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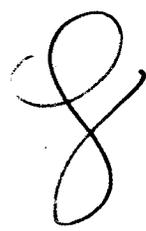
No. 65127-7-1

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

STATE OF WASHINGTON,
Respondent/Cross-Appellant,

v.

PEPPER NICOLE PRIGGER,
Appellant/Cross-Respondent.



ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

SUPPLEMENTAL BRIEF OF APPELLANT

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A. SUPPLEMENTAL ASSIGNMENT OF ERROR

7. Ms. Prigger did not receive the effective assistance of counsel guaranteed by the federal and state constitutions.

8. Defense counsel was ineffective because she failed to object to improper testimony vouching for the credibility of Riannah Rammage, a critical witness for the State.

9. Defense counsel was ineffective because she failed to impeach Heather Moseley with her prior conviction for a crime of dishonesty.

B. ISSUES PERTAINING TO SUPPLEMENTAL ASSIGNMENTS OF ERROR

7. The federal and state constitutions guarantee a criminal defendant the right to effective assistance of counsel at trial, and competent counsel is aware of the law and evidence rules applicable to the case. Ms. Prigger's lawyer did not object when the prosecutor elicited testimony that a key witness (1) was granted immunity by the court, (2) entered an agreement with the State which provided she would not be prosecuted if she testified truthfully, and (3) she was telling the truth at trial. Where this witness was the only person who could testify the statements she signed under oath were not true, was Ms. Prigger prejudiced by her

attorney's failure to object to the improper vouching for the witness's credibility? (Assignments of Error 7-8).

8. A criminal defendant has the constitutional right to effective assistance of counsel at trial, and defense counsel is responsible for investigating the facts and law of the case. The State's trial memorandum revealed that a critical witness had a prior conviction for a crime of dishonesty, but Ms. Prigger's attorney did not impeach the witness with her prior theft conviction. Where the witness's testimony was the basis for Ms. Prigger's conviction for bribery and also critical to two perjury charges, was Ms. Prigger prejudiced by her lawyer's failure to attack the witness's credibility? (Assignments of Error 7, 9).

C. SUPPLEMENTAL STATEMENT OF THE CASE

Pepper Prigger was convicted of three counts of perjury in the second degree for (1) a written statement she signed on April 19, 2009, (2) a written statement signed by Riannah Rammage on April 19, and (3) a written statement Ms. Rammage signed on April 30. CP 40-42, 58-60. At trial, Ms. Rammage testified she was not telling the truth when she signed the two statements and Ms. Prigger paid her to sign them. 3RP 21-23, 28-30, 85-86.

Both Ms. Prigger's attorney and the State had difficulty locating Ms. Rammage in order to interview her prior to trial.¹ 1/29/10RP 12, 27-28, 32-33. A material witness warrant was issued, and eventually the trial court appointed counsel for Ms. Rammage. 12/15/10RP 1; 2/18/10RP 22-24; 2/19/10RP 4-5.

The State then offered Ms. Rammage an immunity agreement to secure her testimony against Ms. Prigger.² 3RP 3. The State agreed not to prosecute Ms. Rammage for perjury if she testified "truthfully" at Ms. Prigger's trial. 3RP 3. The trial court then granted Ms. Rammage immunity from prosecution for perjury or accepting a bribe based upon either her testimony or her acts. 3RP 5.

At trial, Ms. Rammage testified she had received a letter from the prosecutor's office stating she would not be prosecuted if she testified "truthfully" but she would be prosecuted if she testified "falsely." 3RP 44.

Q: O.K. At some point were you given a letter saying that if you testified truthfully, you wouldn't be prosecuted?

¹ Over defense objection, the State was permitted to amend the information shortly before the trial date based upon a late interview of this important witness. 2/18/10RP 2-4, 11-4, 18

² The written immunity agreement is not in the record. See CP 105-12.

A: Yes. Just -- that was just last week.

Q: O.K. And the letter said that you wouldn't be prosecuted for what you testify if it was true?

A: Correct.

Q: But if you testified falsely, you could be prosecuted for that?

A: Yes.

3RP 44. Ms. Rammage also told the jury that the court had granted her immunity that day for two perjury charges. 3RP 44.

Ms. Rammage further testified that when she initially talked to the police about her statement, the detective could tell she was lying. 3RP 35, 99. She realized, however, that the truth would set her free, 3RP 99, and assured the jury she was telling the truth in court. 3RP 98.

Detective Barrett testified that he re-contacted Ms. Rammage and told her he had "concerns" about her statement, and she agreed to tell him the truth. 4RP 48-49. He said he did not tell Ms. Rammage she would not be prosecuted if she told the truth. 4RP 49-50. He added that he did not arrest Ms. Rammage because "she was not the person who masterminded the whole thing and had not solicited false statements." 4RP 52-53. Arlington Police Officer Jason Rhodes added that when he and Detective

Barrett contacted Ms. Rammage on April 26, they told her it was important to tell the truth. 2RP 110.

D. ARGUMENT

5. MS. PRIGGER'S ATTORNEY DID NOT PROVIDE THE EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY THE FEDERAL AND STATE CONSTITUTIONS WHEN SHE FAILED TO OBJECT TO IMPROPER TESTIMONY VOUCHING FOR THE CREDIBILITY OF THE KEY GOVERNMENT WITNESS

a. Ms. Prigger had the constitutional right to effective assistance of counsel. A criminal defendant has the constitutional right to the assistance of counsel.³ U.S. Const. amends. VI, XIV; Const. art. I, § 22; State v. A.N.J., 168 Wn.2d 91, 96-97, 225 P.3d 956 (2010). Counsel's critical role in the adversarial system protects the defendant's fundamental right to a fair trial. Strickland v. Washington, 466 U.S. 668, 684-85, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); United States v. Cronin, 466 U.S. 648, 656, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). "The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of

³ The Sixth Amendment provides in pertinent part, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." The Fourteenth Amendment states in part, ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . ." The right to counsel found in the Sixth and Fourteenth Amendment applies to the States. Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963).

Article I, Section 22 provides in part, "In all criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel . . ."

a case will best promote the ultimate objective that the guilty be convicted and the innocent go free.” Cronic, 488 U.S. at 655 (quoting Herring v. New York, 422 U.S. 853, 862, 95 S.Ct. 2550, 45 L.Ed.2d 593 (1975)). The right to counsel therefore necessarily includes the right to effective assistance of counsel. Kimmelman v. Morrison, 477 U.S. 365, 377, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986); A.N.J., 168 Wn.2d at 98.

When reviewing a claim that trial counsel was not effective, appellate courts utilize the two-part test announced in Strickland. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Under Strickland, the appellate court must determine (1) was the attorney’s performance below objective standards of reasonable representation, and, if so, (2) did counsel’s deficient performance prejudice the defendant. Strickland, 466 U.S. at 687-88; Thomas, 109 Wn.2d at 226. Ineffective assistance of counsel is a mixed question of law and fact reviewed de novo. Strickland, 466 U.S. at 698; A.N.J., 168 Wn.2d at 109. “A claim of ineffective assistance of counsel is an issue of constitutional magnitude that may be considered for the first time on appeal.” State v. Kylo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

In reviewing the first prong of the Strickland test, the appellate courts presume that defense counsel was not deficient, but this presumption is rebutted if there is no possible tactical explanation for counsel's performance. Strickland, 466 U.S. at 689-90; State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). The appellate court will find prejudice under the second prong if the defendant demonstrates "counsel's errors were so serious as to deprive the defendant of a fair trial." Strickland, 466 U.S. at 687.

b. The prosecutor committed misconduct by admitting evidence vouching for the truth of Riannah Rammage's trial testimony. A criminal defendant's right to due process of law ensures the right to a fair trial. U.S. Const. amends. V, VI, XIV; Const. art. I, §§ 3, 22. The prosecutor, as a quasi-judicial officer, has a duty to act impartially and to seek a verdict free from prejudice and based on reason. State v. Reed, 102 Wn.2d 140, 146-47, 684 P.2d 699 (1984). When a prosecutor commits misconduct, the defendant's constitutional rights to due process and a fair trial may be violated. State v. Charlton, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978).

It is misconduct for a prosecutor to vouch for the credibility to the State's witnesses, whether by putting the prestige of the prosecutor's office behind the witness or suggesting information not presented to the jury supports the witness's testimony. State v. Ish, ___ Wn.2d ___, 241 P.3d 389, 392-93, 398 (2010) (Sanders, J., dissenting in result only) (citing United States v. Brooks, 508 F.3d 1205, 1209 (9th Cir. 2007)); United States v. Rudberg, 122 F.3d 1199, 1200 (9th Cir. 1997). Whether a witness has testified truthfully is to be determined by the jury, not the prosecutor or other witnesses. Ish, 241 P.3d at 393, 398; Brooks, 508 F.3d at 1210.

It is a fundamental evidentiary principle that evidence of a witness's truthful character is only admissible if her character for truthfulness is attacked by the opposing party. ER 608; United States v. Hilton, 772 F.2d 783, 786 (11th Cir. 1985). Thus, a line of Washington cases hold that the terms of a witness's immunity agreement, especially an agreement to testify truthfully, are not admissible unless the witness's credibility is attacked by the defense. Ish, 241 P.3d at 394; State v. Green, 119 Wn.App. 15, 23, 79 P.3d 460 (2003), rev. denied, 151 Wn.2d 1035, cert. denied, 543 U.S. 1023 (2004); State v. Jessup, 31 Wn.App. 304, 316, 641 P.2d 1185 (1982). Portions of an immunity agreement reciting, for

example, a purpose of securing “true and accurate testimony” or requiring the witness to “testify truthfully” are not admissible as they are irrelevant, prejudicial, and improperly vouch for the witness’s credibility. Green, 119 Wn.App. at 24; Ish, 241 P.3d at 393-94.

A strong case can be made for excluding a plea agreement promise of truthfulness. The witness, who would otherwise seem untrustworthy, may appear to have been compelled by the prosecutor’s threats and promises to come forward and be truthful. The suggestion is that the prosecutor is forcing the truth from his witness and the unspoken message is that the prosecutor knows what the truth is and is assuring its revelation.

Id. at 393 (quoting United States v. Roberts, 618 F.2d 530, 536 (9th Cir. 1980)).

If the defendant uses the plea agreement to attack the witness’s credibility on cross-examination and it is admitted as evidence, however, the State is entitled to draw the jury’s attention to provisions of the agreement requiring the witness to testify truthfully. Ish, 241 P.3d at 394. In so doing, the prosecutor may not comment on the evidence or refer to matters outside the record so as to imply the State can independently verify whether the witness is in fact testifying truthfully. Id.

The Ish Court addressed a murder case where the defendant argued he lacked the capacity to form the required

mental state to commit either first degree murder or second degree felony murder. Ish, 241 P.3d at 391. The defendant's cellmate testified against him as part of an agreement in which the prosecutor agreed to significantly reduce the charges against the cellmate and also recommend a reduced sentence. Id. Over defense objection, the State questioned the cellmate about the plea agreement; the witness testified his agreement with the prosecutor's office required "truthful testimony." Id. After Ish attacked the cellmate's credibility, on redirect examination the witness stated he had indeed testified truthfully. Id. at 392.

The Washington Supreme Court concluded that the trial court erred by permitting the witness to testify during direct examination about the truthfulness clause of his agreement with the State. Id. at 394, 398. "On direct review, where the credibility of the witness had not previously been attacked, referencing Otterson's out-of-court promise to testify truthfully was irrelevant and had the potential to prejudice the defendant by placing the prestige of the State behind Otterson's testimony." Id. at 394.

c. Defense counsel's performance was deficient when she failed to object to evidence improperly vouching for an essential government witness's credibility. Ms. Prigger's lawyer did not object when the prosecuting attorney, like the prosecutor in Ish, questioned Ms. Rammage about the immunity granted her by the court, eliciting its requirement that Ms. Rammage tell the truth and her testimony that she was telling the truth in court. 3RP 44, 98. Nor did counsel object when an experienced police detective and a patrol officer testified the detective told Ms. Rammage to tell the truth. 2RP 110; 4RP 52-53.

Defense counsel is required to employ "such skill and knowledge as will render the trial a reliable adversarial testing process." Strickland, 466 U.S. at 688. This requires investigating both the law and the facts of the case. Id. at 690-91; State v. Hartwig, 36 Wn.2d 598, 601, 219 P.2d 564 (1950). Counsel's performance may be deficient, for example, by failing to research the law and thus failing to propose relevant jury instructions or proposing erroneous ones. Kyllo, 166 Wn.2d at 868-69; Thomas, 109 Wn.2d at 229. Similarly, counsel's decisions on evidentiary issues may constitute deficient performance. State v. Hendrickson, 138 Wn.App. 827, 831-33, 158 P.2d 1257 (2007) (failing to object

to hearsay admitted in violation of defendant's confrontation clause rights constituted deficient performance), aff'd on other grounds, 165 Wn.2d 474, cert. denied, 129 S.Ct. 2873 (2009); State v. Saunders, 91 Wn.App. 575, 578-80, 958 P.2d 364 (1998) (defense counsel's performance deficient for eliciting testimony of defendant's prior record). Not only should defense counsel be aware of evidentiary rules and principles, counsel must also "be aware of the law and make timely objection when the prosecutor crosses the line" and commits misconduct. State v. Neidigh, 78 Wn.App. 71, 79, 895 P.2d 423 (1995).

Every witness is required to declare she will testify truthfully, ER 603, and a party cannot bolster his own witness's credibility unless it is attacked by opposing counsel.⁴ ER 608, ER 701; State v. Sutherby, 138 Wn.App. 609, 617, 158 P.3d 91 (2007), aff'd on other grounds, 165 Wn.2d 870 (2009). Washington cases hold that portions of a immunity agreement reciting the requirement that a witness testify truthfully are not admissible in the State's case in

⁴ ER 608(a) reads:

The credibility of a witness may be attacked or supported by evidence in the form of reputation, but subject to limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness; and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by reputation evidence or otherwise.

chief, and admissible on re-direct only when the agreement is used to challenge the witnesses credibility.⁵ Green, 119 Wn.App. at 23; Jessup, 31 Wn.App. at 316. Competent defense counsel facing a trial where the key witness is granted immunity in exchange for her testimony should have educated herself about this evidentiary rule and posed an objection. Counsel also should have objected when police officers testified they told the witness about the importance of telling the truth.

A lawyer's strategic choices made after thorough investigation of the law and the facts rarely constitute deficient performance. Strickland, 466 U.S. at 690. Here, however, there is no possible tactical explanation for counsel's performance. This Court must find counsel's failure to object to inadmissible evidence vouching for a key witness's credibility was deficient performance. Reichenbach, 153 Wn.2d at 130.

d. Ms. Prigger was prejudiced by her lawyer's deficient performance. In reviewing a claim that counsel was ineffective for failing to object to prejudicial evidence, this Court reviews whether

⁵ Similarly, the introduction of the provision of plea agreements requiring witness to agree to take polygraph examinations improperly bolsters the witness's credibility. Hilton, 722 F.2d at 786; United States v. Brown, 720 F.2d 1059, 1070-74 (9th Cir. 1984).

an objection would likely have been sustained and whether the trial results may have been different had the evidence not been admitted. Saunders, 91 Wn.App. at 578. As argued above, an objection to the improper testimony about Ms. Rammage's agreement to tell the truth would likely have been sustained based upon Washington law. This Court cannot be convinced the outcome of the trial would have been different had the State not been permitted to improperly vouch for its key witness.

The perjury charges against Ms. Prigger rode upon Ms. Rammage's testimony that she was not present during the custody exchange and that her written statements were therefore false. If the jury did not believe Ms. Rammage's trial testimony, then Ms. Prigger would not have been convicted.

In Ish, the Washington Supreme Court found evidence that a key witness entered an agreement with the prosecutor to testify truthfully was improperly admitted, but the lead opinion found the error harmless where a number of other witnesses offered evidence concerning the defendant's mental state, the only element of the crime at issue. Ish, 241 P.3d at 394-95. Here, however, the error was much more prejudicial than in Ish because the jury learned that Ms. Rammage was granted immunity by the court and was required

to testify truthfully. 3RP 44. Thus, the jury could believe that the judge ensured Ms. Rammage's testimony was truthful and they did not have to independently determine her credibility. See United States v. Ortiz, 362 F.3d 1274, 1278 (9th Cir. 2004) (improper for government to elicit testimony that court and law enforcement were monitoring the truthfulness of the testimony of witnesses who were testifying pursuant to plea agreements).

Nor was the prejudice cured by the instructions to the jury. While the court gave an instruction cautioning the jury in relying upon the testimony of an accomplice to the crime, CP 55, the court did not instruct the jury that the granting of an immunity agreement did not mean the judge warranted the truthfulness of the witness's testimony. Such an instruction was given in a federal case after the jury learned that several witnesses had been granted reduced sentences by the trial court judge based upon their testimony in other trials involving the same alleged drug distribution conspiracy. United States v. Harlow, 444 F.3d 1255, 1259-60 (10th Cir. 2006). There, the judge carefully instructed the jury that he only reviewed the plea agreements to determine if they violated public policy, they he did not vouch for the credibility of any of the witnesses, and it was the jury's job to determine the facts and credibility of the

witnesses. Id. at 1260. No such limiting instruction was requested by Ms. Prigger's attorney.

Moreover, defense counsel did not mention the plea agreement in her cross-examination of Ms. Rammage and did little to attack Ms. Rammage's credibility. This is not a case where the State would have been permitted to utilize the truthful testimony section of the immunity agreement on re-direct examination to rehabilitate their witness. Ish, 241 P.3d at 394.

The use of the truthfulness portion of the immunity agreement and testimony that immunity was granted by the court was prejudicial to Ms. Prigger. Ms. Rammage was the only witness who could say that her written statements were false and that Ms. Prigger encouraged her to make them. Ms. Prigger was prejudiced by her attorney's failure to object to the improper testimony, and her three perjury convictions must be reversed and remanded for a new trial. Kyllo, 166 Wn.2d at 871; Saunders, 91 Wn.App. 581.

6. MS. PRIGGER'S ATTORNEY DID NOT PROVIDE THE EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY THE FEDERAL AND STATE CONSTITUTIONS WHEN SHE FAILED TO IMPEACH A GOVERNMENT WITNESS WITH HER PRIOR CRIME OF DISHONESTY

In its trial brief, the State set forth Heather Moseley's prior convictions and conceded that Ms. Moseley could probably be impeached with one prior conviction for theft in a third degree. SuppCP ____ (State's Trial Brief, sub. no. 67, 3/1/10) at 7. When Ms. Moseley testified, defense counsel attempted to impeach her with prior inconsistent statements, but did not inquire about the third degree theft conviction. 2RP 73-81.

Washington evidence rules permit a party to attack the credibility of a witness with her conviction for any crime "involving dishonesty or false statement." ER 609(a). The court lacks discretion to exclude a crime of dishonesty, even if it is a misdemeanor. State v. Ray, 116 Wn.2d 531, 545, 806 P.2d 1220 (1991). Theft is a crime of dishonesty. Id.

As argued above, competent defense counsel is aware of the evidence rules and is able to admit evidence or pose objections to present her client's case. Competent defense counsel should also fully investigate the prosecution's case. Morrison, 477 U.S. at

385-86; Thomas, 109 Wn.2d at 230; RPC 1.1, 1.3; American Bar Association, American Bar Association Standards for Criminal Justice: Prosecution and Defense Function, Standard 4-4.1(a) (3rd ed. 1993).⁶ This Court has found defense counsel was ineffective for not properly investigating his client's criminal history when the lawyer was caught off guard and the prosecutor successfully impeached the defendant with an out-of-state drug conviction the defendant had not mentioned on direct examination. State v. Shaver, 116 Wn.App. 375, 382-85, 65 P.3d 688 (2003). This Court found "adequate representation should include accurate knowledge of prior criminal history, especially when the State had this information and used it to prepare a damaging cross-examination." Id. at 384-85. Similarly, adequate defense counsel should investigate the criminal history of key prosecution witnesses in order to prepare her own damaging cross-examination.

⁶ Standard 4-4.1(a) reads in full:

Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to defense counsel of facts constituting guilt or the accused's stated desire to plead guilty.

Heather Moseley was an essential witness for the State, as Ms. Prigger was charged with bribing Ms. Moseley. Defense counsel certainly should have been aware of Ms. Moseley's prior theft conviction; not only did her investigator interview Ms. Moseley prior to trial, the conviction was revealed in the prosecutor's trial brief. Effective counsel would have obtained a certified copy of Ms. Moseley's theft conviction for purposes of impeachment.

Ms. Prigger was prejudiced by her attorney's failure to fully impeach Ms. Moseley's credibility. Ms. Moseley was a critical witness for the State. She was the person Ms. Prigger was charged with bribing, and thus the key witness in her prosecution for a Class B felony. Ms. Moseley also offered important testimony to support Ms. Rammage's testimony that Ms. Prigger hounded her to sign the statements at issue and offered Ms. Rammage money, food, and cigarettes to obtain what she wanted. Denting Ms. Moseley's credibility with her prior record was thus critical to Ms. Prigger's defense. Ms. Prigger was prejudiced by her attorney's failure to impeach Ms. Moseley with her crime of dishonesty, and her convictions for bribery and perjury must be reversed and remanded for a new trial. Kyllo, 166 Wn.2d at 871; Saunders, 91 Wn.App. 581.

E. CONCLUSION

Pepper Prigger did not receive the effective assistance of counsel guaranteed by the federal and state constitutions because her trial lawyer (1) failed to object to testimony improperly vouching for Ms. Rammage's truthfulness, and (2) failed to impeach Ms. Moseley with her conviction for a crime of dishonesty. Ms. Prigger's convictions must be reversed and remanded for a new trial.

DATED this 16th day of December 2010.

Respectfully submitted,



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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent/Cross-appellant,)	
)	NO. 65127-7-I
)	
PEPPER PRIGGER,)	
)	
Appellant/Cross-respondent.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 16TH DAY OF DECEMBER, 2010, I CAUSED THE ORIGINAL **SUPPLEMENTAL BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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HAND DELIVERY
_____ |

SIGNED IN SEATTLE, WASHINGTON, THIS 16TH DAY OF DECEMBER, 2010.

X _____ 

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