., 478 (1987), "The stigma that accompanies a diagnosis of AIDS, based on fear and society's attitude toward drug users and homosexuals, presents a factor beyond the control of the infected individual." Doe v. Prime Health/Kansas City, Inc., Dist. Ct. for Johnson County, KS 1018 (1988). The Kansas court was referring to the effect of disclosure on an individual in the general population. The possible effect of disclosure on a prisoner in the inmate population of the prison is more extreme. Within the confines of the prison, the infected prisoner is likely to suffer from harassment and psychological pressures. Doe v. Coughlin, 697 F.Supp. 1234 (N.D.N.Y. 1988). As mentioned above, the Idaho Legislature has adopted a strong policy favoring confidentiality of information regarding infected individuals. Adherence to this policy is particularly important in the prison population. Disclosure would not be justified absent a clear need and a demonstration that disclosure would accomplish a greater degree of control over the confirmed seropositive prisoners now in the prison than is exercised through the current practices of the medical staff.

These legislative and prison policies are echoed in the opinions of two recent court decisions. In a suit by a prison inmate against the prison medical personnel for disclosing to non-medical staff that he had tested positive for AIDS, the court concluded "...that there is a constitutional right to privacy in one's medical records and in the doctor-patient relationship; that this right is not relinquished automatically

when a person is incarcerated as the result of a criminal conviction." Woods v. White, 689 F.Supp. 874, (W.D. Wis. 1988). The court based this decision, in part, upon Whalen v. Roe, 429 U.S. 589 (1977). In Whalen, a unanimous Court identified two interests encompassed by the right to privacy, one of which "is the individual interest in avoiding disclosure of personal matters." Another court followed this line of cases when it provided injunctive relief to an inmate requesting he not be placed in segregated housing for the AIDS-infected. "In the court's view there are few matters of a more personal nature... than the manner in which he [the inmate] reveals that diagnosis [AIDS] to others.... The court determines that the prisoners subject to this program must be afforded at least some protection against the non-consensual disclosure of their diagnosis." Doe v. Coughlin, supra, at 1237, 1238.

Summary

The Department of Corrections owes a duty to inmates and staff to take reasonable measures to ensure their safety. These reasonable measures include acting to prevent the spread of communicable diseases and to provide safety to inmates. The question as to how to meet this obligation is a universal prison problem. The National Institute of Justice states that:

Many correctional systems are worried about their potential liability for HIV infections which occur among inmates while incarcerated and among staff while on the job. There are serious difficulties in linking infection with a particular episode; however, correctional systems can probably eliminate any potential liability, and maximize safety in their institutions, by taking all reasonable steps to prevent inmates from being victimized and providing all inmates and staff with clear and complete training on how to avoid becoming infected with HIV.

AIDS in Correctional Facilities, 3rd Ed., National Institute of Justice, p.108 (February 1988).

This opinion concludes that the state is meeting its fourth, eighth and fourteenth amendment obligations to the inmate population. The precautions outlined above, in addition to proper training and education, appear to be sufficient to meet the reasonable safety requirements of the prison personnel.

The policy and practices of the Department of Corrections, and its employees, as outlined in this opinion, are sufficient under current medical knowledge to fulfill any duties that could result from the knowledge of inmate HIV infection.

AUTHORITIES CONSIDERED:

Constitutions:

United States Constitution Amendment IV.
United States Constitution Amendment VIII.
United States Constitution Amendment XIV.

Idaho Statutes:

Idaho Code § 20-209.
Idaho Code § 39-601.
Idaho Code § 39-604.
Idaho Code § 39-606.
Idaho Code § 39-609.

United States Supreme Court Cases:

Estelle v. Gamble, 429 U.S. 97 (1976).
Rhodes v. Chapman, 452 U.S. 337 (1981).
Robinson v. California, 370 U.S. 660 (1962).
Whalen v. Roe, 429 U.S. 589 (1977).
Whitley v. Albers, 475 U.S. 312 (1986).
Youngberg v. Romeo, 457 U.S. 307 (1982).

Other Federal Cases:

Blake v. Hall, 668 F.2d 52 (1st Cir. 1981).
Doe v. Coughlin, 697 F.Supp. 1234 (N.D.N.Y. 1988).
Duckworth v. Fransen, 780 F.2d 645, 653 (1985).
Goodson v. City of Atlanta, 763 F.2d 1381 (11th Cir. 1985).
LaRue v. Manson, 651 F.2d 96 (1981).

Madison County Jail Inmates v. Thompson, 773 F.2d 834 (7th Cir. 1985).

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Curtis v. Deatley, 104 Idaho 787, 663 P.2d 1089 (1983).

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Shirts v. Schultz, 76 Idaho 463, 285 P.2d 479 (1955).

Wilson, et al. v. State of Idaho, 113 Idaho 563 (Ct.App. 1987).

Other Jurisdictions:

Doe v. Prime Health/Kansas City, Inc., Dist. Ct. for Johnson County, KS 1018 (1988).

LaRocca v. Dalsheim, 467, N.Y.S.2d 302 (Sup. 1983).

Parker v. State, 282 So.2d 483 (La. 1973).

Spicer v. Williamson, 191 N.C. 487, 490, 132 S.E., 291, 293 (1926).

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D.K. Henderson, A.J. Saah, B.J. Zak, et al., Risk of Nosocomial Infection with HTLV-3/LAV in a Large Cohort of Intensively Exposed Health Care Workers, Annals of Internal Medicine, 104, 644 to 647 (1986).

Journal of the American Medical Association, Vol. 257, No. 3, Page 344, The Initial Impact of AIDS on Public Health Law in the United States - 1986.

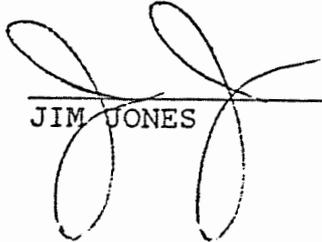
E. McCray, The Co-operative Needlestick Surveillance Group: Occupational Risk of AIDS Among Health Care Workers, New Eng. J. of Med., 314, 1127 to 1132 (1986).

Prisons: Confidentiality of Medical Information Concerning AIDS, Nevada Att'y Gen. Op. NO. 87-18 (1987).

54 Clev. Clinic. J. of Med., 478 (1987).

DATED this 12th day of June, 1989.

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