

NO. 35602-3-II

COURT OF APPEALS, DIVISION II

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STATE OF WASHINGTON,

Respondent,

vs.

KEVIN D. MOORE,

Appellant,

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APPEAL FROM THE SUPERIOR COURT  
FOR THURSTON COUNTY  
The Honorable GARY R. TABOR, Judge  
Cause No. 04-1-00531-4

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BRIEF OF APPELLANT

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P. M. 8-31-2007

TABLE OF CONTENTS

	<u>Page</u>
A. ASSIGNMENTS OF ERROR.....	1
B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....	1
C. STATEMENT OF THE CASE.....	2
D. ARGUMENT.....	5
01. THE TRIAL COURT ERRED IN DENYING MOORE’S MOTIONS FOR A MISTRIAL .....	5
02. A SCHOOL-BUS-ROUTE ENHANCEMENT PURSUANT TO AN INFORMATION THAT FAILS TO ALLEGE ALL OF THE ELEMENTS OF THE ENHANCEMENT MUST BE REVERSED AND DISMISSED.....	11
03. THE TRIAL COURT MISCALCULATED MOORE’S OFFENDER SCORE WHEN IT INCLUDED HIS SIX ALLEGED PRIOR CRIMINAL CONVICTIONS IN DETERMINING HIS OFFENDER SCORE.....	15
E. CONCLUSION.....	17

TABLE OF AUTHORITIES

	<u>Page(s)</u>
<u>State of Washington</u>	
<u>Auburn v. Brooke</u> , 119 Wn.2d 623, 836 P.2d 212 (1992).....	13
<u>In re Personal Restraint of Cadwallader</u> , 155 Wn.2d 867, 123 P.3d 456 (2005).....	17
<u>State v. Coe</u> , 101 Wn.2d 772, 684 P.2d 668 (1984).....	11
<u>State v. Escalona</u> , 49 Wn. App. 251, 742 P.2d 190 (1987).....	8
<u>State v. Ford</u> , 137 Wn.2d 472, 973 P.2d 452 (1999).....	15, 16
<u>State v. Hennessey</u> , 80 Wn. App. 190, 907 P.2d 331 (1995).....	13
<u>State v. Hopper</u> , 118 Wn.2d 151, 822 P.2d 775 (1992).....	11
<u>State v. Kitchen</u> , 61 Wn. App. 911, 812 P.2d 888 (1991).....	14
<u>State v. Kjorsvik</u> , 117 Wn.2d 93, 812 P.2d 86 (1991).....	11, 12, 14
<u>State v. Lane</u> , 56 Wn. App. 286, 786 P.2d 277 (1989).....	3
<u>State v. Lord</u> , 117 Wn.2d 829, 822 P.2d 177 (1991).....	9
<u>State v. Lua</u> , 62 Wn. App. 34,813 P.2d 588, <u>review denied</u> , 117 Wn.2d 1025 (1991).....	13
<u>State v. McCarty</u> , 140 Wn.2d 420, 998 P.2d 296 (2000).....	14
<u>State v. McCorkle</u> , 88 Wn. App. 485, 945 P.2d 736 (1997).....	16
<u>State v. Moen</u> , 129 Wn.2d 535, 919 P.2d 69 (1996).....	9
<u>State v. Morley</u> , 134 Wn.2d 588, 952 P.2d 167 (1998).....	15
<u>State v. Oughton</u> , 26 Wn. App. 74, 612 P.2d 812 (1980).....	14

TABLE OF AUTHORITIES

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<u>State of Washington</u>	
<u>Auburn v. Brooke</u> , 119 Wn.2d 623, 836 P.2d 212 (1992).....	13
<u>In re Personal Restraint of Cadwallader</u> , 155 Wn.2d 867, 123 P.3d 456 (2005).....	17
<u>State v. Coe</u> , 101 Wn.2d 772, 684 P.2d 668 (1984).....	11
<u>State v. Escalona</u> , 49 Wn. App. 251, 742 P.2d 190 (1987).....	8
<u>State v. Ford</u> , 137 Wn.2d 472, 973 P.2d 452 (1999).....	15, 16
<u>State v. Hennessey</u> , 80 Wn. App. 190, 907 P.2d 331 (1995).....	13
<u>State v. Hopper</u> , 118 Wn.2d 151, 822 P.2d 775 (1992).....	11
<u>State v. Kitchen</u> , 61 Wn. App. 911, 812 P.2d 888 (1991).....	14
<u>State v. Kjorsvik</u> , 117 Wn.2d 93, 812 P.2d 86 (1991).....	11, 12, 14
<u>State v. Lane</u> , 56 Wn. App. 286, 786 P.2d 277 (1989).....	3
<u>State v. Lord</u> , 117 Wn.2d 829, 822 P.2d 177 (1991).....	9
<u>State v. Lua</u> , 62 Wn. App. 34,813 P.2d 588, <u>review denied</u> , 117 Wn.2d 1025 (1991).....	13
<u>State v. McCarty</u> , 140 Wn.2d 420, 998 P.2d 296 (2000).....	14
<u>State v. McCorkle</u> , 88 Wn. App. 485, 945 P.2d 736 (1997).....	16
<u>State v. Moen</u> , 129 Wn.2d 535, 919 P.2d 69 (1996).....	9
<u>State v. Morley</u> , 134 Wn.2d 588, 952 P.2d 167 (1998).....	15
<u>State v. Oughton</u> , 26 Wn. App. 74, 612 P.2d 812 (1980).....	14

A. ASSIGNMENTS OF ERROR

01. The trial court erred in denying Moore's motion for a mistrial after the State's witness testified in violation of the court's ruling on Moore's motion in limine.
02. The trial court erred in denying Moore's motion for a mistrial after the State argued material during closing argument in violation of the court's ruling on Moore's motion in limine.
03. The trial court erred in not taking the school-bus-route enhancement in count I from the jury for the failure of the information to allege all of the elements of the enhancement.
04. The trial court erred in not taking the school-bus-route enhancement in count II from the jury for the failure of the information to allege all of the elements of the enhancement.
05. The trial court erred in calculating Moore's offender score when it included his six alleged prior criminal convictions in determining his offender score.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

01. Whether the outcome of Moore's trial was affected by the trial court's denial of his motion for a mistrial after the State's witness testified in violation of the court's ruling on Moore's motion in limine? [Assignment of Error No. 1].

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02. Whether the outcome of Moore's trial was affected by the trial court's denial of his motion for a mistrial after the State argued material during closing argument in violation of the court's motion in limine? [Assignment of Error No. 2].
03. Whether the outcome of Moore's trial was affected by the combination of the trial court's denial of his motions for a mistrial after the State's witness testified in violation of the court's ruling on Moore's motion in limine and after the State argued during closing argument in violation of the court's motion in limine? [Assignment of Error Nos. 1-2].
04. Whether the trial court erred in not taking the school-bus-route enhancements in counts I and II from the jury for the failure of the information to allege all of the elements of the enhancements. [Assignment of Error Nos. 3-4].
05. Whether the trial court erred in calculating Moore's offender score when it included his six alleged prior criminal convictions in determining his offender score? [Assignment of Error No. 5].

C. STATEMENT OF THE CASE

01. Procedural Facts

Kevin D. Moore (Moore) was charged by second amended information filed in Thurston County Superior Court on February 13, 2006, with two counts of delivery of cocaine, each with

school-bus-route enhancement, contrary to RCWs 69.50.401(2)(a) and 69.50.435. [CP 44].

No pre-trial motions were filed nor heard regarding either a CrR 3.5 or CrR 3.6 hearing. Trial to a jury commenced on May 10, 2006, the Honorable Gary R. Tabor presiding.<sup>1</sup>

The jury returned verdicts of guilty as charged, Moore was sentenced within his standard range, including enhancement, and timely notice of this appeal followed. [CP 120-23, 143-154].

## 02. Substantive Facts

### 02.1 Delivery: Count I: March 2, 2004

On March 2, 2004, the police used an informant, Shawnte Cardwell, to conduct a controlled buy<sup>2</sup> of six pieces of rock cocaine from Moore. [RP Vol. I 45-60; RP Vol. II 265-66]. The purchase took place inside Moore's car, which was parked in the parking lot of a local store. [RP Vol. I 55, 59]. Cardwell, who acted as an informant in exchange for dismissal of pending charges for felony and misdemeanor theft and who testified on the condition that the State intervene on her behalf by making a telephone call regarding her other

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<sup>1</sup> Moore's initial trial ended in a hung jury. [RP 02/16/06 12].

<sup>2</sup> In a "controlled buy," an informant is given marked money, searched for drugs, and observed while sent into the specified location. If the informant "goes in empty and comes out full," his or her assertion that drugs were available is proven, and his or her reliability confirmed. State v. Lane, 56 Wn. App. 286, 293, 786 P.2d 277 (1989) (citing 1 W. LaFave, Search and Seizure SS 3.3(b), at 512 (1978)).

pending felony charges in Oregon [RP Vol. II 315-16], explained that when she got into the car:

I tell him I have \$60 and I want some rocks, and I set the money down. He picks it up, counts it, and then goes in his sock and gets the stuff and, you know, we have a little chitchat, then I get out of the car.

[RP Vol. II 281].

The place of the transaction was within one thousand feet of a school bus route stop designated by the school district. [RP Vol. II 357].

#### 02.2 Delivery: Count II: March 8, 2004

On March 8, the police again used Cardwell to conduct a controlled buy of seven pieces of rock cocaine from Moore. [RP Vol. I 65-70, 77; RP Vol. II 265-66]. This time the purchase took place inside Cardwell's car, which was parked in a different location in the same parking lot as the previous purchase. [RP Vol. I 71-74]. Cardwell explained:

We chitchatted for a minute, and I was giving him shit about, you know, not letting me sit in his car, I wanted to drive it, and I give him the money, he gets the stuff out of his sock and then goes on.

[RP Vol. II 291].

This transaction was also video-recorded and played to the jury. [RP Vol. I 83]. And Cardwell was wearing a body wire, a recording of which was also played to the jury. [RP Vol. II 295-97].

The place of the transaction was within one thousand feet of a school bus route stop designated by the school district. [RP Vol. II 357].

D. ARGUMENT

01. THE TRIAL COURT ERRED IN DENYING MOORE'S MOTIONS FOR A MISTRIAL.

01.1 Procedural History

01.1.1 Motion in Limine

Prior to trial, the court granted Moore's motion to exclude any evidence of his prior drug dealings with Shawnte Cardwell. The concern was that Cardwell, when asked how she knew Moore, would respond that "he is my source." [RP Vol. I 31]. The court stated:

Well, it's my belief that based upon the language that's employed in the defendant's motion in limine, that saying he was my source would be an allegation of a bad act. I think there are other ways a witness can state that they've had prior dealings with. It doesn't have to say drug dealings or we've known each other for several months, that kind of information, but not that he was my source, implying that other bad acts have taken place, without this Court being further apprised of those specifics. So I think you need to instruct your

witness when she testifies as to how to carefully phrase what she's saying so it does not reveal prior drug dealings. [Emphasis added].

[RP Vol. I 31-32].

01.1.2 Evidence Elicited and Ruling at Trial

During direct examination, the State asked and Cardwell responded in the following manner:

Q. Now, what was your understanding as your job as a CI? You already intimated that you had to buy from certain people. Were these targets that the task force identified for you, or did you identify them?

A. No, I identified them.

Q. Why did you identify them?

A. Because that was my person that I was getting it from anyways. [Emphasis added].

[RP Vol. II 274].

Following Moore's objection, the court directed the jury to "disregard the last statement" before holding a sidebar conference. [RP Vol. II 274]. When Moore moved for a mistrial for violation of the motion in limine [RP Vol. II 305-06], the State argued harmless error: "Nothing was made of that, it wasn't brought up again, no further commentary was solicited or testified as to those points...." [RP Vol. II 307].

In denying the motion, the court, while agreeing with Moore that “(t)his clearly was a violation of the Court’s ruling in limine(,)” held that it expected the jury to follow its limiting instruction to disregard the statement. [RP Vol. II 308-09].

#### 01.1.3 Closing Argument and Ruling

During closing argument, the State, in characterizing Cardwell’s testimony, argued:

And what did she tell you? She told you I worked for the task force. I hadn’t worked for anybody else but the task force. This is the first time I’ve worked and I made a deal with them. I made a deal to do two buys, and my job was to purchase crack cocaine from somebody I knew I could purchase crack cocaine from, and she identified Kevin Moore. [Emphasis added].

[RP Vol. III 404].

After the court overruled Moore’s objection and motion to strike, holding “(t)his is argument. The jury will evaluate argument as they see fit [RP Vol. III 404](,)” Moore moved for a mistrial, again arguing a violation of the motion in limine concerning any prior drug dealings on his part. [RP Vol. III 477]. In denying the motion, the court held:

The fact that she indicated that she identified Mr. Moore as the person she believed she could make purchases from is appropriate for a jury to have heard, but they’re not to go outside the evidence and speculate as to why that was.

[RP Vol. III 480].

## 01.2 Mistrial Argument

A trial court's decision whether or not to grant a mistrial is reviewed for an abuse of discretion. State v. Post, 118 Wn.2d 596, 620, 826 P.2d 172, 837 P.2d 599 (1992). In making this determination, this court applies a three-step test to determine if the trial irregularity may have influenced the jury: "(1) the seriousness of the irregularity, (2) whether the statement in question was cumulative of other evidence properly admitted, and (3) whether the irregularity could be cured by an instruction." State v. Escalona, 49 Wn. App. 251, 254, 742 P.2d 190 (1987) (citing State v. Weber, 99 Wn.2d 158, 165-66, 659 P.2d 1102 (1983)).

### 01.2.1 Trial Mistrial

The seriousness of the irregularity of Cardwell's testimony at trial that she identified Moore for the drug task force because she was getting drugs from him cannot be denied, and was certainly exacerbated by the prosecutor's closing argument. This testimony, as noted by the trial court when ruling on the motion in limine, was tantamount to "an allegation of a bad act [RP Vol. I 32](,)" and, again quoting the trial court, "clearly was a violation of the Court's ruling in limine." [RP Vol. II 308-09].

Even as juries are presumed to follow the court's instructions, State v. Lord, 117 Wn.2d 829, 861, 822 P.2d 177 (1991), the prejudicial effect of Cardwell's statement was not alleviated by the court's limiting instruction to the jury to disregard the statement. Where there is substantial likelihood of prejudice to a defendant's case in the admission of certain testimony, even where there is substantial relevance, not the case here, the testimony may simply be too explosive even when admitted with a limiting instruction. United States v. Brown, 490 F.2d 758, 773-74 (D.C. Cir. 1973); See also State v. Parr, 93 Wn.2d 95, 98, 606 P.2d 263 (1980).

The prejudice here is self-evident, which precluded the jury from making a fair determination of Moore's guilt or innocence. Cardwell's statement had no relevance and served only to plant the seed that Moore was a drug dealer with a history of such activity. Given that drug conviction evidence is not admissible even for impeachment purposes, State v. Wilson, 83 Wn. App. 546, 553-54, 922 P.2d 188 (1996), reviewed denied 130 Wn.2d 1024 (1997), the prejudicial effect of Cardwell's testimony cannot be ignored, doing nothing less than implying that Moore had a drug history, which undeniably bolstered the State's case. And this was not cured by an instruction to disregard the testimony.

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### 01.2.2 Closing Mistrial

All of the above and more. At the core of the trial court's reasoning in denying the motion for mistrial at closing argument is the logic-free premise that the implication to be drawn from Cardwell's trial testimony that Moore was her source for crack cocaine, which was held to be clearly a violation of the motion in limine, was in some way different than the State's closing argument that Cardwell knew she could purchase crack cocaine from Moore. This takes a great deal of imagination, for the implication each time is the same: Moore was a drug dealer with a history of such activity. In the end, there is no right way to do the wrong thing.

### 01.3 Conclusion

In denying the motions for mistrial, the trial court, in each instance, abused its discretion in ignoring the obvious and inescapable prejudice inherent in both Cardwell's testimony and the State's closing argument by reasoning that this prejudice was somehow expunged by the court's limiting instruction at trial and that it somehow became "appropriate" for the jury to hear in closing argument that Cardwell had told them that she knew she could purchase crack cocaine from Moore. The prejudice survived both the limiting instruction and the State's closing argument, with the result that in each instance or in

combination Moore was denied his right to a fair and impartial jury trial. See State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984) and State v. Oughton, 26 Wn. App. 74, 612 P.2d 812 (1980). The evidence in each instance or in combination materially affected the outcome of the trial by confirming that Moore was a drug dealer with a history of such activity, which was of major significance and not harmless.

02. A SCHOOL-BUS-ROUTE ENHANCEMENT  
PURSUANT TO AN INFORMATION  
THAT FAILS TO ALLEGE ALL OF THE  
ELEMENTS OF THE ENHANCEMENT  
MUST BE REVERSED AND DISMISSED.

The constitutional right of a person to be informed of the nature and cause of the accusation against him or her requires that every material element of the offense be charged with definiteness and certainty. 2 C. Torcia, Wharton on Criminal Procedure Section 238, at 69 (13th ed. 1990). In Washington, the information must include the essential common law elements, as well as the statutory elements, of the crime charged in order to appraise the accused of the nature of the charge. Sixth Amendment; Const. art. 1, Section 22 (amend. 10); CrR 2.1(b); State v. Kjorsvik, 117 Wn.2d 93, 812 P.2d 86 (1991). Charging documents that fail to set forth the essential elements of a crime are constitutionally defective and require dismissal, regardless of whether the defendant has shown prejudice. State v. Hopper, 118 Wn.2d 151, 155, 822 P.2d 775 (1992). If, as here, the sufficiency of the information is not challenged until after the verdict, the information “will be more liberally construed in

favor of validity....” State v. Kjorsvik, 117 Wn.2d at 102. The test for the sufficiency of charging documents challenged for the first time on appeal is as follows:

(1) do the necessary facts appear in any form, or by fair construction can they be found, in the charging document; and, if so, (2) can the defendant show that he or she was nonetheless actually prejudiced by the inartful language which caused a lack of notice?

State v. Kjorsvik, 117 Wn.2d at 105-06.

It is not fatal to an information that the exact words of the statute are not used; it is instead sufficient “to use words conveying the same meaning and import as the statutory language.” State v. Leach, 113 Wn.2d 679, 689, 782 P.2d 552 (1989). The information must, however, “state the acts constituting the offense in ordinary and concise language....” State v. Royse, 66 Wn.2d 552, 557, 403 P.2d 838 (1965). The question “is whether the words would reasonably appraise an accused of the elements of the crime charged.” State v. Kjorsvik, 117 Wn.2d at 109.

The primary purpose (of a charging document) is to give notice to an accused so a defense can be prepared. (citation omitted) There are two aspects of this notice function involved in a charging document: (1) the description (elements) of the crime charged; and (2) a description of the specific conduct of the defendant which allegedly constituted the crime.

Auburn v. Brooke, 119 Wn.2d 623, 629-30, 836 P.2d 212 (1992).

A defendant convicted of delivery of cocaine “(w)ithin 1,000 feet of a school bus route stop designated by the school district” is subject to a sentencing enhancement under RCW 69.50.435(1)(c).

Before a defendant can be subjected to an enhanced penalty, the State must prove beyond a reasonable doubt every essential element of the allegation, which triggers the enhanced penalty.

State v. Hennessey, 80 Wn. App. 190, 194, 907 P.2d 331 (1995) (quoting State v. Lua, 62 Wn. App. 34, 42, 813 P.2d 588, review denied, 117 Wn.2d 1025 (1991)).

Here, the second amended information charging Moore with two counts of delivery of cocaine, each with school-bus-route enhancement, did not allege that the school bus route stop was designated by the school district:

Count I – UNLAWFUL DELIVERY OF A  
CONTROLLED SUBSTANCE WITHIN 1000  
FEET OF A SCHOOL BUS ROUTE STOP, RCW  
69.50.401(2)(a), RCW 69.50.435 – CLASS B  
FELONY

In that the defendant, KEVIN DONOVAN MOORE, in the State of Washington, on or about the 2<sup>nd</sup> day of March, 2004, did unlawfully deliver a controlled substance, to-wit: Cocaine. It is further alleged that said offense took place within 1000 feet of a designated school bus route stop. [Emphasis added].

Count II– UNLAWFUL DELIVERY OF A  
CONTROLLED SUBSTANCE WITHIN 1000  
FEET OF A SCHOOL BUS ROUTE STOP, RCW  
69.50.401(2)(a), RCW 69.50.435 – CLASS B  
FELONY

In that the defendant, KEVIN DONOVAN MOORE, in the State of Washington, on or about the 8<sup>th</sup> day of March, 2004, did unlawfully deliver a controlled substance, to-wit: Cocaine. It is further alleged that said offense took place within 1000 feet of a designated school bus route stop. [Emphasis added].

[CP 44].

This information failed to apprise Moore of the nature of the enhancements. It did not allege that the school bus route stop was designated by the school district, though this language did appear in the court’s instruction 16, as well as on the special verdict form for each count. [CP 115, 121-22]. “(S)ince both charging documents and jury instructions must identify the essential elements of the crime for which the defendant is charged [information] and tried [jury instructions](,)” State v. McCarty, 140 Wn.2d 420, 426 n.1, 998 P.2d 296 (2000), the information is defective, and the enhancements obtained on each count must be reversed and dismissed. State v. Kitchen, 61 Wn. App. 911, 812 P.2d 888 (1991). Moore need not show prejudice, since Kjorsvik calls for a review of prejudice only if the “liberal interpretation” upholds the validity of the information. See State v. Kjorsvik, 117 Wn.2d at 105-06.

03. THE TRIAL COURT MISCALCULATED MOORE'S OFFENDER SCORE WHEN IT INCLUDED HIS SIX ALLEGED PRIOR CRIMINAL CONVICTIONS IN DETERMINING HIS OFFENDER SCORE.

Without objection or acknowledgment, the trial court included Moore's six alleged prior criminal convictions in determining his offender score. [RP 01/20/06 3-22; CP 144-45].

One of the following must occur for a trial court to include prior convictions in a defendant's criminal history: (1) the State proves the prior convictions with the required evidence; (2) the defendant admits to the prior convictions; (3) the defendant acknowledges the prior convictions by failing to object to their inclusion in a presentence report. RCW 9.94A.500(1); RCW 9.94A.530(2).

Since none of the above happened during Moore's sentencing [RP 01/20/06 3-22], the trial court erred in including the six alleged prior criminal convictions in determining his offender score. While issues not raised in the trial court may not generally be raised for the first time on appeal, State v. Moen, 129 Wn.2d 535, 543, 919 P.2d 69 (1996), illegal or erroneous computations of an offender score that alter the defendant's standard sentence range may be challenged for the first time on appeal. State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999). If Moore's six alleged prior criminal convictions were improperly included in his

offender calculation, his standard range, including enhancement, would drop from 84-144 months to 36-44 months. RCW 9.94A.517; CP 142, 145].

At sentencing, the State bears the burden of proving all prior convictions before those convictions can be used in an offender score or otherwise. See State v. Ford, 137 Wn.2d at 479-80. A defendant does not acknowledge an incorrect offender score simply by failing to object at sentencing. State v. Ford, 137 Wn.2d at 481-82.

Moore's sentence should be remanded for resentencing under the general rule that the State is held to the existing record on remand. State v. McCorkle, 88 Wn. App. 485, 500, 945 P.2d 736 (1997). At the sentencing hearing, given that the State presented no evidence to prove Moore's six alleged prior criminal convictions, there was nothing to object to in this regard. Unlike the facts in State v. Ford, 137 Wn.2d at 485, where our Supreme Court remanded for an evidentiary hearing to permit the State to prove the disputed matters because "defense counsel has some obligation to bring deficiencies of the State's case to the attention of the sentencing court(,)" 137 Wn.2d at 485, here there was no "State's case." Nothing occurred that could possibly have warranted an objection from Moore's counsel.

CERTIFICATE

I certify that I mailed a copy of the above brief by depositing it in the United States Mail, first class postage pre-paid, to the following people at the addresses indicated:

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Dated this 31<sup>st</sup> day of August 2007.

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STATE OF WASHINGTON  
COUNTY OF KING  
BY \_\_\_\_\_  
CLERK OF SUPERIOR COURT