

65562-1

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NO. 65562-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,
Respondent,

v.

RICARDO PEREZ,
Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY
THE HONORABLE MICHAEL HAYDEN

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COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

BRIEF OF RESPONDENT

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A. ISSUES

A standard range sentence may not be appealed under RCW 9.94A.585 unless the court failed to exercise discretion. The trial court considered Perez's request for an exceptional sentence below the standard range, taking into account Perez's mental health issues, his danger to reoffend, and the availability of alternatives to incarceration before imposing a standard range sentence. Did the court fail to exercise its discretion?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The defendant, Ricardo Perez, was charged with two counts of robbery in the first degree. CP 1-2. The State alleged that Perez robbed two banks on April 25th and 29th, 2009. CP 3-4. The State amended the information alleging aggravating factors that Perez had reoffended shortly after his release from prison, and that his high offender score resulted in some of his current offenses going unpunished. CP 7-8. Perez pleaded guilty as charged (including the aggravating factors). CP 9-33. Perez was sentenced on May 21, 2009. CP 35-45. The Court imposed a standard range sentence. Id.

2. SUBSTANTIVE FACTS

On April 25, 2009 Perez walked into a Wells Fargo Bank in Seattle wearing thick glasses. CP 3. He handed the teller a note threatening that he had a gun and demanding money. Id. The teller complied and Perez fled. Id.

Four days later Perez entered a Banner Bank in Seattle wearing thick glasses. CP 4. He again used a note that said he had a gun and demanded money. Id. The teller complied and Perez fled. Id. Perez was indentified by bank surveillance video, and police contacted him later that day. Id. He acknowledged that he wore the glasses to hide his identity and used the money to buy heroin. Id.

Perez was charged with two counts of robbery in the first degree. CP 1-2. He pleaded guilty to both counts, and he also pleaded guilty to two aggravating factors: that he had reoffended shortly after his release from prison, and that his high offender score resulted in some of his current offenses going unpunished. CP 9-33. Perez was sentenced on May 21, 2009. CP 35-45.

The prosecution requested an exceptional sentence above the standard range. The State asked for an exceptional sentence under RCW 9.94A.535(3)(t) because Perez had reoffended shortly

after his release from prison. CP 49. Perez had been released from prison in October, 2008, and he committed the current robberies in April, 2009. CP 18. Perez had been out of prison for only six months when he robbed two banks within days of each other. The State also asked for an exceptional sentence under RCW 9.94A.535(3)(c) because his high offender score resulted in some of his current offenses going unpunished. CP 49. He had eleven prior felony convictions, including five prior robberies¹. CP 41. Hence his offender score was eighteen for both of his current robbery convictions. CP 36. The trial court declined to impose an exceptional sentence above the standard range, instead imposing the high end of the standard range. CP 38.

Perez asked for an exceptional sentence below the standard range under RCW 9.94A.535(1)(c), arguing that Perez's capacity to appreciate the wrongfulness of his conduct or conform his conduct to the law was significantly impaired. CP 90. Perez requested a

¹ In 1997 Perez was given an exceptional sentence above the standard range for five counts of robbery in the second degree. CP 73-76. Perez committed thirteen bank robberies and pleaded guilty to five counts. CP 74, 81-83. The State agreed not to file eight additional counts, and requested an exceptional sentence based on the multiple offense policy. CP 74, 73-76. The trial court agreed and imposed an exceptional sentence. Id.

sixty-month sentence. CP 89. Perez relied upon the evaluation of Dr. Robin Ladue. CP 95-108.

Dr. Ladue diagnosed Perez with poly-substance abuse, depression, and post-traumatic stress disorder. CP 95². Dr. Ladue indicated that Perez had a "probability of organic brain damage due to prenatal alcohol exposure," and his IQ was "below average in the mildly mentally retarded range." 2RP 6³; CP 104. Dr. Ladue described "several signs of organic brain damage, likely organic brain damage." 2RP 7.

She suggested there is further testing a neurologist could perform. 2RP 7. Dr. Ladue's IQ assessment was limited to using the Wechsler Adult Intelligence Scale for "screening," and she conceded that there is a battery of tests that take eight to ten hours to complete that she did not perform. 2RP 8. Dr. Ladue's report is couched in less than certain terms. She notes that Perez is "believed" to have Fetal Alcohol Syndrome Spectrum Disorder as well as the attendant brain dysfunction. CP 95. The report says

² Dr. Ladue's report was filed but appears to be missing the second page. CP 95-96.

³ The verbatim report of proceedings consists of two volumes, which will be referred to in this brief as follows: 1 RP (3/11/10), and 2 RP (5/21/10). Appellant ordered a corrected transcript of the hearing on May 21, 2010 and Respondent will refer to the corrected transcript.

Perez has "facial features associated with fetal alcohol syndrome. This diagnosis would need to be confirmed by a dysmorphologist." CP 98. Ladue describes characteristics of Perez that are "consistent with fetal alcohol syndrome." CP 105. One of Dr. Ladue's recommendations is for a FASD evaluation at the University of Washington to verify the diagnosis. CP 108.

The trial court declined to impose an exceptional sentence below the standard range. The court's primary concern was to protect the community in light of Perez's extensive criminal history and rapid recidivism. 2RP 8-9. The Court noted that "my first concern is public safety." 2RP 9.

Dr. Ladue suggested that Perez might be able to obtain housing with "24/7 supervision" from the Department of Social and Health Services (DSHS) through their Community Protection Program. Id. However, neither Dr. Ladue nor Perez's attorney could ensure that Perez would be able to obtain "24/7 supervision" from the DSHS. 2RP 9-10. The trial court had the following exchange with Perez's lawyer:

Court: Let me ask the lawyers, I'm not even sure I know they [Community Protection Program] are amenable?

Defense: That is something that counsel and I did look into. The offer certainly had to include quite a bit of a lesser charge with a lesser range for him to be eligible for that, and that is something that - -

Court: The question I asked is given this, can I even order him into such a program?

Defense: I don't believe you can. He has to apply. We looked into applying and Ms. Ladue and I kind of put that together ahead of time.

2RP 9-10. The trial court declined to impose the exceptional sentence, emphasizing the need to protect the community⁴:

My first priority is to protect the community, and if the legislature doesn't give me a way to protect the community, other than to put somebody in prison, I'm stuck. If I could order him into a 24/7 halfway house where they would keep an eye on him all the time and give him treatment, if the legislature would let me do that, I could do that. I don't have that, there are no such facilities available to me to put him in. So his sentence is 171 months. The only place I can put him where he won't be robbing banks. And it does institutionalize him - no doubt - it's a tragedy. But is not an exceptional sentence. That is a standard range sentence.

2RP 17-18.

C. ARGUMENT

1. PEREZ MAY NOT APPEAL HIS STANDARD RANGE SENTENCE.

⁴ The court focused on practical considerations of the defense request and did not make any other findings regarding the proposed exceptional sentence.

Perez appeals his standard range sentence arguing that the trial court failed to exercise its discretion. Perez is incorrect. The trial court considered Perez's request for an exceptional sentence below the standard range, taking into account Perez's mental health issues, his danger to reoffend, and the availability of alternatives to incarceration before imposing a standard range sentence. The trial court understood its authority and exercised its discretion. Perez may not appeal his standard range sentence.

The defense request for an exceptional sentence was considered by the trial court and denied. The defendant was given a sentence within the standard range. That decision cannot be appealed. The Sentencing Reform Act (SRA) clearly indicates:

9.94A.585. Which sentences appealable--
Procedure--Grounds for -reversal--Written
opinions

(1) A sentence within the standard sentence range, under RCW 9.94A.510 or 9.94A.517, for an offense shall not be appealed. For purposes of this section, a sentence imposed on a first-time offender under RCW 9.94A.650 shall also be deemed to be within the standard sentence range for the offense and shall not be appealed

RCW 9.94A.585.

The Washington Supreme Court explained, in State v. Herzog, that the SRA does not place an absolute prohibition on the right of appeal. 112 Wn.2d 419, 423, 771 P.2d 739 (1989). Rather, it precludes only appellate review of "challenges to the amount of time imposed when the time is within the standard range." Id. at 423 (quoting State v. Ammons, 105 Wn.2d 175, 183, 713 P.2d 719 (1986)). The prohibition on appealing a standard range sentence has been upheld against constitutional attack on equal protection grounds. State v. Garcia-Martinez, 88 Wn. App. 322, 944 P.2d 1104 (1997).

As the court pointed out in Garcia-Martinez, the defense can only appeal the refusal to grant an exceptional sentence if the trial court refuses to exercise discretion. The court in Garcia-Martinez ruled that:

Review is limited to circumstances where the court has refused to exercise discretion at all or has relied on an impermissible basis for refusing to impose an exceptional sentence below the standard range. A court refuses to exercise its discretion if it refuses categorically to impose an exceptional sentence below the standard range under any circumstances; i.e., it takes the position that it will never impose a sentence below the standard range. A court relies on an impermissible basis for declining to impose an exceptional sentence below the standard range if it

takes the position, for example, that no drug dealer should get an exceptional sentence down or it refuses to consider the request because of the defendant's race, sex or religion.

Id. at 330.

Garcia-Martinez clearly states that the only basis to appeal a standard range sentence is if the Court refuses to exercise its discretion or uses an impermissible basis for its decision. Id. The court went on in Garcia-Martinez to say that the court did consider the arguments of counsel when it refused to grant the exceptional sentence down and that the defendant was precluded from appealing that ruling. Id. at 331.

An example of a court's refusal to exercise discretion can be found in State v. Grayson, 154 Wn.2d 333, 111 P.3d 1183 (2005). In Grayson, the judge categorically declined to impose a Drug Offender Sentencing Alternative (DOSA) because he did not believe the programs were funded. Id. at 337. There was no basis for the courts belief in the record. The Court of Appeals reversed because the trial court's categorical denial of a DOSA to anyone was a failure to exercise discretion. Id. at 342.

In the present case, the trial court clearly weighed Perez's mental health issues, the danger Perez posed to the community,

and the availability of alternatives. The trial judge considered the request for an exceptional sentence but declined to grant the request because of practical considerations. No one could ensure that Perez would obtain the treatment his expert suggested. The court did not categorically decline to impose an exceptional sentence, it declined because there was nothing on the record to demonstrate that Perez would obtain the services he claimed he needed. Furthermore, the court weighed the danger to the community posed by Perez when denying his request. The court clearly exercised its discretion and the sentence is not subject to appeal under RCW 9.94A.585.

2. THE TRIAL COURT CORRECTLY CONCLUDED THAT IT HAD NO AUTHORITY TO ORDER PEREZ'S PLACEMENT IN THE COMMUNITY PROTECTION PROGRAM WITH DSHS.

Perez complains that the trial court's ruling was based on a "misapprehension that it lacked the authority to order Perez into the Community Protection Program." Brief of Appellant, at 9. Perez further argues that this "misapprehension" precluded the exercise of discretion. Perez is incorrect. The trial court understood that it could place affirmative conditions on Perez, but could not issue

orders to DSHS. The court clearly understood its authority and exercised its discretion accordingly.

A refusal to grant an exceptional sentence may be appealed if the trial court's decision was based on an erroneous interpretation of the law. In re Mulholland, 161 Wn.2d 322, 166 P.3d 677 (2007). A court may fail to exercise its discretion if it mistakenly believes it has no discretion. State v. McGill, 112 Wn. App. 95, 100-02, 47 P.3d 173 (2002). However, in both Mulholland and McGill the courts made clearly erroneous conclusions about their authority to grant exceptional sentences. In Mulholland the court mistakenly believed it could not grant an exceptional sentence to impose concurrent sentences. Mulholland, 161 Wn.2d at 332. In McGill the court mistakenly believed it could not impose an exceptional sentence. McGill, 112 Wn.App. at 98. Both cases are distinguishable from the present case. The trial court never indicated it was legally prohibited from granting Perez an exceptional sentence. The court considered the community's safety and Perez's treatment options. The trial court properly understood it had authority to order community custody conditions on Perez, but did not have authority over other entities such as DSHS. The court did not misunderstand its authority.

The trial court had the authority to impose community custody as part of Perez's sentence. Robbery in the first degree is a violent offense, and subject to an 18-month period of community custody. RCW 9.94A.030(53)(a)(i) (violent offense is defined as any class A felony); RCW 9A.56.200(2) (robbery in the first degree is a class A felony); RCW 9.94A.701(2) (18 months of community custody is authorized for violent offenses). The trial court clearly understood it had the authority to impose community custody. The court did, in fact, impose 18 months of community custody. CP 39. The court also has the authority to order a defendant to perform affirmative conduct reasonably related to the circumstances of the offense. RCW 9.94A.703(3)(d). The court clearly understood that it had authority to order Perez to comply with affirmative conditions of community custody. In fact, the court did impose treatment conditions on Perez. CP 45. The court required Perez to obtain a substance abuse evaluation and follow all treatment recommendations. Id. The court understood its authority, and it exercised that authority in Perez's sentence.

However, nothing in RCW 9.94A.703 grants the court authority to issue orders to DSHS. If Perez were not accepted into the community protection program, the court could not order DSHS

to place him there. The Community Protection Program is a voluntary program for offenders with developmental disabilities. See RCW 71A.12.025; WAC 388-831-0020. It is governed by RCW 71A.12. Perez seems to argue that the record established that Perez would receive services under the minimal statutory criteria in RCW 71A.12.200. Brief of Appellant, at 20-21. Perez is incorrect. The record, at best, establishes that he may be eligible for services. There are numerous statutory requirements that are not established by the record. The bare statutory criteria applicable to Perez under RCW 71A.12.210 require only that: 1) the person has a conviction for a violent offense; 2) the person constitutes a current risk to others as determined by a qualified professional; 3) the person has a developmental disability as defined by RCW 71A.10.020(3).

Dr. Ladue's report does not qualify as the formal risk assessment required by RCW 71A.12.230. Dr. Ladue's diagnosis does not clearly establish that Perez meets the criteria for a developmental disability under RCW 71A.10.020(3). Dr. Ladue's report notes several times that follow-up evaluations were needed to confirm the fetal alcohol syndrome, and she only completed a

fraction of the necessary tests to evaluate Perez's IQ. CP 98, 108; 2RP 8.

Furthermore, meeting the bare statutory requirements may not insure placement in a community protection program. The Secretary of the DSHS may adopt additional rules for eligibility. RCW 71A.12.080. Notification of eligibility does not guarantee services. WAC 388-831-0080. For example, if an applicant cannot be managed in the community safely, he may be rejected. WAC 388-831-0090.

In re Detention of Mulkins, 157 Wn. App. 400, 237 P.3d 342 (2010), illustrates that a court should not consider eligibility for services as proof of a defendant's placement in a program. The State sought to commit Mulkins as a sexually violent predator under RCW 71.09. Id. at 401. Mulkins wished to admit evidence that his risk to reoffend was reduced because he was eligible for the Community Protection Program offered by DSHS. Id. at 403. Mulkins had a letter from DSHS indicating that he was eligible for the program. Id. at 403. The court found that his eligibility alone was not admissible:

Mulkins asserts that the CPP [community protection program] is an existing option for him, relying on the letter from DSHS and noting that offenders who have

been identified by DSHS as meeting the criteria for the program are notified by the form letter that was sent to him. But at most, this letter only indicated that he was identified as a potential candidate for the program and directed him to follow up with his case manager if he was interested in the program. Mulkins points to nothing else in the record establishing that he has in fact been through the application process, has been accepted as a suitable candidate for the program, and has agreed to participate in the program. Without further information about his actual placement in the program, Mulkins fails to establish that the CPP is an option that in fact "would exist" for him upon his release. Thus, even if evidence of the CPP were admissible under the statute, he fails to show that it would be admissible in his case.

Id. at 406-07⁵.

The trial court in this case was in a similar position. Absent any showing that Perez had applied, and would be placed under conditions including full-time supervision, Perez's assertion that the Community Protection Program would protect the public was speculative. The court would have had to rely on hypothetical conditions to protect the community, and the court had the discretion not to do so.

⁵ Mulkins addressed a provision specific to sexually violent predator cases that prohibits evidence of conditions of release unless they "would exist." Id. at 405-06; see RCW 71.09.060(1). However, the Court's conclusion that mere eligibility for services does not prove placement in the community protection program is instructive.

Furthermore, the court had no authority to dictate the conditions imposed by DSHS on Perez. While the court may have felt that a halfway house with full-time supervision was needed to protect the community, it could not order DSHS to provide such a placement. The court was unwilling to order Perez to obtain specific services when it could not be reasonably sure that those services would be available, or would include conditions that would protect the community. The trial court understood its authority and properly exercised its discretion in favor of protecting the community by incarcerating Perez⁶.

Perez's contention that the trial court rejected his request for an exceptional sentence "based on its mistaken belief about the extent of its discretionary authority" is incorrect. Brief of Appellant, at 12. The court recognized that it could impose affirmative conditions on Perez such as obtaining substance abuse treatment, and correctly concluded that it did not have authority over DSHS to

⁶ Perez may argue that the court could have ordered him to apply to the community protection program without directly issuing orders to DSHS. The trial court could have ordered an exceptional sentence of 60 months and directed Perez to apply to the program, but would then have few options to protect the community if Perez were rejected, or was terminated from the program. The court could only impose a 60-day sanction for a willful violation of his community custody. RCW 9.94B.040(3)(c). The court could not order DSHS to take him back to the program, nor could the court impose a standard range sentence. Such a sentence would fail to protect the community, which was the court's primary concern.

order Perez's placement in the Community Protection Program.

The trial court understood its authority, and appropriately exercised its discretion, choosing to ensure community safety by imposing the high end of the standard range. The trial court's valid exercise of discretion is not appealable under RCW 9.94A.210.

3. THE RECORD DOES NOT ESTABLISH THAT PEREZ'S ATTORNEY WAS INEFFECTIVE NOR PREJUDICED.

Perez next argues that his attorney was ineffective because she failed to have him apply to the Community Protection Program, and incorrectly believed that he was ineligible. Perez fails to demonstrate that his counsel's performance was deficient and fails to show prejudice. Perez has failed to show that it is even possible to obtain a commitment from DSHS to provide a secure Community Protection Placement years before Perez would be released from prison.

A criminal defendant has a constitutional right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The benchmark for judging a claim of ineffective assistance of counsel is whether counsel's

conduct "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Id. at 686.

Perez has the burden of establishing ineffective assistance of counsel. Id. at 687. To prevail on a claim of ineffective assistance of counsel, the defendant must meet both prongs of a two-part standard: (1) counsel's representation was deficient, meaning it fell below an objective standard of reasonableness based on consideration of all the circumstances (the performance prong); and (2) the defendant was prejudiced, meaning there is a reasonable probability that the result of the proceeding would have been different (the prejudice prong). Id. at 687; State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). If the court decides that either prong has not been met, it need not address the other prong. State v. Garcia, 57 Wn. App. 927, 932, 791 P.2d 244 (1990).

The inquiry in determining whether counsel's performance was constitutionally deficient is whether counsel's assistance was reasonable considering all the circumstances. Strickland, 466 U.S. at 688. Judicial scrutiny of counsel's performance must be highly deferential. Id. at 689. In judging the performance of trial counsel,

courts must engage in a strong presumption of competence. Id. at 689.

In addition to overcoming the strong presumption of competence and showing deficient performance, Perez must affirmatively show prejudice. Id. at 693. Prejudice is not established by a showing that an error by counsel had some conceivable effect on the outcome of the proceeding. Id. at 693. If the standard were so low, virtually any act or omission would meet the test. Id. at 693. Perez must establish a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. Id. at 694.

On direct appeal, the reviewing court will not consider matters outside the trial record. McFarland, 127 Wn.2d at 335. The burden is on a defendant alleging ineffective assistance of counsel to show deficient representation based on the record established in the proceedings below. Id. If a defendant wishes to raise issues on appeal that require evidence or facts not in the existing trial record, the appropriate means of doing so is through a personal restraint petition. Id.

For Perez to prevail on his claim of ineffective assistance of counsel, the record must establish that his counsel's performance

was deficient, and there was a reasonable probability that the court would have granted his exceptional sentence but for the deficient performance. The record does not establish either. It is clear that Perez's attorney, and Dr. Ladue, took steps to obtain services from the Community Protection Program, but the record does not establish what those steps were. While discussing the Community Protection Program, Perez's lawyer noted, "That is something counsel and I looked into," and "we looked into applying and Ms. Ladue and I kind of put that together ahead of time." 2RP 9-10. The record does not provide any further detail about what counsel did, or was told, about Perez's eligibility. It would not be appropriate to deem Perez's counsel ineffective when the record does not establish what steps counsel took or what she learned.

For example, there is nothing in the record that suggests Perez can apply for services five years in advance⁷. It is possible that even if Perez is not legally barred from the program, as a practical matter he cannot apply until his release date approaches because he was facing a long prison sentence. Perez argues that his attorney was ineffective when she told the court that, "the offer certainly had to include quite a bit of a lesser charge with a lesser

range for him to be eligible for that . . . " 2RP 9-10. If Perez is not "eligible" to apply until he approaches his release date, his attorney's suggestion that a significant reduction in charges resulting in a shorter sentence would be required to obtain services may have been correct. Even Perez acknowledges that the record

⁷ Perez requested an exceptional sentence of 60 months.

is not sufficient to interpret his attorney's remarks. Brief of Appellant, at 19-20⁸.

Perez must also show prejudice, and unless the record establishes that he would be able to obtain services under the Community Protection Program that addressed the court's concerns, he cannot show a reasonable likelihood that the court would have granted his request for an exceptional sentence. The trial court was not inclined to grant any exceptional sentence below the standard range that did not protect the community, and the court believed that a halfway house with full-time supervision was required. In order to show a substantial likelihood that the court would have granted his request, he would need to establish that he would have obtained such a placement. As previously discussed, the record at best, establishes that he *may* be eligible for such services. Proving that Perez *may* be eligible does not prove that he

⁸ Since the basis for counsel's remarks, and her efforts to ascertain Perez's eligibility for the Community Protection Program are outside the record, a personal restraint petition would be a more appropriate avenue to address this claim of ineffective assistance of counsel. McFarland, 127 Wn.2d at 338.

would be accepted and placed under the conditions the court believed were necessary to protect the community. See In re Mulkins, 157 Wn. App. at 406-07. The record fails to establish that Perez would have obtained the placement the court felt was necessary to protect the community⁹. Hence he has failed to show a reasonable likelihood that the court would have granted his request for an exceptional sentence.

The record does not establish that Perez's counsel's performance was deficient given that it may not even be possible to apply for DSHS services years in advance. In addition, Perez cannot show prejudice because he has failed to demonstrate that he would have obtained a placement that the trial court felt was necessary to grant an exceptional sentence. Hence his claim of ineffective assistance of counsel fails.

⁹ Again, if Perez were able to obtain information outside this record to show he has applied, and been accepted to a fully supervised halfway house through the community protection program, he could supplement the record in a personal restraint petition. See McFarland.

D. **CONCLUSION**

For the foregoing reasons, the State asks this Court to affirm
Perez's sentence.

DATED this 4th day of February, 2011.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Casey Grannis, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. RICHARDO PEREZ, Cause No. 65562-1-I, in the Court of Appeals, Division I, for the State of Washington.

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

U Brame

Name

Done in Seattle, Washington

2/4/11

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