STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

Honorable Edward W. Miller, Circuit Court Judge

THE STATE,

APPELLANT,

V.

JASON SKYLAR ISRAEL POGUE,

RESPONDENT

APPELLATE CASE NO. 2017-000890

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

The plea court erred in sentencing Respondent to home detention after his guilty plea to second degree sexual exploitation of a minor under section 16-15-405 of the South Carolina Code, a violent offense, when the statute requires he must be imprisoned not less than two years and home detention is only available for "low risk, nonviolent adult and juvenile offenders" under section 24-13-1530 of the South Carolina Code.

COUNTER STATEMENT OF ISSUE ON APPEAL

Whether the plea court acted within its discretion in sentencing respondent to home detention, where there was medical evidence respondent would be a "low risk" for reoffending, where there was also evidence respondent only intended to view the pornography for "fantasy purposes," he never intended to distribute the pornography, there was evidence before the court that appellant had never hurt anyone, and particularly where the sentence included inpatient admission to a very strict behavioral program?

STATEMENT

Respondent agrees with the state's procedural history of the case. Respondent would only add that the home detention sentence also included in patient treatment in a very strict behavioral facility.

ARGUMENT

The plea court acted within its discretion in sentencing respondent to home detention, where there was medical evidence respondent would be a "low risk" for reoffending, where there was also medical evidence respondent only intended to view the pornography for fantasy purposes, he never intended to distribute the pornography, there was evidence before the court that appellant had never hurt anyone, and particularly where the sentence included inpatient admission to a very strict behavioral program.

Relevant Facts

Respondent had no prior criminal record. R. 20, ll. 5-7. Respondent admitted his guilt except for "the second-degree charge." Respondent never meant for anyone else to see the images: "I did download those images for personal viewing. And I definitely, I know it's very wrong and I hate it and it's disgusting, but I do not purposely share anything. The file sharing program that I use, you can't disable sharing on it. And that's on their website that you cannot do that. Even when you turn it off it does not turn it off. . . . I just wanted to add that. I'm not saying I'm not guilty. I'm very guilty, but I never shared anything on purpose." R. 20, ll. 9-22.

The assistant attorney general said whether "purposefully or not" respondent intentionally "sought out" these files, and he recommended a sentence of six years imprisonment. R. 21, ll. 4-11. Defense counsel Manigault responded: "Your Honor, we rejected that recommendation from this solicitor and from this AG and the previous AG." R. 21, ll. 12-14. The judge then asked defense counsel "What do you want?" R. 21, ll. 18-19.

Defense counsel Manigault then handed the judge a medical evaluation from Dr. Karl Bodtorf. R. 21, ll. 20-23. She said that Dr. Bodtorf did a psychosexual evaluation of respondent

on May 16, 2016. Counsel noted the conclusion was that the doctor found it clear "that his attraction to such material is "ego-dystonic."[1] R. 22, ll. 2-5.

> That is to say, dystonic with the person that he wishes to be, the ideal self-image. It does lay the framework for understanding how he may have an interest in such material.
>
> He's talking about my client had told him that he was sexually abused as a child by his biological father. He goes on to say: (Reading.) He does acknowledge having had some issues with loneliness. And adult information would suggest that Jason has experienced difficulties in the development of healthy male/female relationship and has retreated to a fantasy life involving prepubescent females. The fact that this has occurred is not surprising given his overall personality. Psychological testing fails to suggest the presence of any significant psychological disturbance, such as bizarre ideation, delusion or hallucinations. There are no indicators to suggest the presence of a personality disorder antisocial and paranoid or narcissistic. (Ends reading.)
>
> Your Honor, to summarize what the doctor says that he would include -- he would not be inclined to describe Jason as a classic pedophile. There is a significant difference between classic pedophiles who utilize computers as a means of assessing and communicating and grooming potential victims.
>
> Dr. Bodtorf is saying that that was not Jason's aim when he downloaded these materials. His aim was sexual fantasy. That he was not actively recruiting any young child he was viewing, viewing the material, which he, himself, has described as disgusting.

R. 22, l. 5 – 23, l. 10.

Defense counsel also told the judge that Dr. Bodtorf opined respondent was in the "low risk range" of possible reoffending. Further, respondent had completed twenty-three of the twenty-four behavioral classes as of February 22, 2017. R. 23, ll. 11-25

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[1] Describing elements of a person's behavior, thoughts, impulses, drives, and attitudes that are unacceptable to him or her and cause anxiety. Mosby's Medical Dictionary, 9th edition (2009).

Defense counsel also noted that respondent "has been out since August of 2015. He has a good family support system and a good friendship support system." R. 24, ll. 1-3. Respondent was thirty-three years old, he was a web developer, and he would not have any access to computers while on home detention. R. 24, ll. 10-24.

The judge then heard from several people urging home detention, **and** that respondent undergo in patient treatment in "Miracle Hill program."

James Cutler was a father of eight, and he had three grandchildren. He had known respondent for ten years. Mr. Cutler told the judge he knew respondent was ashamed of his actions. Mr. Cutler was "a very protective father." However, respondent had been around his family for ten years, and respondent had never been a threat. Mr. Cutler asked the judge to allow respondent to enter the Miracle Hill program -- which respondent had applied for -- and he opined that home incarceration, **along with the Miracle Hill program**, would be the best outcome. R. 25, l. 6 – 26, l. 7. As will be seen infra, respondent was accepted into this program.

Jacqueline Cutler also told the judge that the Miracle Hill program would be very beneficial for respondent. The program included "such things as inner healing from destructive thought patterns, healthy living and relationships". In addition, "there was training and planning and life skills that will help him achieve employment and transition back into society. The Overcomers is a strict program that starts at 5:30 each morning, including chores and housekeeping, laundry, classes and counseling and a strict schedule that keeps him actively engaged until 10 p.m. each day. Good behavior, attitude, and personal hygiene are stressed in the program. And it would help him conquer his addiction, help him with life skills that he lacks. And help him to improve all areas of his life, including spiritual growth." R. 26, l. 20 – 27, l. 8.

Jaqueline Cutler added:

> I've known Jason for ten years. He's lived on my property. He interacted with my eight children, age 26 down to six years old. He's attended church regularly, including prayer meetings and other voluntary meetings. Never once has there been an issue with him and one of our children, not even a hint.
>
> He's attended family events at my home, including Thanksgiving dinner, including the Thanksgiving dinner after he was arrested in August of 2015. **I do not believe Jason is a threat to people, but that he needs help. Help that he could receive in the Miracle Hill Overcomer program**. Thank you for your time and for hearing what I have to say and your consideration.

R. 27, ll. 9-21. (emphasis added)

Jonathan Crosby was a pastor in Greenville County for thirty-three years. Pastor Crosby also asked the judge to consider a house arrest program at Miracle Hill in their Overcomers addiction program. "Jason knows, and we totally agree, that he had egregious, criminal and sinful content in his possession in August of 2015. He's confessed his fault and this repulsive stuff to me and others several times. He never made excuses. There is no excuse. . . . For 20 months since his arrest Jason has submitted to accountability partners, me included, attended all church services, been transparent to bold questions, and has been free from illegal content. During these 20 months of legal freedom **he agreed to house arrest with his married sister without access to an unmonitored computer or to a cell phone with internet**. . . . *Jason is no danger to society*. R. 28, l. 5 – 29, l. 17. (emphasis added).

Pastor Crosby also said, "Your Honor, his personality, fearful, gentle, timid, weak, is not suitable for prison . . . The excellent Overcomers program at Miracle Hill Ministries has accepted him for immediate entrance into their program with your approval of HIP. We believe a faith-based structure and continued counseling there will truly help Jason start a new life free from his past bondage." R. 28, l. 5 – 29, l. 17. (emphasis added).

Defense counsel Manigault then provided the judge a copy of "the acceptance letter from Miracle Hill for the Court to review in the packet that I presented. And I also provided a copy of everything to the Attorney General's office. Again, Your Honor, we'd ask the Court to consider a HIP sentence in this case." R. 29, ll. 19-24.

Respondent then told the judge: "I hate what I've done. I do . . . [but] I never hurt anyone, never touched anyone. I don't want to make excuses." Respondent added: "Those sessions with Dr. Bodtorf have done [gone] very well, helped me understanding a lot of things and about just my relationships and how to interact with other people and how to avoid looking at pornography." R. 30, ll. 7-23.

The judge then sentenced respondent to ten years imprisonment, suspended upon "four years HIP, five years of probation. Random drug and alcohol testing, sexual offender counselling, no unsupervised conduct with minors, *inpatient at Overcomers*. $500 public defender fund. Ten suspended - - Ten consecutive, suspended during probation and ten on all the rest of it, concurrent, suspended during probation. You don't have a prior record. We'll see if you can deal with it. If not you're going to prison. Good luck." R. 31, ll. 6-16.

The assistant attorney general said "the State would argue against the home incarceration program. If it's the second-degree charge it's not actually valid for that program." The judge told the attorney for the state that he had ruled, and "if you feel it's wrong, you can take whatever legal action you need to do, but I just ruled." R. 31, l. 17 – 32, l. 3.

Discussion

The state argues that South Carolina Code § 16-15-405(D) provides that a person convicted of second-degree sexual exploitation of a minor "must be sentenced not less than two years nor more than ten years." However, S.C. Code § 24-13-1530(A) provides

"notwithstanding another provision of law which requires mandatory incarceration, electronic and nonelectronic home detention programs may be used as an alternative to incarceration for **low risk, nonviolent adult** and juvenile offenders **as selected by the court** if there is a home detention program available in the jurisdiction."

The mere fact that S.C. Code § 16-1-60 provides that sexual exploitation of a minor in the second degree is a violent offence does not preclude the court in its discretion from finding, from the evidence before it, that the defendant is actually a "low risk, nonviolent adult." S.C. Code § 24-13-1530(A) specifically cites the court as the one determining whether a particular offender is low risk and nonviolent.

The legislature has the discretion to define whatever offenses it chooses as "violent." For example, "felony driving under the influence with an unlawful alcohol concentration resulting in death" is a violent offense even though felony DUI consists of a car accident where the driver is allegedly "under the influence" as defined by the legislature. It does not involve an intentional act, or a violent act by its very nature.

In addition, certain drug offenses are classified as violent crimes in S.C. Code § 16-1-60 also, even though many drug transactions involve no violence.

Further, if the legislature intended to link the definition of "nonviolent offender" in the Home Detention Act to the classification of violent and nonviolent offenses, it could have easily done so as it has many times.[2] As the legislature has done in other statutes, it could have inserted after the phrase "nonviolent" a reference to the statutes classifying offenses. See S.C. Code Ann. § 24-21-480 (permitting placement in the restitution center "for a defendant convicted of a nonviolent

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[2] A very similar issue is currently pending, as of the writing of this initial brief of respondent, in State v. Jamie Lee Simpson, Appellate Case No. 2016-002210 from which the statutory research below emanates.

offense, as defined in Section 16-1-70"); S.C. Code Ann. § 63-19-2050 (allowing expungement of juvenile records related to "a status offense or a nonviolent crime, as defined in Section 16-1-70").

On the other side of the coin, had the legislature intended to exclude individuals convicted of statutorily defined violent offenses, the legislature certainly knew how to do so as evidenced by its work in countless other statutory provisions. In fact, the legislature has shown this ability in almost every aspect of the law. Quite naturally, and unsurprisingly, the criminal statutes are replete with examples of the legislature's ability to make its intent to refer to the statutorily defined violent offenses. See S.C. Code Ann. § 16-1-130(A)(excluding from diversion programs persons with a current charge or prior conviction "for a violent offense as defined in Section 16-1-60" or who "is currently on parole or probation for a violent crime as defined in Section 16-1-60"); S.C. Code Ann. § 16-3-1045(A)(specifically defining an offense in reference to "a violent crime as defined in Section 16-1-60); S.C. Code Ann. § 16-3-1080(A)(same); S.C. Code Ann. § 16-3-1083(A)(1)(same); S.C. Code Ann. § 16-3-1085(A)(prohibiting the possession of body armor by "a person who has been convicted of a violent crime, as defined in Section 16-1-60"); S.C. Code Ann. § 16-8-230(4)(a)(defining pattern of criminal gang activity in reference to "a violent offense as defined in Section 16-1-60"); S.C. Code Ann. § 16-11-440(C) & (D)(describing the parameters for the Protection of Persons and Property Act in reference to "a violent crime as defined in Section 16-1-60); S.C. Code Ann. § 16-15-342(A)(defining a crime in reference to "a violent crime as defined in Section 16-1-60); S.C. Code Ann. § 16-23-490(A)(authorizing additional punishment for possession of a weapon "during the commission of a violent crime" when the person "is convicted of committing or attempting to commit a violent crime as defined in Section 16-1-60"); S.C. Code Ann. § 16-23-500(A)(excluding individuals "convicted of a violent crime, as defined by Section 16-1-60" from possession of a firearm); S.C. Code Ann. § 16-25-120 (A)(delineating the factors to be

considered during a bond hearing for "a person ... who is charged with a violent offense, as defined in Section 16-1-60"); S.C. Code Ann. § 17-15-55(C)&(D)(explaining reconsideration of bonds for a person who committed "a violent crime, as defined in Section 16-1-60").

Also not surprisingly, the legislature's promulgation of laws governing criminal procedures is replete with how the legislature refers to the statutory provision defining violent crimes. See S.C. Code Ann. § 17-22-50(A)(2)(e)(excluding from pre-trial intervention programs a person who is charged with "a crime of violence as defined in Section 16-1-60"); S.C. Code Ann. § 17-25-45(D)(allowing a person convicted of certain offenses to be eligible for work release as long as the crime did not involve "an additional violent crime as defined in Section 16-1-60"); S.C. Code Ann. § 17-25-140(1)(defining a targeted offender for a community penalties program as a criminal defendant "not previously convicted of a violent crime as defined in § 16-1-60").

The statutory schemes governing corrections, *including incarceration*, probation, and parole contain numerous instances of the legislature showing its intent to refer to the statutorily defined violent crimes. See S.C. Code Ann. § 22-5-510 (A)(specifically stating that the term "'violent offenses' as used in this section means the offenses contained in Section 16-1-60"); S.C. Code Ann. § 22-5-920(B)(2)(b)(excluding "an offense classified as a violent crime in Section 16-1-60" from the expungement provision for youthful offenders); S.C. Code Ann. § 24-3-20(B)(2)(b)(excluding from work release a prisoner "currently serving a sentence for a violent offense as defined in Section 16-1-60"); S.C. Code Ann. § 24-3-210(D)(excluding "a person convicted of a violent crime as defined in Section 16-1-60" from participating in furlough programs unless certain conditions are met); S.C. Code Ann. § 24-13-125(A)(providing the parameters for work release, including a reference to a "violent crime as defined in Section 16-1-60"); S.C. Code Ann. § 24-13-230(F)(2)(not allowing the earning of educational credits "to any individual

convicted of a violent crime as defined in Section 16-1-60"); S.C. Code Ann. § 24-13-650 (prohibited the release of an offender "committed to incarceration for a violent offense as defined in Section 16-1-60" under the work release program); S.C. Code Ann. § 24-13-710 (directing the implementation of supervised furlough programs with reference to individuals who "have not committed a violent crime as defined in Section 16-1-60"); S.C. Code Ann. § 24-13-1310(1)(c)(using a definitions section of the statutory scheme providing for shock incarceration programs to define an "eligible inmate" as one "who has not been convicted of a violent crime as defined in Section 16-1-60"); S.C. Code Ann. § 24-19-10 (d)(i)&(ii)(using a definitions of the statutory scheme for youthful offender program to define "youthful offender" as an offender of a certain age accused of committing or convicted of committing "an offense that is not a violent crime, as defined in Section 16-1-60); S.C. Code Ann. § 24-21-30 (discussing the granting of parole to "an offender who commits a violent crime as defined in Section 16-1-60"); S.C. Code Ann. § 24-21-610 (discussing parole of "a prisoner who if sentenced for a violent crime as defined in § 16-1-60"); S.C. Code Ann. § 24-21-610 (prohibiting the granting of parole "to any prisoner serving a sentence for a second or subsequent conviction, following a separate sentencing for a prior conviction, for violent crimes as defined in Section 16-1-60"); S.C. Code Ann. § 24-21-645(D)(requiring review of cases every two years for a determination of parole for "prisoners in confinement for a violent crime as defined in Section 16-1-60"); S.C. Code Ann. § 24-21-650(providing the number of signatures required for parole "for persons convicted of a violent crime as defined in Section 16-1-60"); S.C. Code Ann. § 24-21-1300(C)(1)(excluding a person sentenced for "a violent crime, as provided for in Section 16-1-60" from participating in "day reporting centers").

The legislature's role in licensing the workforce of this state show the legislature can and will make reference to "violent crimes as defined by Section 16-1-60" when that is the intent of the legislature. See S.C. Code Ann. § 40-22-20(18)(using a definitions section of the statutory scheme governing engineers to define a person of "good character" as "one who has not been convicted of a violent crime, as defined in Section 16-1-60"); S.C. Code Ann. § 40-29-200(F)(permitting the denial of a license for manufactured home sales to an applicant who "has been convicted ... of a violent crime as defined in Section 16-1-60"); S.C. Code Ann. § 40-30-230(8)(defining misconduct as including a conviction of "a violent crime as defined in Section 16-1-60" for those licensed in massage or bodywork); S.C. Code Ann. § 44-7-264(B)(1)(b)(prohibiting the issuance of a nursing home license to a person who has been convicted of "any violent crime, as defined in Section 16-1-60"); S.C. Code Ann. § 59-19-117(A)(requiring school districts to establish polices that prohibit the "hiring of individuals convicted of violent crimes as defined in Section 16-1-60"); S.C. Code Ann. § 59-25-280(A)(1)(providing for the revocation of teaching certificates when the person is convicted of "a violent crime as defined in Section 16-1-60"); S.C. Code Ann. § 59-63-370(requiring notification to schools when a student is convicted of "a violent offense as defined in Section 16-1-60").

The Children's Code contains innumerable references to the statute defining violent crimes. See S.C. Code Ann. § 63-19-810(B)(2)(proscribing the rules for releasing a child taken into custody for "a violent crime as defined in Section 16-1-60"); S.C. Code Ann. § 63-19-820(B)(1)(providing a child is eligible for detention in a secure facility if the child "is charged with a violent crime as defined in Section 16-1-60"); S.C. Code Ann. § 63-19-1430(B)(creating a Youth Mentor Program and requiring its availability to all "juveniles who commit nonviolent offenses" and explaining that "nonviolent offenses mean all offenses not listed in Section 16-1-60"); S.C. Code Ann. § 63-19-

1440(E)(requiring transfer of juveniles to the Department of Corrections on their seventeenth birthdays "following an adjudication for a violent offense contained in Section 16-1-60"); S.C. Code Ann. § 63-19-1820(A)(2)(providing for parole procedures in juvenile cases for offenders who have "not committed a violent offense, as defined by Section 16-1-60" and for offenders who committed "a violent crime, as defined in Section 16-1-60"); S.C. Code Ann. § 63-19-2020(E)(1)(a)(requiring notification to the school when a child is charged with "a violent crime, as defined in Section 16-1-60"); S.C. Code Ann. § 63-19-2030(E)(1)(requiring provision of incident reports to a school when a child is charged with " a violent crime, as defined in Section 16-1-60"); S.C. Code Ann. § 63-19-2040(A)(4)(a)(establishing confidentiality of juvenile offender information unless the child has been adjudicated delinquent for "a violent crime, as defined in Section 16-1-60").

In State v. Thomas, 372 S.C. 466, 642 S.E.2d 724 (2007), the Supreme Court, relying upon a statutory provision from 1989 and case law dating back to 1996, held that a trial judge had the general power to suspend sentences and impose probation unless the legislature specifically mandated that no part of a sentence may be suspended and probation imposed. Id. at 468, 642 S.E.2d at 725. Where a statute failed specifically to prohibit suspension of a sentence, then the court had the authority to suspend the sentence even where the statute required a minimum sentence be imposed. Id. In short, the legislature knew how to prohibit the suspension of a sentence as evidenced by its enactment of other statutes doing just that, but chose not to do so in the statute at issue; therefore, the judge here had the authority to suspend respondent's sentence.

As has been made abundantly clear by examining South Carolina's Code, the legislature knows how to make reference to "violent crimes as defined by Section 16-1-60." See State v.

Ramsey, 409 S.C. 206, 211, 762 S.E.2d 15, 17 (2014)(explaining the legislature's "use of the term 'freshly committed' in section 23-13-60 illustrates the legislature knows how to draft a statute extending an officer's authority to freshly committed crimes" which was not done in the statute at issue in the case). Quite simply, the legislature chose not to refer to "violent crimes as defined by Section 16-1-60" in the Home Detention Act because it was not the intent of the legislature to limit the number of individuals permitted to serve their terms of incarceration in home detention to those convicted of statutorily defined non-violent offenses. Because "[t]he legislature could have employed this phraselogy when enacting" the Home Detention Act, "but it did not," the Court "must give such omission effect." See Ramsey, 409 S.C. at 211, 762 S.E.2d at 18; see also South Carolina Coastal Conservation League v. South Carolina Dept. of Health and Environmental Control, 390 S.C. 418, 427, 702 S.E.2d 246, 251 (2010)(explaining that the legislature's use of a particular phrase in one statute indicated "the legislature knew how to draft the statute to accomplish this result" had it wanted to do so in another statute). Rather, the legislature's intent was to leave the determination of whether an offender was violent or non-violent to the judge.

The judge here had a right to determine, from the evidence before him, if he found respondent to be a "low risk, nonviolent adult" pursuant to S.C. Code § 24-13-1530, and cited by the state in its Initial Brief of Appellant at 3. The plea judge had before him compelling medical and other evidence that respondent had been sexually abused as a minor, and that he only viewed the pornography for purposes of his own "fantasy life," and that he did not intend to share the pornography with anyone else and he was not "targeting" anyone. The judge also had evidence before him that respondent was a "low risk" to ever offend again. This was also the medical evaluation evidence from Dr. Karl Bodtorf.

The court also had evidence before it that respondent was not a danger to anyone else, that he had never hurt anyone, he had no prior criminal record, that he was a "gentle, timid, weak, and a nonviolent person."

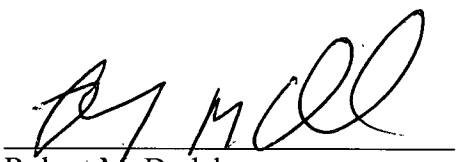
Moreover, respondent's sentence went far beyond home detention. The judge ordered respondent to "inpatient at Overcomers," part of the Miracle Hill program, that was very strict. As seen, the judge ordered respondent in patient committed into a program that started at 5:30 each morning, included chores and housekeeping, classes, and counseling that lasted from 5:30 each morning until 10:00 each night. Good behavior, attitude, and personal hygiene were demanded in this program. R. 26, l. 25 – 27, l. 5; R. 31, ll. 6-16.

The legislature enacted S.C. Code § 24-13-1530 to allow for home detention and home detention programs as alternatives to mandatory incarceration where mandatory incarceration for some crimes has come to be criticized in our modern day criminal justice system. See Cassidy, (AD)MINISTERING JUSTICE: A PROSECUTOR'S ETHICAL DUTY TO SUPPORT SENTENCING REFORM, 49 Loy, U. Chi. L.J. 981 (2014).

Respondent presented a very strong case that he was a "low risk, nonviolent offender," and the judge acted within his discretion in sentencing respondent to home detention for four years as part of a ten year suspended prison sentence, particularly where the judge also sentenced respondent to inpatient treatment in the Miracle Hill program, which appears more strict than an ordinary prison with its mandatory 5:30 a.m. to 10:00 p.m. daily program. This court should respectfully affirm the lower court's sentence.

CONCLUSION

By reason of the foregoing argument, the lower court's ruling on sentencing should be affirmed.



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ATTORNEY FOR RESPONDENT

This 20th day of July, 2018.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

July 20, 2018

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