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Case Number 169,2014

IN THE SUPREME COURT IN THE STATE OF DELAWARE

STATE OF DELAWARE,	:No.: 169,2014
	:
Plaintiff-Below,	:On Appeal from the Superior Court
Appellant,	:of the State of Delaware in and for
	:New Castle County
v.	:
	:
ANDY LABOY,	:
	:
Defendant-Below,	:
Appellee.	:

APPELLEE'S ANSWERING BRIEF

/s/David J. J. Facciolo, Esquire
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Dated: January 22, 2015

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Nature and Stage of the Proceedings

On July 28, 2012, at approximately 4:30 a.m., Andy Laboy was observed by a Delaware State Police officer allegedly speeding on the Interstate 95. (B-21). When pulled over, the officer observed bloodshot eyes and a moderate odor of alcohol. (B-22). He performed some but not all of the tests associated with DUI detection. (B- 22,27).

The driver, Andy Laboy, was charged with and later indicted for Driving Under the Influence and the related speed violation (B-12). Counsel for Mr. Laboy filed a Motion to Suppress on June 12, 2013. (B-14).

At the suppression hearing, counsel argued that there was a lack of probable cause citing Esham v. Voshell 1987 WL 8277 (Del.Super.Ct. March 2, 1987), and Lefevbre v. State 19 A.2d 287 (Del. Supr.2011). (B-33). The officer pointed out that the Horizontal Gaze Nystagmus Test of Mr. Laboy's eye movement, was only 77 percent accurate. (B-35) . The officer conceded and counsel pointed out that his client absolutely passed the alphabet test although he went further by a couple of letters. (B-34).

The court held that based on these tests the PBT test (Portable Breathalyzer Test) could be administered and that probable cause was established. (B-35,36).

From a review of Mr. Laboy's history as provided by the State, a Delaware

Driving Under the Influence Offense appeared in his past. Initially counsel opined that it may have been under the unconstitutional DUI statute from the 1990s but it was clarified by the time of sentencing that the Delaware prior conviction was a proper one. (B- 42,104,105). The State concedes that the Delaware conviction was more than ten years old and absent the Maryland conviction, it would be too old to be part of the sentencing calculus as an enhancement for a second offense. (B-105). (See also State's Brief at 6)

There also appeared to be a possible out-of- state offense *which was never established on the record below as the equivalent of a Delaware DUI charge for the purposes of enhanced sentencing as a Third Offense felony with mandatory incarceration* (B-105,107). That is the principle subject of the State's appeal.

After the Court ruled that probable cause existed based on the evidence presented at the suppression hearing, counsel informed the court that his client would immediately plea guilty to DUI but the issue of whether it was a first or third offense would likely be raised. (B-36). When the Court read the Plea agreement into the record counsel stated as follows:

> "Your Honor, that is my understanding of this agreement. But the court does need to know, as does the State, that there may be the possibility that legally or factually the Maryland conviction does not apply, then this becomes a

first offense ... My client understands, though, that even if we don't raise those issues that he could face the prospect of being sentenced to a third offense..."

(B-36).

Finally at the end of the colloquy, the court asked the defendant:

"You realize the penalties that you are facing for–depending on how this comes out, right?"

The Defendant responded :

" Yes."

(B-38).

Mr. Laboy's counsel subsequently filed a Motion to Sentence Defendant as Qualifying for First Offense (B-42). The State did not respond directly to this motion but instead, the State filed a Motion to Sentence Defendant as a Third Offense DUI Offender. (B-50).

At sentencing the court entertained oral argument by both counsel. (B-103-107).

Counsel for Mr. Laboy argued that the lead case whereby a sentence could be enhanced as a felony was Hall v. State, 788 A2d. 110 (Del. Supr. 2001). Counsel also cited the then recent United States Supreme Court decision Alleyene

v. U.S., 133 S.Ct.2151, 2155 (2013) which would require an even higher standard of proof and suggested that the State met neither standard to allow the out-of-state conviction to enhance the offense. (B-44, B-106, 107).

The court was not satisfied that the State had established the Maryland conviction as consistent with Delaware law based upon the record before the court. (B-108).

The State filed for reargument. (B-110).

The defendant's counsel responded. (B-116).

The court denied the State's motion stating as follows:

> "The core of the dispute here is whether Defendant was convicted under a " similar statute" when he was convicted of DUI, in Maryland in 1999. The court denied the State's request to sentence Defendant as a third offender because the State presented absolutely no evidence about the Maryland statute in effect at the time of the Defendant's 1999 conviction. Therefore there was no basis upon which the court could conclude that Delaware's current statute and the 1999 Maryland statute are "similar".

(B-129).

The State filed a Notice of Appeal and an Amended Notice of Appeal. (B-132).

The Appellee filed a Motion to Affirm in this Court, which was denied. (B-141,153).

Summary of Argument

Appellant's Argument I is Denied

The Trial Court correctly sentenced Andy Laboy as a DUI first offender under the facts presented at sentencing. The record shows that there was *no effort* by the State to find the relevant Maryland statute, point it out or discuss it at the sentencing or even in the State's own Motion to Sentence as Third Offense even though the correlation of the Maryland and Delaware convictions was a core issue in this case from the beginning and was expressly noted at the time of the plea, at sentencing and in the Defendant's Motion to be Sentenced as a First Offender.(B-36,50,106). The court stated at the sentencing that it did not know what the law of Maryland was that the State might be asserting. (B-107). This was an abject failure of proof. The State never even attempted to make the purported statute it cites in its brief a part of the record below. At sentencing it may have been relevant but the State's argument in its Opening Brief is premised completely outside of the factual record below. Delaware law required that for an out-of- state statute to be used as a sentencing enhancement, it must "substantially conform" to Delaware law.

Statement of Facts

Andy Laboy was arrested, charged with, and later indicted for Driving Under the Influence and a related speed violation (B-12). He pled guilty on August 30, 2013, but the issue of whether he would be sentenced as a first offender or a third offender was left open to the court. (B-36).

After committing his offense Mr Laboy showed remorse and appreciation of his offense. (B-83).

Unlike many individuals with a history before the court, Mr . Laboy went to have his safe drivers program assessment and immediately went to SODAT and Connections. He had multiple letters of recommendation. He had a long history of uninterrupted employment. He had sole custody of his daughter.(B-78,80). He was regarded as a loving and devoted father to his children.(B-81). He was a graduate of Newark High School where he played football his freshman and Sophomore years. He completed an Automotive Technology Program at Lincoln Technical Institute of Philadelphia (B-79). He worked at the same location where he lived. (B-106,107). He had been a positive and mentoring figure for fellow employees (B-82,85). Each of these positive factors related directly to the SENTAC mitigation factors: M2 Voluntary Redress or Treatment; M8 Treatment Need exceeds Need for Punishment; M9 Could Lose Employment; M13 Other-Exceptional Remorse.

See http:// courts. delaware.gov/Superior/pdf/benchbook 2014.pdf at 127.

At no point does the record reflect the court entertaining any of these factors alone or collectively in its determination of *the level of offense*.

Nor did the court appear to cut the defendant a break out of a concern for his well being or his characteristics. The court felt it had the discretion to determine the lower level of sentence because *the State presented no evidence as to the prior Maryland conviction corresponding to the Delaware statute.* [1]

All of these factors were relevant as to mitigation and to the State's recommendation for the minimum sentence once the court determined the level of the offense.

The court's stated its reasoning twice on the day of sentencing (B-106,108) and a third time in its denial of the Motion for Reargument (B-129). It could not

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[1]The State in its Opening Brief at pages 9 and 12, claims that it found the appropriate Maryland statute for comparison to Delaware's law with little effort on appeal. The record shows that there was *no effort* by the State to find it, point it out or discuss it at the sentencing or even in the State's own Motion to Sentence as Third Offense even though the correlation of the Maryland and Delaware convictions was a core issue in this case from the beginning and was expressly noted at the time of the plea, at sentencing and in the Defendant's Motion to be Sentenced as a First Offender.(B-36,50,106) In fact the court stated at the sentencing that it did not know what the law of Maryland was that the State might be asserting. (B-107). This is an abject failure of proof. The State never even attempted to make the purported statute it cites in its brief a part of the record below. At sentencing it may have been relevant but the State's argument is premised completely outside of the factual record below. In essence, the court was presented with an abject failure of proof by the State. The State did not address or meet its burden of establishing the predicate offenses necessary to sentence the defendant legally as a third time DUI offender.

accept the State's argument without some evidence and explanation of the out-of-state conviction's conformity with the Delaware statute on the record at sentencing.

Andy Laboy was sentenced to one year at Supervision Level V suspended for one year at supervision Level III with the special conditions as follows- first: drug and alcohol treatment; second: a prohibition on driving a motor vehicle until properly licensed and insured; and third: maintaining of employment.

Andy Laboy completed his probation in an exceptional manner. His progress report at the conclusion of his probation stated the following:

> "Mr. Laboy's compliance has been satisfactory during his term of probation. Mr. Laboy reports as directed, has incurred no new offenses and has been compliant with all aspects of this probation term. Mr. Laboy was court ordered to undergo a substance abuse evaluation and to follow recommendations for treatment. Mr Laboy was scheduled with SODAT/Del DUI and found appropriate for a course of DUI instruction with Connections Inc. Mr. Laboy attended scheduled one-on-one session with his counselor, groups as required and complied with the guidelines of treatment, Mr. Laboy was successfully discharged form treatment in May 2014. Mr. Laboy has been subject to random urine screens and the results have been returned as negative for the use of illegal substances. Additionally, Mr. Laboy was evaluated by the LSI-R and scored low risk, which allowed him to meet Level 2 supervision requirements. Mr. Laboy is currently employed full time and continues to display a positive attitude and outlook on his future. The financial obligation in this case has been paid in full."

(B-130).

Mr.. Laboy was recommended for early successful discharge of his

probation on September 17, 2014 as was ordered by the sentencing Judge on October 2, 2014. (B-130, 131)

Argument I

The Superior Court Judge's decision was a proper use of discretion based on the record below (B-106, 108, 116, 129).

Question Presented

Did the Superior Court Judge correctly sentence Andy Laboy as a DUI First Offender when the State failed to meet its burden of proof to establish if the Maryland DUI statute substantially conformed to the Delaware DUI statute for enhancement purposes?

Standard and Scope of Review

The standard and scope of review applicable to this case is abuse of discretion on appeal. To the extent that the court examines the trial judge's legal conclusions, the court reviews them *de novo* for errors in formulating or applying legal precepts. To the extent the trial judge's decision is based on factual findings, we review for whether the trial judge abused his or her discretion in determining whether sufficient evidence supported the findings and whether those findings were clearly erroneous. *Miller v. State*, 4 A.3d 371, 373 (Del. 2010).

Merits

The State had the burden of proof at sentencing that the Maryland law and conviction "substantially conformed" to Delaware caselaw and statutes. The State

at sentencing should have compared these two laws and not just raise that comparison on appeal.

Here, the State failed at the sentencing hearing to present the Maryland statute as it was at the time of Defendant's prior DUI conviction.

As a result, the State is asking this court to repair its own mistake by making a comparison on appeal of Maryland's DUI law with Delaware's DUI law in order to determine whether the two are substantially similar and then to apply its determination to the facts of this case.

Before engaging in an in depth analysis of why the Superior Court judge's decision was proper, just and consistent within the discretion allotted to him within the confines of the record below, it is essential to examine three issues:

First, the State had the opportunity to raise this appeal under 10 Del. C. Section 9902 (e) and not under 10 Del C. Section 9902 (f) . It chose section (f) which would apply to the rights of Andy Laboy personally. Thus, if the court delineates a comparison of the statutes on appeal in the manner the State urges, despite the dearth of record to support it below, the nature of this appeal will violate Andy Laboy's constitutional protection against double jeopardy. Essentially, the State is trying to sandbag Andy Laboy by improperly seeking a second bite at the sentencing apple.

Andy Laboy had completed his sentence and paid his legal debt to society after a sentencing in which the State simply never proved he qualified for an enhanced felony sentence DUI. He was discharged early from probation by the Superior Court judge with an exemplary progress report by his probation officer (B-130, 131). This court granted leave to supplement the Superior Court docket and record so it can properly reflect these facts because they directly implicate Andy Laboy's right to be protected from double jeopardy. (B- 5).

The Fifth Amendment of the United States Constitution provides that "no person shall ... be subject for the same offense to be twice put in jeopardy of life and limb...." The Double Jeopardy Clause is applicable to the states through the Fourteenth Amendment. *Benton v. Maryland,* 395 U.S. 784 (1969). The Double Jeopardy Clause protects an individual from three types of state action: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after a conviction; and (3) multiple punishments for the same offense. *North Carolina v. Pearce,* 395 U.S. 711 (1969). *See State v. Cook,* 600 A.2d 352, 354 (Del. Supr. Ct. 1991). It is well-settled that Delaware courts adhere to the principles of *Pearce* and its progeny. *State v. Schwander,* 1995 WL 413248, at *2 (Del. Super. Ct. June 15, 1995).

It was the obligation and duty of the state below to meet its burden of proof

and it utterly failed to address this issue before the sentencing court. The State comes to this court on a direct appeal and wants this court to substitute its judgement to fix the State's failure to meet its burden. The State asks this court to unconstitutionally re-sentence Andy Laboy.

Second, the State waived its right to argue this issue on appeal under 10 Del C. Section 9902 (f).

Arguments that are not raised below ordinarily cannot be raised for the first time on appeal." *Montgomery v. Aventis Pharm.*, 2007 WL 4577625, at *2 (Del. Super. Dec. 14, 2007); s*ee, e.g., Equitable Trust Co. v. Gallagher,* 77 A.2d 548, 550 (Del.1950) *(holding that "[a]ppellate Courts generally will refuse to review matters on appeal not raised in the Court below")*; *Wilmington Trust Co. v. Conner,* 415 A.2d 773, 781 (Del.1980) **(***holding that "[i]t is ... the general rule in this State that issues not raised in the trial court shall not be heard on appeal).*

As mentioned above, the State failed to address at the Superior Court sentencing the issue of whether the Maryland DUI statute and the Delaware DUI statute in place at the time of Defendant's prior DUI were substantially similar. The record shows that there was *no effort* by the State to find the relevant Maryland statute, point it out or discuss it at the sentencing or even in the State's own Motion to Sentence as Third Offense even though the correlation of the

Maryland and Delaware convictions was a core issue in this case from the beginning and was expressly noted at the time of the plea, at sentencing and in the Defendant's Motion to be Sentenced as a First Offender. (B-36,50,106) In fact, the court stated at the sentencing that it did not know what the law of Maryland was that the State might be asserting. (B-107)

Because the State failed to raise this argument below, the State cannot properly raise this argument on appeal. Given that the State has failed to argue the substantial similarity between the two statutes, Defendant's alleged prior DUI under the Maryland statute cannot be considered for sentencing enhancement purposes.

Third, the State appears to suggest that this court should lower the standard of proof for an out-of-state conviction to be used as a felony sentence enhancement.

The State in its Opening Brief at page 12 appears to suggest that this court can lower the standard to mere probability that an out-of-state sentence conforms to Delaware law.

The State takes the Superior Court Judge's sentencing remarks out of context. At page 12 of its Opening Brief it states that when the judge said the first

Maryland conviction "probably" satisfies the statute, he essentially conceded that it should apply in this case. Yet the State completely ignores the context of that remark. The judge had not heard any argument or evidence by the State whatsoever to prove that the Maryland statute would apply and the State ignores the caselaw that requires that an out-of-state statute be proved and established as "substantially conforming" to the Delaware law as it existed at that time. (B-108,129).

Having addressed the three introductory points for this court to consider, it is essential to look at the record below and the court's analysis in light of both Delaware and United States Supreme Court caselaw.

Although the Delaware DUI statute uses the term "similar" statute in defining prior out-of-state convictions for the purposes of enhanced DUI penalties, Delaware constitutional law requires a prior out-of-state conviction to be "substantially similar" for felony enhancement and the US Supreme Court decision in *Alleyene* requires or at least suggests that the prior out-of-state conviction may need to be proved "beyond a reasonable doubt" to allow for such enhancement.

It is settled law that if an out-of-state offense is used for enhancement of a charge to a felony offense, the out-of-state statute must substantially conform to

the equivalent Delaware statute. *Hall v State*, 788 A.2d 118,128 (Del. 2001). It is also well-settled law that the State has the burden of establishing that an offense is a predicate offense for enhancement purposes. *State v. Harrell* 2014 WL606631 (Del. Super. Ct.); *Hall v State*, 788 A.2d 118,128 (Del. 2001). In Delaware, this has been accomplished in two ways: first, establishing that the out-of-state criminal *activity* would have been a crime under Delaware law *Hall v State*, 788A.2d 118,128 (Del. 2001); and, second, establishing that the *out-of-state statute substantially conformed* to Delaware law. *State v. Rogers*, 2001 WL 1398583 (Del. Super. Ct.), aff'd, 798 A.2d 1042 (Del. 2002).

Here, the State has failed in several ways to meet its burden of proof regarding whether the Maryland statute applies for enhanced sentencing purposes. First, the State did not even make an argument regarding whether there was substantial similarity between the Maryland DUI statute and the Delaware DUI statute that was in place at the time of Defendant's prior DUI. (B-107) Second, the State failed to produce the Maryland DUI statute that was in place at the time of Defendant's prior DUI in Maryland. (See Footnote 1 supra.) As a result, the Superior Court Judge could not even draw his own conclusions regarding whether the two statutes were substantially similar. (B-106). Finally, the State was not even able to determine what the Maryland DUI statute was at the time of

Defendant's prior conviction. (B-107) Consequently, the State failed to meet its burden of proving that Delaware and Maryland laws at the time of the prior DUI were substantially similar. Without such a foundation, the State also could not show that the defendant's activities were similar under either statute.

The State in its Opening Brief offers broad general assertions with no specifics from the record below and it assumes that the terms of the Maryland statute as applied to the defendant would qualify under Delaware law as a DUI offense. The State never proffered a *State v. Stewart, 930 A.2d 923,(Del Supr. 2007)* analysis below comparing the particular statutes even though it incorrectly asserts that *Stewart* supports its conclusion.

The Delaware Supreme Court has held that a conviction for a DUI in another State may be considered for sentencing purposes (i.e. subsequent offender) even if the DUI statute of the other state is not identical to Delaware's DUI statute. The Delaware Supreme Court held that Delaware's statute at the time of the prior DUI and the other state's statute at the time of the prior DUI must be substantially similar. *State v. Stewart,* 2004 WL 1965986, at *1 (Del. Super. Aug. 31, 2004).

In *State v. Stewart*, the State argued that Florida DUI law and Delaware DUI law were substantially similar. In *Stewart* however there was an extensive cross analysis at trial and on appeal in Superior Court and this court of the two

statutes and an examination of their ramifications and intent. Nothing even remotely approaching a *Stewart* analysis was proffered by the state below.

Similarly the State's citation of *Davis v. State, Del Super., ID No 11030052909 FSS , Silverman, J. (Feb. 28, 2014)* in the State's Motion for reargument and in its Opening Brief is misplaced. The court herein stated that from the information before it and under the applicable standard of Delaware law it could not regard the Maryland conviction as qualifying as a prior offense *in this case.*(B108). In *Davis,* the court felt that the mere certified record therein gave it substantial enough basis to make the determination requested by the State under *Hall v. State, 788 A.2d 118 (Del. Supr. 2001)* . The State's citation of *Davis v State* is inapplicable to this case. In *Davis*, the Maryland conviction for whatever statute it may have been was for a .23 alcohol reading that was conceded by the defendant. This case presented no description of how the Maryland conviction occurred nor did the state indicate the specific statute of the MD Code upon which it relied. (Counsel incorporates by reference herein Footnote 1 of this brief.) Lastly, this differs in one other measure from the *Davis* case. *Davis* involved a second conviction_ *not a felony level enhanced conviction. Under Delaware law, the enhancement of a crime to felony status must be substantially proved by the state, Hall v. State, 788 A.2d 118 (Del. Supr. 2001)* . Under recent US Supreme

Court law this may be required *beyond a reasonable doubt. Alleyne v. U.S., 133 S.Ct. 2151, 2155 (2013).* In any event it was not proved at all in this case.[2]

Whether the crime is made a felony, or is essentially a form of habitual status, the standards established by *Hall* as well as the methodology of proof established in *Morales v. State,* 696 A.2d 390 (Del.1997) and *Fletcher v. State,* (Del. 1979) must apply.409 A.2d 1254 (Del. 1979).

Among the most basic tenets of of Anglo-American jurisprudence and American appellate procedure is the requirement that the appellate court must examine closely the record below and that the appellate court must confine

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[2]The State in its Opening Brief at page 11, attempts to address the issue of whether *Alleyene v. U.S.*, 133 S.Ct. 2151, 2155 (2013), the United States Supreme Court case that overruled *Harris v. U.S.*, 536 U.S. 545 (2013), should require a higher standard than *Hall* under Delaware constitutional due process provisions in this specific context. This court may want to consider whether it should apply *Alleyne* in this context even though at sentencing Counsel argued that the court did not have to reach that level of proof since the State failed the lower *Hall* standard. (B-106).

Delaware has an important interest in making sure that out -of-state enhancement convictions conform to our statutes and our constitutional provisions

Notwithstanding the holding of *Fountain v. State*, 2014 WL 4102069 (Del. Supr., Aug.19, 2014) and consistent with *Ortiz v State*, 869 A.2d 285,291 (Del.Supr., 2005), this court may entertain under the Delaware constitutional due process provisions, a more protective analysis of due process than in *Sacksith v. Ebbert*, 2013 WL 4812459 (M.D. Pa. Sept. 9, 2013) and apply the *Alleyene* standard to Delaware law in this context.

itself to that record as presented below in fashioning decisions - especially those involving sentencing under criminal statutes.

The court stated its reasoning in this case twice on the day of sentencing (B-106-108) and a third time in its denial of the Motion for Reargument (B-129). It could not accept the State's premise that the Maryland conviction could trigger a third offense enhancement without some evidence and explanation of the out-of-state conviction's conformity with the Delaware statute on the record as established at sentencing.

The court denied the State's motion for reargument after it imposed sentence

stating as follows:

> "The core of the dispute here is whether Defendant was convicted under a " similar statute" when he was convicted of DUI, in Maryland in 1999. The court denied the State's request to sentence Defendant as a third offender because the State presented absolutely no evidence about the Maryland statute in effect at the time of the Defendant's 1999 conviction. Therefore there was no basis upon which the court could conclude that Delaware's current statute and the 1999 Maryland statute are "similar".

(B-129).

The record shows that there was *no effort* by the state to find the Maryland statute, point it out, quote it or discuss it at (1.) the sentencing, or even (2.) in the

State's own Motion to Sentence as Third Offense even though the correlation of the Maryland and Delaware convictions was a core issue in this case from the beginning and was expressly noted at (3.) the time of the plea, at (4.) sentencing and in (5.) the Defendant's Motion to be Sentenced as a First Offender. (B-36,50,106).

Finally, the State suggests that Mr. Laboy was sentenced as a second offender when he had his prior Delaware conviction. This assertion neither enhances nor buttresses the State's argument. The point is not whether a prior court may have sentenced him in a particular way that may or may not have been legally correct. In the final analysis, even if such an argument was to be raised properly, it should have been raised below at the sentencing in the first instance. It too is utterly misplaced , misdirected and without merit. Counsel incorporates by reference herein its prior argument as to waiver above.

Delaware requires substantial conformity between an out-of-state statute and a Delaware statute. Delaware also puts the burden of proof on the State to establish such conformity when it is at issue before the sentencing court See *Hall v. State* .

The State herein failed in that objective. The State now attempts to blame

the sentencing judge for not accepting its argument despite no record of its argument being properly presented to him. The State now asks this court to re-sentence Andy Laboy in an unconstitutional manner in violation of his double jeopardy protections under the United States constitution as applied to the states when it could have properly lodged this appeal as an appeal to set standards for future cases under 10 Del. C. Section 9902 (e) and not under 10 Del C. Section 9902 (f) .

The State's arguments are misplaced, misdirected and upon close analysis devoid of merit.

CONCLUSION

Based upon the above argument and authorities the Superior Court decision sentencing Andy Laboy as a DUI first offender must be Affirmed.

Respectfully presented,

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