

IN THE SUPREME COURT  
STATE OF ARIZONA

LISA GILPIN,	)	Supreme Court
	)	No. CR-23-0252-PR
Petitioner,	)	Court of Appeals
	)	No. 2 CA-SA 2023-0067
SUPERIOR COURT OF THE STATE	)	Pinal County Superior Court
OF ARIZONA, in and for the County of	)	No. CR201800324
PINAL, THE HONORABLE	)	<b>NATIONAL CRIME VICTIM</b>
DANIELLE HARRIS, a judge thereof,	)	<b>LAW INSTITUTE, PARENTS</b>
	)	<b>OF MURDERED CHILDREN</b>
Respondent Judge,	)	<b>VALLEY OF THE SUN</b>
	)	<b>CHAPTER, NAVAJO COUNTY</b>
MARCOS JERELL MARTINEZ,	)	<b>ATTORNEYS OFFICE AND</b>
	)	<b>THE ARIZONA CRIME</b>
Real Party in Interest.	)	<b>VICTIM RIGHTS LAW GROUP</b>
	)	<b>AMICI CURIAE BRIEF IN</b>
	)	<b>SUPPORT OF PETITIONER</b>

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## INTRODUCTION

Arizona voters long ago granted crime victims fundamental constitutional rights enshrined in the Arizona Constitution. ARIZ. CONST. Art. II, §2.1(A)(1)-(12) (“VBR”). Among these constitutionally protected rights is the enumerated right to “receive prompt restitution from the person or persons convicted of the criminal conduct that caused the victim’s loss or injury.” VBR Art., II, §2.1(A)(8). These VBR protections attach “on the arrest or formal charging of the person or persons who are alleged to be responsible for a criminal offense against a victim.” A.R.S. §13-4402(A). They continue “until final disposition of the charges, including acquittal or dismissal ..., all post-conviction release and relief proceedings and the discharge of all criminal proceedings related to restitution.” *Id.* In other words, victims’ rights, including the right to restitution, attach on arrest and continue in the criminal court until charges have been dismissed, the Defendant has been acquitted, or restitution for economic loss has been paid in full. *Id.*; *see also* A.R.S. §13-805(A)(2) (criminal court retains jurisdiction “[f]or all restitution orders in favor of a victim...for purposes of ordering, modifying and enforcing the manner in which payments are made until paid in full.”). If any questions arise about the extent to which a victim may seek restitution, all inferences and VBR protections must be construed liberally. A.R.S. §13-4418 (VBR implementation act shall be liberally construed); *see also* VBR Art. II, §2.1(E) (“The enumeration in the constitution of

certain rights for victims shall not be construed to deny or disparage others granted by the legislature or retained by victims.”). An adjudication of guilty except insane is not a final disposition, nor has dismissal occurred, nor has the defendant been acquitted. Using VBR and statutory construction principles and considering the purpose of VBR, including making crime victims whole for their economic losses, victims must be able to recover restitution irrespective of whether the Defendant was adjudged guilty or guilty except insane. To the extent that *State v. Heartfield*, 196 Ariz. 407, 408-10, 998 P.2d 1080, 1081-83 (App. 2000) decided otherwise, it must be overruled.

**I. Voters adopted the VBR creating a minimum set of constitutional rights that cannot be abridged.**

VBR rights, particularly the right to restitution, do not vary based on a defendant’s mental state. According to the Arizona Legislative Council publicity pamphlet analysis in support of the VBR, back in 1990, voters understood the express purpose of the VBR as follows:

For too long victims of crime have been second class citizens. The rights of defendants have been eagerly fought for and protected while the victim has been overlooked, at best, and, at worst, trampled upon by the judicial system. This Proposition would attempt to equalize the rights of defendants and victims so that the scales of justice would no longer weigh heavily in favor of the defendant.

Ariz. Sec’y of State, 1990 Publicity Pamphlet 35 (1990) (emphasis added), <https://apps.azsos.gov/election/files/hist/pubpam90.pdf>. Following the

passage of the VBR, the legislature then passed the Victim Rights Implementation Act (“VRIA”), adding a statement of intent in Section Two. The VRIA added A.R.S. §§13-4401 through -4437 to the criminal code along with other legislative enhancements bolstering a victim’s newly established VBR protections in all criminal proceedings unless expressly limited. *See* 1991 Ariz. Sess. Laws, Ch. 229,

§ 2. The Arizona Legislature Statement of Intent passing the VRIA states:

The legislature recognizes that many innocent persons *suffer economic loss* and personal injury or death as a result of criminal acts. It is the intent of the legislature of this state to:

1. Enact laws that define, implement, preserve and protect the rights guaranteed to crime victims by article II, section 2.1, Constitution of Arizona.
2. Ensure that article II, section 2.1, Constitution of Arizona, is fully and fairly implemented and that *all crime victims* are provided with basic rights of respect, protection, participation and healing of their ordeals.
3. Ensure at *all stages of the criminal justice process* that the duties established by article II, section 2.1, Constitution of Arizona, are fairly apportioned among all law enforcement agencies, prosecution agencies, courts and corrections agencies in this state.
4. Ensure that employees of this state and its political subdivisions who engage in the detention, investigation, prosecution and adjudication of crime use reasonable efforts to see that crime victims are accorded the rights established by article II, section 2.1, Constitution of Arizona.

(Emphasis added). Neither the VBR publicity pamphlet nor the statement of intent in the VRIA carved out limitations or narrowed the application of VBR rights of crime victims to recover their economic losses based on the sanity of the perpetrator.

Courts must construe the plain language of the VBR and the VRIA, which, on their face, do not limit a victim's right to restitution based on a Defendant's sanity. *See, e.g., State v. Superior Ct.*, 184 Ariz. 409, 411, 909 P.2d 476, 478 (App. 1995) ("We are required to follow and apply the *plain language* of the Victim's Bill of Rights in interpreting its scope.") (emphasis added) (citation omitted). Absent explicit limitations, courts cannot create "*ad hoc* exceptions to the Victims' Bill of Rights" in an attempt to carve out limitations on the application of the VBR. *See, e.g., id. (quoting Knapp v. Martone*, 170 Ariz. 237, 239, 823 P.2d 685, 687 (1992) ("If trial courts are permitted to make *ad hoc* exceptions to the constitutional rule based upon the perceived exigencies of each case, the harm the Victims' Bill of Rights was designed to ameliorate will, instead be increased.")). Consequently, absent plain language in the VBR and VRIA limiting the right to restitution whenever a Defendant pleads guilty except insane, a victim's VBR right to restitution must remain intact. It is within these clear and unequivocal VBR pronouncements, that the words "guilty except insane" spelled out in A.R.S. §13-502 must be construed.



**II. By enacting A.R.S. §13-502, the Arizona legislature did not intend to abrogate a victim’s VBR right to restitution for economic loss when a defendant pleads guilty except insane.**

According to the plain language of A.R.S. §13-502(E), “A guilty except insane verdict is not a criminal conviction for sentencing enhancement purposes under section 13-703 or 13-704.” The limiting language in this provision stops at “sentencing enhancement” and goes no further. The legislature did not express that when construing a guilty except insane verdict, VBR rights to recover restitution are erased. The legislature did not express that a guilty except insane verdict or plea is an “acquittal” or “dismissal” or another procedural moment that prevents crime victims from recovering restitution whenever a defendant relies on A.R.S. §13-502. Instead, in the plain language of the statute, Defendants do not plead “acquitted because insane” or “dismissed because insane.” Defendants plead only “guilty except insane.” The statute must therefore be understood to mean that the legislature intended for none of the VBR rights-ending triggers (i.e., final disposition after payment in full, acquittal, or dismissal) to be included in the guilty except insane statute modified soon after Arizona voters passed the VBR. *See State v. Green*, 248 Ariz. 133, 135, 459 P.3d 45, 47 (2020) (statutory construction requires inquiry into the plain language of a statute; “[w]hen the plain text of a statute is clear and unambiguous, it controls unless an absurdity or constitutional violation results.”)

(citation omitted).<sup>1</sup> Instead, passage of the statute changed nothing about a victim’s VBR right to restitution for economic loss and the Court maintains jurisdiction over restitution for “purposes of ordering, modifying and enforcing the manner in which payments are made until paid in full.” A.R.S. §13-805(A)(2).

Any legislative or judicial attempt to narrow the application of VBR rights must be considered highly suspect within the careful framework of VBR and statutory construction developed over the past thirty years. To be sure, in *Knapp*, 170 Ariz. at 239, 823 P.2d at 687 (1992), this Court has already cautioned that the legislature and courts must be careful to construe the plain language of statutes to preserve VBR rights and not claw them back by creating *ad hoc* exceptions. (cautioning against *ad hoc* exceptions because “proceedings [about application of VBR rights] can only increase the harassment of victims that the Victims’ Bill of

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<sup>1</sup> Relying on the plain text of A.R.S. §13-502, any attempt to remove the statutory significance of the word “guilty” in a “guilty except insane” plea must not be considered rational. *See Green*, 248 Ariz. at 135, 459 P.3d at 47 (“An interpretation is ‘absurd if it is so irrational, unnatural, or inconvenient that it cannot be supposed to have been within the intention of persons with ordinary intelligence and discretion.’”) (citations omitted). According to the Merriam-Webster on-line dictionary, the term “guilty” has been defined as “justly chargeable with or responsible for a usually grave breach of conduct or a crime.” Merriam-Webster. (n.d.). Guilty. In Merriam-Webster.com dictionary. Retrieved May 5, 2024, from <https://www.merriam-webster.com/dictionary/guilty>. The ordinary use of the word “guilty” in this context must therefore mean responsible and not an acquittal, dismissal or other form of disposition which would otherwise prevent the criminal court from advancing a victim’s right to request restitution.

Rights was designed to decrease.”). In *State v. Patel*, 251 Ariz. 131, 137, 486 P.3d 188, 194 (2021), rejecting statutory restitution caps in vehicular crime cases, this Court held that “[T]here can be only one choice when a statute conflicts with the constitution. ‘The constitution of this state, second only to the constitution of the United States, is the supreme law of Arizona. Any act of the legislature . . . which contravenes its provisions must fall.’” (citations omitted).

Just a few years after adopting the VBR and passing the VRIA, the legislature reformed Arizona’s insanity law in 1994, creating the “guilty except insane” defense in response to public outcry over the impact of some high-profile decisions absolving defendants from liability due to mental illness. *See Arizona’s Insane Response to Insanity*, 40 Ariz. L. Rev. 287, 303-04 (1998). While the legislature certainly could have explained that the plea of guilty except insane is not a conviction for purposes of restitution, it did not. *See* A.R.S. §13-502(E). Instead, the legislature carefully limited the application of the guilty except insane designation to only prevent courts from enhancing a sentence but not to expressly remove a victim’s VBR right to restitution for economic loss.

Nowhere in the statute does the legislature place limits on restitution so nowhere did the legislature intend such limitations on such an important victim fundamental right. Court construction of an *ad hoc* exception to a VBR right to prompt payment of restitution simply because a defendant pleads guilty except

insane is therefore inconsistent with the VBR, the VRIA and the plain language and legislative intent behind passage of A.R.S. §13-502 and cannot withstand scrutiny.

**III. Even if the legislature intended to prevent victims from recovering restitution, such efforts would be an unconstitutional abrogation of VBR rights.**

Even if the legislature intended to claw back victims' rights to receive restitution for economic loss based only on a defendant's state of mind, attempts to do so exceed its authority. The legislature can certainly pass laws expanding victims' rights but it does not have the power to limit or take them away. *See* VBR, ART. II, §2.1(D) (providing that the legislature has authority to enact "substantive and procedural laws to define, implement, preserve and protect the rights guaranteed to victims..."); *see also State v. Roscoe*, 185 Ariz. 68, 73, 912 P.2d 1297, 1302 (1996) (noting that the VBR "grants to the legislature the authority to define the rights created therein, *not* the power to redetermine who is entitled to them.") (emphasis added).<sup>2</sup>

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<sup>2</sup> The "legislature possesses those powers 'not expressly prohibited or granted to another branch of the government,'" *State v. Hansen*, 215 Ariz. 287, 289, 160 P.3d 166, 168 (2007) (*quoting Adams v. Bolin*, 74 Ariz. 269, 283, 247 P.2d 617, 626 (1952), (criminalizing behavior but limiting VBR rights to a subset of victims cannot be considered constitutionally permissible.)). In other words, to give the VBR Art. II, §§2.1(D) and (E) any significance, the VBR limited the power of the legislature to take away rights to recover restitution from a subset of crime victims based solely on the state of mind of a defendant. *See, e.g., Patel*, 251 Ariz. at 137, 486 P.3d at 194 (rejecting legislation that conflicts with state constitution).

The VBR affords victims the fundamental right to “prompt restitution from the person or persons convicted of the criminal conduct that caused the victim’s loss or injury.” VBR Art. II, §2.1(A) (8). The primary purpose of this right is to make the victim whole. *State v. Wilkinson*, 202 Ariz. 27, 30, 39 P.3d 1131, 1134 (2002) (observing the “primary purposes of restitution” are “reparation to the victim“). Further, the VBR affords victims the right to be treated with fairness, dignity and respect. VBR Art. 2, §2.1(A)(1). *See also J.D. v. Hegyi*, 236 Ariz. 39, 41, 335 P.3d 1118, 1120 (2014) (construing VBR as broadly recognizing victims’ rights to be treated fairly, with respect and dignity). Nothing in VBR or VRIA should be construed as making these rights contingent on the mental state of the defendant. *See A.R.S. §§ 13-603(C), -804(G), -805; see also State v. Wilson*, 150 Ariz. 602, 606, 724 P.2d 1271, 1275 (App. 1986) (describing the legislative history of A.R.S. §13-603(C)). Instead, the statutory scheme allowing recovery of restitution applies to all cases in which a person is “convicted” of an offense. This Court has previously held as unconstitutional legislative efforts to narrow the definition of a victim to prevent a peace officer from seeking VBR protections or narrowing the type of crime for which any victim may invoke VBR protections. *See State v. Roscoe*, 185 Ariz. 68, 72-73, 912 P.2d 1297, 1301-02 (1996); *State v. Klein*, 214 Ariz. 205, 209, 150 P.3d 778, 782 (App. 2007). This Court has also already confirmed that the Arizona legislature simply cannot roll back rights that the VBR has already granted. *See*

*State v Lee*, 226 Ariz. 234, 237, 245 P.3d 919, 922 (App. 2011) (“neither the legislature nor court rules can eliminate or reduce rights guaranteed by the VBR.”); *Patel*, 251 Ariz. at 137, 486 P.3d at 194 (statutory caps on restitution for vehicular crimes). Thus, the legislature’s authority does not include the power to strip victims of rights already afforded. *See State v Hansen*, 215 Ariz. 287, 290, 160 P.3d 166, 169 (2007) (“The legislature’s power to promulgate rules under the VBR is not unlimited. . . [and includes] those rules that define, implement, preserve and protect the specific rights unique and peculiar to crime victims, as guaranteed and created by the VBR.”) (citations omitted).

Construing guilty except insane as an acquittal is at odds with these well-established VBR mandates to further constitutional rights but not limit them. As *Patel* instructs, any legislative act that at its core amounts to an attempt to claw back a victim’s VBR right to restitution must fail. 251 Ariz. at 137, 486 P.3d at 194. As a result, any legislative effort to pull back a victim’s right to restitution based on a contention that a guilty except insane plea means that the Defendant was acquitted, or charges dismissed or a final case disposition attained cannot withstand constitutional scrutiny and must be rejected.

**IV. Because courts cannot overlook VBR protections, *State v. Heartfield* should be overturned so that victims can seek restitution from defendants who plead guilty except insane.**

A case challenging the constitutionality of a statute must be reviewed *de novo*. *Gallardo v. State*, 236 Ariz. 84, 87, 336 P.3d 717, 720 (2014). Because courts must construe statutes in a manner to give effect to the VBR as required by the legislature and the courts, the outlier case *State v. Heartfield*, 196 Ariz. 407, 410, 998 P.2d 1080, 1083 (App. 2000), must be overturned as wrongfully decided. In the case before this Court, although the acknowledging that the victim suffered economic loss, the court presumably relied on *Heartfield* to reject the victim’s losses holding that “[r]estitution is not applicable at this time given the Guilty Except Insane Plea.” Petitioner’s App. of Record at 053. Absent relief from this Court, the Petitioner and other similarly situated crime victims will suffer disparate treatment compared to other crime victims based not on the losses suffered and the ordinary elements required to prove economic loss,<sup>3</sup> but instead on the state of mind of the Defendant. In *Heartfield*, the court wrongfully decided that “[w]e do not believe that a finding

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<sup>3</sup> See A.R.S. §13-105(16) (defining economic loss); *see also State v. Wilkinson*, 202 Ariz. 27, 30, 39 P.3d 1131 (2002) (describing elements required to prove economic loss); *State v. Madrid*, 207 Ariz. 296, 298, 85 P.3d 1054, 1056 (App. 2004). Restitution for economic loss is mandatory once a victim shows the following by a preponderance: 1. The loss must be economic, 2. The loss must be one that the victim would not have incurred but for the criminal offense, and 3. The criminal conduct must directly cause the economic loss, that is, the damage must not be consequential. *See id.*; *see also* A.R.S. §13-603(C).

of guilty except insane is a conviction *for purposes of restitution.*” 196 Ariz. at 408, 998 P.2d at 1081 (emphasis added).

The proper inquiry for the court in *Heartfield* was not whether the plea was a conviction. It was. Instead, the court should have inquired into whether the “guilty except insane” plea amounted to a final disposition, acquittal or dismissal. That inquiry is simple. If the Defendant still requires monitoring, supervision, and custody, it cannot be construed as an acquittal, dismissal, or final disposition because the court still has jurisdiction over the ongoing care imposed on the defendant in the form of a sentence.<sup>4</sup>

Because a guilty except insane plea cannot be considered a final disposition, acquittal, or dismissal, all VBR rights, including the right to seek restitution remain intact. All crime victims who suffer losses are entitled to an award of restitution for their economic loss except in the event of final disposition of the charges, acquittal or dismissal. *Compare* A.R.S. §13-603(C) *with* -4402(A). The guilty except insane

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<sup>4</sup> In the case at issue, the sentencing Court did not dispose of, dismiss or acquit the Defendant of any charges. Petitioner’s App. at 51-54. Instead, the court relied on sentencing statutes and ordered the Defendant/Real Party In Interest into custody “pursuant to A.R.S. 13-752 and A.R.S.13-751, [Defendant] is sentenced to the Arizona Department of Corrections, to be placed under the jurisdiction of the Arizona Psychiatric Security Review Board and committed to the Arizona State Hospital, a secure mental health facility under the Arizona Department of Health Services for a period equal to the presumptive prison term authorized by law for each offense committed by the Defendant....” *Id.* at 53. Because none of the VBR rights ending triggers arose, restitution was still mandatory. *See* A.R.S. §13-603(C).



statute never created an express statutory exemption from restitution for a victim's economic loss. Nor did the legislature ever expressly confirm that a guilty except insane verdict or plea is a final disposition, "acquittal" or "dismissal" preventing crime victims from requesting restitution for their economic loss. *See* A.R.S. §13-502. The legislature never expressly explained that a "guilty except insane" plea terminates a victim's VBR rights or prevents a crime victim from requesting restitution for their economic loss.

Because the Defendant did not plead "acquitted because insane" or "dismissed because insane," and the criminal court still maintains jurisdiction over the Defendant in the form of a suspended sentence, the criminal court must also maintain jurisdiction over restitution. *See* A.R.S. §13-805(A)(2). The application of the guilty except insane statute is substantially different from an acquittal, dismissal or final disposition. The plain language of the statute limiting its application confirms only that a court cannot enhance a defendant's sentence but that supervision by the criminal court does not go away. *Id.* Defendants who plead guilty except insane are still guilty and still face criminal liability for a suspended sentence. A.R.S. §13-502(D). In contrast, defendants who are acquitted or face dismissal of charges no

longer face criminal liability and jurisdiction ends. To the extent *Heartfield* holds to the contrary, it must be overruled.<sup>5</sup>

Long ago, Arizona voters decided to protect victims of crime by establishing their constitutional right to prompt payment of restitution that is not dependent on a criminal defendant's mental state or financial wherewithal. VBR Art. II, §2.1(A)(8). And the legislature created a comprehensive scheme for crime victims to

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<sup>5</sup> Other states recognize that a crime victim should recover restitution from criminal defendants who either pled guilty except insane or have been adjudicated as mentally ill; these states recognize that a defendant who is guilty except insane is no less guilty than a defendant who suffers no mental illness. *See, e.g., Eubanks v. State*, 197 Ga. App. 731, 732, 399 S.E.2d 290, 291 (1990) (guilty but mentally ill; restitution ordered totaling \$3,145.56); *People v. Harrison*, 226 Ill. 2d 427, 436, 877 N.E.2d 432, 437 (2007) (“[A] defendant found guilty but mentally ill is ‘no less guilty than one who is guilty and not mentally ill; unlike insanity, a GBMI (guilty but mentally ill) finding or plea does not relieve an offender of criminal responsibility for his conduct.” (quoting *People v. Crews*, 122 Ill. 2d 266, 278, 522 N.E. 2d 1167, 119 Ill. Dec. 308 (1988); *Crawford v. State*, 770 N.E.2d 775, 777, 781-82 (2002) (defendant found guilty but mentally ill; restitution award of \$9,960.40 affirmed); *People v. Peach*, 174 Mich. App. 419, 421, 437 N.W.2d 9, 11 (1989) (affirming restitution award and verdict of guilty but mentally ill); *Com. v. Liebensperger*, 904 A.2d 40, 42 (Super. Ct. PA 2006) (affirming collateral challenge to negotiated plea of guilty but mentally ill plus restitution to two victims, one in the amount of \$16,014.15 and the other to an insurance carrier totaling \$223,771.77); *see also Survey of Select State Laws Governing the Availability of Restitution When a Defendant is Found or Pleads “Guilty But Insane” or “Guilty But Mentally Ill,”* NCVLI Victim Law Library (Nat’l Crime Victim Law Inst., Portland, Or.), Oct. 2022, available at [https://ncvli.org/wp-content/uploads/2022/11/Select-State-Survey-GBI-or-GBMI\\_Updated-10-31-22.pdf](https://ncvli.org/wp-content/uploads/2022/11/Select-State-Survey-GBI-or-GBMI_Updated-10-31-22.pdf).

advance this VBR right to establish and recover restitution for economic loss.<sup>6</sup> Never did Arizona voters or the legislature envision creating exceptions dependent on the state of mind of a criminal defendant and this Court should not now condone such an *ad hoc* exception. If *Heartfield* is not overruled, victims of crime in Arizona who suffer economic loss face the tragedy of disparate treatment of their fundamental VBR right to restitution based solely on a defendant's state of mind. Some victims would forever be foreclosed from an award of restitution not based on whether a crime occurred and economic loss suffered but instead based on whether the person who committed the crime was guilty or guilty except insane. Such a disparate outcome cannot stand.

## CONCLUSION

For the reasons set forth in this *amici* brief, in Petitioner's Petition for Review and Supplemental Brief, *amici* joins Petitioner in requesting that this Court overrule

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<sup>6</sup> The legislature recognized that extrinsic considerations such as the ability to pay have nothing to do with a victim's threshold right to recover total economic loss subject to an award of restitution and that the manner of payment of restitution only becomes a consideration after the Court awards restitution. *Compare* A.R.S. §13-804(C) ("The court shall not consider the economic circumstances of the defendant in determining the amount of restitution.") *with* A.R.S. §13-804(E) (after awarding restitution, the court "shall consider the economic circumstances of the defendant."). Presumably, while a defendant's mental health does not play a role in a victim's threshold right to recover an award of restitution pursuant to A.R.S. §13-603(C), mental health may nevertheless come into consideration when the court evaluates the appropriate manner of payment of restitution. *See* A.R.S. §13-804(E).

*Heartfield* and confirm that a victim of crime may present a claim for restitution for economic loss irrespective of whether a defendant has been adjudicated guilty except insane.

RESPECTFULLY SUBMITTED this 6<sup>th</sup> day of May, 2024.

/s/ Randall Udelman

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