THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Steven H. John, Circuit Court Judge

The State of South Carolina.....Respondent,

v.

Bruce Antwain Hill.....Appellant.

APPELLATE CASE NO. 2011-199807

FINAL BRIEF OF APPELLANT

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The trial judge erred when he granted the State a six month continuance of the 180 days it had to bring Appellant to trial under the Interstate Agreement on Detainers Act.

STATEMENT OF THE CASE

On May 28, 2009, Appellant was charged with murder and first-degree burglary. (R. p. 15, lines 3-6). These charges arose out of a 2005 double-homicide committed in Horry County. In 2008, Appellant's codefendant, Richard Gagnon, was convicted of the same double homicide in a separate jury trial before the Honorable Judge Steven H. John. (R. p. 12, lines 16-23).

When Appellant was charged with this crime, he was serving time in Tennessee. On August 26, 2010, pursuant to the Interstate Agreement on Detainers Act, Appellant requested the final disposition of all untried South Carolina charges pending against him. (R. pp. 345-46). The Horry County Clerk of Court and the Office of the Solicitor of the Fifteenth Judicial Circuit received Appellant's request on September 3, 2010. (R. p. 350).

Appellant's jury trial before The Honorable Steven H. John began on September 12, 2011. Prior to the start of the trial, three hearings occurred. The first was held on March 1, 2011 and concerned a motion for a continuance brought by the solicitor. The hearing resulted in a six-month extension of time for the solicitor to call Appellant's case to trial. (R. p. 16, line 23 - p. 17, line 2).

The second was a Schmerber hearing conducted on March 17, 2011. The result of this hearing was a court order that required Appellant to provide an involuntary DNA sample for testing. (R. p. 37, lines 14-25).

The third hearing concerned pre-trial matters. It was conducted on September 1, 2011. As a result of this hearing, Appellant was prevented from any mention to the jury of the 2008 murder and burglary conviction of his codefendant, Richard Gagnon. (R. p. 58, lines 9-21). Judge John presided over each of these pretrial hearings.

On September 14, 2011 the jury returned a verdict that found Appellant guilty of both murder and first-degree burglary. (R. p. 329, lines 11-25). Judge John denied Appellant's new trial motion, declined to reconsider any of the ruling made during the pendency of Appellant's case, and reaffirmed his prior rulings. (R. p. 334, lines 8-22). At sentencing Appellant received life in prison without the possibility of parole on each murder indictment and a concurrent thirty-year sentence on the burglary indictment. (R. p. 337, lines 6-18). Appellant filed a timely notice of appeal with the South Carolina Court of Appeals on September 21, 2011.

STATEMENT OF THE FACTS

The evidence that ultimately linked Appellant to the 2005 double homicide was four drops of blood collected from the crime scene. (R. p. 144, line 13-p. 145, line 25). Caulder, an Horry County Police Department (HCPD) crime scene investigator, testified he collected these blood drops from the crime scene as evidence items three, four, seven and thirteen. (R. p. 150, line 24-p. 151, line 10). Though Caulder claimed to collect this evidence from the crime scene on April 12, 2005, he kept physical custody of the blood drops until April 19, 2005. (R. p. 182, line 15-p. 183, line 18). On cross-examination he maintained that as long as the blood drops were with him they were in evidence. (R. p. 175, lines 15-p. 176, line 16). The day he turned this crucial evidence into the secure evidence facility was the day it went to Columbia for testing. (R. p. 193, lines 18-23).

On April 21, 2005, Lambert, a DNA analysis employed by the South Carolina Law Enforcement Division (SLED) initiated testing of the blood drops. (R. p. 217, line 21-p. 219, line 1). On June 26, 2007, SLED published the result of the DNA test. (R. p. 220, lines 1-2). The report concluded that the blood drops belonged to an unknown

individual. (R. p. 225, lines 12-23). Lambert's last responsibility with regard to his testing of the blood drops was to upload the unknown DNA sample he developed into a database that contains both known and unknown DNA samples from crime scenes. (R. p. 225, line 24-p. 226, line 10).

On May 28, 2009, McClure, the SLED DNA Database Unit supervisor, ran a DNA database search that generated a report linking the DNA standard developed by Lambert to Appellant. (R. p. 230, lines 20-25). SLED then sent a letter to the HCPD to inform them that the unknown DNA profile developed by Lambert had been submitted to the COmbined DNA Index System (CODIS) and matched with a DNA profile developed from Appellant. (R. p. 232, lines 10-18). Over the objection of the defense, the letter was submitted into evidence and published to the jury. (R. p. 231, line 17-p. 232, line 9).

At some point after Appellant's DNA profile was linked to the unknown profile collected from the crime scene in 2005, agents with the HCPD travelled to Tennessee to meet with Appellant. (R. p. 26, lines 18-21). Testimony indicates these agents may have obtained a Tennessee search warrant to collect a DNA sample from Appellant, but the paperwork and potential results related to that endeavor were lost, and the agents who went to Tennessee subsequently left the employment of the HCPD. (R. p. 27, lines 9-25).

On August 26, 2010, Appellant filed a request under the Interstate Agreement on Detainers Act for the disposition of all his untried South Carolina charges. (R. p. 346). The correctional facility in which Appellant was then housed, Northeast Correctional Complex in Mountain City, Tennessee, sent both the Office of the Solicitor of the Fifteenth Judicial Circuit and the Horry County Clerk of Court copies of Agreement on Detainer Forms II, III and IV on September 1, 2010 via Certified Mail, Return Receipt

Requested. (R4. pp. 344-49). The solicitor's office and the clerk's office both acknowledged receipt of Appellant's request for disposition of his pending South Carolina charges on September 3, 2010. (R. p. 350).

In response, via letter dated September 15, 2010, the solicitor's office served Agreement on Detainers Form VII and set October 21, 2010 as the date that custody of Appellant would transfer from Tennessee to South Carolina. (R. p. 342). Via letter dated September 22, 2010, the solicitor's office confirmed October 21, 2010 as the date custody of Appellant would transfer to South Carolina and provided Agreement on Detainer Form VI, which projected Appellant would be tried on or about November 8, 2010. (R. p. 339).

On March 1, 2011, Deputy Solicitor Richardson appeared before Judge John to request an extension of the time in which to bring Appellant to trial. He calculated the time given to South Carolina under the Interstate Agreement on Detainers Act would run on March 4, 2011 unless the court granted the State a continuance. (R. p. 13, lines 9-17). In support of his motion, Richardson pointed out that Appellant had yet to complete his seven-year sentence in Tennessee, recalled the preparation that was involved in Richard Gagnon's trial, unsuccessful plea negotiations with Appellant, and the fact that the State had yet to schedule or conduct a Schmerber hearing. (R p. 13, line 22-p. 14, line 12).

Appellant opposed the State's motion for a continuance. He argued that Richard Gagnon's trial was irrelevant to the State's prosecution of Appellant, as no identifiable connection exists between Appellant and Richard Gagnon. (R. p. 15, lines 12-21). He also stressed the fact that the State had failed to even schedule a Schmerber hearing and pointed out that Appellant was unable to earn good time credit in Tennessee while awaiting his trial in South Carolina. (R. p. 16, lines 1-19).

Judge John ruled the State demonstrated good cause for a six-month extension of time in which to bring Appellant to trial and found that a six-month continuance would not prejudice Appellant's rights or prove unduly burdensome to him. (R. p. 16, line 23-p. 17, line 4). The court further noted Richard Gagnon's trial was complicated and required much preparation and ordered the State to conduct its Schmerber hearing on Wednesday, March 9, 2011. (R. p. 17, lines 4-23).

This hearing took place on March 17, 2011. (R. p. 239, lines 15-18). Appellant opposed the Schmerber motion. (R. p. 21, lines 19-22). As its lone witness, the State called Cox, an investigator with HCPD. Cox testified to his second-hand knowledge of the details surrounding the DNA testing done by SLED on the unknown blood sample from the 2005 crime scene and the subsequent CODIS match to Appellant's DNA in 2009. (R. p. 25, line 17-p. 26, line 17). Cox, who was one of the officers that responded to the crime scene in 2005, then testified to his knowledge of the location from where the four blood drops that SLED tested were collected. (R. p. 29, lines 7-23).

Cross-examination elicited the admission that, though he read it in the past, Cox did not bring documentation of the CODIS hit on Appellant to the hearing. (R. p. 30, lines 10-25). Cox further testified that he did not know how to read the results of DNA tests. (R. p. 31, lines 3-13). Based on these admissions, Appellant argued that the State failed to present any documentary evidence to support the testimony and further that the State's witness was not qualified to testify regarding the accuracy of the alleged DNA test. (R. p. 33, line 18-p. 34, line 5; R. p. 35, lines 12-20).

Judge John found that the State presented sufficient probable cause of Appellant's involvement in the double-homicide (and another unsolved Horry County crime) to allow

the court ordered collection of non-testimonial identification evidence from Appellant. (R. p. 37, lines 1-25). After the Schmerber hearing, Cox used buccal swabs to collect DNA evidence from the inside of Appellant's cheek. (R. p. 238, line 25-p. 239, line 6). The DNA sample collected from Appellant was sent to SLED, which tested it, developed a DNA profile and then issued a report on April 14, 2011. (R. p. 257, lines 14-16).

The final pretrial hearing was held on September 1, 2011. Judge John decided several matters that impacted Appellant's trial. First, the State asked for a ruling that would keep Appellant from any mention of Richard Gagnon's conviction for the same crime. (R. p. 51, line 25-p. 52, line 21). Judge John first ruled that he would address whether he would allow Appellant to raise the issue of Richard Gagnon's conviction at the close of the State's case if that fact had not been brought out during the State's case. (R. p. 53, line 3-p. 54, line 10).

Appellant argued that he should be allowed to question any witness regarding the participation and presence of Richard Gagnon in the double-homicide, because the State had placed both Appellant and Richard Gagnon at the scene at the same time, (R. p. 54, lines 13-20), and because Richard Gagnon's conviction is a matter of public record. (R. p. 55, lines 2-21). The State responded that Richard Gagnon's conviction is irrelevant to its theory of the case, which was based on DNA evidence that Appellant was involved in the crime. (R. p. 55, line 23-p. 56, line 7).

Citing to concerns about relevance, the State candidly admitted its desire to keep Appellant from mentioning Richard Gagnon's conviction during opening statements and during the cross-examination of witnesses for the State. (R. p. 56, line 23-p. 57, line 4). In response, Appellant stated the real reason the State wished to keep Richard Gagnon out

of the trial was because the State had no evidence to connect Appellant to Richard Gagnon, and that this lack of evidence connecting the two codefendants was precisely the information the State wished to keep from the jury. (R. p. 57, lines 9-15).

Judge John ruled he would only allow Appellant to cross-examine on the general topic of another person's participation in the double homicide. He agreed with the State that Richard Gagnon's conviction for the same crime was irrelevant to Appellant's trial. He also found that it would invade the jury's role of fact finder to hear another person was already convicted of the same crime. (R. p. 57, lines 16-25). He concluded that the information would make it easy for the jury to convict Appellant as they could convict him simply because Richard Gagnon had been convicted without treating evidence of Appellant's involvement in the crime separately. (R. p. 58, lines 9-21). As he concluded that information about Richard Gagnon's conviction would harm Appellant at trial, Judge John refused to allow Appellant to mention Richard Gagnon. (R. p. 60, lines 8-19).

The second matter raised at the September 1, 2011 pre-trial hearing involved the State's desire to inform the jury that Appellant's DNA profile was linked to the double homicide through a CODIS hit. The State assured the court that it would not prejudice Appellant by referring to Appellant's incarceration in Tennessee and that it only wanted to refer to CODIS as a national DNA database which provided the initial link between the blood drops at the crime scene and Appellant. (R. p. 60, line 25-p. 61, line 8). Appellant argued no reference to CODIS was necessary, as the State could rely on the SLED profile that resulted from the Schmerber hearing to link his DNA to the crime scene. (R. p. 61, lines 11-15). Appellant further argued that any mention of – or reference to – CODIS would prejudice him at it could give the jury an indication of Appellant's criminal record,

since "the jury can sit there and say 'well, I ain't [sic] in no database so he must, ergo, have a criminal record, and must have been previously incarcerated.' I would object to that, Your Honor." (R. p. 61, lines 15-21).

Judge John found that considering the passage of time between the 2005 double homicide and Appellant's arrest for the crime in 2009, he would allow the State to go into background information that would help explain the delay in the prosecution of Appellant and further ruled this testimony would not prejudice Appellant. (R. p. 62, lines 16-22). Judge John also made clear that the State was not to explain how or why Appellant's DNA was uploaded to CODIS or that Appellant was arrested in Tennessee. (R. p. 62, line 23-p. 63, line 8).

Appellant then renewed his objections to the court's grant of the continuance on March 1, 2011 and argued that the State failed to present any specific reasons to show why the continuance was necessary and pointed the court to the fact that Appellant was not even indicted until thirty days after the extension was granted. (R. p. 66, lines 7-12). Appellant maintained the State failed to show any good cause as to why it should receive a continuance; the grant of a continuance constituted an abuse of discretion, and that Appellant's charges should be dismissed as a remedy. (R. p. 66, line 13-p. 67, line 2).

The State acknowledged that it relied on the complexity of preparing a double homicide case for trial and again mentioned plea negotiations with Appellant to support its request for an extension and stated that Judge John exercised proper discretion when he granted a six-month extension on March 1, 2011. (R. p. 67, line 5-p. 68, line 2). The State also reminded the court that Appellant's defense counsel requested one continuance of the trial. (R. p. 68, lines 3-10). In response, Appellant stated that the only written plea

offer to Appellant was dated March 8, 2011, thus post-dating the continuance by seven days. (R. p. 68, lines 12-15). Appellant further stated the second extension was requested in mid-June for unrelated matters. (R. p. 68, lines 16-24). (This extension did extend Appellant's trial beyond the six-month continuance Judge John granted.)

In reconsidering his ruling on the continuance, Judge John linked the grant of the six month extension to the State's then-outstanding need to conduct a Schmerber hearing, affirmed his prior ruling on the State's requested continuance and found no violation of the 180 day requirement which is set forth in the Interstate Agreement on Detainers Act. (R. p. 69, line 2-p. 70, line 18).

The last matter put on the record on September 1, 2011 was a renewed objection to Judge John's order from the Schmerber hearing that required Appellant to provide involuntary, non-testimonial identification evidence. Appellant argued the State's failure to present any documentation of the CODIS hit or the SLED DNA analysis prevented the court from making neutral and detached determination as to whether to grant the State's motion. (R. p. 70, line 20-p. 72, line 2). Judge John declined to reconsider his prior ruling without the opportunity to first review a copy of the Schmerber hearing transcript. (R. p. 73, lines 10-18).

Appellant's trial began on September 12, 2011. Over Appellant's objection, the State admitted the results of the DNA profile created by Lambert in 2007 into evidence. (R. p. 221, lines 3-21). When the State sought to admit the result of the DNA testing of the evidence collected from Appellant as a result of the Schmerber hearing, the evidence was again admitted over Appellant's objection. (R. p. 255, lines 17-24). The State rested on September 14, 2011, and the court denied Appellant's motion for a directed verdict.

(R. p. 302, line 23-p. 304, line 1). After a recess, Appellant rested his case without putting up a defense. (R. p. 309, line 23-p. 310, line 1). The jury was excused to deliberate at 12:55 p.m. on September 14, 2011, and returned their verdict of guilty at 3:35 p.m. (R. p. 49, lines 16, 19).

ARGUMENT

Appellant raises three distinct errors committed by the trial judge. First, the trial judge erred when he ruled that Appellant could not mention the conviction of Richard Gagnon in opening argument, on cross-examination and, by extension, during closing summation. The trial judge cited relevance and a concern regarding one potential jury reaction to evidence of Richard Gagnon's conviction. This ruling prejudiced Appellant in two ways. It lessened the burden imposed on the State to obtain a conviction, as it allowed the State to avoid any need to attempt to connect Appellant and Richard Gagnon. It also weakened a primary theme in Appellant's defense strategy considerably.

Second, the trial judge erred when, over an objection from Appellant, he admitted the May 28, 2009 letter from SLED to Horry County law enforcement into evidence. The letter was unnecessary to the presentation of the State's case. Its admission in evidence highly prejudiced Appellant by indicating his prior criminal record to the jury.

Third, the trial judge erred when, on March 1, 2011, the very last of the 180 days the State had to bring Appellant to trial under the Interstate Agreement on Detainers Act, he granted the State a six month continuance at its request when the State failed to show good cause for its motion. The continuance was not reasonable as the State had not even extended one plea offer to Appellant, indicted Appellant on his criminal charges or took the basic step of scheduling the Schmerber hearing needed to bring Appellant to trial.

I. The trial judge erred when he excluded any mention of the conviction of Richard Gagnon from Appellant's trial.

In criminal cases, South Carolina appellate courts review error of law only and are bound by the factual findings of the trial court unless clearly erroneous. State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001). "A court's ruling on the admissibility of evidence will not be reversed on appeal absent an abuse of discretion or the commission of legal error that results in prejudice to the defendant." State v. Adams, 354 S.C. 361, 377, 580 S.E.2d 785, 793 (Ct. App. 2003).

Further, "[e]rror may not be predicated on a ruling to admit or exclude evidence unless a substantial right of a party is affected." Rule 103(a), SCRE. "[T]o warrant reversal based on the admission or exclusion of evidence, the complaining party must prove both the error of the ruling and the resulting prejudice." State v. Commander, 384 S.C. 66, 73, 681 S.E.2d 31, 35 (Ct. App. 2005) (citing Vaught v. A.O. Hardee & Sons, Inc., 366 S.C. 475, 480, 623 S.E.2d 373, 375 (2005)). "To establish prejudice, the appellant must convince this Court that there is a reasonable probability that the jury's verdict was influenced by the challenged evidence." Id. at 74, 681 S.E.2d at 35 (citing Fields v. Reg'l Med. Ctr. Orangeburg, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005).

In a pre-trial hearing that occurred twelve days before trial, the State requested that Appellant not be permitted to raise to the jury the fact Richard Gagnon had been convicted of the same crime Appellant was charged with committing. (R. p. 52, lines 13-21). In opposition to this motion, Appellant maintained that he had the right to ask any witness called to testify his trial about the involvement of Richard Gagnon in the underlying crime. (R. p. 54, lines 13-20).

The trial judge ruled Richard Gagnon's conviction was irrelevant to Appellant's trial and found it would invade the jury's role as finder of fact to hear Richard Gagnon had been convicted of the crime. (R. p. 57, lines 16-25). The trial judge concluded that the injection of Richard Gagnon into the trial would make it easy for the jury to convict Appellant without the need to treat the evidence of Appellant's involvement separately. (R. p. 58, lines 9-21). At trial, neither the State nor Appellant attempted to bring to the jury's attention to the 2008 conviction of Richard Gagnon.

As a threshold matter, the record indicates that during the September 1, 2011 pretrial hearing, the trial judge was very clear that he was not going to allow the mention of Richard Gagnon at trial. (R. p. 57, line 16-p. 58, line 21; R. p. 59, line 24-p. 60, line 19). While the trial judge's pretrial ruling was not challenged during the trial, Appellant maintains that the issue of whether he should have been permitted to inform the jury of the conviction of Richard Gagnon is preserved for appellate review.

"[O]ur courts have developed the doctrine of futility, which recognizes that in circumstances where it would be futile to raise an objection to the trial judge, failure to raise the objection will be excused." State v. Covert, 368 S.C. 188, 201, 628 S.E2d 482, 489 (Ct. App. 2006). Appellant submits that, considering the trial judge's pretrial ruling that unequivocally prohibited the mention of Richard Gagnon's conviction, it would have been futile for Appellant to attempt to proffer testimony regarding the conviction of Richard Gagnon to the trial judge during the course of trial.

"'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." State v. Saltz, 346 S.C. 114, 127, 551

S.E.2d 240, 247 (2001) (quoting Rule 401, SCRE). "Even if evidence is relevant, it 'may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay . . ." Id., 551 S.E.2d at 247 (quoting Rule 403, SCRE). "Unfair prejudice means an undue tendency to suggest decision on an improper basis, such as an emotional one." Id., 551 S.E.2d at 247 (citing State v. Kelly, 343 S.C. 350, 540 S.E.2d 851(2001)).

Appellant maintains the trial judge's evidentiary ruling that prevented him from informing the jury of Richard Gagnon's conviction was reversible error that resulted in prejudice to Appellant. As was argued to the trial judge, Richard Gagnon's conviction is a matter of pubic record. (R. p. 55, lines 20-21). Further, despite the State's trial level position to the contrary, (R. p. 55, line 23-p. 56, line 7), Richard Gagnon's conviction is relevant to the State's theory of Appellant's involvement in the crime.

According to the full version of the State's theory, Richard Gagnon and Appellant acted in concert to commit a double-homicide as codefendants. The fact that the State did not need to show a connection between Appellant and Richard Gagnon took a large fact out of the equation and simplified the State's case against Appellant considerably. The State wanted this result and indicated on the record that it did not intend to show a connection between Richard Gagnon and Appellant. (R. p. 56, lines 8-9). In response, Appellant suggested to the trial judge that the reason for this was the fact that no evidence linking the codefendants exists. (R. p. 57, lines 9-15). Regardless of whether that is true, it is precisely the lack of connection between Appellant and his codefendant that makes Richard Gagnon's prior conviction relevant to Appellant's trial, and when the trial judge suppressed this relevant evidence from the jury, he committed error.

The fact that Richard Gagnon was Appellant's convicted codefendant is a piece of evidence that would have tended to influence the jury's ultimate conclusion as to the guilt or innocence of Appellant. Therefore, it was relevant and should have been heard by the jury unless properly excludable under Rule 403, SCRE, supra.

The trial judge's factual (not legal) conclusion that Appellant's jury would likely convict him if it heard that a different jury convicted Richard Gagnon, (R. p. 60, lines 8-19), appears to be a Rule 403, SCRE analysis. But that conclusion, which is not a truism, was an error that prejudiced Appellant.

The jury could have drawn a different conclusion from the fact Richard Gagnon was convicted, especially if, as indicated by the solicitor pretrial, (R. p. 56, lines 8-9), the State did not present the jury with evidence that linked Richard Gagnon to Appellant. If unconvinced of a connection between the two codefendants, the jury could quite easily have viewed the fact that Richard Gagnon was convicted of the crime as evidence of Appellant's innocence. However, the trial judge's pretrial ruling took this possibility away from Appellant and his jury. To do so was reversible error.

Turning to the issue of prejudice, Appellant was prejudiced in two ways by the trial judge's ruling that evidence of Richard Gagnon's conviction would not enter into Appellant's trial. First, a theme touched upon throughout Appellant's defense, and also argued in closing summation, was the theory that the HCPD crime scene investigators obtained Appellant's DNA from some location other than the April 12, 2005 double homicide crime scene, inadvertently cataloged it with evidence from the double homicide and sent it to SLED for testing. (R. p. 316, line 2-p. 320, line 10). Appellant drew out the fact that the lead investigator, Caulder, kept the evidence he collected from the crime

scene with him until he turned it over for transportation to SLED headquarters in Columbia on April 19, 2005. (R. p. 193, lines 1-24). Appellant was also able to elicit testimony that six different individuals, including Caulder, each had access to the Horry County evidence room. (R. p. 191, lines 3-7).

Had Appellant been able to present the jury with evidence that Richard Gagnon had no connection to Appellant, as was alleged by the defense, (R. p. 57, lines 9-15), then the trial theory that the HCPD committed a mistake with the evidence it collected and sent to SLED for testing could have been strengthened by that lack of connection. At the very least, Appellant would have had the opportunity to address the State's ability or inability to establish a connection between Richard Gagnon and Appellant during its case, which could easily have had an impact on the outcome of the trial.

Second, the trial judge's pretrial ruling all but ensured that Appellant's trial, in the words of the solicitor would be "simple and straightforward." (R. p. 56, line 4). Once the State did not need to worry about the introduction of Richard Gagnon into the trial, all that was needed for the State to carry its burden of proof was to establish the chain of custody for the blood drops tested by SLED, bring out the 2009 CODIS hit that caused Appellant to be charged with the crime, and inform the jury of the result of the DNA profiles created by SLED that implicated Appellant. Had Appellant been permitted to explore Richard Gagnon's involvement in the crime, the State would have been forced to focus on the full picture and explain to the jury how both Appellant and Richard Gagnon came to be connected with this 2005 double homicide. The State was never forced to draw this connection, and for these two reasons, Appellant submits that more than a reasonable probability exists that the jury's verdict could have been different if the trial

judge had allowed the jury to hear the relevant evidence that Richard Gagnon had previously been convicted of the same crimes that Appellant faced at trial.

II. The trial judge erred when he allowed the SLED letter that informed the HCPD of the CODIS hit on Appellant's DNA into evidence.

At the September 1, 2011 pretrial hearing, the State informed the trial judge that it would refer to CODIS as a national DNA database without reference to Appellant's incarceration in Tennessee when the CODIS hit occurred. (R. p. 60, line 21-p. 61, line 8). Appellant objected to any mention of CODIS on grounds that the State's reference to a national DNA database would allow the jury to conclude that Appellant had been either arrested or incarcerated in the past. (R. p. 61, lines 15-21).

The trial judge ruled that it would not prejudice Appellant to allow the State to go into background information that would explain the delay between the 2005 crime and Appellant's 2009 arrest. (R. p. 62, lines 16-22). He went on to clarify that he would not allow the State to elicit testimony about how Appellant's DNA entered the database or anything about his incarceration in Tennessee, but that he would allow the State to obtain basic information about how SLED became aware of the Appellant. (R. p. 62, line 23-p. 63, line 8). Appellant objected to this ruling. (R. p. 63, lines 8-9).

At trial, the State called McClure, the SLED employee who ran the CODIS hit that linked the unknown DNA from the 2005 crime scene to Appellant's DNA sample. Contrary to the pretrial assurance made by the State that it would "basically refer to Codus [sic] as the national DNA database," (R. p. 61, lines 3-4), McClure testified CODIS is "computer software that allows DNA profiles to be shared between law enforcement agencies for the purpose of generating investigative leads for unsolved

cases." (R. p. 230, lines 11-16). McClure then testified that he confirmed the 2009 CODIS hit in Appellant's DNA and sent a letter to the HCPD that informed them about Appellant. (R. p. 230, line 20-p. 231, line 6).

Next, the State produced the letter McClure sent to the HCPD, laid its foundation and moved it into evidence over Appellant's previously made and renewed objection. (R. p. 231, line 7-p. 232, line 6). McClure published the letter to the jury, which read:

> Dear Neil Livingston, the short tandem repeat, STRPCR DNA profile developed from item 19 was compared to the COmbined DNA Index System, CODIS. This profile matches the STRPCR DNA profile developed from Bruce Antwain Hill. This information is provided for investigative purposes only. If the suspect is charged, additional biological specimen must be submitted for court purposes. This search was conducted by Lieutenant David McClure with the South Carolina Law Enforcement Division.

(R. p. 232, lines 10-18).

On appeal Appellant argues that the admission of the SLED letter was an error that highly prejudiced Appellant. It was a non-subtle reference to his prior criminal record. This official SLED letter was read to the jury by the supervisor of the SLED DNA Database Unit who initially wrote the letter and had literally moments ago characterized CODIS to the jury as "computer software that allows DNA profiles to be shared between law enforcement agencies for the purpose of generating investigative leads for unsolved cases." (R. p. 230, lines 11-16). He referred to it as much more than a national DNA database. Further when the State moved the SLED letter into evidence, it had already asked the background questions it was given pre-trial clearance from the trial judge to ask. The State had no legitimate need to place this letter into evidence, and the jury easily could have interpreted the letter as an overt indication of Appellant's prior criminal record that unfairly prejudiced him in the eyes of the jury.

Appellant asserts the fact that the State unnecessary moved the SLED letter into evidence is the primary fact that distinguishes his case from previous reported cases where appellate courts have held that an arguably vague reference to a defendant's prior criminal record did not result in prejudice to the defendant.

In State v. Council a SLED agent testified to the jury that he obtained a voluntary fingerprint from the defendant and then "went over to the SLED records, two buildings over, retrieved a card with the name 'Council' on it and compared those impressions and in fact, they were produced by the same individual." 335 S.C. 1, 12, 515 S.E.2d 508, 513 (1999). The trial judge would not declare a mistrial, and the defense and the trial judge agreed that a curative instruction would only call more attention to the testimony. Id., 515 S.E.2d at 513.

In finding no error in the trial judge's decision, the Supreme Court held it "is questionable whether the jury even understood the implication of [the SLED agent's] statement." Id. at 13, 515 S.E.2d at 514. The Court noted that it "has held that similar references to a defendant's past conduct were too vague to be prejudicial." Id., 515 S.E. at 514. The Court characterized the SLED agent's remark as "only an inadvertent vague reference was made to appellant's prior record," and concluded, "this reference was not prejudicial." Id., 515 S.E.2d at 514 (emphasis supplied).

In a footnote, the Court distinguished Counsel from State v. Tate, 288 S.C. 104, 341 S.E.2d 380 (1986), which is a case in which the Court reached a different result regarding prejudice. Id. at 313, n.7, 515 S.E.2d at 514. In that case, the State introduced a mug shot of the appellant that identified the date of his arrest for another unrelated charge into evidence without meeting even the first two prongs of the three-part test controlling

the admission of a mug shot. Tate, 288 S.C. at 105-06, 341 S.E.2d at 381. The Court noted that the fingerprint card at issue in Council "was never introduced into evidence, and therefore the jury was not aware of when SLED obtained the card. Therefore, there was no evidence before the jury of when or for what purpose the fingerprint card was made." Id., 515 S.E.2d at 514.

Unlike Council and akin to the prejudicial conduct found in Tate, right after the State's witness referred to CODIS as "computer software that allows DNA profiles to be shared between law enforcement agencies for the purpose of generating investigative leads for unsolved cases," (R. p. 230, lines 11-16), the State moved the very letter from SLED to the HCPD that linked Appellant with CODIS into evidence. This was completely unnecessary to accomplish the reasons given on the record at the pretrial hearing for drawing juror attention to CODIS. It was the complete opposite of the solicitor's stated intent not to say "anything that would subjugate [Appellant] to some sort of prejudice with regard to [CODIS]." (R. p. 61, lines 5-6). The trial judge's decision to allow the SLED letter into evidence was error, and Appellant objected in a manner that drew the least amount of juror attention to the State's non-subtle indication that Appellant had a prior criminal record.

Appellant's case is further distinguished from Council because the statement made by the SLED fingerprint analyst in Council was inadvertent and the fingerprint cards were never placed in evidence. In Appellant's case the SLED agent explained CODIS as a law enforcement database that exists to generate investigative leads in unsolved cases. (R. p. 230, lines 11-16). This reference was overtly prejudicial and a far cry from a benign reference to CODIS as a national DNA database. The admission of the

SLED letter into evidence allowed the jury to hear that Appellant's DNA was discovered by SLED in CODIS. This was not an inadvertent or vague reference to Appellant's prior criminal record, and it resulted in prejudice to him.

"The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion." State v. Saltz, 346 S.C. 114, 121, 551 S.E.2d 240, 244 (2001). "An abuse of discretion arises from an error of law or a factual conclusion that is without evidentiary support." State v. Irick, 344 S.C. 460, 463, 545 S.E.2d 282, 284 (2001). For an appellate court to reverse based on "the erroneous admission or exclusion of evidence, prejudice must be shown." State v. Taylor, 333 S.C. 159, 172, 508 S.E.2d 870, 876 (1998).

The trial judge's decision to admit the SLED letter into evidence was error because it drew juror attention to the fact Appellant had a criminal record needlessly. The probative value of the SLED letter was far outweighed by its prejudicial effect on Appellant. Right before the State moved to admit the SLED letter into evidence, it had already elicited testimony about the nature of CODIS and explained the background pertaining to how the CODIS hit on Appellant's DNA occurred. (R. p. 230, line 16-p. 231, line 6). This was the very testimony that the trial judge had ruled pretrial that he would allow the State to elicit. (R. p. 62, line 5-p. 63, line 8).

The admission of the SLED letter into evidence highlighted the fact Appellant's DNA had been entered into CODIS and prejudiced Appellant by allowing the jury to draw conclusions about his prior criminal record. When the trial judge allowed the SLED letter to enter evidence over Appellant's objection based on prejudice, he abused his discretion. See State v. Cooley, 342 S.C 63, 69, 536 S.E.2d 666, 669 (2000) (noting

trial judges have broad discretion in ruling on the admission of testimony but cautioning "although evidence is relevant, it should be excluded where the danger of unfair prejudice substantially outweighs its probative value.").

III. The trial judge erred when he granted the State a six-month continuance of the 180 days it had to bring Appellant to trial pursuant to the provisions of the Interstate Agreement on Detainers Act.

Typically "[t]he granting of a motion for a continuance is within the sound discretion of the trial court and will not be disturbed absent a clear showing of an abuse of discretion." State v. Yarborough, 363 S.C. 260, 266, 609 S.E.2d 592, 595 (Ct. App. 2005). "An abuse of discretion arises from an error of law or a factual conclusion that is without evidentiary support." State v. Irick, 344 S.C. 460, 464, 545 S.E.2d 282, 284 (2001). Even if a factual conclusion is without evidentiary support, "for an error to warrant reversal, the error must result in prejudice to the appellant." State v. Preslar, 364 S.C. 466, 473, 613 S.E.2d 381, 385 (Ct. App. 2005).

However, when a defendant requests the final disposition of pending charges under the provision of the Interstate Agreement on Detainers Act (IAD), codified at §17-11-10 et. seq. of the South Carolina Code of Laws, the analysis regarding the grant of continuances changes. This is due to purpose of the IAD, which is to "foster the expeditious disposition of charges outstanding against prisoners so as to eliminate the uncertainties which accompany the filing of detainers." State v. Patterson, 273 S.C. 361, 363, 256 S.E.2d 416, 418 (1979) (citing State v. Allen, 269 S.C. 233, 237 S.E.2d 64 (1977)). In relevant part, Article III(a) of the act provides:

> Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of a party state, and whenever during the continuance of the term of imprisonment there is pending in any other party state any untried indictment, information or complaint on the basis of which a detainer has been

> lodged against the prisoner, he shall be brought to trial within one hundred eighty days after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information or complaint; provided, that for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance.

The IAD applies to the 48 party states to the act, the District of Columbia and the United States government. Fex v. Michigan, 507 U.S. 43, 44, 113 S.Ct. 1085, 1086 (1993). Under the IAD, when an incarcerated defendant has a detainer for untried criminal charges filed against him by another party state to the IAD, he may file a request for final disposition of his pending charges. If the request is properly prepared and filed, the defendant "shall," (Article III(a)), be brought to trial 180 days "after he shall caused to be delivered," (Article III(a)), his request for disposition.

Under the act the State may request a continuance of the trial beyond the 180-day deadline "for good cause shown." (Article III(a)). Provided the defendant or his counsel is present in court, the trial judge "may grant any necessary or reasonable continuance." (Article III(a)).

In Patterson, a Supreme Court IAD case, the Court addressed the question of whether a trial judge could grant a continuance after the 180 days the State had to bring the defendant to trial had passed. 273 S.C. 361, 256 S.E.2d 416 (1979). Horry County received a request from the defendant to dispose of his South Carolina charges on August 25, 1977. Id. at 363, 256 S.E.2d at 418. The State took no action, and 271 days later on May 23, 1978, the defendant moved that his charges be dismissed. Id., 256 S.E.2d at 418. Rather than dismiss the charges, the trial judge granted the State a continuance. Id., 256 S.E.2d at 418. The continuance was granted well after the expiration of the 180 days the

State had to bring the defendant to trial, and the Court held that the "mandatory language of the act, particularly when read in light of the statute's purpose, precluded the granting of any motion for continuance after expiration of the 180 day period. We . . . conclude the trial court erred in granting the State a continuance [ ]." Id. at 364, 256 S.E.2d at 418.

On August 26, 2010, Appellant made a fully compliant request pursuant to the IAD to have his pending South Carolina charges disposed. (R. pp. 344-349). This request was sent via Certified Mail, Return Receipt Requested on September 1, 2010 as required by the IADA, and it was received on September 3, 2010. (R. p. 350).

According to the decision of the United States Supreme Court, with Justices Blackmun and Stevens dissenting, Appellant "caused" his request "to be delivered" to the Horry County Clerk of Court and the Solicitor's Office of the Fifteenth Judicial Circuit on September 3, 2010, the date Horry County acknowledged receipt of his request. See Fex, 507 U.S. at 52, 113 S.Ct. at 1091 ("We hold that the 180 day time period in Article III(a) of the IAD does not commence until the prisoner's request for final disposition of the charges against him has actually been delivered to the court and prosecuting officer of the jurisdiction that lodged the detainer against him.").

Applying this settled rule to Appellant's case, when the State made its request for an extension on March 1, 2010, the State had been in possession of Appellant's request under the IAD for exactly 180 days. Had the State's motion been brought one day later, the State's request would not have been timely, and Appellant's case should have been dismissed pursuant to Patterson, supra. Appellant urges this Court to consider this fact as part of an analysis of whether the State demonstrated "good cause" for the continuance it received and whether the grant of the continuance was "necessary" or "reasonable."

State v. Finley involves Article IV(c) of the IAD which requires the State, if it files a request for temporary custody of a defendant, to bring the defendant to trial within 120 days of the date the defendant arrives in South Carolina. 277 S.C. 548, 549-50, 290 S.E.2d 808, 808-09 (1982). The defendant arrived in Richland County on July 29, 1980, and on September 16, 1980 he filed a motion to have out-of-state witness ruled material, which was heard September 29, 1980 and taken under advisement. Id. at 550, 290 S.E.2d at 809. On December 8, 1980, the judge that heard the motion had yet to reach a ruling on the defendant's motion, and the defendant moved to dismiss his charges for a violation of the 120-day rule of Article IV(c) of the IADA. Id., 290 S.E.2d at 809.

The judge who heard the motion to dismiss "ruled that the circuit judge who took under advisement appellant's motion to have certain out of state witnesses ruled material had in effect granted a continuance thereby tolling the one hundred twenty day period." Id., 290 S.E.2d at 809. The defendant was convicted at trial and appealed on grounds that the court "erred in denying his motion to dismiss due to the expiration of the one hundred twenty day period without commencement of trial." Id., 290 S.E.2d at 809.

The Court noted "the one hundred twenty day period is mandatory. Thus, the issue raised is whether the court granted a continuance which satisfies the exception stated in Article IV(c)." Id. at 551, 290 S.E.2d at 809. After examining cases from sister jurisdictions that involved similar defense motions, the Court held "a defendant cannot cause the delay in the trial and then expect dismissal of the charges because the case was not tried within the one hundred twenty day period." Id., 290 S.E.2d at 809.

In the present case, Appellant did not cause the delay in his trial. Rather, it was the State's March 1, 2010 request that delayed Appellant's trial six months. Appellant

was not tried during that six-month period, but the extension granted by the trial judge was not for good cause shown by the State, therefore the continuance was neither reasonable nor necessary and should not have been granted.

For the following reasons, the State failed to show the requisite good cause to support the grant of a continuance of the 180-day rule under the IAD. First, and most importantly, the State, which had full control of the docket pursuant to §1-7-330 of the South Carolina Code of Laws, as amended, and had made no effort to even schedule a Schmerber hearing. Second, for the sake of obtaining the continuance, it referred to the complexity surrounding Richard Gagnon's trial and drew a parallel to Appellant's then-pending trial. (R. p. 14, lines 4-5; R. p. 67, lines 5-8; R. p. 67, lines 14-20). Once the continuance was granted, the State all of a sudden recognized the case as simple and straightforward. "This is a DNA case, and it really is a very straightforward DNA case." (R. p. 52, lines 11-12). "This case is simple and straightforward." (R. p. 56, line 4).

The State was well aware of the need to conduct a Schmerber hearing. The 2009 SLED letter informed it that "[i]f the suspect is charged, additional biological specimen must be submitted for court purposes." (R. p. 232, lines 15-17). Further, at some point before Appellant filed his request under the IAD, the State testified it sent HCPD agents to Tennessee to obtain a search warrant to collect DNA evidence from Appellant. (R. p. 27, lines 9-24). That paperwork was "lost." (R. p. 27, lines 22-24).

Then, between the time Appellant arrived in South Carolina on October 21, 2010 and March 1, 2010, the State did absolutely nothing with regard to collecting Appellant's DNA until the 180th day under the IAD. At that time, the State rushed Appellant into court for a continuance and said it would hold a Schmerber hearing "next week," (R. p.

14, line 9), making one of the State's primary reasons for the extension the need to conduct a Schmerber hearing. (R. p. 14, lines 4-12). At the March 1, 2011 continuance hearing, Appellant objected and maintained the State's need to hold a Schmerber hearing was not good cause shown to support the grant of an extension. (R. p. 16, lines 6-19). Again, at the pretrial hearing held on September 1, 2011 Appellant renewed his objection to the grant of the State's extension. (R. p. 65, line 4-p. 67, line 2).

On the record on September 1, 2010, the trial judge stated that a reason he granted the continuance on March 1, 2011 was so that the Schmerber hearing could be conducted. (R. p. 69, line 2-p. 70, line 18). He noted testing had been done previously and that the State gave "valid reasons" to have testing done again. (R. p. 69, lines 5-10).

With respect to Appellant's trial judge, the record reflects that the State never gave the need to re-test Appellant as a reason for an extension on March 1, 2010. Rather, at the March 17, 2011 Schmerber hearing the State's lone witness testified that HCPD agent went to Tennessee and that the "paperwork, chain of custody, all of that with regard to the search warrant" had been lost. (R. p. 27, lines 22-24).

The reason the State gave on March 1, 2010 as to why a Schermber hearing was needed was the simple, honest truth it had not conducted that hearing, despite the fact Appellant had been in Horry County since October 21, 2010. The fact the State offered to hold the hearing the week after their 180 days under the IAD ran supports this conclusion. (R. p. 14, lines 7-9). Appellant submits the State's complete failure to hold a Schmerber hearing between October 21, 2010 and March 1, 2011 was not good cause shown for a last second extension. As was candidly admitted on September 1, 2011, the State was simply unprepared for trial on March 1, 2011. (R. p. 67, lines 14-20).

Appellant's argument that the extension of the 180 day rule was error focuses on the State's failure to present a good cause showing to support the trial judge's grant of a continuance in favor of the State. By extension, Appellant maintains that the trial judge's grant of the motion could not have been reasonable or necessary, as the requirement that the State must present good cause for an extension should not be disconnected from the duty of the trial judge to find that the continuance is reasonable or necessary. If this Court concludes that the State's stated reasons for an extension failed to show good cause, then Appellant respectfully submits that this Court cannot easily conclude that the grant of the continuance was either reasonable or necessary.

The State made no showing whatsoever that it would be reasonable or necessary for the trial judge to grant an extension of the 180 day rule. Persuasive authority that it should have done so exists in other jurisdictions. As succinctly and correctly stated by the Court of Appeals of the State of Maryland:

> Speaking generally there can be no doubt that the disposition of petitions for a continuance are within the sound discretion of the trial judge and his rulings in this regard will not be disturbed absent an abuse of that discretion. Here, however, the [IAD] controls. The pertinent language of [IAD] is as follows . . . provided that for good cause shown in open court, the prisoner or his counsel being present, the court . . . may grant any necessary or reasonable continuance. To what we have said about "good cause" might be added the observation that the State neither claimed nor made a showing that continuance of whatever duration was either "necessary" or "reasonable."

State v. Hoss, 266 Md. 136, 144-45, 292 A.2d 48, 52 (Md. 1972).

Following the recognition of Maryland high court's decision in Hoss that the State's duty to bring a defendant to trial pursuant to the IAD is not to be taken lightly, the Court of Special Appeals of Maryland held:

> We cannot agree that a general statement that the State was not ready for trial, as opposed for example to a statement that a crucial witness was presently

> hospitalized, can be considered as good cause. The statute, as interpreted by the Court of Appeals mandates that the State be ready for trial within the 180 days. Its excuse for not trying the case must amount to more than lack of preparation.

Dennett v. State, 19 Md.App. 376, 383-84, 311 A.2d 437, 442 (Md. Ct . Spec. App. 1972). In the case at hand, the State of South Carolina was simply unprepared to try Appellant at the end of the 180 day rule of the IAD. (R. p. 67, lines 14-20). It had not taken one step towards collecting DNA evidence from Appellant, who respectfully contends that the trial judge should not have granted the State a continuance. To do so excused the State's complete lack of preparation in contravention of the purpose of the Interstate Agreement on Detainers Act, S.C. Code Ann. §17-11-10, et. seq., (1976).

CONCLUSION

For the above-stated reasons, Appellant requests that this Court determine the State's request for a continuance of the IAD's mandatory 180-day rule was not based on a show of good cause, the grant of the continuance was not reasonable or necessary, and, as a result, Appellant's conviction must be vacated and his charges dismissed. In the alternative, Appellant asks this Court to rule the errors the trial judge committed during the course of Appellant's trial in disallowing the mention of Richard Gagnon and allowing the 2009 SLED letter into evidence resulted in prejudice to Appellant and that he be granted a new trial as a result.

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July 25, 2013

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Steven H. John, Circuit Court Judge

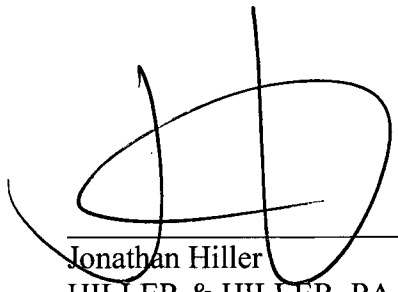
The State of South Carolina.....Respondent,

v.

Bruce Antwain Hill.....Appellant.

CERTIFICATE OF COUNSEL

The undersigned attorney hereby certifies that the Final Brief of Appellant complies with Rule 211(b), SCACR.



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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
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The State of South Carolina.....Respondent,

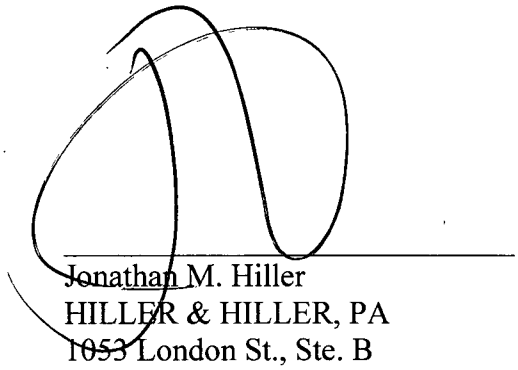
v.

Bruce Hill.....Appellant.

PROOF OF SERVICE

The undersigned certifies that on this, the 25th day of July 2013, he served a true copy the Final Brief of Appellant and the Reply Brief of Appellant on the Respondent by causing the same to be mailed to Anthony Mabry, Esq. via the United States Postal Service to the following addresses with sufficient postage attached:

Office of the Attorney General
PO Box 11549
Columbia, SC 29211



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July 25 2013

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Defense Lawyers. We Defend to Restore.

VIA HAND DELIVERY

July 26, 2013

The Honorable Jenny Kitchings
Clerk, South Carolina Court of Appeals
1015 Sumter Street
Columbia, SC 29201

RE: State of South Carolina v. Bruce Hill – Tracking No. 2011199807

Dear Madame Clerk:

Enclosed is the Final Brief of Appellant, the Reply Brief of Appellant and the Record on Appeal together with my Proof of Service stating that the Respondent has been served with the Final and Reply Briefs. Fifteen copies of each, one of each unbound, is submitted for filing.

Sincerely,

Jonathan M. Hiller
Attorney at Law

cc: Anthony Mabry, Esq.
Court Administration

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