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SC Court of Appeals

The State of South Carolina
In the Court of Appeals

APPEAL FROM SUMTER COUNTY

Honorable R. Kirk Griffin, Circuit Court Judge
Appellate Case No. 2022-001444

The State ..... Respondent

v.

Brittany Martin ..... Appellant

FINAL REPLY BRIEF OF APPELLANT

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INTRODUCTION

Nowhere in its twenty-page brief does the State identify the specific conduct that resulted in Ms. Martin's conviction for BOPHAN. Rather, in a *post hoc* attempt to sustain Ms. Martin's conviction, the State cobbles together disparate snapshots from a five-day protest, none of which involved injury or destruction of property. The State's brief does, however, reveal exactly why Sumter County officials prosecuted Ms. Martin: because she was not "polite" and because she "attempted to spread" ideas they disagree with. Respondent's Initial Brief at 8, 3 [hereinafter RIB]; *see also* Appellant's Initial Brief at 8–9 [hereinafter AIB]. But the First Amendment protects even "vehement, caustic, and . . . unpleasantly sharp attacks on government and public officials," *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964), that "inflict great pain," *Snyder v. Phelps*, 562 U.S. 443, 460–61 (2011), are "vituperative, abusive, and inexact," *Watts v. United States*, 394 U.S. 705, 708 (1969), or "stir[] people to anger, invite[] public dispute, or br[ing] about a condition of unrest," *Edwards v. South Carolina*, 372 U.S. 229, 238 (1963) (citation and quotation marks omitted). Because Ms. Martin is now serving a four-year prison sentence for conduct protected by the First Amendment, her conviction should be vacated.

ARGUMENT

I. Martin's conviction for BOPHAN violates the First Amendment and must be vacated.

"[I]n cases raising First Amendment issues . . . an appellate court has an obligation to make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression." *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984). This is particularly important when, as here, the conviction did not "result[]

from the evenhanded application of a precise and narrowly drawn regulatory statute evincing a legislative judgment that certain specific conduct be limited or proscribed." *Edwards*, 372 U.S. at 237. If Ms. Martin "had been convicted upon evidence that [she] had violated a law regulating traffic, or had disobeyed a law reasonably limiting the periods [a certain location was] open to the public, this would be a different case." *Id.* But that is not what happened: rather, Ms. Martin was "convicted of an offense so generalized as to be, in the words of the South Carolina Supreme Court, 'not susceptible of exact definition.'" *Id.* at 237. In this case, then, this Court's obligation to conduct an independent review is paramount.

A. Independent review to protect the First Amendment is distinct from review to ensure the sufficiency of the evidence.

A sufficiency of the evidence challenge asks whether, when "view[ing] the evidence and all reasonable inferences in the light most favorable to the State," there is "*any* direct evidence or substantial circumstantial evidence reasonably tending to prove the guilt of the accused." *See, e.g.*, *State v. Butler*, 407 S.C. 376, 380, 755 S.E.2d 457, 460 (2014) (quoting *State v. Weston*, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006)).

The independent review demanded by the First Amendment, on the other hand, is more searching. Independent review asks whether "the judgment . . . constitute[d] a forbidden intrusion on the field of free expression"—in other words, whether the defendant was convicted for expression protected by the First Amendment. *Bose*, 466 U.S. at 499. To fulfill its duty, a reviewing court must first identify the specific conduct that gave rise to the conviction and *then* determine whether *that* conduct is protected by the First Amendment. Both steps are necessary to ensure that the trier of fact did not impermissibly "intru[de] on the field of free expression." *Id.*

B. This issue is properly before the court.

The State's argument that Appellant failed to preserve this issue is unavailing. To invoke an appellate court's obligation to conduct an independent review, a party must do two things: raise a First Amendment defense and challenge the sufficiency of the evidence. *See In re George T*, 93 P.3d 1007, 1015 (Cal. 2004) ("[A] reviewing court should make an independent examination of the record . . . when a defendant raises a plausible First Amendment defense[.]"); *Ryan v. Brooks*, 634 F.2d 726, 735 (4th Cir. 1980) ("The defendants have properly challenged the sufficiency of the evidence, and on that basis we have followed the Supreme Court's lead in First Amendment cases and have conducted an independent examination of the record[.]"). Those two acts, in tandem, trigger the court's duty.

Here, Ms. Martin did both. Her defense centered entirely around the First Amendment, *see, e.g.*, R. p. 546, lines 9-16, and she challenged the sufficiency of the State's evidence in her Motion to Dismiss, R. p. 541, lines 12-15. In arguing her motion after the conclusion of the evidence, Appellant maintained that "the State has not produced any evidence that Ms. Martin has participated in any kind of high and aggravated activities as required." R. p. 541, lines 12-15. Importantly, the trial court construed Appellant's argument as a challenge to the sufficiency of the evidence and ruled accordingly. *See* R. p. 544, lines 23-25 ("evidence has been presented that the jury could conclude would make this high and aggravated."). Appellant's First Amendment defense and argument on the sufficiency of the evidence preserved this Court's obligation to independently review the record.

C. Because the State did not clearly define what conduct supported Ms. Martin's conviction, this Court is unable to ensure "the judgment d[id] not constitute a forbidden intrusion on the field of free expression."

The State took a blunderbuss approach to prosecuting Ms. Martin for BOPHAN. The indictment alleged that Ms. Martin engaged in five days of protests

but declined to specify any *particular* conduct that constituted BOPHAN. At trial, the State again refused to point the jury to *specific* act(s) that satisfied the elements of BOPHAN. Instead, the solicitor merely urged the jury to simply "use its common sense" to answer: "Did [Ms. Martin] breach the peace of our community?" R. p. 568, lines 2-13 ("[T]hat's all we have to prove, ladies and gentlemen."). Now on appeal, the State's brief again fails to identify the particular conduct that constituted BOPHAN, instead suggesting various distinct moments from a five-day-long period during which the offense might have committed, such as by interfering with traffic, threatening officers, "confronting officers in the middle of gas station parking lots," or "caus[ing] harm to businesses." RIB 7–9. But without knowing exactly what conduct was punished, it is impossible for this Court to guarantee that Ms. Martin's conviction "d[id] not constitute a forbidden intrusion on the field of free expression." *See supra*, Part I.A. Therefore, Ms. Martin's conviction cannot withstand the scrutiny of independent review.

D. Independent examination of the record, to the degree it is possible, reveals Appellant's conviction violated the First Amendment.[1]

Although the State fails to identify the specific conduct underlying Ms. Martin's BOPHAN conviction, the Court can still independently evaluate the various moments the State suggests. None of those moments—if they were, in fact, what Ms. Martin was convicted for—can support a lawful conviction for BOPHAN.

First, the Supreme Court has clearly established that "streets . . . are so historically associated with the exercise of First Amendment rights that access to them for the purpose of exercising such rights cannot be constitutionally denied broadly and absolutely." *Amalgamated Food Emp. Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 315 (1968), *abrogated on other grounds by Hudgens v.*

[1] The State does not refute the Court's obligation to conduct an independent review of the record when the issue is properly preserved.

NLRB, 424 U.S. 507, 517–18 (1976); *see also, e.g.*, *United Food & Com. Workers Union Local 442 v. City of Valdosta*, 861 F. Supp. 1570, 1581 (M.D. Ga. 1994). Therefore, Ms. Martin's presence in the street did not, by itself, remove her conduct from the protection of the First Amendment.

Additionally, only expression "likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest" may be punished. *Edwards* 372 U.S. at 237 (quoting *Terminiello*, 337 U.S. at 4–5). Ms. Martin's speech and conduct fell outside that narrow category of unprotected expression. After hearing all the evidence, the jury failed to convict Ms. Martin of Threatening a Public Official or Instigating a Riot, R. p. 636, lines 4-21, p. 637, lines 23-25, finding that Ms. Martin's speech and conduct did not constitute true threats, fighting words, or incitement. Given that the jury could not unanimously agree that Ms. Martin uttered threats or engaged in incitement, the State cannot backfill its BOPHAN record with those allegations.

In its effort to carve out instances of unprotected conduct, the State attempts to contrast the Ms. Martin with the protesters in *Edwards v. South Carolina*, 372 U.S. 229 (1963). But when South Carolina was defending the *Edwards* convictions, it characterized those protesters in terms nearly identical to those used by the State here. Although the Supreme Court in *Edwards* ultimately declared that the defendants' conduct was "orderly" and not causing "obstruction," 372 U.S. at 231, the State complained in its briefing that "the petitioners took no thought of the disruption" and "refused to obey the order" to desist and disperse. Brief for Respondent, *Edwards v. South Carolina*, 372 U.S. 229 (1963) (No. 86), 1962 WL 115493, at *6, 3. The State described the protesters' conduct as a "harangue," "boisterous," "disrupti[ve]," "extremely disorderly," and an "imminent danger [to] further disruption of the public peace." *Id.* at *3, 7, 6, 11, 3. The State claimed that the protest caused a "serious blockage of and hindrance to vehicular and pedestrian

traffic" and create[d] the clear and present danger of the substantive evils a state has a right to prevent[.]" *Id.* at *3–4, 11. The State claimed also that the protest in *Edwards* was "*more serious* than that which was involved in *Feiner v. New York*, 340 U.S. 315," and argued that "[t]he words of the speaker [in *Feiner*] undertaking 'incitement to riot' seem less an actual or threatened breach of the public peace than the boisterous stamping of feet, shouting, and loud singing of the petitioners here when they were instructed to disperse." *Id.* at *4, 5 (emphasis added). Just as the Supreme Court rejected the State's characterization of the *Edwards* protest,[2] this Court should reject the State's similar attempts to mischaracterize Appellant's protest as anything other than nondestructive, nonviolent expression protected by the First Amendment.

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[2] Similar attempts to mischaracterize protests were rejected in other Civil Rights-era cases involving prosecutions of protestors for breach of the peace. In *Barr*, the State claimed that the defendants' actions—which the Supreme Court later characterized as "polite, quiet, and peaceful," *Barr v. City of Columbia*, 378 U.S. 146, 150 (1964)—created the "obvious result" of "incit[ing] violence, or an act or conduct 'likely to produce violence[.]'" Brief for Respondent City of Columbia at 33, *Barr v. City of Columbia*, 378 U.S. 146 (1964) (No. 10).

Similarly, in *Fields*, the State claimed that the protest "simply was not peaceful" and created "a clear and present danger of riot, disorder, interference with traffic upon the public streets, and other immediate threats to public safety." Brief in Opposition at 2–3, *Fields v. South Carolina*, 375 U.S. 44 (1963) (No. 335). The Supreme Court summarily reversed the convictions. *Fields v. South Carolina*, 375 U.S. 44, 44 (1963) (citing *Edwards v. South Carolina*, 372 U.S. 229 (1963)).

Likewise, in *Henry*, the State claimed that "25 to 30 minutes" of "loud and boisterous" singing created "a clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety." Brief in Opposition at 2, *Henry v. City of Rock Hill*, 376 U.S. 776 (1964) (No. 954). The Supreme Court reversed the convictions, holding that the defendants "were engaged in the 'peaceful expression of unpopular views.'" *Henry v. City of Rock Hill*, 376 U.S. 776, 777 (1964) (quoting *Edwards*, 372 U.S. at 237).

II. Martin's conviction for BOPHAN must be reversed because the trial court failed to instruct the jury about her First Amendment defense.

The instructional error permitted the jury to convict Ms. Martin for expression protected by the First Amendment.

A. This issue was properly preserved for appellate review.

Clear precedent precludes any argument that the instructional error was not preserved for review. Courts must "approach issue preservation rules with a practical eye and not in a rigid, hyper-technical manner." *Herron v. Century BMW*, 395 S.C. 461, 470, 719 S.E.2d 640, 644 (2011); *see also State v. Johnson*, 439 S.C. 331, 341, 887 S.E.2d 127, 132 (2023) (applying *Herron*'s approach in the criminal context). In that vein, "where a party requests a jury charge and, after opportunity for discussion, the trial judge declines the charge, it is unnecessary, to preserve the point on appeal, to renew the request at conclusion of the court's instructions." *State v. Johnson*, 33 S.C. 62, 64 n.1, 508 S.E.2d 29, 30 n.1 (1998); *see also State v. Bryant*, 391 S.C. 225, 231 n.3, 705 S.E.2d 465, 469 n.3 (Ct. App. 2010) ("While trial counsel did not thereafter except to the charge as given, the matter is still preserved for our review."); *State v. Hatcher*, 2008 WL 9841517, at *3 (Ct. App. 2008).

This year, the Supreme Court reaffirmed this rule in *State v. Johnson*, 439 S.C. 331, 887 S.E.2d 127 (2023). In *Johnson*, the defendant challenged the admission of certain evidence. *Id.* at 336, 129. In response, the prosecution suggested the court offer a limiting instruction, and defense counsel said, "certainly if you allow all this stuff in, then certainly I would request a charge." *Id.* At the time, the court took the issue under advisement. *Id.* The court later decided against a limiting instruction, and "[w]hen the trial court asked if either party objected to the charge, [defense counsel] replied he did not." *Id.* at 337, 129–30. Nevertheless,

because defense counsel initially requested the instruction, the Supreme Court held that the issue was preserved. *Id*. at 340–41, 131–32.

At Ms. Martin's trial, defense counsel requested that the court instruct the jury on the First Amendment's protections regarding each offense, including BOPHAN. R. pp. 25, 29-30, 31-33; *see also* AIB at 21–22; R. p. 546, lines 9-16, p. 548, line 24-p. 549, line 3, p. 549, lines 10-14. The trial court ultimately instructed the jury regarding First Amendment principles for the Instigating and Threatening a Public Official counts but not for BOPHAN. R. pp. 619-23. Appellant's case, then, is nearly identical to that decided by the Supreme Court this year in *Johnson*. Appellant, like the defendant in *Johnson*, requested that a certain instruction be given.[3] Then, the trial court, like in *Johnson*, decided not to give the requested instruction. Here, like in *Johnson*, the issue was preserved for appellate review.

The two cases relied upon by the State—*State v. Avery*, 333 S.C. 284, 509 S.E.2d 476 (1998), and *State v. Ford*, 334 S.C. 444, 513 S.E.2d 385 (Ct. App. 1999), RIB at 11—are inapposite. The State contends that *Avery* requires "when an instruction as given is inadequate, a party must object at the completion of the instructions in order to preserve the issue for review." RIB at 11. But in *Avery*, the court determined that no objection ever occurred, not that an objection occurred at the improper time. 333 S.C. at 296, 509 S.E.2d at 483 ("Although appellant originally suggested the jury could return inconsistent verdicts on armed robbery and involuntary manslaughter, *he did not object* to the trial judge's initial or supplemental instructions regarding armed robbery and involuntary manslaughter.

[3] Without any support, the State contends that Appellant's proposed instruction "d[id] not provide the discussion regarding the First Amendment in a manner consistent with an appropriate jury instruction." RIB at 11. Setting aside the absence of any support in statute or case law, this Court should reject that argument because "issue preservation rules" must be applied "with a practical eye and not in a rigid, hyper-technical manner." *Herron*, 395 S.C. at 470, 719 S.E.2d at 644.

Accordingly, this issue is not preserved for appeal.") (emphasis added). Likewise, in *Ford*, the court held that the defendant "*never objected* to the admission of this testimony. As such, the issue is not preserved for appellate review." 334 S.C. at 453–54, 513 S.E.2d at 390 (emphasis added). Unlike *Avery* and *Ford*, in which the defendant did not raise the issue later presented on appeal, Ms. Martin's request for an instruction adequately presented the issue to the trial court to allow for full consideration.

B. Reversal is warranted because the instructions were erroneous and prejudicial.

Ms. Martin's conviction must be reversed because the "trial judge's refusal to give [the] requested jury charge" was "both erroneous and prejudicial to the defendant." *State v. Burkhart*, 350 S.C. 252, 263, 565 S.E.2d 298, 304 (2002).

1. The instructions, when taken as a whole, were erroneous.

In its haste to defend Ms. Martin's conviction, the State woefully misstates the record. The trial court did not, as the State claims on appeal, "define[] the elements of the three offenses" and then "explain[] to the jury the impact of the First Amendment and its protections of speech." RIB at 12. The jury did not receive a generally applicable First Amendment instruction. Rather, the trial court handled each offense—including its uniquely applicable First Amendment concerns—separately.

The sequence of the court's instructions is important. First, the court instructed the jury on the elements of BOPHAN. R. pp. 619-20. This instruction did not discuss any First Amendment protections available to Ms. Martin. *Id.* Next, the court instructed the jury on the Instigating a Riot charge. R. p. 620, lines 23-25, p. 621, lines 8-10. On that charge (unlike on BOPHAN), the court twice instructed the jury that the offense "must not be construed to prevent peaceable assembling of

persons for lawful purposes or protest or petition." R. p. 620, lines 23-25, p. 621, lines 8-10. Last, the court instructed the jury on the elements of Threatening a Public Official. R. pp. 622-23. In describing that offense (again, unlike on BOPHAN), the court explained the specific First Amendment protections that applied to that charge. R. pp. 622-23 ("The First Amendment protects a significant amount of verbal criticism in challenge directed at police officers. The fighting words exception may require narrow application in cases involving words addressed to a police officer because a properly trained officer may be reasonable expected to exercise a higher degree of restraint than the average citizen.").

The structure of the jury instructions, taken together with the court's admonition to consider "each charge separately on the evidence and law applicable to it uninfluenced by . . . any other charges," R. p. 612, lines 20-24, left no ambiguity. Ms. Martin's jury was told *not* to consider her First Amendment defense to BOPHAN. That was error.

2. The trial court's instructional error was not harmless beyond a reasonable doubt.

"When considering whether an error with respect to a jury instruction was harmless, we must determine beyond a reasonable doubt that the error complained of did not contribute to the verdict." *State v. Burdette*, 427 S.C. 490, 496, 832 S.E.2d 575, 578 (2019) (internal quotation marks and citation omitted). "In making a harmless error analysis, our inquiry is not what the verdict would have been had the jury been given the correct charge, but whether the erroneous charge contributed to the verdict rendered." *Id*. (citation omitted).

Here, the prejudice is obvious. Ms. Martin's First Amendment defense was "the sole issue in this case." *State v. Burkhart*, 350 S.C. 252, 263–64, 565 S.E.2d 298, 304 (2002) (reversing prejudicial instructional error). Moreover, BOPHAN was both the only charge that did not carry a First Amendment instruction, *supra* Part

II.B, and the only charge for which the jury returned a conviction. Based on that record, the court's instructional error very likely contributed to the verdict and cannot be ruled harmless beyond a reasonable doubt.[4] Reversal is therefore required.

III. Martin's four-year prison sentence for nonviolent and nondestructive conduct is grossly disproportionate and violates the Eighth Amendment.

The comparison of Ms. Martin's crime to her sentence gives rise to an inference of gross disproportionality, and comparison to other sentences highlights that disproportionality. "[I]n analyzing proportionality under the Eight Amendment outside the capital context, South Carolina courts shall first determine whether a comparison between the sentence and the crime committed gives rise to an inference of gross disproportionality." *State v. Harrison*, 402 S.C. 288, 299–300, 741 S.E.2d 727, 733 (2013). If such an inference is present, "intrajurisdictional and interjurisdictional analysis is appropriate. Courts may then look to whether more serious crimes carry the same penalty, or more serious penalties, and the sentences imposed for commission of the same crime in other jurisdictions." *Id*.

A. Ms. Martin's criminal history does not undermine the inference of gross disproportionality.

First, under the language of *Harrison*, the gross proportionality inference is limited to consideration of "the *sentence* and the *crime committed*," 402 S.C. at 300, 741 S.E.2d at 733 (emphasis added), and does not permit consideration of external factors such as criminal history. Under that framework, comparison of Ms. Martin's offense to her four-year prison sentence gives rise to an inference of gross

[4] Notably, the State argues only that the instructions were proper and offers no rebuttal to Ms. Martin's contention that the instructions prejudiced her.

disproportionality because Ms. Martin never caused injury to another person, and she never destroyed any property.

But even if this Court takes a more expansive view of *Harrison* and considers factors other than the crime itself and the resulting sentence, Ms. Martin's criminal history does not undermine an inference of gross proportionality. The State argues that Ms. Martin's "sentence was imposed, in significant part, based on Appellant's prior criminal record and the inability of probation to prevent her continued criminal behavior."[5] RIB at 17. Essentially, the State argues, Ms. Martin should receive a sentence more severe than probation because probation has failed to deter Ms. Martin in the past. But even if that's true, there is a massive and unexplainable gulf between a would-be probationary sentence and the four-year prison term Ms. Martin ultimately received. That Ms. Martin has a mildly checkered past does not explain or justify a prison term for nonviolent and nondestructive conduct that well exceeds the next longest known sentence for BOPHAN. To argue that Ms. Martin's shoplifting convictions justify a thirty-three percent longer sentence than the one imposed on a USC football fan that *killed* another person is more than wrong, it is nonsensical. *See* RIB at 18–19.

Beyond that, the state's deterrence-based argument also rests on a faulty assumption: that Ms. Martin knew her actions in this case were criminal and acted anyways, in spite of prior punishment. Deterrence occurs when an individual is presented with a choice: act illegally, or not. If that individual is "deterred" (by a previous punishment or the threat of a future punishment), that individual *chooses*

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[5] The State misstated Ms. Martin's criminal record at trial and in response to her motion for sentence reconsideration. The shoplifting charges that appear on Ms. Martin's Georgia and South Carolina records reflect a single probationary sentence from a Georgia shoplifting offense that was transferred to South Carolina. Even more egregiously, the Wisconsin "conviction" for possession of a firearm is no conviction at all—the charge resulted in an acquittal.

not to act illegally. But here, because BOPHAN is extraordinarily—likely unconstitutionally—vague, *see* AIB at 23–28, neither Ms. Martin nor anyone else had adequate notice of what conduct is prohibited. Without that notice, Ms. Martin could not *choose* to either commit BOPHAN or be deterred from committing BOPHAN—because she could not know what BOPHAN actually prohibits. Deterrence (or the lack thereof), then, was not a factor in this case and cannot ameliorate the disproportionality of a years-long prison sentence for nonviolent and nondestructive conduct.

B. The State did not address the compelling comparative analysis offered by Appellant.

A comparison of Ms. Martin's four-year prison term to other sentences, both for BOPHAN and for other crimes, reveals that Ms. Martin's case is one of the "rare instances" where a sentence violated the Eighth Amendment. Counsel for Appellant has not found—and the State has not offered—a single BOPHAN conviction with a sentence equal or greater to Ms. Martin's. *See* AIB at 35. Even in *State v. Simms*, 412 S.C. 590, 774 S.E.2d 445 (2015), which involved physical violence resulting in a death, the defendant received less prison time than Ms. Martin. *Id*. at 593, 446. Additionally, many other offenses more severe than BOPHAN carry less or comparable prison time to Ms. Martin's sentence. *See* AIB at 34. The State offered no rebuttal to Ms. Martin's arguments on this point.

CONCLUSION

Over five days in Sumter, Ms. Martin protested a grave injustice. She expressed her grief and anguish in a way that Sumter County officials disapproved of, *see* AIB at 8–9, but she did not cause any injury or destroy any property. Nevertheless, Ms. Martin is now serving a four-year prison sentence—likely the longest ever imposed for a BOPHAN conviction—because of her "speech on public

issues," which "occupies the highest rung of the hierarchy of First Amendment values" and "is entitled to special protection." *Connick v. Myers*, 461 U.S. 138, 145 (1983) (quotation marks and citations omitted). This Court should grant Ms. Martin the requested relief.

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Certificate of Compliance

Undersigned counsel hereby certifies that Appellant's Final Brief and Final Reply Brief are compliant with SCACR, Rule 211(b).

October 17, 2023

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