98278-3

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

Court of Appeals No. 36362-7-III

STATE OF WASHINGTON, Respondent,

v.

VALERIY V. ALESHKIN, Petitioner.

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Valeriy Aleshkin requests that this court accept review of the decision designated in Part II of this petition.

II. DECISION OF THE COURT OF APPEALS

Petitioner seeks review of the decision of the Court of Appeals filed on February 13, 2020, concluding that Mr. Aleshkin waived his argument that his detention was unlawful despite his argument that it constituted a manifest error affecting a constitutional right and holding that RAP 2.5(a)(3) does not apply to suppression issues. A copy of the Court of Appeals' unpublished opinion is attached hereto.

III. ISSUES PRESENTED FOR REVIEW

The Court of Appeals relied upon *State v. Baxter*, 68 Wn.2d 416, 413 P.2d 638 (1966) to conclude that constitutional questions involving the suppression of evidence are waived if not raised in the trial court. In so doing, the court disregarded numerous cases in which this Court and other divisions of the Court of Appeals have considered suppression errors for the first time on appeal as manifest errors affecting a constitutional right under RAP 2.5(a)(3). Does *Baxter* remain good law in light of RAP 2.5(a)(3)? Are appellants prohibited from challenging manifest errors

affecting a constitutional right under RAP 2.5(a)(3) when those errors would, if raised in the trial court, result in evidence being suppressed at trial?

IV. STATEMENT OF THE CASE

The facts surrounding Aleshkin's arrest were described and developed three times, in the arresting officer's statement of probable cause, his testimony at a pretrial CrR 3.5 hearing, and his trial testimony. CP 2-3, I RP 33-35, 43-45, 87-88, 123, 125, 136. Around 4 a.m. on January 31, 2017, Spokane County Sheriff's deputy Brent Miller was on patrol in the vicinity of Pull & Save, an automobile recycling yard. I RP 33-34, 142. As he drove past a dead-end road that led to the access to Pull & Save, he saw headlights facing out toward him. I RP 34. By the time he was pulling up to the vehicle it had started to leave, so Miller turned on his emergency lights and stopped the car. I RP 34-35. In neither the affidavit of probable cause supporting Aleshkin's arrest, nor in Miller's testimony at a pretrial CrR 3.5 hearing as well or at trial, did Miller identify any infraction committed by Aleshkin, did he identify any other basis for stopping the car other than its presence at an early hour on the dead-end road leading to, but not on the property of, Pull & Save. CP 2-3, I RP 33-35, 43-45, 87-88, 123, 125, 136.

After Miller stopped and approached the vehicle, the driver identified himself as Valeriy Aleshkin and told Miller he did not have a valid license. I RP 35, 90. Dispatch informed Miller that Aleshkin was subject to an ignition interlock requirement, confirmed that his license was suspended, and alerted Miller to four outstanding misdemeanor warrants for his arrest. I RP 35, 91, 94. Miller then told Aleshkin he was under arrest and handcuffed him when he stepped out of his car. I RP 37, 94.

Noticing that Aleshkin's pants were wet, Miller asked him about it and Aleshkin responded that he had been walking in the snow and took radiators from Pull & Save. I RP 37-38. At that point, Miller advised Aleshkin of his Miranda rights and Aleshkin agreed to waive them. I RP 38-39. Thereafter, according to Miller, Aleshkin described changing his clothes and shoes, cutting a hole in the fence around Pull & Save, and taking radiators, dragging them back to his car on a tarp or a tent. I RP 39-40, 98-99. Miller obtained Aleshkin's consent to search the car and recovered wet coveralls and shoes, a set of vise grips Aleshkin described using to cut the fence, and 14 vehicle radiators as well as two wheels. I RP 99, 103, 106, 108. Miller confirmed that Aleshkin did not have permission from Pull & Save to take the items. I RP 119.

The State charged Aleshkin with second degree burglary, driving without an ignition interlock device, driving with a suspended license, possessing burglary tools, and added a charge of bail jumping after he failed to appear for a pretrial hearing. CP 45, 50. At trial, Aleshkin testified in his defense. He testified that he repairs cars for a living and on the evening of January 30th, around 5:00 p.m., he drove by Pull & Save and saw a pile of radiators in the field behind the business. II RP 282, 283-84. After returning home from his original outing around midnight, he decided to go back to Pull & Save. II RP 285. Denying that he cut the fence or entered Pull & Save's property, Aleshkin reported that he parked by the gate and found 14 radiators in a pile that he dragged to his car on a tent. II RP 286-87, 302. He was just starting to drive off when a police car approached and turned on its lights, causing him to stop. II RP 290.

The jury convicted Aleshkin of all of the charges. II RP 384-85, CP 90-94. On appeal, Aleshkin argued for the first time that stopping his car for merely being present in a cul-de-sac in the early morning hours violated his rights under the Fourth Amendment and article I, section 7 of Washington's constitution under *State v. Larson*, 93 Wn.2d 638, 611 P.2d 771 (1980) and *State v. Carriero*, 8 Wn. App. 2d 641, 439 P.3d 679 (2019). *Appellant's Brief*, at 6-10. He further argued that the validity of the stop was arguable initially on appeal as a manifest error affecting a

constitutional right under RAP 2.5(a)(3) because it implicated his right to be free from unlawful seizure and resulted in the admission of evidence used to prosecute him at trial. *Appellant's Brief*, at 11-12.

The Court of Appeals declined to consider Aleshkin's argument under RAP 2.5(a)(3), instead holding that he waived the error by not raising it in the trial court. *Opinion*, at 5-6. The opinion relied upon *State v. Baxter*, 68 Wn.2d 416, 413 P.2d 638 (1966), a case decided 10 years before RAP 2.5(a)(3) was adopted, and two Court of Appeals opinions relying on *Baxter*. The Court of Appeals did not acknowledge this Court's application of RAP 2.5(a)(3) to a warrantless arrest in *State v. McFarland*, 127 Wn.2d 322, 899 P.2d 1251 (1995), and *State v. Kirwin*, 165 Wn.2d 818, 203 P.3d 1044 (2009), or similar treatment by numerous decisions of the Court of Appeals.

Because the Court of Appeals' opinion creates substantial confusion concerning the applicability of RAP 2.5(a)(3) to a challenge to an unlawful arrest, Aleshkin requests that this Court accepts review.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Review should be granted under RAP 13.4(b)(1), (2), and (4). The Court of Appeals' ruling that RAP 2.5(a)(3) does not apply to Aleshkin's challenge to an unlawful arrest is in conflict with Supreme Court and

Court of Appeals decisions, and whether *Baxter* and its progeny continues to apply to constitutional errors that would result in evidence being suppressed in spite of the subsequent enactment of RAP 2.5(a)(3) is a question that will be of substantial interest to reviewing courts and appellate practitioners.

Aleshkin's case stands at the intersection of two conflicting lines of authority concerning reviewability of search and seizure issues for the first time on appeal. One line of authority, relying upon RAP 2.5(a)(3), permits the asserted error to be reviewed so long as the challenger satisfies the "manifest error affecting a constitutional right" standard. *See, e.g.*, *State v. Swetz*, 160 Wn. App. 122, 127-28, 247 P.3d 802 (2011), *review denied*, 174 Wn.2d 1009 (2012); *State v. Jones*, 163 Wn. App. 354, 360, 266 P.3d 886 (2011), *review denied*, 173 Wn.2d 1009 (2012); *State v. Abuan*, 161 Wn. App. 135, 257 P.3d 1 (2011); *State v. Littlefair*, 129 Wn. App. 330, 337-38, 119 P.3d 359 (2005); *see also Kirwin*, 165 Wn.2d 818 (considering search pursuant to allegedly unlawful arrest under RAP 2.5(a)(3)); *McFarland*, 127 Wn.2d 322 (evaluating but declining to find that challengers established a manifest error affecting a constitutional right under RAP 2.5(a)(3) standard).

This line of authority is explained and supported by this Court's explanation of issue preservation in *State v. Robinson*, 171 Wn.2d 292, 253 P.3d 84 (2011). In *Robinson*, the Supreme Court considered whether issue preservation principles applied at all when a new rule of constitutional interpretation with retroactive effect is decided after a defendant has been tried. *Id.* at 306. It noted that under the law in effect at the time, there was no right to be asserted. *Id.* at 305. Because issue preservation was not applicable – there was no issue to raise until the defendants' cases were already on appeal – the defendants were not required to demonstrate a "manifest error affecting a constitutional right" within the meaning of RAP 2.5(a)(3). *Id.* at 306. This suggests that when issue preservation does apply, because there has been no significant, intervening change in the law, RAP 2.5(a)(3) governs the availability of review. Thus, so long as the error implicates a constitutional violation and the violation affected the evidence and the outcome of the trial, review should be available for the first time on appeal.

The other line of authority derives from *Baxter*. In *Baxter*, decided in 1966, this Court held that the "exclusion of improperly obtained evidence is a privilege and can be waived" by failing to timely object to its admission. 68 Wn.2d at 423. The Court of Appeals adopted this reasoning in *State v. Valladares*, 31 Wn. App. 63, 639 P.2d 813 (1982),

reversed in part on other grounds, 99 Wn.2d 663, 664 P.2d 508 (1983), when a defendant filed and then withdrew a motion to suppress evidence. This Court subsequently agreed that affirmatively withdrawing a motion to suppress constitutes a waiver of the right to have the evidence suppressed. *Valladares*, 99 Wn.2d at 671-72. But the *Valladares* Court noted the distinct factual circumstances supporting the holding, citing the U.S. Supreme Court's language in *Johnson v. United States*, 318 U.S. 189, 200, 63 S. Ct. 549, 87 L. Ed. 704 (1943):

> We can only conclude that petitioner expressly waived any objection to the prosecutor's comment by withdrawing his exception to it and by acquiescing in the treatment of the matter by the court. It is true that we may of our own motion notice errors to which no exception has been taken if they would "seriously affect the fairness, integrity, or public reputation of judicial proceedings." **But we are not dealing here with inadvertence or oversight.** This is a case where silent approval of the course followed by the court is accompanied by an express waiver of a prior objection to the method by which the claim of privilege was treated.

99 Wn.2d at 672 (emphasis added).

Despite the Court's apparent intent to limit the waiver doctrine to circumstances where the error is asserted and then expressly withdrawn, the Court of Appeals subsequently applied *Baxter* and *Valladares* to search and seizure issues that were not raised in the trial court. *State v. Tarica*, 59 Wn. App. 368, 798 P.2d 296 (1990), *overruled on other*

grounds in McFarland, 127 Wn.2d 322. The *Tarica* court acknowledged RAP 2.5(a)(3) and that the error asserted was constitutional, but cited *Baxter* and *Valladares* for the proposition that the defendant's failure to move to suppress the evidence in the trial court constituted a waiver of the violation. 59 Wn. App. at 373.

In none of these subsequent cases have the courts reconciled RAP 2.5(a)(3)'s permissive approach to review of constitutional errors that affect a trial with *Baxter*'s waiver doctrine or consider whether the timing of RAP 2.5(a)(3)'s enactment implicitly overruled *Baxter*. Nor does the case law reconcile the conclusion of the *Baxter* line that search and seizure issues are waived if not raised in the trial court with the long-standing doctrine that constitutional rights can only be waived knowingly, intelligently, and voluntarily, with the courts indulging in every presumption against a waiver of fundamental rights. *State v. Forza*, 70 Wn.2d 69, 71, 422 P.2d 475 (1966); *Glasser v. U.S.*, 315 U.S. 60, 70, 62 S. Ct. 457, 86 L. Ed. 680 (1942), *superseded by court rule on other grounds as recognized in Bourjaily v. U.S.*, 483 U.S. 171, 181, 107 S. Ct. 2775, 97 L.Ed.2d 144 (1987). And the reviewing courts may not generally infer a waiver of constitutional rights from a silent record, which fails to establish the defendant's knowledge of his rights and his knowing relinquishment of them. *See, e.g., City of Bellevue v. Acrey*, 103 Wn.2d

203, 207, 691 P.2d 957 (1984); *State v. Wicke*, 91 Wn.2d 638, 591 P.2d 452 (1979); *State v. Blanchey*, 75 Wn.2d 926, 933, 454 P.2d 841 (1969).

This Court has recently acknowledged the conflict between the waiver doctrine and RAP 2.5(a)(3)'s manifest constitutional error provisions in the context of confrontation clause errors in *State v. Burns*, 193 Wn.2d 190, 138 P.3d 1183 (2019). The *Burns* Court's conclusion that the defendant waived a confrontation error by failing to raise it below calls into question this Court's previous application of RAP 2.5(a)(3) to search and seizure issues in *McFarland* and *Kirwin*. 193 Wn.2d at 211.

As a result of the separate lines of authority concerning RAP 2.5(a)(3)'s application to search and seizure questions, substantial confusion concerning the purpose and scope of RAP 2.5(a)(3) are evident. The Court of Appeals' opinion finding waiver in this case conflicts with *Kirwin* and multiple published opinions of the Court of Appeals applying RAP 2.5(a)(3) to search and seizure issues. Accordingly, review should be granted under RAP 13.4(b)(1), (2), and (4) to resolve the conflict and to establish a consistent standard for initial appellate review of search and seizure questions.

VI. CONCLUSION

For the foregoing reasons, the petition for review should be granted under RAP 13.4(b)(1), (2), and (4) and this Court should enter a ruling that Aleshkin's unlawful detention is a manifest error of constitutional magnitude warranting review and reversal under RAP 2.5(a)(3).

RESPECTFULLY SUBMITTED this 16 day of March, 2020.

TWO ARROWS, PLLC

ANDREA BURKHART, WSBA #38519
Attorney for Petitioner

DECLARATION OF SERVICE

I, the Undersigned, hereby declare that on this date, I caused to be served a true and correct copy of the foregoing Petition for Review upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

Valeriy Aleshkin
4508 E. 4th
Spokane, WA 99212

And, pursuant to prior agreement of the parties, by e-mail through the Washington Courts' electronic filing portal to the following:

Larry Steinmetz
Deputy Prosecuting Attorney
SCPAAppeals@spokanecounty.org

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 16 day of March, 2020 in Kennewick, Washington.

Andrea Burkhart

APPENDIX A

FILED
FEBRUARY 13, 2020
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,	)	
	)	No. 36362-7-III
Respondent,	)	
	)	
v.	)	
	)	
VALERIY V. ALESHKIN,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	

SIDDOWAY, J. — Valeriy Aleshkin appeals two burglary-related convictions, raising an argument never made in the trial court: that the State's evidence in support of the charges was the fruit of a *Terry*[1] stop that was unsupported by reasonable suspicion. He argues in the alternative that by failing to bring such a motion, his trial lawyer provided ineffective assistance of counsel.

Under well-settled case law, the challenge to the *Terry* stop was waived. The record is insufficient to consider Mr. Aleshkin's claim of ineffective assistance of counsel

[1] *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

on direct appeal, but if an expanded record would support the claim, he is free to file a personal restraint petition. We affirm the convictions and grant *Ramirez*[2] relief to which the State concedes Mr. Aleshkin is entitled.

FACTS AND PROCEDURAL BACKGROUND

At 3:56 in the morning on January 31, 2017, Spokane County Deputy Sheriff Brent Miller conducted a suspicious vehicle stop of a car being driven by Valeriy Aleshkin. The deputy had noticed the car's headlights at the end of a dead end road behind Pull & Save, a salvage yard that was then closed. When Deputy Miller asked Mr. Aleshkin for his driver's license, Mr. Aleshkin admitted it was suspended. Dispatch confirmed that his license was suspended and that he was required to have an interlock device, which the car did not have. When Mr. Aleshkin got out of the car, Deputy Miller asked why the bottom of his pants were wet and Mr. Aleshkin said it was because he was walking in the snow and took some radiators. Deputy Miller arrested Mr. Aleshkin and read him his *Miranda*[3] rights. Mr. Aleshkin eventually admitted that he parked behind Pull & Save, cut the fence with a pair of vise grips, and stole radiators and wheels from the fenced area. Mr. Aleshkin consented to a search of his car and Deputy Miller recovered 14 radiators and two wheels, which were returned to Pull & Save.

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[2] *State v. Ramirez*, 191 Wn.2d 732, 426 P.3d 714 (2018).
[3] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

Mr. Aleshkin was eventually charged with second degree burglary, possession of burglary tools, violation of an interlock requirement, third degree driving while license suspended, and bail jumping. The defense never moved to suppress the evidence recovered as a result of Deputy Miller's stop.

On the day before trial, the court conducted a CrR 3.5 hearing to determine the admissibility of Mr. Aleshkin's statements to Deputy Miller. Both the deputy and Mr. Aleshkin testified at the hearing.

Mr. Aleshkin testified that he traveled to the location where he was stopped by Deputy Miller because while earlier driving by on the freeway he saw seemingly abandoned radiators in a snowy field outside Pull & Save's fence. After completing an errand with his girlfriend and taking her home, he returned to take the radiators. He admitted that when stopped by Deputy Miller, he told the deputy he was taking radiators and that his driver's license was suspended. He denied ever telling the deputy that the radiators were from inside the salvage yard, that he had stolen salvage items, or that he cut a hole in the fence. At the conclusion of the testimony and argument, the trial court ruled that with the exception of the pre-*Miranda* exchange about why his pants were wet, Mr. Aleshkin's statements were admissible.

In the two-day jury trial that followed, Mr. Aleshkin conceded he was guilty of driving with a suspended license and without the required ignition interlock device, but denied that he had possessed burglary tools or stolen any salvage items from the Pull &

Save yard. The jury found Mr. Aleshkin guilty as charged. The court sentenced Mr. Aleshkin to three months of confinement and imposed legal financial obligations, including a $200 criminal filing fee. Mr. Aleshkin appeals.

ANALYSIS

The *Terry* stop exception to the warrant requirement allows officers to briefly seize a person if specific and articulable facts, in light of the officer's training and experience, give rise to a reasonable suspicion that the person is involved in criminal activity. *State v. Glover*, 116 Wn.2d 509, 514, 806 P.2d 760 (1991). "The level of articulable suspicion necessary to support an investigatory detention is 'a substantial possibility that criminal conduct has occurred or is about to occur.'" *State v. Bray*, 143 Wn. App. 148, 153, 177 P.3d 154 (2008) (quoting *State v. Kennedy*, 107 Wn.2d 1, 6, 726 P.2d 445 (1986)). For the first time on appeal, Mr. Aleshkin argues that Deputy Miller lacked reasonable suspicion to stop and question him. He also argues that his trial lawyer provided ineffective assistance of counsel by failing to move to suppress the evidence resulting from the *Terry* stop.

RAP 2.5(a) states the general rule for appellate disposition of issues not raised in the trial court: appellate courts will not entertain them. *State v. Guzman Nunez*, 160 Wn. App. 150, 157, 248 P.3d 103 (2011), *aff'd*, 174 Wn.2d 707, 285 P.3d 21 (2012) (citing *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988)). Mr. Aleshkin argues that the absence of reasonable suspicion for the *Terry* stop is a manifest constitutional error

reviewable under RAP 2.5(a)(3). He contends the error is manifest because the circumstances of the stop appear in the affidavit of facts that Deputy Miller prepared after the stop and were testified to by the deputy in the CrR 3.5 hearing and at trial. He argues that the circumstances of the stop as described by the deputy are indistinguishable from Washington cases in which it was found that reasonable suspicion was lacking.

I. THE RIGHT TO SEEK SUPPRESSION OF THE EVIDENCE WAS WAIVED

It is well settled that the exclusion of improperly obtained evidence is a privilege and can be waived. *State v. Baxter*, 68 Wn.2d 416, 423-24, 413 P.2d 638 (1966) (citing *State v. Smith*, 50 Wn.2d 408, 312 P.2d 652 (1957)). "While it is true that both our state and federal constitutions protect us from unreasonable searches and seizures, it is also true that, in order to preserve these rights, persons claiming benefits thereunder must seasonably object." *Id.* at 423 (citing *Segurola v. United States*, 275 U.S. 106, 48 S. Ct. 77, 72 L. Ed. 186 (1927)).

Mr. Aleshkin suggests that the absence of reasonable suspicion can be reviewed as manifest constitutional error under RAP 2.5(a)(3), but if a defendant does not affirmatively seek the protection of the exclusionary rule, there is no constitutional per se prohibition against using unconstitutionally obtained evidence. *State v. Valladares*, 31 Wn. App. 63, 76, 639 P.2d 813 (1982), *aff'd in part, rev'd in part on other grounds*,

99 Wn.2d 663, 664 P.2d 508 (1983). Since there was no motion to suppress, there *was* no error during the trial proceeding, manifest or otherwise. *State v. Millan*, 151 Wn. App. 492, 212 P.3d 603 (2009), *rev'd sub nom. State v. Robinson*, 171 Wn.2d 292, 253 P.3d 84 (2011). Absent any error, RAP 2.5(a)(3) cannot apply.

II. THE RECORD PROVIDES AN INSUFFICIENT BASIS FOR REVIEWING THE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM

Mr. Aleshkin makes the alternative argument that his trial lawyer was ineffective for failing to file a motion to suppress. To succeed on a claim of ineffective assistance of counsel, a defendant must establish that defense counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness, and the deficient representation prejudiced the defendant, i.e., there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Both prongs must be established based on facts in the record of proceedings below. *Id.* at 335-37.

Courts engage in a strong presumption that counsel's representation was effective. *Id.* at 335. Given that presumption, Mr. Aleshkin must show in the record the absence of legitimate strategic or tactical reasons supporting the challenged conduct. *Id.* at 336. To show he was actually prejudiced by his lawyer's failure to move for suppression, he must show that a motion likely would have been granted. *Id.* at 333-34. These showings often cannot be made when challenging a lawyer's failure to bring a suppression motion

because the record lacks a factual basis for determining the merits of the claim. *Id.* at 337-38.

Mr. Aleshkin argues that the record is sufficient in his case because the facts that are significant are clear, and they clearly do not provide a basis for reasonable suspicion. But the record may not be complete. Since there was no motion to suppress, the State had no need to prove that Deputy Miller had reasonable suspicion to conduct the stop. It is unsurprising that at both the CrR 3.5 hearing and at trial the State elicited some testimony from Deputy Miller about why he stopped and questioned Mr. Aleshkin, as part of a coherent narrative of the events. We will not presume from that testimony alone that the State presented *all* the experience, information, and observations that contributed to Deputy Miller's belief that he had reasonable suspicion to stop and question Mr. Aleshkin.

Mr. Aleshkin can raise his ineffective assistance of counsel claim in a personal restraint petition.

III. *RAMIREZ* RELIEF

Mr. Aleshkin was found indigent for purposes of appeal and contends that the $200 criminal filing fee should be stricken from his judgment and sentence based on changes to Washington law that became effective in 2018 and *Ramirez*, which held that the 2018 changes apply to cases then on direct review. 191 Wn.2d 747-49. The State concedes that the cost should be stricken.

We affirm the convictions and direct the trial court to strike the $200 criminal filing fee from the judgment and sentence.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Siddoway, J.

WE CONCUR:

Korsmo, J.

Pennell, A.C.J.

BURKHART & BURKHART, PLLC

March 16, 2020 - 9:20 AM

Transmittal Information

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