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# SENATE COMMITTEE ON PUBLIC SAFETY

Senator Loni Hancock, Chair

2015 - 2016 Regular

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**Bill No:** AB 2298                      **Hearing Date:** June 21, 2016  
**Author:** Weber  
**Version:** May 31, 2016  
**Urgency:** No                                      **Fiscal:** Yes  
**Consultant:** JM

**Subject:** *Criminal Gangs*

## HISTORY

**Source:** Youth Justice Coalition; Urban Peace Initiative; PolicyLink

**Prior Legislation:** SB 458 (Wright) – Ch. 797 Stats. of 2013

**Support:** A New path; All of Us or None; Alliance for Boys and Men of Color; Alliance San Diego; American Civil Liberties Union; American Friends Service Committee; Arts for Incarcerated Youth Network; Asian Americans Advancing Justice – California; Asian Pacific Policy & Planning Council; Aspire Los Angeles; Bay Area Youth Summit; Boston-area Youth Organizing Project; California Immigrant Policy Center; California Immigrant Youth Justice Alliance; California League of United Latin American Citizens; Public Interest Advocacy; The Center for Popular Democracy; Central American Resource Center-LA; Chance Films; Coalition for Humane Immigrant Rights of Los Angeles; Community Coalition; CSA San Diego County; Dream Team Los Angeles; Drug Policy Alliance; Electronic Frontier Foundation; Ella Baker Center for Human Rights; Fair Chance Project; Filipino Migrant Center; Homeboy Industries; House Keys not Handcuffs; Immigrant Defenders Law Center; Immigrant Legal Resource Center; Immigrant youth Coalition; Inland Empire Immigrant Youth Coalition; Justice Not Jails; Khmer Girls in Action; KIWA Workers for Justice; Korean Resource Center; Law Offices of Chavez and Vigil; Learn Everything About the Parole Process; Legal Services for Prisoners with Children; Life After Uncivil Ruthless Acts; Long Beach Immigrant Rights Coalition; Los Angeles Brown Berets; Los Angeles Center for Law and Justice; Loyola Law School of Los Angeles; Mexican American Legal Defense and Education Fund; Motivating Individual Leadership for Public Advancement; National Association of Social Workers, California Chapter; national Juvenile Justice Network; Orange County Immigrant Youth United; People Organized for Westside Renewal; PICO California; PolicyLink; Public Counsel; Public Law Center; RAIZ; Santa Ana Boys and Men of Color; San Diego Immigrant Rights Consortium; Services, Immigrant Rights & Education Network; Silicon Valley De-Bug; Southwestern Law School; Teachers Unite; T.R.U.S.T. South Los Angeles; Urban Peace Institute; University of California Irvine School of Law; Violence Prevention Coalition; The W. Haywood Burns Institute; The Women’s Foundation of California; Young Women’s Freedom Center; Youth Justice Coalition

Opposition: Association of Deputy District Attorneys; California District Attorneys Association; California Police Chiefs Association Inc.; California State Sheriffs' Association; E3 Research; Fraternal Order of Police; San Bernardino County Sheriff's Department

Assembly Floor Vote: 42 - 34

### PURPOSE

*The purpose of this bill is to: 1) extend to adults the right to be notified of inclusion in a shared gang database and to seek removal of a person's name and identifying information from the database; 2) require that database operators comply with federal privacy and data accuracy rules, as specified; 3) require that any person who has not been convicted of a gang-related crime within three years be removed from the data; 4) establish an administrative procedure, with an available superior court appeal, for seeking removal from a gang database; 5) require any agency that utilizes a shared gang database to annually report to the Department of Justice (DOJ) on the number of persons in the database, the number of people in each of the following categories in the previous year - added to the database, sought removal, were granted removal and automatically removed; and 6) require DOJ to annually publish the information on its Website, as specified.*

*Existing law* defines a "criminal street gang" as any ongoing organization, association, or group of three or more persons . . . having as one of its primary activities the commission of one or more enumerated offenses, having a common name or identifying sign or symbol, and whose members individually or collectively engage in a pattern of criminal gang activity. (Pen. Code, § 186.22, subd. (f).)

*Existing law* provides that any person who actively participates in a criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity and who promotes, furthers, or assists in any felonious conduct by members of the gang is guilty of an alternate felony-misdemeanor. (Pen. Code, § 186.22, subd. (a).)

*Existing law* provides that any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in criminal conduct by gang members, shall receive a sentence enhancement or specified life term. (Pen. Code, § 186.22, subd. (b).)

*Existing law* provides that any person who is convicted of either a felony or misdemeanor that is committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall be punished by imprisonment in the county jail for up to one year or by 1, 2, or 3 years in state prison. (Pen. Code, § 186.22, subd. (d).)

*Existing law* defines "pattern of criminal gang activity" as the commission of two or more of enumerated offenses, provided at least one of the offenses occurred after the effective date of the statute and the last of the offenses occurred within three years after a prior offense, and the offenses were committed on separate occasions, or by two or more persons. (Pen. Code, § 186.22, subd. (e).)

*Existing law* requires any person who is convicted in criminal court or who has a petition sustained in a juvenile court of one of the specified criminal street gang offenses or enhancements to register with the local Police Chief or Sheriff within 10 days of release from custody or within 10 days of his or her arrival in any city, county, or city and county to reside there, whichever is first. (Pen. Code, § 186.30, subds. (a) & (b).)

*Existing law* provides that when a minor has been tried as an adult and *convicted* in a criminal court or has had a petition sustained in a juvenile court for any of the specified criminal street gang offenses or enhancements, a law enforcement agency shall notify the minor and his or her parent that the minor belongs to a gang whose members engage in or have engaged in a pattern of criminal activity as described. (Pen. Code, § 186.32 (a)(1)(B).)

*Existing law* requires the court, at the time of sentencing in adult court or dispositional hearing in juvenile court, to inform any person subject to registration detailed above of his or her duty to register and requires that the parole or probation officer assigned to that person to verify that the person has complied with the registration requirements. (Pen. Code, § 186.31.)

*Existing law* requires local law enforcement to notify a minor and his or her parent or guardian before designating that minor as a gang member, associate, or affiliate in a shared gang database and the basis for the designation. (Pen. Code § 186.34.)

*Existing law* authorizes a minor included in a gang data base, or the minor's parent or guardian, to request, with supporting documentation, the relevant local law enforcement agency to remove the minor's name and information from the database and gives the law enforcement agency 60 days to act on the request. (Pen. Code § 186.34 (c).)

*Existing law* requires local law enforcement to notify a minor and his or her parent or guardian before designating that minor as a gang member, associate, or affiliate in a shared gang database and the basis for the designation. (Pen. Code § 186.34.)

*This bill* expands the notice requirement given to minors to include adults, by requiring notice be provided to an adult before designating a person as a suspected gang member, associate, or affiliate in the database.

*This bill* requires databases comply with federal requirements regarding the privacy and accuracy of information in the database, and other operating principles for maintaining these databases.

*This bill* requires local law enforcement, commencing December 1, 2017, and every December 1st thereafter to submit specified data pertaining to the database to the Department of Justice, and would require the Department of Justice, commencing January 1, 2018, and every January 1st thereafter, to submit a report containing that information to the CalGang Executive Board and to the Legislature.

*This bill* requires that a person designated as a suspected gang member, associate, or affiliate in a shared gang database who has not been convicted of a violation of gang-related crimes, as specified, within three years of the initial designation be removed from the database.

*This bill* establishes a procedure for a person designated in a shared gang database to challenge that designation through an administrative hearing and appeal to the superior court as follows:

- a) Provides that a person who is listed by a law enforcement agency in a shared gang database as a gang member, suspected gang member, associate, or affiliate may contest that designation pursuant to this section. The person may contest the designation initially pursuant to this section or a denial as specified.
- b) States that the person may request an administrative hearing to review the designation decision.
- c) Provides that an administrative hearing shall be held within 90 calendar days following the receipt of a request for an administrative hearing. The person requesting the hearing may request one continuance, not to exceed 21 calendar days.
- d) States that the administrative hearing shall be conducted in accordance with written procedures established by the agency. The hearing shall provide an independent, objective, fair, and impartial review of a contested designation.
- e) Provides that the agency shall appoint or contract with qualified examiners or administrative hearing providers that employ qualified examiners to conduct the administrative hearings. Examiners shall demonstrate those qualifications, training, and objectivity necessary to conduct a fair and impartial review.
- f) States that the examiner's decision following the administrative hearing may be personally delivered to the person by the examiner or sent by first-class mail, and, if the designation is not canceled, shall include a written reason for that denial.
- g) Provides that within 30 calendar days after the mailing or personal delivery of the examiner's decision, the person may seek review by filing an appeal to be heard by the superior court where the appeal shall be heard de novo. A copy of the notice of appeal shall be served in person or by first-class mail upon the agency by the person.
- h) Provides that the law enforcement agency has the burden of demonstrating active gang membership, associate status, or affiliate status to the court by clear and convincing evidence.
- i) States that a successful challenge to the designation shall result in the removal of the person from the shared gang database.

#### RECEIVERSHIP/OVERCROWDING CRISIS AGGRAVATION

For the past several years this Committee has scrutinized legislation referred to its jurisdiction for any potential impact on prison overcrowding. Mindful of the United States Supreme Court ruling and federal court orders relating to the state's ability to provide a constitutional level of health care to its inmate population and the related issue of prison overcrowding, this Committee has applied its "ROCA" policy as a content-neutral, provisional measure necessary to ensure that the Legislature does not erode progress in reducing prison overcrowding.

On February 10, 2014, the federal court ordered California to reduce its in-state adult institution population to 137.5% of design capacity by February 28, 2016, as follows:

- 143% of design bed capacity by June 30, 2014;
- 141.5% of design bed capacity by February 28, 2015; and,
- 137.5% of design bed capacity by February 28, 2016.

In December of 2015 the administration reported that as of December 9, 2015, 112,510 inmates were housed in the State's 34 adult institutions, which amounts to 136.0% of design bed capacity, and 5,264 inmates were housed in out-of-state facilities. The current population is 1,212 inmates below the final court-ordered population benchmark of 137.5% of design bed

capacity, and has been under that benchmark since February 2015.” (Defendants’ December 2015 Status Report in Response to February 10, 2014 Order, 2:90-cv-00520 KJM DAD PC, 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (fn. omitted).) One year ago, 115,826 inmates were housed in the State’s 34 adult institutions, which amounted to 140.0% of design bed capacity, and 8,864 inmates were housed in out-of-state facilities. (Defendants’ December 2014 Status Report in Response to February 10, 2014 Order, 2:90-cv-00520 KJM DAD PC, 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (fn. omitted).)

While significant gains have been made in reducing the prison population, the state must stabilize these advances and demonstrate to the federal court that California has in place the “durable solution” to prison overcrowding “consistently demanded” by the court. (Opinion Re: Order Granting in Part and Denying in Part Defendants’ Request For Extension of December 31, 2013 Deadline, NO. 2:90-cv-0520 LKK DAD (PC), 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (2-10-14). The Committee’s consideration of bills that may impact the prison population therefore will be informed by the following questions:

- Whether a proposal erodes a measure which has contributed to reducing the prison population;
- Whether a proposal addresses a major area of public safety or criminal activity for which there is no other reasonable, appropriate remedy;
- Whether a proposal addresses a crime which is directly dangerous to the physical safety of others for which there is no other reasonably appropriate sanction;
- Whether a proposal corrects a constitutional problem or legislative drafting error; and
- Whether a proposal proposes penalties which are proportionate, and cannot be achieved through any other reasonably appropriate remedy.

## COMMENTS

### 1. Need for This Bill

According to the author:

In 2013 the enactment of SB 458 (Wright) gave a youth under 18 and his or her parent or guardian the right to be notified if they were added to a gang file and to challenge their designation. In just two years since the passing of SB 458, the number of people on the CalGang Database has dropped from nearly 202,000 to approximately 150,000.

As an indication of how powerful transparency is in achieving fair and accurate implementation, AB 2298 continues the work of SB 458 by 1) Extending to adults the current requirement that youth under 18 be given notice as well as an opportunity to contest inclusion in a shared gang database; 2) Removing individuals from the gang database after three years without a convicted violation of California’s Street Terrorism Enforcement and Prevention Act; and 3) Requiring that the California Department of Justice (DOJ) post an annual local law enforcement data reports on gang databases.

Most important, for youth and young adults that police suspect of gang membership or association, they and their families should be both notified and

flooded with intervention resources and other supports. Instead, the continued secrecy of CalGang and the increased surveillance and police contact it triggers, actually eliminate a vital and early opportunity to prevent victimization, injury, incarceration and death. In fact, CalGang and similar efforts exclude people and their families from the community when they most need that connection and support.

## **2. History of Shared Gang Databases**

In 1987, the Los Angeles County Sheriff's Department developed the Gang Reporting, Evaluation and Tracking System (GREAT), the nation's first gang database. "Before GREAT existed, police departments collected information on gang members in locally maintained files, but could not access information that had been collected by other law enforcement agencies." (Stacey Leyton, *The New Blacklists: The Threat to Civil Liberties Posed by Gang Databases* (a chapter in *Crime Control and Social Justice: The Delicate Balance*, edited by Darnell F. Hawkins, Samuel L. Myers Jr. and Randolph N. Stone, Westport, CT, 2003. *The African American Experience*, Greenwood Publishing Group, Mar. 27, 2013. Using GREAT, local law enforcement could collect, store, centralize, analyze, and disperse information about alleged gang members.

In 1988, the Legislature passed the Street Terrorism Enforcement and Prevention (STEP) Act, asserting California to be "in a state of crisis... caused by violent street gangs whose members threaten, terrorize and commit a multitude of crimes against the peaceful citizens of their neighborhoods." (Pen. Code, § 186.21 (1988).) The STEP Act established the nation's first definitions of "criminal street gang," "pattern of criminal gang activity," and codified penalties for participation in a criminal street gang.

In 1997, less than a decade after the regional GREAT database was first created, the regional GREAT databases were integrated into a new unified statewide database, CalGang, with the goals of making the database easier to use and less expensive to access. CalGang operates pursuant to the 1968 Omnibus Crime Control and Safe Streets Act, which requires that "all criminal intelligence systems ... are utilized in conformance with the privacy and constitutional rights of individuals."

## **3. Required Parental Notification of a Minor's Duty to Register as a Gang Member**

Prior to 2013, if a minor was tried as an adult and convicted, or had a petition sustained in a juvenile court, his or her parent or guardian was required to be notified of a requirement to register with a local sheriff's office upon release from custody or moving to a new city or county. (Pen. Code, § 186.32, subd. (a)(1)(B).) Parents were notified when a minor was designated in the CalGang database as a suspected gang member, associate, or affiliate. Although a conviction or declaration of wardship was not required for a minor to be placed in the CalGang database, serious consequences to the minor could flow from that action.

SB 458 (Wright), Chapter 797, Statutes of 2013 required a local law enforcement agency to notify any person under 18 years of age and his or her parent or guardian of the minor's designation in a shared gang database and the basis for the designation before the minor was designated as a suspected gang member, associate or affiliate in a shared gang database, regardless of conviction status.

#### 4. Application of Shared Gang Databases

The CalGang system is accessed by over 6,000 law enforcement officers in 58 counties. The database tracks 200 data fields including name, address, physical information, social security number, and racial makeup and records all encounters police have with the individual. (Leyton, supra, at 113.) CalGang is a web-based intranet system accessible by police departments by way of computer, telephone, and web browser that allows law enforcement to check an individual's record in real time. (Ibid.) For example, qualified law enforcement personnel may sign on to the CalGang database from a laptop in their patrol car and locate a source document regarding a specific individual about whom law enforcement seeks information.

Concerns have been raised regarding the secrecy of the CalGang database and the accuracy of records entered into CalGang. For example, in 1999, then-Attorney General Bill Lockyer described the database as “mix[ing] verified criminal history and gang affiliations with unverified intelligence and hearsay evidence, including reports on persons who have committed no crime.” “This database,” he went on “cannot and should not be used, in California or elsewhere, to decide whether or not a person is dangerous or should be detained.” (Ibid.) Moreover, with 201,094 people currently listed on CalGang, community groups have expressed concern about transparency, accountability, notification, release of information to policy makers and the public, and independent evaluations regarding the effectiveness of such shared databases in reducing crime.

Youth Justice Coalition states that CalGang “dramatically expands the criminalization of individuals and communities” noting that the database is used routinely to determine who should be served with civil gang injunctions, given gang enhancements during sentencing and targeted for saturation policing. With no notification system, community members say, CalGang has become a “secret surveillance tool,” for monitoring children. This system dramatically impacts the way those children are seen and treated by law enforcement without notifying families who may wish to intervene, move to a new neighborhood or place their child into an intervention program. (Id.) Although the exact number of minors designated is unknown, approximately 10% of those listed on the CalGang database are 19 years of age or younger. (Id.)

Law enforcement representatives, however, have emphasized that any records which are not modified by the addition of new criteria for five years will be purged. Thus, a person need only avoid gang-qualifying criteria for five years to ensure that he or she will be stricken from the database.

However, as a practical matter, it may be difficult for a minor, or a young-adult, living in a gang-heavy community to avoid qualifying criteria when the list of behaviors includes items such as “is in a photograph with known gang members,” “name is on a gang document, hit list or gang-related graffiti” or “corresponds with known gang members or writes and/or receives correspondence.” In a media-heavy environment, replete with camera phones and social network comments, it may be challenging for a teenager aware of the exact parameters to avoid such criteria, let alone a teenager unaware of he or she is being held to such standards.

## 5. Criminal Intelligence Systems

According to the United States Code of Federal Regulations, title 28, section 23, a Criminal Intelligence System is allowed to collect the names of individuals or organizations not reasonably suspected of involvement in criminal activity, as “noncriminal identifying information” if the information relates to the identification of a criminal subject or criminal activity. The broad definition of criminal activity allows the database to maintain identifying information of many people, whether or not they have been involved in gang activity. According to the Criminal Intelligence Systems website, the stated qualifications limit inclusion to “criminal activity that constitutes a significant and recognized threat to the community. In general, 28 CFR Part 23 views such criminal activity to be multijurisdictional and/or organized criminal activity that involves a significant degree of permanent criminal organization or is undertaken for the purpose of seeking illegal power or profits or poses a threat to the life and property of citizens. This would normally not include traffic or other misdemeanor violations.” ([http://www.iir.com/Home/28CFR\\_Program/28CFR\\_FAQ/](http://www.iir.com/Home/28CFR_Program/28CFR_FAQ/))

## 6. Due Process and the Actions of Law Enforcement Agencies

Due Process Clauses of the U.S. Constitution serve as protections from arbitrary denials of life, liberty, or property by the government, absent law. The protections at risk regarding shared gang databases are both procedural and substantive. Procedural due process protects individuals from the coercive power of the government, which is in this case law enforcement agencies, by ensuring there are processes in place that allow a fair and impartial adjudication of issues.

Article I of the State Constitution says a person may not be deprived of life, liberty, or property without due process of law or be denied equal protection of the laws. In the 9th Circuit Court of Appeals case, *Vasquez v. Rackauckas*, the court stated that this due process clause provides greater procedural due process rights for private parties than does the federal Constitution. The defendants-appellants had been dismissed from a case to enforce a local gang injunction. The prosecution proceeded in the case and secured a gang injunction. When the injunction was being enforced, the police tried to apply the injunction to the two defendants who had been dismissed in the case. The defendant-appellants appealed the injunction on the basis that they were dismissed from the injunction case and were never afforded a due process hearing regarding the injunction. The court held that the defendant-appellants were entitled to a due process hearing prior to being subjected to the injunction order. (*Vasquez v. Rackauckas*, (2013) 734 F.3d 1025.)

Limited Existing Due Process Procedures: Currently, only minors and their parent or guardian, are allowed to be notified that the minor is being entered in the system. Adults have been totally omitted from the notification process even though they are affected by being included in the database. According to the report by the Coalition, these databases can be very harmful to anyone who is categorized as being connected to a gang, even if no such connection ever existed or they were part of a gang 20 years ago. There is no way today for an adult to find out if they have been “tagged” as a gang member by law enforcement and entered into this system. Even if that adult could discover that he or she were included in the database, there is no way today to challenge that inclusion. Finding out that you are in the system during contact with police or when you are applying for college, places the individual in an unfair position and there are not many opportunities

for a person to refute the designation. Furthermore, there must also be a process for having a person's name removed from the system if the individual is not connected with a gang. What happens to a person who has a family member or relative who is associated with a gang? Is that innocent person also entered into the database because they qualify as an associate or an affiliate? Suppression of criminal activity is the job of law enforcement and there are many tools that they use to perform their jobs. However, the use of these shared databases has to be reviewed to ensure that their use doesn't destroy the constitutional rights of those who have been entered.

## 7. Argument in Support

Urban Peace Institute (UPI) argues in support:

Assembly Bill 2298 will require local law enforcement departments to notify people when they are added to a shared gang database, including the statewide CalGang Database. The bill will also enable people to inquire as to their status on a database, to challenge their designation if they no longer or never have never belonged to a gang. The bill provides a clear process for removal from a gang database and for notification of removal. The bill also requires the State Department of Justice to report on an annual basis how many people are added and removed from gang databases by age, race, gender and geography.

In the early 1980s, Los Angeles and quickly the whole state engaged in an aggressive "war on gangs," including the creation of gang databases. *Since then – for nearly 40 years – gang databases have operated without accuracy, consistency or transparency.* Information for local databases is primarily collected through routine police stops – on the street, in schools and traffic stops. Police gather information through a field interview, and local departments then feed this information into shared databases and also into the statewide CalGang Database. Most people are added to local databases and the CalGang Database without having been arrested or accused of a crime. Until the recent passing of Senate Bill 458, no person had a legal right to be notified or an opportunity to appeal their designation as a gang member. SB 458 granted those rights only to minors.

Nearly 20% of the people on the CalGang Database are African- American and 66% are Latino. Since only 6.6% of Californians are African-Americans, and just 38.1% are Latino, this represents an alarming racial disparity. Databases are often used to add people to gang injunctions, contribute to evidence for gang enhancements in court, and are used to deny people access to victims' compensation when a person is killed or injured. An individual's information can also be shared and accessed by federal law enforcement agencies including the FBI and ICE, having huge implications for a person's ability to realize immigration opportunities including deferred action and prosecutorial discretion.

To increase accuracy: AB 2298 will create a process for the removal from gang databases of individuals not currently active in a gang. To establish consistency: AB 2298 will create standard processes for law enforcement agencies across the state for implementation of both SB 458 and AB 2298. To promote transparency: AB 2298 will provide notice to individuals before they are documented as gang

members, allow individuals to inquire about their inclusion in gang databases and require the annual release of data on the numbers and demographics of people added to or removed from gang databases....

## **8. Argument in Opposition**

E3 Research argues in opposition:

E3 Research, which is comprised of researchers with experience in the field of law enforcement and gang expert testimony, opposes AB 2298, which would require notice to a person if he or she is placed in a gang database.

It is not a crime to be involved with a gang. The issue is when individuals engage in criminal activity for the benefit, at the direction of or in association with the gang. Some of the most challenging cases to solve in law enforcement are gang crimes. Many individuals are afraid for their safety and afraid of fear and intimidation. The fear not only extends from victims and witnesses, but it also occurs in the courtroom with jurors. The theory behind gang intelligence is to monitor the gang activity that is conducted by its members. Safety becomes the number one priority and maintaining intelligence helps to solve the criminal activity committed by gang members.

By releasing information in the gang database, you not only jeopardize the safety of the individual you are releasing the information to who is on the list, you are also jeopardizing the safety of others within the gang and their families. Rival gang members can use the information to identify their targets which can lead to violent crimes. Releasing the information also jeopardizes the integrity of law enforcement investigations that include drug sales, murders, robberies, selling and manufacturing firearms, just to name a few. Currently a majority of law enforcement agencies maintain someone in their gang database for approximately five-years and then those individuals are purged from the system, unless there are additional validation criteria that shows the individual is continuing their affiliation with the gang. This has been proven to work in the court of law when gang cases and gang evidence is required to prove a case and obtain a conviction.

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