

No. _____

In the Supreme Court of the United States

STANLEY P. BATES, *PETITIONER*,

v.

UNITED STATES OF AMERICA, *RESPONDENT*

**PETITION FOR WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

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QUESTION PRESENTED FOR REVIEW

Under *Gall v. United States*, 552 U.S. 38 (2007), courts of appeals must review all sentences under a deferential abuse-of-discretion standard. The first step of review requires that every federal criminal sentencing begin with a correctly calculated Guidelines range. While a miscalculated Guidelines range is considered a significant procedural error, *Gall* did not expressly define the standard of review courts of appeals should apply when reviewing the procedural reasonableness of a Guidelines calculation. Different standards of review applied to the interpretation of the Sentencing Guidelines result in the inconsistent application of sentencing enhancements and excessive punishment.

The question presented is: When reviewing the interpretation of the “position of trust” enhancement under Sentencing Guideline §3B1.3, does a court of appeals apply a de novo standard of review, as the majority of circuits require, or a clearly erroneous standard, as the Fifth Circuit applies?

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Petitioner Stanley P. Bates asks that a writ of certiorari issue to review the opinion and judgment entered by the United States Court of Appeals for the Fifth Circuit on March 3, 2020.

PARTIES TO THE PROCEEDING

The caption of this case names all parties to the proceeding in the court whose judgment is sought to be reviewed.

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OPINION BELOW

A copy of the opinion of the court of appeals, *United States v. Bates*, No. 18-50785 (5th Cir. March 3, 2019), is attached to this petition at Pet. App. A.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit were entered on March 3, 2020. On March 19, 2020, the Court extended the time within which to file a petition for writ of certiorari due on or after that date to 150 days after entry of judgment. *See* Sup. Ct. R. 13.1. The Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

UNITED STATES SENTENCING GUIDELINE INVOLVED

The question presented involves United States Sentencing Guideline §3B1.3, which provides that “[i]f the defendant abused a position of public or private trust, ..., in a manner that significantly facilitated the commission or concealment of the offense, increase by 2 levels.” *See* Pet. App. B.

STATEMENT

1. Petitioner Stanley P. Bates, along with Carlos I. Uresti and Gary L. Cain, were named in a 22-count indictment arising out of a failed business venture, Four Winds Logistics, LLC. Four Winds

was a Texas corporation created to buy and sell sand used in hydraulic fracking to produce oil. At the time of Four Winds' founding, fracking sand was in high demand throughout the country.

Four Winds raised capital from third-party investors. Four Winds would execute contracts with investors, styled as either joint venture agreements or memoranda of understanding. The contracts defined the narrow terms by which funds were to be used for the purchase and transportation of fracking sand, minus an agreed amount for administrative costs. The agreements also defined how the profits would be divided between Four Winds and the investors.

Four Winds' expenses exceeded its income, resulting in the misuse of investors' funds and a need for new investors to cover the company's financial shortfalls. The criminal conduct here involved material misrepresentations about the solvency of Four Winds and the status of investments, and the misuse of the invested funds.

Three people held ownership interests in Four Winds: Bates (51%), Shannon Smith (48%), and Uresti (1%). Bates was Four Winds' chief executive officer and primarily controlled its finances and expenditures. Four Winds paid Bates through direct draw, salary payments, and reimbursement of personal expenses. Bates

oversaw Laura Jacobs, who was Four Winds' comptroller and bookkeeper, and Eric Nelson, who prepared advertising and promotional materials for Four Winds. In separate cases, Smith, Jacobs, and Nelson were convicted of conspiracy to commit wire fraud, arising out of their conduct with Four Winds, and sentenced to 60 months' probation, 12 months and one day of imprisonment, and 48 months' probation, respectively.

In addition to his ownership interest, Uresti held several positions in relation to Four Winds. He served as its general legal counsel, for which he was paid a monthly retainer. He held himself out to investors as their investment broker—even though he was not registered with the Securities and Exchange Commission—and he acted as a third-party escrow agent over some of the investments using his law firm's IOLTA account.

Uresti, an attorney and Texas state senator, was living a lifestyle he could not afford. He wanted to ensure he was paid regardless of how Four Winds operated. Four Winds agreed to pay Uresti, through his company Turning Point Strategies, a 3% commission on each investment he secured, an initial profit share of 10% of every joint venture agreement attributed to his efforts for the first time investment, and a subsequent profit share of 20% for any subsequent increased investment. He also sought payment for acting

as the third-party escrow agent. These payments were in addition to his 1% ownership interest in Four Winds and the legal fees.

By May 2014, Uresti learned about Four Winds' need for investors and believed "there's millions to be made." He had been retained by Four Winds as legal counsel. But after Uresti learned that a potential investor did not trust Bates during a sales pitch, Uresti proposed that he take a more active role to recruit investors.

Almost immediately, Uresti began soliciting funds from Victim 1, Uresti's legal client and eventual lover. Uresti had previously induced her to give him \$25,000 based on material misrepresentations that the money was for an investment. Uresti, however, used Victim 1's money for personal and business purposes. Uresti told Victim 1 that her investment in Four Winds would obtain a better return than her previous \$25,000 investment, and he gave her legal advice about the Four Winds' investment opportunities. Uresti did not inform Victim 1 that he would obtain a commission and a percentage of the profits from any money she invested. Victim 1 was offered a 60/40 profit share, in Four Winds' favor. Uresti never informed Victim 1 that Four Winds normally split profits 50/50.

On May 26, 2014, Bates emailed Uresti a proof of funds letter indicating that, as of May 1, Four Winds' operating account balance was \$2,400,000.00. The actual balance was \$98,896.68. On

May 30, 2014, after meeting with Uresti, Bates told Nelson to alter the bank statement to reflect a balance of \$18,798,896.68. Bates emailed the altered bank statement to Uresti. Bates also asked Nelson to alter numbers on promotional materials to make the investment opportunities look more attractive to potential investors. Uresti forwarded the altered bank statement to Victim 1. Victim 1 ultimately signed a contract with Four Winds.

Uresti was also instrumental in recruiting Victims 2 and 3 to invest in Four Winds. Uresti assured them that he would act as an escrow agent for their funds, and he entered into a contract to act as an escrow agent for the investors' funds. To Victim 3, Uresti said that Four Winds would never have control over their money. He did not disclose to Victims 2 and 3 his commission fees or the profit sharing agreement he had with Four Winds. On June 9, 2014, Bates emailed an altered bank statement for Four Winds' operating account to Victims 2, 3, and 4, on which Uresti was copied, with the intention of inducing the investors to invest in Four Winds.

On June 16, 2014, \$800,000 of Victim 1's funds were deposited into a bank account designed for her investments by terms of the joint venture agreement with Four Winds. Bates transferred \$700,000 of those funds from Victim 1's account to the Four Winds'

operating account on June 23, 2014. Two days later, he issued a \$40,000 check from Four Winds as a personal loan to Uresti.

Victim 1 invested an additional \$100,000 on August 28, 2014. On the same day, Bates deposited the money into Four Winds' operating account. Instead of using Victim 1's funds in the manner outlined in the joint venture agreement, Victim 1's investments were used to pay Uresti, Bates, and other members of Four Winds, Four Winds' operating expenses, and "profits" to Victim 5, on his previous investment in Four Winds. Victim 1 was also paid "profits" from her own initial investments.

On November 13, 2014, Uresti transferred Victim 2 and 3's monies from his IOLTA account to Four Winds' bank, contrary to representations he made to them about how he would oversee their funds in escrow. Uresti also emailed an altered bank statement to Victim 1, which overinflated Four Winds' funds.

Gary Cain also lulled Victims 1, 2, and 3 with assurances that their investments were safe. Victim 1 was again provided a fake bank statement in March 2015. Victim 4's investments were used for Four Winds' operating expenses until it filed bankruptcy in May 2015. The total actual loss to five victims was \$6,345,441.

2. Uresti, Bates, and Cain were named in a 22-count indictment. Bates was charged in eight counts for conspiracy to commit

wire fraud, wire fraud, conspiracy to launder money, money laundering, and aiding and abetting securities fraud. Bates pleaded guilty to the charges in the indictment.

3. A probation officer prepared a revised presentence report using the 2016 Sentencing Guidelines. After identifying two groups of offenses, the officer used the guideline for fraud, U.S.S.G. §2B1.1, to calculate the total offense level. Under §2B1.1(a)(1), the base offense level was seven. Eighteen levels were added to account for the actual loss of \$6,345,441 to the five victims. U.S.S.G. §2B1.1(b)(1)(J).

The officer enhanced the offense level by two levels because the offense involved sophisticated means, §2B1.1(b)(10)(C); two levels because Victim 1 was a vulnerable victim, §3A1.1(b)(1); two levels because Bates abused a position of public or private trust in a manner that significantly facilitated the commission or concealment of the offense, §3B1.3; four levels for Bates's role as an organizer or leader of a criminal activity involving five or more participants, §3B1.1(a); and two levels for obstruction of justice, under §3C1.1, arising from false statements made during the Four Winds' bankruptcy proceedings.

Bates submitted 20 objections to factual characterizations in the presentence report, as well as legal objections to the enhancements for vulnerable victim, his role as a leader/organizer, obstruction of justice, denial of acceptance of responsibility, and abuse of a position of trust.

The district court adopted the factual statements in the presentence report to which there were no objections, and overruled the remaining factual disputes. The court also overruled the legal objections to the vulnerable victim enhancement, leadership role, obstruction of justice, and abuse of a position of trust. On the “position of trust” enhancement, the district court concluded that

Bates did make materially false representations and promises to each of the investors in order to get them to invest with assurances of how their money would be safe from misuse including the providing of joint venture agreements and escrow agreements with each of these investors immediately and nearly so Bates began misusing their funds for the personal use, his own personal use, and ignored the requirements set forth in the joint venture agreements and escrow agreements including the misuse of funds and failure to return the income from the sand sales to respective investors’ accounts.

The district court imposed a three-level reduction for acceptance of responsibility, and found that the total offense level was 34, yielding a Guidelines range of 151 to 188 months. The court imposed a near top-of-the-Guidelines sentence of 180 months on Counts Three, Seven, Twenty and Twenty-One, and 120 months

on Counts Eight through Ten, and Twelve, all to run concurrently. The court also imposed concurrent terms of three years' supervised release, a mandatory special assessment of \$800, and restitution in the amount of \$6,345,441.

4. On appeal, Bates argued that the district court procedurally erred when it applied a two-level "position of trust" enhancement under Guideline §3B1.3. The position Bates held in relation to the investors arose out of an arm's-length contract, not a fiduciary or personal trust relationship contemplated by the term "position of trust" under Guideline §3B1.3. By identifying the escrow agreements as an additional basis for the enhancement, the district court also erroneously imputed Uresti's "positions of trust" onto Bates. Bates identified an intra- and intercircuit split over the standard of review applied to the Guideline §3B1.3 enhancement and argued that, because the question of whether Bates held a "position of trust" presents a legal question, the appellate court should exercise *de novo* review.

The court of appeals, however, analyzed whether Bates held a "position of trust" as a fact question under a clearly erroneous standard of review. Pet. App. A at 2. Because Bates was the CEO of Four Winds, with managerial discretion and no oversight, the

Fifth Circuit held that he held a “position of trust” under §3B1.3. Pet. App. A at 3.

REASONS FOR GRANTING THE WRIT

1. When reviewing whether a defendant held a “position of trust,” which triggers a two-level offense enhancement under U.S.S.G. §3B1.3, the Fifth Circuit Court of Appeals uses a clear error standard of review. This minority approach makes the foundational question—whether a “position of trust” exists—a fact question, inviting inconsistencies in the interpretation and application of the guideline and leaving the term without meaningful, definitional boundaries. Consequently, a defendant is subject to a higher Guidelines range, and likely a higher sentence, depending on the jurisdiction of his conviction. The Court should grant certiorari to resolve a circuit split and clarify that, consistent with a majority of courts of appeals, the proper standard of review for determining the procedural reasonableness of a Guidelines calculation, based on the interpretation of a guideline term, is *de novo*.

2. A properly calculated Guidelines range is both “the starting point” for any sentence, *Gall*, 552 U.S. at 38, and “the lodestar,” *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1346 (2016). A court that miscalculates a Guidelines range commits a “significant procedural error.” *Gall*, 552 U.S. at 51. And because the Guidelines often act as an anchor for the court’s sentencing decision, a miscalculated Guidelines range creates a significant risk that a higher sentence is imposed by mistake. *Peugh v. United States*, 569 U.S.

530, 541–42 (2013). While there has been much litigation over how a procedural Guidelines error is addressed on plain error review, *see Rosales-Mireles v. United States*, 138 S. Ct. 1897 (2018), there is no express guidance for what standard of review courts of appeals apply to the procedural reasonableness of a Guidelines calculation.

When Congress implemented the mandatory Sentencing Guidelines in 1987, it authorized and defined a scope of appellate review of federal criminal sentences. 18 U.S.C. § 3742(e). In *Booker*, the Court invalidated two statutory provisions, including 18 U.S.C. § 3742(e), which directed appellate courts to apply a de novo standard of review to departures from the Guidelines. *United States v. Booker*, 543 U.S. 220, 260–62 (2005). Instead, the Guidelines are advisory and appellate review of sentencing decisions is limited to determining whether they are “reasonable.” *Id.*; *see also Rita v. United States*, 551 U.S. 338, 361–62 (2007). In *Gall*, the Court further clarified that, for all federal criminal sentences, “the appellate court must review the sentence under an abuse-of-discretion standard.” *Gall v. United States*, 552 U.S. 38, 50 (2007).

The Court instructed that the first step in that review is to ensure that the district court committed no significant procedural er-

ror. *Id.* at 51. Procedural errors include, among other things, incorrectly calculating the Guidelines range. *Id.* *Gall's* initial articulation of the standard of review—that “the appellate court must review the sentence under an abuse-of-discretion standard”—suggests that both procedural and substantive elements of a sentence are reviewed under the abuse-of-discretion standard. *Id.* at 51. Later in the same paragraph, however, following a discussion of procedural errors for which no standard of review is mentioned, the Court states that “[a]ssuming that the district court’s sentencing decision is procedurally sound, the appellate court should then consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard.” *Id.* The Court explicitly applies the abuse-of-discretion standard of review only to the substantive reasonableness of the sentence. It therefore appears that the opinion leaves untouched the preexisting standards of review for questions of procedural reasonableness. *See United States v. Vickers*, 528 F.3d 1116, 1122 (8th Cir. 2008) (Shepard, J., concurring) (stating that “the Supreme Court did not provide [appellate

courts] with one key piece of the sentencing puzzle: what to do with a significant procedural error?”).¹

The Guidelines are complex, and a uniform approach to how courts of appeals review the procedural reasonableness of a Guidelines calculation is consistent with their overarching purpose: to achieve “uniformity in sentencing … imposed by different federal courts for similar criminal conduct, as well as proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of different severity.” *Rita*, 551 U.S. at 349; *see also* U.S.S.G. Ch.1, Pt.A(3), p.s. (2016). Before the Guidelines, “punishments for identical actual cases could range from three years to twenty years imprisonment,” even within the same circuit. Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 5 (1988). The Guidelines sought to remedy that by “providing certainty and fairness in sentencing and reducing unwarranted sentence disparities.” 28 U.S.C. § 994(f); *see also* 28 U.S.C.

¹ There also appears to be a dispute between Circuits as to whether the “due deference” provision of 18 U.S.C. § 3742(e) survived *Booker*. See, e.g., *United States v. Richards*, 674 F.3d 215, 219 n.2 (3d Cir. 2012) (holding that § 3742(e)’s “due deference” provision survives *Booker*); *United States v. Lopez-Urbina*, 434 F.3d 750, 763 n.1 (5th Cir. 2005) (holding that it does not).

§ 991(b); 18 U.S.C. § 3553(a)(6) (directing sentencing court to consider “the need to avoid unwarranted disparities among defendants with similar records who have been found guilty of similar conduct”). Fairness and certainty are achieved with a uniform approach to reviewing a district court’s Guidelines calculation to determine if there is error.

The detrimental and inconsistent effect that different standards of review can have on the procedural reasonableness of a sentence is well illustrated by U.S.S.G. §3B1.3. Under U.S.S.G. §3B1.3, a defendant is given a two-level enhancement to their advisory sentencing guideline range if the defendant abused a “position of trust.” The application notes to §3B1.3 further define a position of public or private trust as “characterized by professional or managerial discretion (i.e., substantial discretionary judgment that is ordinarily given considerable deference). Persons holding such positions ordinarily are subject to significantly less supervision than employees whose responsibilities are primarily non-discretionary in nature.” U.S.S.G. §3B1.3 appl. n.1. The note then provides three examples of an abuse of trust: 1) an attorney who embezzles a client’s funds; 2) a bank executive’s fraudulent loan scheme; and 3) a physician’s sexual abuse of a patient. *Id.* In each

example, the defendant was either in a position of personal trust or had a fiduciary or fiduciary-like relationship with their victims.

The Second, Third, Fourth, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits consider whether a defendant holds a “position of trust” under §3B1.3 as a legal question reviewed de novo.² In interpreting the term, “position of trust,” and the guideline’s commentary,³ the majority of circuits understand a “position of trust” to be one that involves a fiduciary or fiduciary-like relationship with the victim. *See, e.g., United States v. Williams*, 527 F.3d 1235, 1250–52 (11th Cir. 2008) (explaining that courts evaluate abuse-of-trust enhancement “by assessing the defendant’s relationship to the victim of the crime” and reversing enhancement where “there is no evidence that [the victim] entrusted [the defendant] with discretionary authority or placed a special trust, akin to that of a fiduciary, in [the defendant]”); *United States v. Huggins*, 844 F.3d 118, 124 (2d Cir. 2016) (“a ‘position of trust’ is held by one who was

² See *United States v. Huggins*, 844 F.3d 118, 124 (2d Cir. 2016); *United States v. Douglas*, 885 F.3d 124, 129 (3d Cir. 2018); *United States v. Wolf*, 860 F.3d 175, 196 (4th Cir. 2017); *United States v. Sweet*, 630 F.3d 477, 480 (6th Cir. 2011); *United States v. Hayes*, 574 F.3d 460, 478 (8th Cir. 2009); *United States v. Adebimpe*, 819 F.3d 1212, 1217 (9th Cir. 2016); *United States v. Garrison*, 133 F.3d 831, 837 (11th Cir. 1998).

³ See *Stinson v. United States*, 508 U.S. 36, 42–43 (1993) (holding that Sentencing Guidelines commentary, which is interpretive and instructive to application of a guideline, is binding on federal courts.)

accorded discretion by the victim and abused a position of fiduciary or quasi-fiduciary status,” to be viewed from the perspective of the offense victims); *United States v. Douglas*, 885 F.3d 124, 133 (3d Cir. 2018) (interpreting the guideline commentary for “position of trust” to require a freedom from supervision based on “(1) fiduciary or fiduciary-like relationship [such as an attorney serving as a guardian or a bank executive’s fraudulent loan scheme], or (2) an authoritative status that would lead his actions or judgment to be presumptively accepted [such as a sexual assault of a patient by a physician].”); *United States v. Wolf*, 860 F.3d 175, 200 (4th Cir. 2017) (interpreting abuse-of-trust enhancement to apply when a victim’s trust is based on the defendant’s unique fiduciary or personal trust relationship with the victim); *United States v. Ragland*, 72 F.3d 500, 502–03 (6th Cir. 1999) (interpreting “position of public or private trust” as a term of art, appropriating some of the aspects of the legal concept of a trustee or fiduciary); *United States v. Fuchs*, 635 F.3d 929, 935 (7th Cir. 2011) (interpreting guideline §3B1.3 as requiring a special trust and reliance by the victim); *United States v. Hayes*, 574 F.3d 460, 478–79 (8th Cir. 2009) (interpreting “position of trust” as a term of art, “appropriating some of the aspects of the legal concept of a trustee or fiduciary” and a

showing that the victim place a special trust in the defendant beyond ordinary reliance on the defendant's integrity and honesty that underlies every fraud).

The need for consistent interpretation of the term is especially important in cases involving fraud and arm's-length transactions, where the concept of misplaced trust is inherent in a fraud offense, so that district courts are not overly broad in applying the enhancement. *See United States v. Ghertler*, F.3d 1256, 1264 (11th Cir. 2010) (holding that defendant, who impersonated high-level company officials, did not occupy a position of trust with respect to the victims). Consequently, “a purely arm's-length contractual relationship between the defendant and the victims does not create a position of trust.” *Huggins*, 844 F.3d at 125; *see also Wolf*, 860 F.3d at 200 (same); *United States v. Trice*, 245 F.3d 1041, 1042 (8th Cir. 2001) (same); *United States v. Garrison*, 133 F.3d 831, 839 (11th Cir. 1998) (same).

3. Contrary to the majority of circuits, the Fifth Circuit did not apply de novo review to the question of whether Bates held a “position of trust.” Instead, it examined the preserved objection for

clear error, making “position of trust” a factual determination.⁴ Pet. App. A at 2. Noting that Bates had not rebutted facts in the presentence report, it affirmed the district court’s enhancement because Bates was the CEO of Four Winds and consequently had managerial discretion and oversight. In so doing, the court rejected Bates’s argument that in order to apply, the enhancement required some type of special relationship that the victim relied upon, or something more than an arm’s-length contract induced by fraud.

It is unlikely that, had Bates been sentenced in one of the circuits that reviews this question de novo, he would have received the Guidelines enhancement. Under de novo review, the facts articulated by the district court to support its application of the enhancement do not meet the legal interpretation of a “position of trust.” Bates did not have a fiduciary or fiduciary-like relationship

⁴ The First and Tenth Circuits also consider the question of whether a defendant holds a “position of trust” under §3B1.3 to be a factual issue reviewed for clear error. *See United States v. Sicher*, 576 F.3d 64, 70, 72 (1st Cir. 2009) (“the relevant inquiry ... is whether a person *in fact* occupied a position of trust”); *United States v. Merriman*, 647 F.3d 1002, 1005 (10th Cir. 2011) (“Whether a defendant occupied a position of trust under Section 3B1.3 is generally a factual matter that we review only for clear error.”).

with the victims.⁵ The fraud was based on a simplistic, arm's-length contract that set forth profit sharing percentages from the purchase and sale of sand.

4. The Guidelines play a fundamental role in determining criminal sentences and protect against defendants spending unnecessary time in prison. As both the “the starting point” for any sentence, *Gall*, 552 U.S. at 49, and “the lodestar,” *Molina-Martinez*, 136 S. Ct. at 1346, the procedural correctness of a Guidelines calculation is the essence of federal sentence. District judges clearly follow those guideposts, as almost every sentence imposed nationwide falls within or below the Guidelines range. There should be a uniform standard of review by which courts of appeals review the procedural reasonableness of a Guidelines calculation and the district court’s interpretation and application of the Guidelines. Because the Fifth Circuit’s clear error standard of review applied to whether a defendant holds a “position of trust” under

⁵ The district court erroneously stated that the enhancement was also based on the escrow agreements. But Bates never held an escrow relationship with any of the victims. This was either a factual error or a legal error, where the district court improperly imputed Uresti’s “position of trust” to Bates. *See United States v. Moore*, 29 F.3d 175, 177–78 (4th Cir. 1994) (rejecting the application of §3B1.3 based on relevant conduct principles, holding that the status of a coconspirator’s “position of trust” could not be imputed to a defendant under §1B1.3(a)(1)(B)).

U.S.S.G. §3B1.3 conflicts with a majority of circuits, contributing to a lack of uniformity in the interpretation and application of the Guidelines, this Court should grant certiorari.

CONCLUSION

FOR THESE REASONS, Bates asks this Honorable Court to grant a writ of certiorari, vacate the opinion of the court of appeals, and remand for further proceedings.

Respectfully submitted.

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