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Nos. 10-9646 & 10-9647

IN THE

Supreme Court of the United States

EVAN MILLER

Petitioner,

v.

STATE OF ALABAMA

Respondent.

KUNTRELL JACKSON

Petitioner,

v.

RAY HOBBS, DIRECTOR,
ARKANSAS DEPARTMENT OF CORRECTION

Respondent.

ON WRITS OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF ALABAMA AND THE SUPREME COURT OF ARKANSAS

BRIEF OF PROFESSOR OF LAW AND HIS STUDENTS FROM THE MORITZ COLLEGE OF LAW AT THE OHIO STATE UNIVERSITY AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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MISCELLANEOUS

INTEREST OF THE *AMICI CURIAE*[1]

Amici curiae are a law professor and his law students who have been teaching, studying and writing about sentencing laws, issues, and policies. The drafters of this brief recently participated in a law school class in which they examined modern Eighth Amendment jurisprudence and its implications. Amici offer this brief to highlight sentencing principles deserving of attention in the consideration of whether juvenile offenders may be sentenced to life imprisonment without the possibility of parole.

SUMMARY OF THE ARGUMENT

Interpreting the Eighth Amendment's prohibition on cruel and unusual punishments, this Court has repeatedly stressed that juveniles are a special and unique class of criminal offenders who have a distinct level of maturity, mental capacity, and vulnerability to negative influences. In addition, this Court's Eighth Amendment jurisprudence has repeatedly recognized that not all homicide offenses are constitutionally equivalent; because murders can and will differ in their severity, a constitutional scheme of punishment must sometimes differentiate between and among murder offenses. This Court's Eighth Amendment jurisprudence has also identified constitutional problems

1. Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part, and that no entity or person, aside from *amici curiae*, their members, and counsel, made any monetary contribution toward the preparation and submission of this brief. Counsel of records for both parties have consented to this brief's filing in letters on file with the Clerk's Office.

with certain aspects of some mandatory sentencing schemes. Collectively, these established jurisprudential principles connote that any statutory scheme which mandates that a juvenile offender convicted of a certain class of homicide must be sentenced to life without the possibility of parole, without any consideration of the offender's age or any other potential mitigating offense circumstances, violates the Eighth Amendment's prohibition on cruel and unusual punishments.

ARGUMENT

I. The Eighth Amendment requires a sentencing scheme to recognize and give some effect to the fact that juveniles are a special class of criminal offenders with a distinct level of culpability.

This Court's Eighth Amendment jurisprudence has expressly and repeatedly stressed that juveniles are distinct types of criminal offenders due to their limited and still-developing maturity and mental capacity and due to their particular vulnerability to negative influences. Finding an Eighth Amendment violation in the death sentence imposed on a 16-year-old murderer, this Court three decades ago in *Eddings v. Oklahoma*, 455 U.S. 104 (1982), effectively articulated why an offender's age is critical to an assessment of just punishment:

> [Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage. Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally

> are less mature and responsible than adults. Particularly during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment expected of adults.

Id. at 115–16. *Accord Johnson v. Texas*, 509 U.S. 350, 366 (1993) (discussing the constitutional significance of an offender's age in capital sentencing because a "lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young[, and these] qualities often result in impetuous and ill-considered actions and decisions"); *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2403 (2011) ("[t]ime and again, this Court has … observed that children generally are less mature and responsible than adults; that they often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them; that they are more vulnerable or susceptible to outside pressures than adults. … The law has historically reflected the same assumption that children characteristically lack the capacity to exercise mature judgment and possess only an incomplete ability to understand the world around them.").

In numerous Eighth Amendment cases since *Eddings*, this Court has not only reiterated these uncontested facts about human development and the "mitigating qualities of youth," *Johnson*, 509 U.S. at 366, but it also has repeatedly struck down as unconstitutional punishment schemes that fail to give adequate legal effect to the realities of youthful status. *See, e.g.*, *Graham v. Florida*, 130 S. Ct. 2011 (2010) (finding unconstitutional life without parole sentences for all juvenile offenders who committed nonhomicide

offenses); *Roper v. Simmons*, 543 U.S. 551 (2005) (finding unconstitutional death sentences for all juvenile offenders); *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988) (finding unconstitutional death sentences for all offenders under 16); *cf. Johnson*, 509 U.S. at 366–70 (upholding a death sentence imposed on a 19-year-old murderer only because the sentencing jury was given instructions that provided "a meaningful basis to consider the relevant mitigating qualities of petitioner's youth").

Though this Court first based assertions about juveniles' behavior and mitigated culpability on common sense observations, modern social and cognitive science has confirmed and amplified its insights about the social and moral significance of youth. As this Court highlighted most recently in *Graham*, "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds," in part because "parts of the brain involved in behavior control continue to mature through late adolescence." 130 S. Ct. at 2026. The research demonstrating distinct neurological characteristics of juveniles provides a firm and enduring biological foundation for this Court's long-standing position that the developing mind of juveniles entails that younger offenders "are more capable of change than are adults, and their actions are less likely to be evidence of irretrievably depraved character than are the actions of adults." *Id.; see also Johnson*, 509 U.S. at 366–70 (stressing that the "relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside"); *Roper*, 543 U.S. at 570 ("The personality traits of juveniles are more transitory, less fixed" than adults).

The very latest scientific research further confirms the Court's statements in *Graham* and prior cases about the nature of juveniles. Continuing research on adolescent psychology and brain neuroscience now provides even stronger evidence that significant brain developments occur through adolescence: recent studies suggest adolescents lack the fully developed cognitive ability to weigh the risks and rewards of their actions, and may also lack the ability to process emotional and social information leading to heightened susceptibility to negative influences.[2] Professor Laurence Steinberg, whose research was cited by this Court in *Roper*, recently addressed the emerging consensus in the scientific community by explaining that "[a]dolescents' neurobiological immaturity, relative to adults, is a fact, and within the neuroscience community, an uncontroversial one at that."[3]

This Court need not, and arguably should not, use these cases involving crimes committed by 14-year-old children to expound broadly upon what the "mitigating qualities of youth" entail whenever juveniles are subject to

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2. *See* Daniel Romer, *Adolescent Risk Taking, Impulsivity, and Brain Development: Implications for Prevention*, 52 Developmental Psychobiology 263, 264 (2010); Laurence Steinberg, *Should the Science of Adolescent Brain Development Inform Public Policy?*, 64 American Psychologist 739, 742–745 (2009).

3. Steinberg, *supra* at 742–745 (discussing in detail how the brain's gray and white matter develop during adolescence and have an impact on several key cognitive processes including response inhibition, planning ahead, and weighing risks and rewards, as well as how this development period also alters connections between cortical and subcortical regions of the brain critical for the processing of emotional and social information and control processes).

adult criminal sanctions and procedures. But the modern cognitive science combines with this Court's established punishment jurisprudence to fortify a transcendent Eighth Amendment principle articulated by this Court decades ago: a juvenile's criminal offense necessarily "is not as morally reprehensible as that of an adult." *Thompson*, 487 U.S. at 835. This principle, in turn, connotes that a constitutionally sound sentencing scheme ***must*** give some legal effect to an offender's juvenile status. As the Chief Justice recently put matters in *Graham*, "under our Court's precedents, [an offender's] youth is one factor, among others, that should be considered in deciding whether his punishment was unconstitutionally excessive." 130 S. Ct. at 2042 (Roberts, C.J., concurring).[4]

4. The conclusion in *Graham* and *Roper* that proportionate punishment schemes ***must*** recognize and give some effect to the fact that juveniles are a special class of criminal offenders with a distinct level of culpability finds additional support in significant rulings of state supreme courts and in the doctrines of other nations which also trace their views of civilized punishment to the English Declaration of Rights of 1689. *See, e.g.*, *Workman v. Kentucky*, 429 S.W.2d 374, 378 (Ky. 1968) ("[w]e believe that incorrigibility is inconsistent with youth; that it is impossible to make a judgment that a fourteen-year-old youth, no matter how bad, will remain incorrigible for the rest of his life."); *Naovarath v. State*, 779 P.2d 944, 946–47 (Nev. 1989) (overturning 13-year-old's life without parole sentence for murder while explaining that children "are and should be judged by different standards from those imposed upon mature adults" and that to "adjudicate a thirteen-year-old to be forever irredeemable and subject a child of this age to hopeless, lifelong punishment and segregation is not a usual or acceptable response to childhood criminality, even if the criminality amounts to murder"); *Powers of the Criminal Courts (Sentencing) Act 2000*, § 90 (Eng.) (codifying prohibition of life without parole sentences for juveniles in the United Kingdom).

Any sentencing system that entirely fails to consider an offender's youth as one factor, among others, in deciding on that offender's punishment is constitutionally suspect and will sometimes impose constitutionally excessive punishments. The Eighth Amendment's prohibition on extreme punishments precludes such a sentencing system.

II. The Eighth Amendment requires a sentencing scheme to make distinctions among different types of murder offenses in the imposition of the most severe possible punishments.

For more than a century, this Court has stressed that the Eighth Amendment's limit on excessive criminal sanctions flows from the basic "precept of justice that punishment for crime should be graduated and proportioned to offense." *Weems v. United States*, 217 U.S. 349, 367 (1910). *Accord Atkins v. Virginia*, 536 U.S. 304, 311 (2002); *Roper*, 543 U.S. at 559; *see also Trop v. Dulles*, 356 U.S. 86, 100–02 (1958) (plurality opinion) (stressing that though "the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards" and that a punishment's constitutionality "depend[s] upon the enormity of the crime").

Consistent with precepts of justice concerning proportional punishment, this Court's resolution of Eighth Amendment challenges to capital punishment schemes have repeatedly stressed that the nature of the defendant's involvement in the offense and the defendant's culpable mental state are essential in any determination of whether and when our society's most severe punishments may be constitutionally imposed. *See, e.g.*, *Lockett v. Ohio*, 438

U.S. 586, 608 (1978) (finding Ohio's capital sentencing procedures unconstitutional because the "consideration of a defendant's comparatively minor role in the offense, or age, would generally not be permitted, as such, to affect the sentencing decision"); *Enmund v. Florida*, 458 U.S. 782, 788–96 (1982) (explaining that "punishment must be tailored to [a defendant's] personal responsibility and moral guilt" and finding "impermissible under the Eighth Amendment" Florida's capital sentencing scheme because it failed to give effect to the critical fact that the defendant "did not kill or intend to kill"); *Tison v. Arizona*, 481 U.S. 137, 158 (1987) (upholding the constitutionality of the death penalty for murderers exhibiting "reckless indifference to human life"). *Accord Sumner v. Shuman*, 483 U.S. 66, 79–80 (1987) ("[t]his Court has recognized time and again that the level of criminal responsibility of a person convicted of murder may vary according to the extent of that individual's participation in the crime.")

Importantly, this Court's Eighth Amendment jurisprudence has not only declared that states categorically may ***never*** punish certain murder offenses with the death penalty, *see Enmund*, but it has also required states to develop statutory sentencing schemes that "genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Loving v. United States*, 517 U.S. 748, 755 (1996); *see also Brown v. Sanders*, 546 U.S. 212, 216 (2006) ("[s]ince *Furman v. Georgia*, 408 U.S. 238 (1972), we have required States to limit the class of murderers to which the death penalty may be applied.").

This Court's Eighth Amendment rulings that (1) completely prohibit the punishment of death for some murder offenses and (2) expressly demand statutory schemes to narrow further which other murderers may be subject to this punishment are not merely unique and peculiar constitutional commands with significance only in capital cases. Rather, as an expression of the Eighth Amendment's fundamental limit on excessive sanctions through the Cruel and Unusual Punishments Clause—the text of which, of course, makes no distinction based on types of "punishment"—this jurisprudence stands for and safeguards more broadly the principle that a constitutionally sound sentencing scheme must make legal distinctions among different classes of homicide in the imposition of our society's most severe punishments. It would be wholly inconsistent with the precept of justice that punishment "be graduated and proportioned to offense," as well as jurisprudentially obtuse, for the Eighth Amendment to restrict significantly which murderers states can merely make eligible for the death penalty, but then permit states without any constitutional parameters to subject every other offender found legally responsible for another's death to suffer every other extreme form of punishment without any consideration of potentially mitigating offense factors.

More than a half-century ago, this Court in *Trop v. Dulles* rightly stressed that "the existence of the death penalty is not a license to the Government to devise any punishment short of death within the limit of its imagination." 356 U.S. at 100–01. This Court's subsequent Eighth Amendment jurisprudence, in turn, gives effect to this admonition by holding that *both* the nature of a defendant's involvement in an offense and his culpable

mental state are essential to a sound determination of whether and when our society's most severe punishments may be constitutionally imposed. Any sentencing system that imposes extreme and unbending punishments while refusing to consider or give any legal effect to the nature of a defendant's involvement in an offense and his culpable mental state is constitutionally suspect and will sometimes impose constitutionally excessive punishments. The Eighth Amendment's prohibition on extreme punishments precludes such a sentencing system.

III. The Eighth Amendment requires a sentencing scheme to avoid problematic application of extreme mandatory punishments.

Providing another significant expression of the Constitution's demand for reliable and proportionate application of society's most severe punishments, this Court has long declared that the Eighth Amendment prohibits states from making death a mandatory punishment for even the most culpable forms of aggravated murder. *See Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts v. Louisiana*, 428 U.S. 325 (1976). Not only is it constitutionally essential that a sentencer "not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death," *Lockett*, 438 U.S. at 604, but the Eighth Amendment categorically precludes states, even when responding to murders committed by those already serving life sentences for prior murders, from adopting any laws that fail to consider offenders "as uniquely individual human beings" instead of as "a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death." *Sumner*, 483 U.S. at 74–75 (quoting *Woodson*, 428 U.S. at 304).

Critically, this Court began establishing the "constitutional mandate of individualized determinations in capital-sentencing proceedings," *Sumner*, 483 U.S. at 75, based expressly our nation's long-standing "prevailing practice of individualizing sentencing determinations," *Woodson*, 428 U.S. at 304, which reflects more broadly "society's rejection of the belief that 'every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender.'" *Roberts*, 428 U.S. at 333 (quoting *Williams v. New York*, 337 U.S. 241, 247 (1949)); *see also Pepper v. United States*, 131 S. Ct. 1229, 1239–40 (2011) ("[I]t has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue.") (quoting *Koon v. United States*, 518 U.S. 81, 113 (1996)); *Pennsylvania ex rel. Sullivan v. Ashe*, 302 U.S. 51, 55 (1937) ("For the determination of sentences, justice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender.").

This Court has generally described our nation's tradition of individualized sentencing determinations as "simply enlightened policy rather than a constitutional imperative" outside the death penalty setting. *Woodson*, 428 U.S. at 304. But the imposition of the extreme sentence of life without parole is, functionally, a life-and-death punishment determination for a defendant; consequently, the "fundamental respect for humanity underlying the Eighth Amendment," *id.*, should likewise demand a process that enables a sentencer to "be able to consider and give effect to [mitigating] evidence in imposing sentence"

so to be confident that the imposition of life without any possibility of parole reflects "a reasoned moral response to the defendant's background, character, and crime." *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989). Given the Eighth Amendment's fundamental concern with excessive sanctions through the Cruel and Unusual Punishments Clause—the text of which, of course, makes no distinction based on types of "punishment"—a constitutionally sound sentencing scheme must allow the sentencing authority (and not merely a partisan prosecutor through the unregulated and hidden exercise of charging and bargaining discretion) to have some formal and functional mechanism for distinguishing which offenders may need and deserve to be forever caged and condemned to die in prison and which may not. Again, it would be inconsistent with the precept of justice that punishment "be graduated and proportioned to offense," as well as jurisprudentially obtuse, for the Eighth Amendment to require states to give all repeat intentional murderers already serving life terms a constitutional right to always argue for a reduced sentence, but then permit states without any constitutional parameters to mandate that every other homicide offender always be condemned to die in prison without giving any consideration or legal effect to potentially mitigating offense or offender factors.

This Court need not, and arguably should not, use these cases involving crimes committed by 14-year-old children to expound broadly on whether and when mandatory application of life without the possibility of parole sentences is now contrary to the "the evolving standards of decency that mark the progress of a maturing society," *Trop*, 356 U.S. at 100–01, and thus fails to reflect properly the "history, tradition, and precedent" of the

Eighth Amendment "with due regard for its purpose and function in the constitutional design." *Roper*, 543 U.S. at 555–56. But in light of this Court's established jurisprudence that a defendant's youth and immaturity are paradigmatic examples of constitutionally essential mitigating evidence, these cases do present an important opportunity to declare that any statutory scheme which ***mandates that a juvenile offender*** convicted of a certain class of homicide be sentenced to life without the possibility of parole, without any consideration of the offender's age or any other potential mitigating offense circumstances, violates the Eighth Amendment's prohibition on cruel and unusual punishments.[5] *See generally* Brief for Petitioner in *Miller v. Alabama*, No.

5. Tellingly, there is a history of state supreme courts overturning life without parole sentences for juveniles who commit homicide based on their recognition that the permanence of such a sentence fails to allow any discretionary assessment of whether a young offender is indisputably irredeemable. The California Supreme Court, for example, overturned a youth's life without parole sentence after taking into consideration his age and finding he was an "unusually immature youth" who had never been in trouble with the law before, and was not a "hardened criminal" who poses a "grave threat to society." *People v. Dillon*, 668 P.2d 697, 726–27 (Cal. 1983). The Nevada Supreme Court, when overturning a life without parole sentence for a boy who was convicted of murdering a disabled man who had molested him, similarly stressed the that "the child before us [could be] the beginning of an irremediable dangerous adult human being, but we certainly cannot know that fact with any degree of certainty ***now***." *Naovarath*, 779 P.2d at 947 (emphasis in original). These rulings reflect the sound view that an individualized judgment of a juvenile offender's character and his offense's circumstances is essential for juvenile sentencing to avoid the risk of imposing cruel and unusual punishments through adult mandatory sentencing structures.

10-9646, at 25–29 (highlighting why mandatory life-without-parole sentencing of juveniles is different in kind from mandatory sentencing of adult offenders). Again, because "youth is one factor, among others, that should be considered in deciding whether his punishment was unconstitutionally excessive," *Graham*, 130 S. Ct. at 2042 (Roberts, C.J., concurring), any sentencing system that mandates a life without parole sentence without allowing in any way the sentencing authority to consider mitigating factors is constitutionally suspect and will sometimes impose constitutionally excessive punishments. The Eighth Amendment's prohibition on extreme punishments precludes such a sentencing system.

IV. The Eighth Amendment precludes a sentencing scheme that mandates extreme prison sentences for especially young juveniles like Kuntrell Jackson and Evan Miller, whose homicide offenses were not among the "worst of the worst."

The Eighth Amendment principles stressed above are especially important in these cases because Kuntrell Jackson and Evan Miller, both only fourteen years old at the time of their homicide offenses, plainly were not guilty of an extreme type of intentional murder for which society and its laws typically ascribe the most extreme punishments. Kuntrell Jackson, for example, was just a peripheral participant in a video store robbery in Arkansas; he merely entered the store as two older boys were already pointing a gun at the store clerk, and he was not directly involved in, nor never intended, the shooting of the clerk. *See Jackson v. State*, 194 S.W.3d 757, 758 (Ark. 2004). As Kuntrell Jackson's brief highlights, *see* Brief for Petitioner in *Jackson v. Hobbs*, No, 10-9647, at

63–64, arguably his culpability is even less than Terrance Graham's, the repeat offender who at age 17 committed his second armed robbery and yet still could not be constitutionally sentenced to the life without parole term that Kuntrell Jackson is now serving. Notably, and again in contrast to Terrance Graham's situation, no judge ever decided that a life without parole sentence was needed or justifiable for Kuntrell Jackson; he was sentenced to this extreme prison term only by virtue of a statute which mandated this sentence for anyone who participated in a capital felony-murder (and because of the decision by state prosecutors to try him in adult court). The sentencing judge in this case did not—indeed, under the law as it applied here, was not permitted to—consider Kuntrell Jackson's young age, his limited involvement in the offense, his diminished culpability based on his mental state, or any other mitigating factors.

Kuntrell Jackson's case especially illustrates the necessity for special constitutional reservations regarding any sentencing schemes that involve what might be called "categorical conclusions"—such as the imposition of mandatory life without parole sentences for all offenders who commit a certain crime. *Cf. Graham*, 130 S. Ct. at 2041 (Roberts, C.J., concurring). As members of this Court have stressed, painting with a broad, one-size-fits-all constitutional brush risks failing to respect the reality that "[s]ome crimes are so heinous, and some juvenile offenders so highly culpable" that extreme prison sentences may sometimes be justifiable. *See id.* at 2042. This reality, in turn, highlights the constitutional importance of a sentencing scheme that recognizes that "exceptional case[s]" occur and that a state's mandatory "categorical rule[s] applicable to far different cases" at

sentencing is constitutionally suspect and will sometimes result in constitutionally excessive punishments. *Id.*

For these reasons, Kuntrell Jackson and Evan Miller's appeals do not require this Court to reach a firm constitutional conclusion as to whether an extreme prison sentence might sometimes be justifiable when, for example, a teenager lines up a family of four in front of a ditch and brutally guns them down, one by one—assassinating three in cold-blood and seriously injuring the fourth as they beg to be spared. *Cf. Tennessee v. Howell*, 34 S.W.3d 484, 487–88 (Tenn. Crim. App. 2000) (noting, inter alia, that the teenage defendant bragged about his killing spree while in custody); *see also State v. Martin*, 773 N.W.2d 89, 89 (Minn. 2009) (describing a particularly cold-blooded intentional murder by a teenage gang member); *Phillips v. Florida*, 807 So. 2d 713, 715 (Fla. Dist. Ct. App. 2002) (describing an exceptionally brutal and violent intentional murder of a young child by a teenager). Though this Court certainly could again take a "categorical approach" to examine in these cases whether and when certain juvenile offenders may be subject to certain extreme punishments, *cf. Graham*, 130 S. Ct. at 2021-23, this Court should not fail to acknowledge and hold at the very least that, "given all the circumstances," the extreme punishments of life without the possibility of parole mandatorily imposed on Kuntrell Jackson and Evan Miller are unconstitutionally excessive. *See id.* at 2036 (Roberts, C.J., concurring) (explaining that defendant's "juvenile status … together with the nature of his criminal conduct and the extraordinarily severe punishment imposed" sufficiently justifies conclusion that noncapital sentence violated the Eighth Amendment based on the "particular defendant and particular crime at issue").

CONCLUSION

For these reasons, this Court should declare the life without parole sentences of Kuntrell Jackson and Evan Miller to be unconstitutional.

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