No. 12-1065

In the Supreme Court of the United States

GREGORY WOLFE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Sixth Amendment requires that facts affecting the amount of restitution ordered under the Mandatory Victims Restitution Act of 1996, 18 U.S.C. 3663A, be charged in the indictment, submitted to the jury, and proved beyond a reasonable doubt.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-27a) is reported at 701 F.3d 1206.

JURISDICTION

The judgment of the court of appeals was entered on December 5, 2012. The petition for a writ of certiorari was filed on February 27, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Indiana, petitioner was convicted of bank theft, in violation of 18 U.S.C. 2113(b), and interstate transportation of stolen goods, in violation of 18 U.S.C. 2314. He was sentenced to 88 months of imprisonment, to be followed by three years of supervised release, and ordered to pay $3,028,011.29

in restitution. Pet. App. 1a. The court of appeals affirmed. *Id*. at 1a-27a.

1. Between May 2008 and September 2010, petitioner worked at Katoen Natie (KTN) in Gary, Indiana. KTN is an international company that packages and stores plastics and commodities, including copper. In 2008, KTN's warehouse in Gary began storing copper and other metals for Henry Bath, LLC, a company that warehoused metal being traded on the London Metal Exchange (LME). The copper was stored in bundles of sheets held together by two large bands. Each sheet of copper was about three feet long by three feet wide and weighed approximately 330 pounds, and each bundle contained between 16 and 26 sheets. Ten bundles of copper constituted a "warrant" of copper—the unit by which copper is traded on the LME. Pet. App. 2a; Gov't C.A. Br. 2-3.

In 2009 and 2010, petitioner and another employee, Gregory Harris, engaged in a scheme to steal copper from Henry Bath by directing KTN employees to remove sheets of copper from the bundles stored in the Gary warehouse and then selling the stolen copper to a company with a warehouse in Springfield, Michigan. In late August 2010, a random audit by Henry Bath revealed that the weight of certain warrants of copper at the Gary warehouse was too light. A full audit the next month revealed that 391 metric tons of copper, worth approximately $2.9 million, was missing from the warehouse. Petitioner and Harris were soon fired. Pet. App. 3a-7a; Gov't C.A. Br. 3-10.

2. On March 17, 2011, a federal grand jury returned a superseding indictment charging petitioner with bank theft, in violation of 18 U.S.C. 2113(b) (Count 1), and interstate transportation of stolen goods, in violation of

18 U.S.C. 2314 (Count 2). Gov't C.A. Br. 2; Pet. App. 43a-47a. On May 27, 2011, a jury convicted petitioner on both counts. *Id.* at 41a-42a.

3. The presentence report (PSR) applied a base offense level of 6 under the Sentencing Guidelines, see U.S.S.G. § 2B1.1(a)(2) (2010), an 18-level enhancement based on a loss of $2.9 million, see *id.* § 2B1.1(b)(1)(J), a two-level enhancement for petitioner's role in the offense, see *id.* § 3B1.1(c), and a two-level enhancement for obstructing justice, see *id.* § 3C1.1. With a total offense level of 28 and a category I criminal history, petitioner's advisory Guidelines range was 78 to 97 months of imprisonment. PSR ¶¶ 33, 35-38, 42, 45, 81. The PSR also recommended that petitioner be ordered to pay $3,028,011.29 in restitution. That amount consisted of the value of the stolen copper ($2,947,348), which had been owned by Chase Bank, plus the administrative costs incurred by Henry Bath in the wake of the theft ($80,663.29). PSR ¶¶ 27-28, 42, 89.

Petitioner objected to the recommended enhancements for his role in the offense and for obstructing justice and to the PSR's conclusion that he was responsible for the entire $2.9 million loss in copper. PSR Addendum 1-5; Sent. Tr. 5. The district court overruled those objections. *Id.* at 58-59, 68-70, 79. As to the amount of loss, the court found that petitioner "either directed or was personally involved in the loading of at least 18 trucks" of stolen copper and that the entire $2.9 million loss was "clearly foreseeable" to him because he was involved in the scheme to steal the copper. *Id.* at 79. The court sentenced petitioner to 88 months of imprisonment, to be followed by three years of supervised release, *id.* at 110, and ordered him, as the PSR recom-

mended, to pay $3,028,011.29 in restitution, for which he was jointly and severally liable with Harris. *Id.* at 112.

4. The court of appeals affirmed petitioner's convictions and sentence. Pet. App. 1a-27a.

As relevant here, petitioner contended that the district court's imposition of restitution based on its own factfindings concerning the victims' loss amount violated the Sixth Amendment. See *Apprendi* v. *New Jersey*, 530 U.S. 466, 490 (2000) (holding that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt"); Pet. App. 21a. Because petitioner had failed to object to the restitution order on *Apprendi* grounds in the district court, the court of appeals reviewed petitioner's challenge for plain error. *Id.* at 23a-24a.

The court concluded that petitioner had not demonstrated that the district court committed plain error. Pet. App. 24a-27a. The court rejected petitioner's argument that this Court's decision in *Southern Union Co.* v. *United States*, 132 S. Ct. 2344, 2357 (2012), which applied *Apprendi* to criminal fines, "mandates that all restitution amounts be supported by the jury's verdict." Pet. App. 21a. Explaining that Seventh Circuit precedent held that "restitution is not a criminal penalty," the court of appeals stated that "the only way *Southern Union* may affect the outcome of this case is if we first conclude restitution is a criminal penalty." *Id.* at 24a. The court acknowledged that several other circuits treated restitution as a criminal penalty, *id.* at 25a, but the court held that "[b]eing in the minority" was not a sufficient reason to overrule circuit precedent. *Ibid.* The court of appeals rejected petitioner's reliance on

Pasquantino v. *United States*, 544 U.S. 349 (2005), in which this Court stated that restitution is imposed to "mete out appropriate criminal punishment," *id.* at 365, noting that it had previously declined to reconsider its precedent in light of *Pasquantino*. Pet. App. 26a (citing *United States* v. *Bonner*, 522 F.3d 804, 806-807 (7th Cir.), cert. denied, 555 U.S. 883 (2008), which held that *Pasquantino*'s "passing" reference to restitution's punitive purpose did not require the court to alter its view that restitution is a civil remedy). The court of appeals therefore concluded that in light of its treatment of restitution as civil in nature, "*Southern Union* and the scope of *Apprendi*" did not "come into consideration." *Id.* at 26a-27a. The court held that "[t]he district court's restitution order was not required to be supported by the jury's fact-finding, and therefore, it did not violate [petitioner's] Sixth Amendment rights." *Id.* at 27a.

ARGUMENT

1. Petitioner contends (Pet. 14-16) that *Apprendi* v. *New Jersey*, 530 U.S. 466, 490 (2000), which held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt," applies to the calculation of restitution. Petitioner argues (Pet. 14-16) that this Court's recent decision in *Southern Union Co.* v. *United States*, 132 S. Ct. 2344 (2012), which held that facts increasing a criminal fine above the statutory maximum should be found by a jury, indicates that *Apprendi* applies to restitution. Petitioner is incorrect. Every court of appeals to consider *Apprendi*'s application to restitution, both before and after *Southern Union*, has concluded that the imposition of restitution does not implicate *Apprendi*.

a. As an initial matter, this case would not be an appropriate vehicle to consider *Apprendi*'s application to restitution because petitioner failed to raise an *Apprendi* objection in the district court and his claim is therefore reviewable only for plain error. See Pet. App. 24a (applying plain-error review); Fed. R. Crim. P. 52(b); *United States* v. *Olano*, 507 U.S. 725, 731-732 (1993). To establish reversible plain error, petitioner must show (1) error, (2) that was plain, (3) that affected his substantial rights, and (4) that seriously affected the fairness, integrity, or public reputation of judicial proceedings. See *Johnson* v. *United States*, 520 U.S. 461, 466-467 (1997). Given the uniform precedent holding that *Apprendi* does not apply to restitution, see pp. 8-9, 12, *infra*, petitioner cannot demonstrate that any error was plain, *i.e.*, "clear" or "obvious." *Olano*, 507 U.S. at 734; see *Henderson* v. *United States*, 133 S. Ct. 1121, 1130-1131 (2013) (holding that the error must "be 'plain' at the time of appellate consideration") (internal quotation marks and citation omitted). And even if petitioner could establish that element of the plain-error test, he would still have to establish that any error affected his substantial rights and seriously affected the fairness, integrity, or public reputation of judicial proceedings.

b. i. The court of appeals correctly held that *Apprendi* does not apply to restitution. Pet. App. 24a-27a. In *Apprendi*, this Court held that any fact other than a prior conviction that increases the penalty for a crime beyond the prescribed statutory maximum must be proved beyond a reasonable doubt and found by a jury. 530 U.S. at 490; see also *United States* v. *Cotton*, 535 U.S. 625, 627 (2002) (making clear that "such facts must also be charged in the indictment"). The "'statutory maximum' for *Apprendi* purposes is the maximum

sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." *Blakely* v. *Washington*, 542 U.S. 296, 303 (2004) (emphasis omitted).

Petitioner was ordered to pay restitution pursuant to the Mandatory Victims Restitution Act of 1996 (MVRA), 18 U.S.C. 3663A. The MVRA provides that "when sentencing a defendant convicted of an offense described in subsection (c)," which includes fraud offenses, "the court shall order, in addition to * * * any other penalty authorized by law, that the defendant make restitution to the victim of the offense." 18 U.S.C. 3663A(a)(1); see also 18 U.S.C. 3663A(c)(1)(A)(ii). The MVRA requires that restitution be ordered "in the full amount of each victim's losses." 18 U.S.C. 3664(f)(1)(A); see 18 U.S.C. 3663A(d) ("An order of restitution under this section shall be issued and enforced in accordance with section 3664."); see also 18 U.S.C. 3663A(b)(1) (restitution order shall require return of property or payment of an amount equal to the value of lost or destroyed property).

By requiring restitution of a specific sum—"the full amount of each victim's losses"—rather than prescribing a maximum amount that may be ordered, the MVRA establishes an indeterminate framework. See, *e.g.*, *United States* v. *Day*, 700 F.3d 713, 732 (4th Cir. 2012) ("Critically, * * * there is no prescribed statutory maximum in the restitution context; the amount of restitution that a court may order is instead indeterminate and varies based on the amount of damage and injury caused by the offense."), cert. denied, No. 12-1155 (Apr. 29, 2013); *United States* v. *Reifler*, 446 F.3d 65, 118 (2d Cir. 2006) (the MVRA "is an indeterminate system") (citing cases). Thus, when a sentencing court determines the amount of the victims' loss, it "is merely giv-

ing definite shape to the restitution penalty [that is] born out of the conviction," not "imposing a punishment beyond that authorized by jury-found or admitted facts." *United States* v. *Leahy*, 438 F.3d 328, 337 (3d Cir.) (en banc), cert. denied, 549 U.S. 1071 (2006).

Moreover, while restitution is imposed as part of a defendant's criminal conviction, *Pasquantino* v. *United States*, 544 U.S. 349, 365 (2005), "[r]estitution is, at its essence, a restorative remedy that compensates victims for economic losses suffered as a result of a defendant's criminal conduct." *Leahy*, 438 F.3d at 338. "The purpose of restitution under the MVRA * * * is * * * to make the victim[] whole again by restoring to him or her the value of the losses suffered as a result of the defendant's crime." *United States* v. *Hunter*, 618 F.3d 1062, 1064 (9th Cir. 2010) (internal quotation marks omitted). In that additional sense, restitution "does not transform a defendant's punishment into something more severe than that authorized by pleading to, or being convicted of, the crime charged." *Leahy*, 438 F.3d at 338.

Every other court of appeals to have considered the question has held that the rule of *Apprendi* does not apply to restitution, whether ordered under the MVRA or the primary other federal restitution statute, the Victim and Witness Protection Act of 1982 (VWPA), 18 U.S.C. 3663 (2006 & Supp. V 2011). See, *e.g.*, *Day*, 700 F.3d at 732 (4th Cir.); *United States* v. *Brock-Davis*, 504 F.3d 991, 994 n.1 (9th Cir. 2007); *United States* v. *Milkiewicz*, 470 F.3d 390, 403-404 (1st Cir. 2006); *Reifler*, 446 F.3d at 114-120 (2d Cir.); *United States* v. *Williams*, 445 F.3d 1302, 1310-1311 (11th Cir. 2006), abrogated on other grounds by *United States* v. *Lewis*, 492 F.3d 1219, 1221-1222 (11th Cir. 2007); *Leahy*, 438 F.3d at 337-338 (3d Cir.); *United States* v. *Visinaiz*, 428

F.3d 1300, 1316 (10th Cir. 2005), cert. denied, 546 U.S. 1123 (2006); *United States* v. *Sosebee*, 419 F.3d 451, 461-462 (6th Cir. 2005); *United States* v. *Carruth*, 418 F.3d 900, 902-904 (8th Cir. 2005); *United States* v. *George*, 403 F.3d 470, 473 (7th Cir.), cert. denied, 546 U.S. 1008 (2005).

Those courts have relied primarily on the absence of a statutory maximum for restitution in concluding that when the court fixes the amount of restitution based on the victim's losses, it is not increasing the punishment beyond that authorized by the conviction. See, *e.g.*, *Leahy*, 438 F.3d at 337 n.11 ("the jury's verdict automatically triggers restitution in the 'full amount of each victim's losses'") (quoting 18 U.S.C. 3664(f)(1)(A)). Some courts, like the Seventh Circuit below, have additionally reasoned that "restitution is not a penalty for a crime for *Apprendi* purposes," or that, even if restitution is criminal, its compensatory purpose distinguishes it from purely punitive measures. *United States* v. *LaGrou Distrib. Sys., Inc.*, 466 F.3d 585, 593 (7th Cir. 2006) (internal quotation marks omitted); see *Visinaiz*, 428 F.3d at 1316; *Carruth*, 418 F.3d at 904; see also *Leahy*, 438 F.3d at 338.

ii. This Court's holding in *Southern Union* that "the rule of *Apprendi* applies to the imposition of criminal fines," 132 S. Ct. at 2357, does not undermine the uniform line of precedent holding that restitution is not subject to *Apprendi*. In *Southern Union*, the defendant company was charged with violating the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. 6928(d), by storing liquid mercury without a permit for 762 days. Violations of RCRA were punishable by a fine of up to $50,000 for each day of violation. 132 S. Ct. at 2349. Although the jury was not asked to determine the

length of the violation, the district court concluded from the verdict and the evidence that the jury had found a 762-day violation, making the statutory maximum fine $38.1 million. *Ibid.* The court imposed a $6 million fine, well above the $50,000 that the defendant argued was the maximum necessarily supported by the jury's verdict. *Ibid.*

In holding that the fine violated the Sixth Amendment, the Court explained that criminal fines, like imprisonment or death, "are penalties inflicted by the sovereign for the commission of offenses." *Southern Union*, 132 S. Ct. at 2350. Observing that "[i]n stating *Apprendi*'s rule, [it] ha[d] never distinguished one form of punishment from another," *id.* at 2351, the Court concluded that criminal fines equally implicate "*Apprendi*'s 'core concern' [of] reserv[ing] to the jury 'the determination of facts that warrant punishment for a specific statutory offense,'" *id.* at 2350 (quoting *Oregon* v. *Ice*, 555 U.S. 160, 170 (2009)). The Court also examined the historical record, explaining that "the scope of the constitutional jury right must be informed by the historical role of the jury at common law." *Id.* at 2353 (quoting *Ice*, 555 U.S. at 170). Finding that "English juries were required to find facts that determined the authorized pecuniary punishment," and that "the predominant practice" in early America was for facts that determined the amount of a fine "to be alleged in the indictment and proved to the jury," the Court concluded that the historical record "support[ed] applying *Apprendi* to criminal fines."[1] *Id.* at 2353-2354.

Contrary to petitioner's argument (Pet. 14-16), *Southern Union* does not require applying *Apprendi* to

[1] Petitioner does not contend that the historical record similarly supports applying the *Apprendi* rule to restitution.

restitution. The Court in *Southern Union* considered only criminal fines, which are "undeniably" imposed as criminal penalties in order to punish illegal conduct, 132 S. Ct. at 2351, and it held only that such fines are subject to *Apprendi*. *Id.* at 2357. The Court had no occasion to, and did not, address restitution, which has compensatory and remedial purposes that fines do not, and which is imposed pursuant to an indeterminate scheme that lacks a statutory maximum. Indeed, *Southern Union* supports distinguishing restitution under the MVRA from the type of sentences subject to *Apprendi* because, in acknowledging that many fines during the founding era were not subject to concrete caps, the Court reaffirmed that there cannot "be an *Apprendi* violation where no maximum is prescribed." *Id.* at 2353. Unlike the statute in *Southern Union*, which prescribed a $50,000 maximum fine for each day of violation, the MVRA sets no maximum amount of restitution, but rather requires that restitution be ordered in the total amount of the victims' loss.[2] 18 U.S.C. 3663A(b)(1) and

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[2] Petitioner asserts (Pet. 15-16) that in *Southern Union*, the government "repeatedly emphasized" that "if *Apprendi*'s principles encompassed criminal fines, * * * then those same principles would encompass restitution." The passages in the government's brief on which petitioner relies simply discussed this Court's statement in *Oregon* v. *Ice*, 555 U.S. 160, 171-172 (2009), that applying the *Apprendi* rule to other "sentencing choices or accoutrements," such as "statutorily prescribed fines and orders of restitution," would "cut the rule loose from its moorings." See U.S. Br. at 8-9, 17, *Southern Union Co.* v. *United States*, *supra*, No. 11-94; see also Tr. of Oral Arg. at 25-26, 30-31, *Southern Union Co.* v. *United States*, *supra*, No. 11-94 (same). During the oral argument in *Southern Union*, the government expanded on the Court's statement in *Ice* that a broad application of *Apprendi* would call into question several sentencing practices, including restitution. Tr. 32. But the government also pointed out that the courts of appeals have not adopted that view, as they

(d), 3664(f)(1)(A); see *Day*, 700 F.3d at 732 (stating that "in *Southern Union* itself, the *Apprendi* issue was triggered by the fact that the district court imposed a fine in excess of the statutory maximum that applied in that case," and distinguishing restitution on the ground that it is not subject to a "prescribed statutory maximum") (emphasis omitted).

Since *Southern Union*, two other courts of appeals have addressed in published opinions whether the *Apprendi* rule should be applied to restitution. Both concluded, without dissent, that *Apprendi* does not apply.[3] See *Day*, 700 F.3d at 732 (4th Cir.) (the "logic of *Southern Union* actually reinforces the correctness of the uniform rule adopted in the federal courts" that *Apprendi* does not apply because restitution lacks a statutory maximum); *United States* v. *Read*, 710 F.3d 219 (5th Cir. 2012), petition for cert. pending, No. 12-8572 (filed Jan. 30, 2013); see also *United States* v. *Rebollo*, No. 11-50445, 2013 WL 239568, at *1 (9th Cir. Jan. 23, 2013) (unpublished) (declining to overrule prior precedent in light of *Southern Union*). This Court's review is therefore not warranted.

2. Although no conflict exists among the courts of appeals concerning the question presented—whether

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have declined to apply *Apprendi* to restitution because it has no statutory maximum and because it is "designed simply to compensate for loss." *Id.* at 31-32.

[3] Petitioner is incorrect to suggest (Pet. 15) that these decisions conflict with a pre-*Southern Union* decision, *United States* v. *Milkiewicz*, *supra*. There, the First Circuit observed that a broad understanding of the *Apprendi* rule might encompass restitution, 470 F.3d at 403, but it ultimately concluded that the "statutory restitution scheme is materially different from the sentencing regimens at issue in *Blakely* and *Booker*" because the jury's verdict necessarily authorizes restitution in the full amount of the victims' loss, *id*. at 404.

Apprendi applies to restitution, see Pet. i—petitioner argues (Pet. 8-12) that the decision below implicates a circuit split concerning a subsidiary issue: whether restitution should be characterized as a civil remedy or a criminal penalty. Like the Seventh Circuit, the Eighth and Tenth Circuits view restitution as a civil remedy. See *Carruth*, 418 F.3d at 904 (8th Cir.); *Visinaiz*, 428 F.3d at 1316 (10th Cir.). Other circuits treat restitution as criminal punishment, albeit one with a remedial purpose. See, *e.g.*, *United States* v. *Ziskind*, 471 F.3d 266, 270-271 (1st Cir. 2006), cert. denied, 549 U.S. 1316 (2007); *Leahy*, 438 F.3d at 335 (3d Cir.); *United States* v. *Adams*, 363 F.3d 363, 365 (5th Cir. 2004); *Sosebee*, 419 F.3d at 461 (6th Cir.).

This Court's review is not warranted. The courts of appeals agree that *Apprendi* does not apply to restitution, regardless of whether, as a technical matter, they view restitution as a purely civil remedy or as a criminal penalty with compensatory aspects. In those circuits that treat restitution as civil in nature, including the Seventh Circuit, the civil/criminal question is not outcome-determinative: those courts have held that *Apprendi* does not apply to restitution for the additional reason that the MVRA does not prescribe a maximum amount of restitution, but rather requires restitution in a specific amount, *i.e.*, the full amount of the victim's loss. See *United States* v. *Bonner*, 522 F.3d 804, 807 (7th Cir.) ("[E]ven if we were to * * * recharacterize restitution as a criminal punishment, *Apprendi* and its progeny would not require us to invalidate the defendants' sentences."), cert. denied, 555 U.S. 883 (2008); *United States* v. *Behrman*, 235 F.3d 1049, 1054 (7th Cir. 2000); see also *Carruth*, 418 F.3d at 904 (8th Cir.); *United States* v. *Wooten*, 377 F.3d 1134, 1144-1145 (10th

Cir.), cert. denied, 543 U.S. 993 (2004). Conversely, those courts that view restitution as a criminal penalty have correctly recognized that restitution has compensatory purposes that should be taken into account in the *Apprendi* analysis. See, *e.g.*, *Leahy*, 438 F.3d at 338. The circuit conflict that petitioner identifies thus pertains only to a technical question of characterization that has not materially affected the courts' analysis of the ultimate *Apprendi* issue.

Petitioner contends that even if the characterization question does not determine the outcome of the *Apprendi* analysis, "a holding by this Court that restitution is a criminal sanction still has sweeping effect." Pet. 16 n.2. Petitioner asserts that "[f]or example, restitution's classification as a criminal or civil sanction determines whether prejudgment interest may be imposed as part of a restitution order." *Ibid.* (citing *United States* v. *Rico Indus., Inc.*, 854 F.2d 710, 714 (5th Cir. 1988), cert. denied, 489 U.S. 1078 (1989)). But even courts that treat restitution as a criminal penalty have included prejudgment interest in the calculation of a victim's loss under the VWPA or MVRA because restitution serves compensatory as well as punitive purposes. See *United States* v. *Fumo*, 655 F.3d 288, 319-321 (3d Cir. 2011) (so holding and citing cases from, *inter alia*, the Fourth, Fifth, Ninth, and Eleventh Circuits); *United States* v. *Rochester*, 898 F.2d 971, 982-983 (5th Cir. 1990) (allowing prejudgment interest and distinguishing *Rico Industries*). In any event, to the extent this Court may wish to address the proper characterization of restitution because that characterization has consequences in other contexts, it should do so in a case involving those consequences.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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