

NO. 79064-7

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SUPREME COURT OF THE STATE OF WASHINGTON

In re the Detention of:
ALFRED KISTENMACHER,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

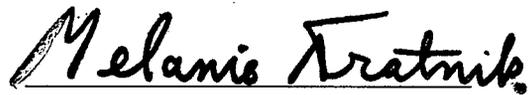
**STATE OF WASHINGTON'S STATEMENT OF
ADDITIONAL AUTHORITIES**

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The State of Washington submits the following additional authorities with regard to the issue of whether Mr. Kistenmacher has a statutory right to counsel during a forensic evaluation conducted pursuant to RCW 71.09.040(4): *In re the Detention of John L. Strand*, 162 P.2d 1195, 1199 (2007). A copy of the opinion is attached as Appendix A.

RESPECTFULLY SUBMITTED this 14th day of September, 2007.



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Appendix A

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(Cite as: 162 P.3d 1195)

In re Detention of **Strand v. State**
Wash.App. Div. 2,2007.

Court of Appeals of Washington, Division 2.
In re the DETENTION of John L. **STRAND**,
Appellant,

v.

STATE of Washington, Respondent.
No. 34442-4-II.

July 31, 2007.

Background: State filed petition to commit a convicted sex offender as a **sexually violent predator** (SVP). After jury trial, the Clallam Superior Court, George Lamont Wood, J., ordered the offender's commitment. Offender appealed.

Holdings: The Court of Appeals, Van Deren, A.C.J., held that:

- (1) offender had no constitutional right to counsel during psychological evaluation that occurred before State filed SVP commitment petition;
- (2) absence of counsel from the pre-petition evaluation did not deprive offender of his Fifth Amendment privilege against self-incrimination;
- (3) offender was not denied effective assistance of counsel during SVP proceedings; and
- (4) trial court's failure to record testimony of offender's only witness did not require remand for new trial.

Affirmed.

West Headnotes

[1] **Criminal Law 110** ↪1028

110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1028 k. Presentation of Questions in General. Most Cited Cases
To preserve an error for appeal, counsel must call it to the trial court's attention so the trial court has an opportunity to correct it.

[2] **Mental Health 257A** ↪463

257A Mental Health
257AIV Disabilities and Privileges of Mentally Disordered Persons
257AIV(E) Crimes
257Ak452 Sex Offenders
257Ak463 k. Counsel or Guardian Ad Litem. Most Cited Cases
Convicted sex offender did not have constitutional right to counsel during psychological evaluation that occurred before State filed petition to commit him as a **sexually violent predator** (SVP).

[3] **Mental Health 257A** ↪463

257A Mental Health
257AIV Disabilities and Privileges of Mentally Disordered Persons
257AIV(E) Crimes
257Ak452 Sex Offenders
257Ak463 k. Counsel or Guardian Ad Litem. Most Cited Cases
Sexually violent predator (SVP) offenders have a statutory right to counsel during all stages of a commitment trial, but there is no constitutional right to counsel at psychological evaluations conducted in the course of SVP proceedings.

[4] **Mental Health 257A** ↪463

257A Mental Health
257AIV Disabilities and Privileges of Mentally

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Disordered Persons

257AIV(E) Crimes

257Ak452 Sex Offenders

257Ak463 k. Counsel or Guardian Ad

Litem. Most Cited Cases

Absence of counsel during psychological evaluation that occurred before State filed **sexually violent predator** (SVP) commitment petition did not deprive convicted sex offender of his Fifth Amendment privilege against self-incrimination; offender did not incriminate himself at any point, and the evaluation did not constitute "interrogation" because offender was not compelled to answer any of the State's queries and he consented to the interview. U.S.C.A. Const.Amend. 5.

[5] Witnesses 410 ⚡297(1)

410 Witnesses

410III Examination

410III(D) Privilege of Witness

410k297 Self-Incrimination

410k297(1) k. In General. Most Cited

Cases

To prevail on a claim of a violation of Fifth Amendment privilege against self-incrimination, there must be a realistic threat of self-incrimination in a subsequent proceeding. U.S.C.A. Const.Amend. 5.

[6] Criminal Law 110 ⚡393(1)

110 Criminal Law

110XVII Evidence

110XVII(I) Competency in General

110k393 Compelling Self-Incrimination

110k393(1) k. In General. Most Cited

Cases

Criminal Law 110 ⚡412(1)

110 Criminal Law

110XVII Evidence

110XVII(M) Declarations

110k411 Declarations by Accused

110k412 In General

110k412(1) k. In General. Most

Cited Cases

A defendant must invoke the Fifth Amendment

privilege against self-incrimination for it to apply, except in a custodial interrogation or a situation where assertion of the privilege would be penalized. U.S.C.A. Const.Amend. 5.

[7] Mental Health 257A ⚡463

257A Mental Health

257AIV Disabilities and Privileges of Mentally Disordered Persons

257AIV(E) Crimes

257Ak452 Sex Offenders

257Ak463 k. Counsel or Guardian Ad

Litem. Most Cited Cases

Failure of sex offender's counsel, during proceedings to commit offender as **sexually violent predator** (SVP), to object to pre-petition psychological evaluation of the offender or to dispute the voluntariness of offender's statements to doctor during the evaluation was not objectively unreasonable and, thus, did not amount to ineffective assistance, where offender had voluntarily participated in the pre-petition evaluation after doctor advised him that his statements could be used against him in SVP proceedings.

[8] Criminal Law 110 ⚡641.13(6)

110 Criminal Law

110XX Trial

110XX(B) Course and Conduct of Trial in General

110k641 Counsel for Accused

110k641.13 Adequacy of Representation

110k641.13(2) Particular Cases and Problems

110k641.13(6) k. Evidence; Procurement, Presentation and Objections. Most Cited Cases

When defense counsel fails to object to the admission of evidence, a defendant alleging ineffective assistance must show that the trial court would likely have sustained the objection. U.S.C.A. Const.Amend. 6.

[9] Mental Health 257A ⚡463

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257A Mental Health
257AIV Disabilities and Privileges of Mentally
Disordered Persons
257AIV(E) Crimes
257Ak452 Sex Offenders
257Ak463 k. Counsel or Guardian Ad
Litem. Most Cited Cases
Failure of sex offender's counsel, during
proceedings to commit offender as **sexually violent
predator** (SVP), to advise offender to assert his
Fifth Amendment privilege against
self-incrimination and refuse to testify about
uncharged events was a matter of trial strategy and,
thus, did not amount to ineffective assistance.
U.S.C.A. Const.Amend. 5.

[10] Criminal Law 110 ⚡641.13(6)

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in
General
110k641 Counsel for Accused
110k641.13 Adequacy of
Representation
110k641.13(2) Particular Cases and
Problems
110k641.13(6) k. Evidence;
Procurement, Presentation and Objections. Most
Cited Cases
The decision whether to call a witness to testify is a
matter of trial strategy and, therefore, does not show
ineffective assistance. U.S.C.A. Const.Amend. 6.

[11] Attorney and Client 45 ⚡92

45 Attorney and Client
45II Retainer and Authority
45k87 Commencement and Conduct of
Litigation
45k92 k. Conduct of Trial. Most Cited
Cases
The decision about whether to testify ultimately
resides with the defendant, not counsel.

[12] Mental Health 257A ⚡467

257A Mental Health
257AIV Disabilities and Privileges of Mentally

Disordered Persons
257AIV(E) Crimes
257Ak452 Sex Offenders
257Ak467 k. Appeal. Most Cited Cases
Trial court's failure to record the testimony of
convicted sex offender's only witness, during
sexually violent predator (SVP) commitment
proceeding, did not require remand for new trial,
where record indicated that the witness's testimony
did not raise any significant issues or objections,
offender's counsel made numerous objections to
State's proposed narrative, which trial court
addressed, and trial court, determining that the
witness's deposition testimony was substantially the
same as his testimony at trial, incorporated the
deposition testimony into the reconstructed record.

[13] Mental Health 257A ⚡467

257A Mental Health
257AIV Disabilities and Privileges of Mentally
Disordered Persons
257AIV(E) Crimes
257Ak452 Sex Offenders
257Ak467 k. Appeal. Most Cited Cases
Sex offender has no constitutional right to a
verbatim report of **sexually violent predator** (SVP)
commitment proceedings.

[14] Constitutional Law 92 ⚡4768

92 Constitutional Law
92XXVII Due Process
92XXVII(H) Criminal Law
92XXVII(H)8 Appeal or Other
Proceedings for Review
92k4768 k. Record. Most Cited Cases
To satisfy due process, a criminal defendant is
entitled to a record of sufficient completeness for
purposes of an appeal; a "record of sufficient
completeness" does not necessarily mean a
complete verbatim report of proceedings and, as
long as another method allows effective review,
such method is constitutionally permissible.
U.S.C.A. Const.Amend. 14.

[15] Mental Health 257A ⚡467

257A Mental Health

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257AIV Disabilities and Privileges of Mentally
Disordered Persons

257AIV(E) Crimes

257Ak452 Sex Offenders

257Ak467 k. Appeal. Most Cited Cases

Convicted sex offender waived any objection to trial court's failure to record the testimony of his only witness during **sexually violent predator** (SVP) commitment proceeding, where offender made no attempt to supplement the record with affidavits from trial counsel or the trial court.

[16] Criminal Law 110  1086.4

110 Criminal Law

110XXIV Review

110XXIV(G) Record and Proceedings Not in
Record

110XXIV(G)1 Matters to Be Shown by
Record

110k1086.4 k. Grounds of Review in
General. Most Cited Cases

A party who contends that the record is deficient must supplement the record through affidavits.

[17] Criminal Law 110  1109(3)

110 Criminal Law

110XXIV Review

110XXIV(G) Record and Proceedings Not in
Record

110XXIV(G)11 Defects and Objections

110k1109 In General

110k1109(3) k. Operation and
Effect. Most Cited Cases

Remand for a new trial is only appropriate due to an incomplete record where the trial court's report of proceedings is insufficient for appellate review and when appropriate affidavits cannot adequately supplement the record.

*1197 Manek R. Mistry, Jodi R. Backlund, Backlund & Mistry, Olympia, WA, for Appellant.
Sarah Sappington, Office of the Atty General, Seattle, WA, for Respondent.
VAN DEREN, A.C.J.

¶ 1 John Leonard **Strand** appeals his commitment as a **sexually violent predator** (SVP) ^{FN1} arguing

that: (1) he had a constitutional right to counsel at a chapter 71.09 RCW psychological evaluation conducted before the State filed a petition to have him adjudicated as a SVP and before the required probable cause hearing, (2) his counsel's failure to object to either the pre-filing or the post-filing psychological evaluations constituted ineffective assistance of counsel, and (3) the court's failure to record the testimony of his expert witness deprived him of an official record of that portion of the proceedings. Finding no error, we affirm.

FN1. "Sexually violent predator" means any person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which actually makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility. RCW 71.9.020(16).

FACTS

¶ 2 In 1992, a jury convicted John **Strand** of first degree child molestation and the trial court sentenced him to a 150-month exceptional sentence. In January 2004, Dr. Kathleen Longwell interviewed him and completed an evaluation under chapter 71.09 RCW. Longwell informed **Strand** that the interview was not confidential and that State could use *1198 the information gathered against him in a SVP case. **Strand** signed a consent form agreeing to an evaluation interview with Longwell.

¶ 3 During the interview, **Strand** denied committing any sex crimes, including the child molestation offense for which he was incarcerated. He denied any sexual interest, contact, or fantasies involving children. Based on the interview and a review of his records, Longwell diagnosed **Strand** with pedophilia, antisocial personality disorder, and alcohol dependence, concluding that these disorders predisposed him to commit violent sex crimes. She determined that he was in the highest risk range for sexual recidivism.

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¶ 4 On February 7, 2005, the State filed a SVP commitment petition and a certification for determination of probable cause under Chapter 71.09 RCW. The following day, the trial court appointed an attorney to represent **Strand**. Thereafter, **Strand** submitted to a second evaluation on November 8, 2005, and to a deposition on December 6, 2005.

¶ 5 Before trial, **Strand** moved to exclude testimony from the State's witnesses about prior unadjudicated sex offenses, arguing that the incidents were not relevant because they may not have occurred and he may not have been the perpetrator. But, during his interviews and in his deposition and trial testimony, **Strand** admitted to having non-sexual contact with the witnesses at the described times and places. The trial court concluded that it was more likely than not that the incidents occurred and allowed the State's witnesses to testify.

¶ 6 At trial, consistent with the court's ruling, the State introduced testimony from six witnesses, including **Strand's** sister, about actual and attempted acts of abuse against children. One of the incidents led to a conviction for lewdness; the remaining incidents were either unreported or the charges were dismissed.

¶ 7 Longwell testified about her conclusions based on interviews with **Strand** and review of his records. In her opinion, **Strand** felt no remorse about his behaviors and their consequences did not trouble him. She believed he would likely sexually re-offend in a violent, predatory manner.

¶ 8 The defense called its own expert, Dr. Theodore Donaldson, who testified that **Strand** did not meet the SVP criteria. But, due to an error, the trial court did not activate its recording system and Donaldson's testimony was not preserved. As soon as the error was discovered, **Strand** moved for a mistrial, arguing that a reconstructed record could not substitute for Donaldson's complex testimony. The trial court denied his motion for mistrial, ruling that the parties could reconstruct the testimony from Donaldson's deposition.

¶ 9 The jury determined that **Strand** was a SVP. After the jury returned its verdict, the trial court directed the parties to reconstruct Donaldson's testimony. **Strand** objected to several portions of the State's proposed narrative and moved for a new trial. After making several changes to incorporate **Strand's** objections, the trial court was satisfied that the reconstructed record, with Donaldson's deposition incorporated, was accurate and sufficient.

¶ 10 **Strand** appeals.

ANALYSIS

I. Evaluation Before Filing SVP Petition

¶ 11 **Strand** argues that the State violated his rights because Longwell evaluated him before the State filed a SVP petition because RCW 71.09.040^{FN2} provides for evaluation only after the probable cause determination. He claims that under *1199 *In re Detention of Williams*, 147 Wash.2d 476, 491, 55 P.3d 597 (2002), RCW 71.09.040 is the exclusive means of evaluating whether an individual is a SVP and the State failed to follow the statute.

FN2. RCW 71.09.040 provides in relevant part:

(1) Upon the filing of a petition under RCW 71.09.030, the judge shall determine whether probable cause exists to believe that the person named in the petition is a sexually violent predator. If such determination is made the judge shall direct that the person be taken into custody.

....

(4) If the probable cause determination is made, the judge shall direct that the person be transferred to an appropriate facility for evaluation as to whether the person is a **sexually violent predator**. The evaluation shall be conducted by a person deemed to be professionally qualified to conduct such an examination.

[1] ¶ 12 But **Strand** consented to the pre-petition

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interview. And to preserve an error for appeal, counsel must call it to the trial court's attention so the trial court has an opportunity to correct it. *State v. Wicke*, 91 Wash.2d 638, 642, 591 P.2d 452 (1979). We do not consider errors raised for the first time on appeal except manifest errors affecting a constitutional right.^{FN3}

FN3. RAP 2.5(a)(3) provides in relevant part: "The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: ... (3) manifest error affecting a constitutional right."

¶ 13 **Strand** makes several arguments claiming that the evaluation process deprived him of his constitutional rights. We consider each in turn.

A. Right to Counsel During SVP Evaluations

[2] ¶ 14 **Strand** contends that the evaluation procedure was unconstitutional because it deprived him of the right to counsel during his SVP evaluation.

[3] ¶ 15 SVP offenders "have a statutory right to counsel during all stages of a commitment trial." *In re Detention of Stout*, 128 Wash.App. 21, 27, 114 P.3d 658 (2005). But there is no constitutional right to counsel at psychological evaluations conducted in the course of SVP proceedings. *In re Detention of Kistenmacher*, 134 Wash.App. 72, 73, 138 P.3d 648 (2006), review granted, 159 Wash.2d 1019, 157 P.3d 404 (2007). We reject **Strand's** request to reconsider our decision in *Kistenmacher* or to create a new requirement for counsel before a SVP petition is filed.

B. Self-Incrimination

[4] ¶ 16 **Strand** also asserts that by denying him counsel at the pre-petition evaluation, the State violated his Fifth Amendment privilege^{FN4} not to

incriminate himself because he remains vulnerable to criminal prosecution for the un-adjudicated incidents.

FN4. No person ... shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law.
U.S. Const. amend. V.

[5][6] ¶ 17 To prevail on a claim of a Fifth Amendment violation, there must be a " 'realistic threat of self-incrimination' " in a subsequent proceeding. *State v. King*, 130 Wash.2d 517, 524, 925 P.2d 606 (1996) (quoting *Minnesota v. Murphy*, 465 U.S. 420, 427, 104 S.Ct. 1136, 79 L.Ed.2d 409 (1984)). But **Strand** did not incriminate himself at any point. Moreover, a defendant must invoke the Fifth Amendment privilege for it to apply, except in a custodial interrogation or a situation where assertion of the privilege would be penalized. *State v. Warner*, 125 Wash.2d 876, 884, 889 P.2d 479 (1995). **Strand** was not compelled to answer any of the State's queries; to the contrary, he consented to the interview after Longwell asked him if he wanted to participate and informed him that his statements could be used against him in SVP proceedings. Absent compulsion, the interview does not constitute "interrogation." See *Warner*, 125 Wash.2d at 884, 889 P.2d 479. **Strand** fails to establish constitutional error based on violation of his Fifth Amendment privilege.

¶ 18 **Strand** does not demonstrate that he had a constitutional right to counsel at his psychological evaluation or that the absence of counsel deprived him of his privilege against self-incrimination. Because **Strand** failed to show that the pre-petition SVP evaluation affected any constitutional right, we decline to consider his objection to the State's evaluation procedure for the first time on appeal. RAP 2.5(a)(3).

II. Ineffective Assistance of Counsel

[7] ¶ 19 Next, **Strand** argues that his attorney provided ineffective assistance by failing to object

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to the evaluation procedure or dispute the voluntariness of his statements, contending that competent counsel would have preserved these issues for review.

*1200 [8] ¶ 20 To prevail on the claim, he must show that his attorney's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced the outcome. *State v. McFarland*, 127 Wash.2d 322, 334-35, 899 P.2d 1251 (1995). We give great deference to trial counsel's performance and presume that counsel was effective, viewing the representation in light of all the circumstances. *McFarland*, 127 Wash.2d at 335, 899 P.2d 1251; *State v. Weber*, 137 Wash.App. 852, 858, 155 P.3d 947 (2007). Matters of trial strategy or tactics do not establish that counsel's performance was deficient. *Weber*, 137 Wash.App. at 858, 155 P.3d 947. And when counsel fails to object to the admission of evidence, a defendant alleging ineffective assistance must show that the trial court would likely have sustained the objection. *Detention of Stout*, 159 Wash.2d 357, 377, 150 P.3d 86 (2007) (defendant entitled to effective assistance of counsel in SVP proceeding); *State v. Saunders*, 91 Wash.App. 575, 578, 958 P.2d 364 (1998).

¶ 21 Trial counsel's decision not to contest the State's pre-petition evaluation and failure to request a voluntariness hearing on the admissibility of his statements to Longwell was not objectively unreasonable. **Strand** voluntarily participated in the interview after Longwell advised him that his statements could be used against him in SVP proceedings. A reasonable attorney could conclude that because **Strand** acquiesced in the procedure and signed a consent form, he would probably not prevail on the issue.

[9][10][11] ¶ 22 Next, **Strand** argues that competent counsel would have advised him to assert his Fifth Amendment privilege and refuse to testify about the uncharged events. But the decision whether to call a witness to testify is a matter of trial strategy and, therefore, does not show ineffective assistance. *State v. King*, 24 Wash.App. 495, 499, 601 P.2d 982 (1979). Moreover, the decision about whether to testify ultimately resides

with the defendant, not counsel. *State v. Robinson*, 138 Wash.2d 753, 758, 982 P.2d 590 (1999). **Strand's** decision to testify and deny committing any sex crimes was a tactical decision and cannot establish ineffective assistance of counsel. **Strand** fails to show that his attorney's performance was objectively unreasonable; therefore his ineffective assistance of counsel argument fails.

III. Failure to record testimony

[12] ¶ 23 Finally, **Strand** contends that his commitment must be overturned because the trial court did not preserve Donaldson's testimony in a verbatim report of proceedings. **Strand** requests a new trial, arguing that the trial court's failure to record his only witness's testimony violated the constitutional requirement that trial courts be courts of record and violated his rights to due process and appeal.

[13][14] ¶ 24 **Strand** has no constitutional right to a verbatim report of proceedings. *State v. Tilton*, 149 Wash.2d 775, 781, 72 P.3d 735 (2003). To satisfy due process, a criminal defendant^{FN5} is entitled to "a record of sufficient completeness" for purposes of an appeal. A "record of sufficient completeness" does not necessarily mean a complete verbatim report of proceedings and, as long as another method allows effective review, such method is constitutionally permissible. *Tilton*, 149 Wash.2d at 781, 72 P.3d 735 (citations omitted).

FN5. Though **Strand** is not a criminal defendant, because he is facing involuntary commitment, we apply a similar standard.

¶ 25 The trial court discovered the inadvertent taping error the day after it occurred. While discussing the error, **Strand's** counsel agreed that there were no significant objections raised during Donaldson's testimony. **Strand's** counsel made numerous objections to the State's proposed narrative, which the trial court addressed. The trial court also determined that Donaldson's deposition testimony was substantially the same as his

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testimony at trial and incorporated it into the reconstructed record.

END OF DOCUMENT

¶ 26 **Strand** fails to demonstrate that the combination of Donaldson's deposition and the reconstructed narrative record is insufficient to allow effective appellate review. He *1201 contends that appellate review is hindered because rulings on objections are unavailable, trial counsel had no notes of Donaldson's testimony, trial counsel disagreed with the trial court's conclusions about what happened, the jury may not have heard important testimony, the State may have elicited inadmissible testimony on cross-examination, and trial counsel may have provided ineffective assistance. But, these potential errors are purely speculative because the record indicates that Donaldson's testimony did not raise any significant issues or objections.

[15][16] ¶ 27 In any event, **Strand** has not taken the necessary steps to complete the record and thereby has waived any objection. A party who contends that the record is deficient must supplement the record through affidavits. *State v. Miller*, 40 Wash.App. 483, 488, 698 P.2d 1123 (1985). **Strand** has made no attempt to supplement the record with affidavits from trial counsel or the trial court and, therefore, we do not consider his argument further.

[17] ¶ 28 Remand for a new trial is only appropriate where the trial court's report of proceedings is insufficient for appellate review and when appropriate affidavits cannot adequately supplement the record. *Tilton*, 149 Wash.2d at 783, 72 P.3d 735. Because **Strand** failed to make a showing that the record, including Donaldson's deposition testimony is insufficient for review, his argument fails.

¶ 29 Affirmed.

We concur: BRIDGEWATER and
QUINN-BRINTNALL, JJ.
Wash.App. Div. 2, 2007.
In re Detention of Strand v. State
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