

81062-1

**WASHINGTON STATE COURT OF APPEALS  
DIVISION III**

**Appeal Number  
25597-2**

**State of Washington  
Respondent**

**v.**

**Ryan J. O'Hara  
Appellant**

**BRIEF OF APPELLANT**

**Jordan McCabe  
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### **ASSIGNMENTS OF ERROR**

- I. The trial was irretrievably contaminated by evidence that violated the Confrontation Clause of the Sixth Amendment of the Constitution of the United States as explained in *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).
- II. There was no evidence untainted by the *Crawford* violation. Therefore, the evidence was insufficient as a matter of law to defeat the presumption of innocence.
- III. The jury instructions did not inform the jury of the applicable law of self-defense. Instr. 10, RP 158.

### **ISSUES**

- I. Two police officers testified that they decided to arrest Mr. O'Hara for the charged offense based on testimonial statements of witnesses at the scene. The defense was not able to cross examine these witnesses. Did this backdoor hearsay violate *Crawford*? Error I.
- II. Without the backdoor corroboration, the only evidence was accusations from the alleged victim. Under the facts of this case, was that enough to dispel all reasonable doubt? Error II.
- III. Washington's law of self-defense permits the use of appropriate force to defend against a "willful disregard" of one's property rights. When this is the sole theory of the defense, must the jury be informed of this? Error III.

**STATEMENT OF THE CASE**

Ryan J. O'Hara, aged 41 and with no history of violence, called 911 from his cell phone at around 4:30 in the morning of January 3, 2006. CP 42, RP 101-02. He had taken refuge at the home of his former girlfriend while fleeing from an enraged Jeffrey Loree. RP 79, 101-02. By Mr. Loree's own evidence, he had been chasing Mr. O'Hara with a piece of lumber for more than 20 minutes. RP 43, 44, 47.

Spokane Police Department officers I. Yamada and R. Boothe responded. RP 67-68; RP 77. Mr. O'Hara said that Jeff Loree and a woman named Tina Gumm had stolen his car. He said both had assaulted him. RP 70; 97. The officers believed him. RP 5, 11.

Officers Yamada and Boothe drove Mr. O'Hara to the nearby home of Michael Nevin, where the incident had started, to "continue the investigation." RP 30, 71-72.

There, they found "numerous people," including Mr. Nevin, Tina Gumm, and Gregory Rickey, a friend of Mr. Loree's. Officers Boothe and Yamada interviewed these people

“to find out what exactly happened.” RP 72, 79, 93. They would later tell the jury that, based on what these witnesses told them, they changed their minds about Mr. O'Hara and concluded that he was the perpetrator, not a victim. They promptly arrested Mr. O'Hara for the second degree assault of Mr. Loree and took him to jail. RP 6, 72.

**Procedure:** Mr. O'Hara was charged by amended information with second degree assault, committed as follows: that he “did intentionally assault Jeffrey William Loree and did thereby recklessly inflict substantial bodily harm. CP 7.

He was tried by jury before the Honorable Robert D. Austin on September 18 and 19, 2006.

**Trial:** Of the numerous people present at the scene, only Mr. Loree and Mr. O'Hara testified. RP.

Jeffrey Loree said he and his friend, Greg Rickey, dropped in on Mr. Nevin after the bars closed that night. RP 30-31, 49, 63. Mr. Loree could not say how many other people were at the house, but the only one he noticed was an acquaintance called Tina Gumm. RP 32. Some time later, Mr. Loree heard Ms. Gumm in a loud argument with Ryan O'Hara.

RP 33. Things were being broken, and Ms. Gumm and Mr. O'Hara "hit the floor a couple of times." Mr. Loree decided to intervene. RP 35.

Ms. Gumm had Mr. O'Hara's car keys and was refusing to give them back. RP 58. Mr. Loree persuaded her to give the keys to him. RP 37. Then Mr. Loree gave Ms. Gumm one of the keys that was hers. RP 48-49. But, instead of handing O'Hara his keys, Loree kept them. He then went outside to retrieve some of Ms. Gumm's belongings from the trunk of Mr. O'Hara's car, with Mr. O'Hara following behind. RP 37-38. The car was only about 20 yards from the house. RP 83.

According to Mr. Loree, Mr. O'Hara was calm and cooperative and Loree did nothing to provoke him. RP 39, 46, 63. Mr. Loree said Mr. O'Hara, with no warning, just hit him from behind with his flashlight as Loree bent over to insert the trunk key into the lock. RP 40-41. Mr. Loree denied that O'Hara ever objected to this threatened invasion of privacy. RP 51, 65. Mr. Loree did admit that he'd had a hearing problem for some years and it was possible that O'Hara said something Loree did not hear. RP 52, 64.

Mr. Loree said he then picked up the "biggest rock I could find" to use as a weapon, and Mr. O'Hara retreated. RP 42, 54. Loree told the jury he was enraged and "wanted to go after" O'Hara and started chasing him around, screaming. RP 42, 59. According to Mr. Loree, Mr. O'Hara jumped a fence "to try to get away." RP 42. Loree then "either threw the rock or tried to get him with the rock..." Nevertheless, Loree says, Mr. O'Hara somehow managed to hit him again. RP 43. Mr. Loree then picked up a cedar "lawn timber" and went after Mr. O'Hara with that. RP 43, 54, 59. "I wanted justice, you know, I was mad as heck." RP 44. Loree admitted chasing O'Hara for 20 minutes to half an hour. RP 44, 47.

Mr. Loree said his friends at the Nevin residence finally came outside, and Mr. O'Hara again ran away. Again Mr. Loree chased O'Hara with the timber, but Mr. Loree fell down. He said Mr. O'Hara, rather than seizing his opportunity to get away, instead came and hit Mr. Loree again. RP 44.

Mr. Loree said he was scared, but he did not go back inside during all this. He was "really mad," but he did not call the police when it was over. RP 59.

Mr. Loree was bruised and had a cut on the left front of his head that took 12 stitches. RP 47, CP 16. Defense counsel had Mr. Loree approach the jury, so they could see there was no discernable scar. RP 47, 178-79.

Besides the police officers, the only other witness was Mr. O'Hara himself. He said he loaned his car to Ms. Gumm at around 9:00 p.m. so she could go to the grocery store. He fell asleep at Mr. Nevin's while waiting for her to bring the car back. RP 102-03. When she finally showed up – at around 4:00 a.m. – she was “ranting and raving about something” and refused to hand over the car keys. RP 105. Mr. O'Hara went outside to look in the car for them. When he came back, he still had his flashlight in his hand. RP 106-07.

Ms. Gumm had the keys in her hand, and Mr. O'Hara battled her for them, until Jeff Loree intervened. RP 108. Ms. Gumm then gave the keys to Mr. Loree, but Loree also refused to return them to Mr. O'Hara. RP 109-11.

As Mr. O'Hara followed Mr. Loree outside, he said he told Loree four or five times to give back his keys. RP 111-12. He tried to grab the keys, but Mr. Loree struck him. RP 113,

RP 136. Mr. O'Hara kept on asking for his keys and telling Mr. Loree to stay out of his trunk. But Mr. Loree ignored him and went ahead and put the key in the lock to open the trunk. RP 113-15. That's when Mr. O'Hara admits he used the flashlight to prevent Loree from opening the trunk. RP 115, 174.

These conflicting stories by the two combatants were the only eye-witness accounts the jury heard. Unfortunately, every independent witness – Mr. Nevin, Mr. Rickey and Ms. Gumm – had disappeared. RP 62-63, 93. Even Mr. Loree had to be brought in on a material witness arrest warrant. RP 56, 62. But the two police officers' described how they came to arrest Mr. O'Hara after talking to other witnesses at the scene. RP 30, 71-72, 79, 93.

The jury found Mr. O'Hara guilty of second degree assault, and he was sentenced to six months. CP 53.

### **SUMMARY OF THE ARGUMENT**

Mr. O'Hara's trial did not meet the bare essentials of fundamental due process.

First, the State introduced incriminating “backdoor hearsay” by way of the police witnesses. The State’s entire case rested on the uncorroborated testimony of a single interested witness, Jeffrey Loree. But the police officers subtly but unambiguously communicated to the jury that other people interviewed at the scene had corroborated Mr. Loree’s story. Mr. O’Hara had no opportunity to cross examine these missing witnesses as required by the Confrontation Clause of the Sixth Amendment. *Crawford v. Washington*, 541 U.S. 36, 68, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

Second, without the inadmissible hearsay, the evidence of guilt was utterly insufficient to overcome the evidence in Mr. O’Hara’s favor, namely the constitutional presumption of innocence. The State produced nothing more than the word of a person with an obvious personal interest in the outcome. Unless Mr. Loree convinced the police – and later the jury – that he was a victim, things did not look so good for him. As a matter of law, uncorroborated parol evidence by an interested plaintiff is insufficient to defeat a legal presumption in favor of the defendant.

Third, the self-defense instruction was fatally defective. Mr. O'Hara's defense was completely gutted when the court failed to tell the jury that 'malicious' conduct – against which reasonable force is lawful – includes the willful disregard of property rights, which was O'Hara's lawful force justification.

### **ARGUMENT**

#### **I. Testimonial hearsay was admitted at Mr. O'Hara's trial in violation of the Confrontation Clause of the Sixth Amendment of the U.S. Constitution.**

***Pertinent Facts:*** When Officer Yamada and Officer Boothe drove Mr. O'Hara back to Mr. Nevin's house to "continue the investigation," they believed Mr. O'Hara to be a victim. RP 3, 5, 72. Officer Yamada interviewed "numerous people" at the Nevin residence "to find out what exactly happened." RP 72. Officer Boothe also testified that he "contacted" additional individuals (plural) at Mr. Nevin's. RP 5, 79, 93. Both officers testified that, based on the statements of these witnesses, they arrested Mr. O'Hara for second degree assault and took him to jail. RP 6, 72.

***Backdoor Hearsay:*** The testimony of Officers

Yamada and Boothe as to their understanding of the facts based on statements made to them at the scene by Mr. Nevin, Ms. Gumm and various other people constitutes a variety of inadmissible evidence recognized by this court as “backdoor hearsay.” See, *State v. Martinez*, 105 Wn. App. 775, 782, 20 P.3d 1062 (2001). Having police officers testify to the nature of their understanding after talking to a witness, instead of reporting what the witness actually said, is “simply an attempt to circumvent the [hearsay] rule.” *Martinez*, 105 Wn. App. at 782.

The fact that an out-of-court declarant’s precise words used are not repeated in court is immaterial. *Martinez*, 105 Wn. App. at 782, citing *United States v. Sanchez*, 176 F.3d 1214, 1222 (9th Cir.1999) (citing *United States v. Check*, 582 F.2d 668, 683 (2d Cir.1978)). “Inadmissible evidence is not made admissible by allowing the substance of a testifying witness’s evidence to incorporate out-of-court statements by a declarant who does not testify.” *Martinez*, 105 Wn. App. at 782; *Sanchez*, 176 F.3d at 1222; *Check*, 582 F.2d at 683.

This court has held that such police testimony is inadmissible “backdoor” hearsay. *Martinez*, 105 Wn. App. at 782. Because the hearsay was testimonial, it violated the Sixth Amendment Confrontation Clause. *Crawford v. Washington*, 541 U.S. 36, 68, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). Accordingly, the error can be raised for the first time on appeal. RAP 2.5(a).

**Confrontation Clause:** The fact that people at the crime scene made statements incriminating Mr. O’Hara was inadmissible without reference to the hearsay rules.

The Confrontation Clause provides: “In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him.” U.S. CONST. amend. VI; *Crawford*, 541 U.S. at 42.

*Crawford* resoundingly rejected the notion that the protection of Confrontation Clause is limited by the rules of evidence. *Crawford*, 541 U.S. at 50-51. “Leaving the regulation of out-of-court [testimonial] statements to the law of evidence would render the Confrontation Clause powerless...” *Id.* “Where testimonial statements are

involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence[.]” *Crawford*, 541 U.S. at 61.

The Confrontation Clause excludes from criminal trials all evidence of all out-of-court testimonial statements unless the declarant is unavailable, and the defendant has had an opportunity to cross-examine. *Crawford*, 541 U.S. at 68. This reflects the traditional exception to the confrontation requirement for a witness who is unavailable and has testified previously against the defendant and was subject to cross-examination by the defendant. *See, Barber v. Page*, 390 U.S. 719, 722, 88 S. Ct. 1318, 20 L. Ed. 2d 255 (1968).

***The Statements Were Testimonial:*** It is beyond dispute that the statements at issue here were testimonial. A “testimonial” statement is any statement that a declarant would reasonably expect to be used prosecutorially. *Crawford*, 541 U.S. at 52. Specifically, statements made during interrogation by police officers “fall squarely” within the classification of testimonial statements. *Crawford*, 541 U.S. at 53; *State v. Saunders*, 132 Wn. App. 592, 601, 132 P.3d 743

(2006). These statements were given to police officers investigating crimes reported by Mr. O'Hara.

The fact that the precise words of the statements was not repeated is immaterial. The Confrontation Clause is in effect whenever testimony in some manner implicates a defendant. *State v. Greiff*, 141 Wn.2d 910, 927, 10 P.3d 390 (2000), citing *Ohio v. Roberts*, 448 U.S. 56, 65, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980).

The clear implication and the only possible inference from the testimony of Officers Boothe and Yamada is that people at the scene made statements to the police that dispelled their belief that Mr. O'Hara was a victim and convinced them he was guilty of second degree assault.

***The Witnesses Were Not Unavailable:*** A witness is not "unavailable" for Confrontation Clause purposes unless the State has made a good-faith effort to obtain his or her presence at trial. *Barber*, 390 U.S. at 724-25. 'Unavailable' is defined in ER 804(a). It means more than 'absent without explanation.' ER 804(a)(1) - (6); *Barber*, 390 U.S. at 724-25.

Here, the State made no showing these declarants were unavailable. The State did not even allege that the hearsay declarants here were unavailable by any stretch of ER 804(a)(1) – (6).

**No Cross Examination:** This element is not in dispute.

**Conclusion:** The testimony of Officers Boothe and Yamada was a transparent *Crawford* violation.

**Not Harmless:** A Confrontation Clause violation requires reversal unless the State can prove that the error was harmless beyond a reasonable doubt. *State v. Davis*, 154 Wn.2d 291, 304, 111 P.3d 844 (2005); *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985).

A *Crawford* violation is always prejudicial, unless the untainted evidence is overwhelming. *Guloy*, 104 Wn.2d at 426; *State v. Edwards*, 131 Wn. App. 611, 615, 128 P.3d 631 (2006). The court must first assume that the damaging potential of the out-of-court statements was fully realized. *Guloy*, 104 Wn.2d at 425; *Delaware v. Van Arsdall*, 475 U.S. 673, 684, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986). The court then must conclude that the untainted evidence was so

overwhelming that it necessarily leads to a finding of guilt. *State v. Moses*, 129 Wn. App. 718, 732, 19 P.3d 906 (2005), citing *Davis*, 154 Wn.2d at 304.

Here, there was no 'untainted' evidence. The sum total of the State's case was the uncorroborated story of Jeff Loree. But Mr. Loree's evidence was not merely tainted, it was virtually nullified by the confrontation error. By his own evidence, Mr. Loree had a strong incentive to implicate Mr. O'Hara by any available means when the police unexpectedly showed up and started asking questions. It cannot be said beyond a reasonable doubt that, without a shred of physical evidence, the "backdoor" corroboration in the form of unsworn, untested statements by Mr. Loree's cohorts did not influence the jury's decision as to which story to believe.

The testimony at issue here clearly prejudiced Mr. O'Hara. Reversal is required.

**II. The untainted evidence was insufficient to overcome the presumption of innocence and establish guilt beyond a reasonable doubt.**

Evidence is sufficient to support a conviction only if, viewed in the light most favorable to the State, it is

strong enough to persuade a rational jury to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

The evidence must be strong enough to overcome the presumption of innocence. *Coffin v. United States*, 156 U.S. 432, 453, 15 S. Ct. 394, 39 L. Ed. 481 (1895). The presumption of innocence is “axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.” *Id.* The presumption is “evidence in favor of the accused introduced by the law on his behalf,” and must be so regarded by the jury. *Coffin*, 156 U.S. at 460, 459 (emphasis added.) The legal presumption of innocence prevails until it is destroyed by such an “overpowering” amount of admissible evidence of guilt “as is calculated to produce the opposite belief.” *Coffin*, 156 U.S. at 459.

When Mr. Loree’s evidence is seen for what it is – the uncorroborated story of an accuser with obvious personal interests at stake – the evidence is decidedly *underpowering*. The State did not produce evidence from a single independent witness – not Tina Gumm, not Michael Nevin, not Greg Rickey.

Not one person who implicated Ryan O'Hara that night appeared for questioning under oath.

Considering Mr. Loree's admitted role in the fracas, and the fact that had a strong motive to lie about who did what to whom when the police suddenly showed up and started asking questions, together with the unlikely circumstance that not one, but three people who could have shed light on the conflicting stories conveniently disappeared, Jeffrey Loree's uncorroborated parol evidence was insufficient on its face to overcome the legal presumption of innocence.<sup>1</sup>

If the jury had not been led to believe that independent witnesses had corroborated Jeffrey Loree's story and refuted Ryan O'Hara's, it could not have failed to entertain a reasonable doubt as to Mr. Loree's veracity.

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<sup>1</sup> Ironically, if this case were about commercial paper rather than a man's liberty and reputation, the State could not prevail on this evidence. Mere parol evidence cannot, as a matter of law, overcome the legal presumption that a written instrument is valid – no matter how many parol witnesses the plaintiff produces. *Barnes v. Packwood*, 10 Wash. 50, 55, 38 P. 857 (1894) (the unsupported oral testimony, contradicted by defendant, of not one but four makers, that they signed a negotiable instrument by mistake could not overcome the legal presumption in favor of the correctness of the note.)

A conviction based on insufficient evidence must be reversed and the prosecution dismissed with prejudice. *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998).

**III. The self-defense instruction did not allow Mr. O'Hara to argue his theory of the case.**

**Instruction:** The court instructed Mr. O'Hara's jury that it is a defense to second degree assault that the force used was lawful as defined in the instructions. Instr. No. 11, CP 35. That is, a degree of force no greater than necessary, used by a person who reasonably believes he is about to be injured, to prevent an offense against his person, or to prevent "a malicious trespass, or other malicious interference from real or personal property lawfully in that person's possession." RP 158-59.

The court defined "malicious" as follows:

'Malice' and 'maliciously' mean an evil intent, wish, or design to vex, annoy, or injure another person.

Instr. No. 10, CP 35; RP 158. This instruction omits two-thirds of the statutory language, including a crucial element of the definition of lawful force – namely, that "malice" also means the willful disregard of a person's rights. This

prevented Mr. O'Hara from arguing an essential theory of his defense.

**Applicable Law:** The instruction was only the first sentence of the applicable law defining "malicious" as found in RCW 9A.04.110(12). The statutory definition begins with the text of the instruction given:

"Malice" and "maliciously" shall import an evil intent, wish, or design to vex, annoy, or injure another person.

RCW 9A.04.110(12). But the definition continues:

"Malice may be inferred from an act done in willful disregard of the rights of another, or an act wrongfully done without just cause or excuse, or an act or omission of duty betraying a willful disregard of social duty."

RCW 9A.04.110(12).

**Constitutional Error:** An error affecting a defendant's self-defense claim is of constitutional magnitude. *State v. Arth*, 121 Wn. App. 205, 213, 87 P.3d 1206 (2004). An error in the self-defense instruction is presumed to be prejudicial. *State v. Walden*, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997). Accordingly, a defective self-defense instruction requires reversal, unless the State proves it was harmless

beyond a reasonable doubt. *Arth*, 121 Wn. App. at 213; *State v. McCullum*, 98 Wn.2d 484, 498, 656 P.2d 1064 (1983).

Jury instructions must be clear and complete enough to allow the defense to fully argue its theory of the case. *State v. Rodriguez*, 121 Wn. App. 180, 184-85, 87 P.3d 1201 (2004). Above all, the instructions must clearly and completely inform the jury of the applicable law. *Rodriguez*, 121 Wn. App. at 184-85. The instructions “must make the relevant legal standards manifestly apparent to the average juror.” *State v. Marquez*, 131 Wn. App. 566, \_\_\_, 127 P.3d 786, 791 (2006), citing *Walden*, 131 Wn.2d at 473.

***The Instruction Is Incomplete:*** Mr. O'Hara's jury was not told the applicable law of self defense. Therefore, the jury did not know that the definition of “malice” includes the willful disregard of a person's rights. Without the “willful disregard” language, the instruction failed to inform the jury of precisely that element of the applicable law that accommodates Mr. O'Hara's theory of the case: that he was lawfully defending his rights from Jeffrey Loree's willful disregard.

***The Instruction Is Ambiguous:*** The truncated instruction is also hopelessly ambiguous. The problem is the unfortunate reference to “evil intent” in the definition ‘malice’ and ‘maliciously.’ It told the jury it could not infer malice solely from Mr. Loree’s act of wilfully disregarding Mr. O’Hara’s rights. Rather, it had to find some quality of “evil” attaching to Mr. Loree’s design or intent. “Evil” was not defined.

The instructions read as a whole fail to convey the plain language of RCW 9A.110.04(12) that malice can be inferred from even the most well-intentioned conduct if it willfully disregards another person’s rights.

The self-defense instruction was fatally defective.

***Not Harmless:*** The error was not harmless by any standard. We cannot say that a properly instructed jury would not have found that Jeff Loree willfully disregarded Ryan O’Hara’s rights – however noble his intent – and that Mr. O’Hara acted within the law when he took a swing at his tormentor with a flashlight. Reversal is required.

**CONCLUSION**

Mr. O'Hara was convicted on insufficient evidence patched up with the clearly implied out-of-court accusations of people he could not confront, by a jury that was not informed of a crucial component of the law favorable to his defense. Retrial following reversal for insufficient evidence is "unequivocally prohibited." *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998). Accordingly, Mr. O'Hara asks the court to reverse and dismiss with prejudice.

Respectfully submitted, this 20<sup>th</sup> day of February, 2007.



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**APPENDIX**

**RCW 9A.04.110(12):**

“Malice” and “maliciously” shall import an evil intent, wish, or design to vex, annoy, or injure another person. Malice may be inferred from an act done in wilful disregard of the rights of another, or an act wrongfully done without just cause or excuse, or an act or omission of duty betraying a wilful disregard of social duty[.]

**ER 804:**

(a) Definition of Unavailability. “Unavailability as a witness” includes situations in which the declarant:

- (1) Is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or
- (2) Persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or
- (3) Testifies to a lack of memory of the subject matter of the declarant's statement; or
- (4) Is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
- (5) Is absent from the hearing and the proponent of the statement has been unable to procure the declarant's attendance ...by process or other reasonable means.
- (6) A declarant is not unavailable as a witness if the exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

I certify under penalty of perjury that on this date  
I hand-delivered one copy of this brief to the Spokane  
County Prosecutor's office addressed to:

Mr. Kevin M. Korsmo  
Deputy Prosecuting Attorney  
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I also sent one copy by first class U.S. mail to:

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February 20, 2007