

NO. 36552-9

FILED
COURT OF APPEALS
DIVISION II

06/11/08 PM 2:17

STATE OF WASHINGTON

BY _____

DEPUTY

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

STEVEY DUNLAP, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable John A. McCarthy

No. 06-8-01500-0

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Should this court refuse to review defendant's claim of error regarding the admission of child hearsay statements when this claim was not properly preserved below and when it is not an issue of constitutional magnitude that may be raised for the first time on appeal?
2. Did the defendant have a right to a jury trial in a juvenile proceeding because he was charged with a sex offense when other juveniles do not have this right and when case law has consistently held that given the juvenile's systems focus on rehabilitation versus punishment, juvenile respondents do not have a right to a jury trial?

B. STATEMENT OF THE CASE.

1. Procedure

On September 19, 2006, the State arraigned defendant,¹ Stevey Dunlap, on one count of child molestation in the first degree against seven year old victim, C.M. CP 1-3. A bench trial commenced on January 4, 2007 in front of the Honorable John McCarthy. 1RP 3. The court found

¹ The State will refer to appellant Stevey Dunlap as defendant even though he is a respondent in juvenile court. This is to avoid confusion with the State being the respondent in this court.

C.M. competent to testify. 1RP 21-23. The court admitted the child hearsay statements offered by the State. 2RP 17-9, 5ARP 157-161.

The court found defendant guilty of child molestation in the first degree. 1/23/07 RP 15. Sentencing followed on June 14, 2007. Sentencing RP 1-8. The court sentenced defendant to 15-36 weeks with credit for time served of 14 days. CP 23-29, Sentencing RP 6-7. Defendant filed this timely appeal. CP 9-16.

2. Facts

On December 9, 2005, seven-year old victim, C.M. attended a sleepover birthday party. 1RP 26-7, CP 4-8. Defendant, Stevey Dunlap, also attended the party. 1RP 26. The party was the first time C.M had met defendant. 1RP 27.

During the party, defendant played a game of “husband and wife” with C.M. 1RP 34. Defendant got on top of C.M. and rubbed his “front private” on him. 1RP 34. Defendant kissed C.M. on the lips and also reached down C.M.’s pants and touched his “bottom.” 1RP 34, 36, 55.

When C.M. got home from the party, he was grumpy. 1RP 70. C.M. told his mother the bad things that had happened at the party: the adult at the party was drinking beer with his girlfriend on his lap, the adult and his girlfriend were kissing, the kids had watched a rated “R” movie with sex in it, the adult at the party took out a gun and said he was going to kill the “f-ing” boogieman, and the kids had gone to a park by

themselves. 1RP 71, 73. C.M. had not been exposed to sex prior to the party, but was “fixating” on sex after the party. 1RP 72-3. C.M. mentioned sex daily after the party. 1RP 73-4. About two weeks after the party, C.M.’s mom told C.M. that sex was for adults and not to talk about it. 2RP 6. C.M.’s mom was frustrated, didn’t know where the sex talk was coming from and showed C.M. a child friendly book on how babies are made. 1RP 74, 2RP 6.

The next day, C.M. told his mother what had happened at the party. 1RP 38, 2RP 8. C.M. came to his mother and told her “brown people are nice.” 2RP 8. C.M. told his mother that he had played a game at the party where he was the wife and defendant was the husband. 2RP 9. C.M. said defendant rolled over onto him, kissed his mouth, said “oh baby, oh baby”, rubbed his penis on C.M.’s stomach and put his hand down his underwear and rubbed C.M.’s bottom. 2RP 9. C.M. stated that he did not know what defendant did was bad until he told his mother. 1RP 38. C.M.’s mom called CPS. 2RP 20-1. C.M. was interviewed by child interviewer Kim Brune and a DVD was made of the interview. 4RP 126-8, Supp CP. C.M. made the same statements to Ms. Brune about defendant rubbing his penis on him and touching his bottom. 4RP 141-3.

Defendant was questioned by Deputy McGinnis and denied playing the game with C.M., touching C.M. or kissing C.M. 3RP 104-5. As the deputy questioned defendant about the allegations, defendant’s demeanor changed. 3RP 105. Defendant would not look at the deputy.

3RP 105. Defendant told the deputy that the top bunk was small and there was not enough room for what C.M. alleged to have happened. 3RP 106. Defendant then put his hands around his eyes and started to raise his voice at the deputy. 3RP 106. Defendant shouted at the deputy that he was taking the word of “that kid.” 3RP 107.

C. ARGUMENT.

1. THIS COURT SHOULD REFUSE TO REVIEW DEFENDANT’S CLAIM REGARDING THE COURT ADMITTING CHILD HEARSAY AS THIS WAS NOT PROPERLY PRESERVED BELOW; DEFENDANT DOES NOT PRESENT AN ISSUE OF CONSTITUTIONAL MAGNITUDE THAT MAY BE RAISED FOR THE FIRST TIME ON APPEAL.

The admission or exclusion of relevant evidence is within the discretion of the trial court. *State v. Swan*, 114 Wn.2d 613, 658, 700 P.2d 610 (1990); *State v. Rehak*, 67 Wn. App. 157, 162, *review denied*, 120 Wn.2d 1022 (1992). A party objecting to the admission of evidence must make a timely and specific objection in the trial court. ER 103; *State v. Guloy*, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985). Failure to object precludes raising the issue on appeal. *Guloy*, 104 Wn.2d at 421. The court has “steadfastly adhered to the rule that a litigant cannot remain silent as to claimed error during trial and later, for the first time, urge objections thereto on appeal.” *Bellevue Sch. Dist. 405 v. Lee*, 70 Wn.2d 947, 950, 425 P.2d 902 (1967). A defendant may only appeal a non-

constitutional issue on the same grounds that he or she objected on below. *State v. Thetford*, 109 Wn.2d 392, 397, 745 P.2d 496 (1987); *State v. Hettich*, 70 Wn. App. 586, 592, 854 P.2d 1112 (1993). The trial court's decision will not be reversed on appeal absent an abuse of discretion, which exists only when no reasonable person would have taken the position adopted by the trial court. *Rehak*, 67 Wn. App. at 162.

The Washington Legislature enacted a statute commonly referred to as the "Child Hearsay Statute." RCW 9A.44.120. This statute provides for the admission of out-of-court statements of a child victim of sexual abuse under certain circumstances. The statute provides, in relevant part that:

A statement made by a child when under the age of ten describing any act of sexual contact performed with or on the child by another, describing any attempted act of sexual contact with or on the child by another, or describing any act of physical abuse of the child by another that results in substantial bodily harm as defined by RCW 9A.04.110, not otherwise admissible by statute or court rule, is admissible in evidence in dependency proceedings under Title 13 RCW and criminal proceedings, including juvenile offense adjudications, in the courts of the state of Washington if:

- (1) The court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability; and

(2) The child either:

(a) Testifies at the proceedings; or

(b) Is unavailable as a witness:
PROVIDED, That when the child is
unavailable as a witness, such statement
may be admitted only if there is
corroborative evidence of the act.

RCW 9A.44.120. Essentially, the child hearsay statute requires a trial court to answer three questions in making its determination of the admissibility of child hearsay statements: (1) is the child victim's statement reliable; (2) is the child available to testify; and (3) if the child is unavailable, is there corroborative evidence of the act.

The child hearsay statute requires the court to hold a pre-trial hearing in which it determines the admissibility of a child victim's statements. During that hearing, the court must first determine if the statement being offered is reliable. That determination is based on a set of

reliability factors approved by the Washington Supreme Court in *State v. Ryan*, 103 Wn.2d 165, 175-76, 691 P.2d 197 (1984).²

Not every *Ryan* factor must be met before a statement is reliable. “[I]t is clear that not every factor listed in *Ryan* needs to be satisfied before a court will find a child’s hearsay statement reliable under the child victim hearsay statute.” See *Swan* at 652. Hence, there is no “magic number” of the remaining seven factors that must be present before the court finds the child’s statements are reliable. The court must only find the factors have been “substantially met.” See, e.g., *State v. McKinney*, 50 Wn. App. 56, 61-62, 747 P.2d 1113 (1987).

² The factors are:

1. Whether the child has an apparent motive to lie;
2. The general character of the declarant, including veracity;
3. Whether more than one person heard the statements;
4. Whether the statements were made spontaneously;
5. Timing of declaration and relationship between declarant and witness.
6. Whether the statement contains express assertions about past facts;
7. Whether cross-examination could show the declarant’s lack of knowledge;
8. Is there only a remote possibility the declarant’s recollection is faulty; and
9. The overall circumstances surrounding the statement.

Ryan, 103 Wn.2d at 175-76 (taking the first five of those factors from *State v. Parris*, 98 Wn.2d 140, 654 P.2d 77 (1982) and the last four from *Dutton v. Evans*, 400 U.S. 74, 91 S. Ct. 210, 27 L. Ed. 2d 213 (1970)).

In the years since the *Ryan* case was decided, two of the factors have been eliminated from consideration in the context of child hearsay. Factor six about assertions of past facts does not apply to child hearsay statements because every statement a child makes concerning sexual abuse will be a statement relating a past fact. See *State v. Leavitt*, 111 Wn.2d 66, 75, 758 P.2d 982 (1988); *State v. Stange*, 53 Wn. App. 638, 769 P.2d 873, review denied, 113 Wn.2d 1007 (1989). Factor seven concerning cross-examination also does not apply to child hearsay statements because “cross-examination could in every case possibly show error in the child hearsay statement.” *Stange*, 53 Wn. App. at 647. See also *Idaho v. Wright*, 497 U.S. 805, 820-824, 110 S. Ct. 3139, 111 L. Ed. 2d 638 (1990).

While the statute directs the trial court to make findings regarding certain aspects of the statements, there is nothing in the statute that requires entry of findings of fact or even entry of a written order. RCW 9A.44.120.

In *State v. Stevens*, 58 Wn. App. 478, 794 P.2d 38 (1990), a defendant challenged the trial court's ruling admitting the child victim's statements to several different people. Stevens argued that the trial court abused its discretion by applying the *Ryan* factors to the out of court statements collectively, rather than individually to each statement. The appellate court noted that Stevens had failed to object to the trial court's method of analysis and that objections to "the admission of evidence would not be considered for the first time on appeal unless based upon the same ground asserted at trial." *Stevens*, 58 Wn. App. at 485-86. The court went on to examine whether Stevens could raise this as an issue of constitutional magnitude based upon a violation of his right to confrontation; it noted that if the declarant and the hearsay recipient witnesses are available to testify and subject to cross-examination then the confrontation and due process clauses are satisfied. *Id.* at 486.

Thus, admission of child hearsay statements where the declarant and the recipient witness both testify at trial does not present an issue of constitutional magnitude that may be raised for the first time on appeal under RAP 2.5. Only those claims that were preserved for review by a specific objection in the trial court are properly before the appellate court.

In the instant case, no objection was made to the court's ruling that the child hearsay statements were admissible. The State filed a brief as to the child hearsay statement that detailed all seven *Ryan* factors. 2RP 16-7. Defense did not file any memorandum concerning the statements. The court made two separate rulings that the child hearsay statements were admissible. 2RP 17-9, 5ARP 157-161.

The first ruling concerned the statements made by C.M. to his mother. 2RP 17. The court specifically asked defense counsel if he had any objections and defense counsel only made a comment that he wanted the judge to watch the movie the "Butterfly Effect" before making his ruling. 2RP 17. The court ruled that the defense comments went to weight and not admissibility. 2RP 18-9. The court indicated that under *Ryan*, "the full content and circumstance of the statements" indicate an indicia of reliability. 2RP 18. In looking at the *Ryan* factors, the court found there was no motive of C.M. to lie, and that the spontaneity, timing of the declarations and "other factors" indicated the statements to be admissible. 2RP 18-19. Defense made no objections to the findings.³

The second set of child hearsay statements was made to child interviewer Kim Brune. 5ARP 157. When asked by the court, defense counsel indicated he had no objections to the admissibility of the statements. 5ARP 158-9. The court also noted that the testimony itself

³ The appellant does not allege that his counsel was ineffective.

was not objected to. 5ARP 159. The court then made findings that under the *Ryan* factors, the statement were admissible. 5ARP 159-61. The court found that C.M. did not have a motive to lie and the court indicated that he had observed the demeanor of C.M. on the video and in court. 5ARP 160. C.M.'s statements were consistent and during the interview, C.M. blurted out spontaneous comments. 5ARP 161. The court found that the timing of the statement and the statements themselves were reliable. 5ARP 161. No objection was made to the findings.

Defendant assigns error to both findings of the court in admitting the child hearsay statements and findings that defendant alleges were not made. *See* Appellant's Opening Brief at 23-29. However, defendant fails to show where these claims were preserved below. There was no objection to the admission of the child hearsay statements at the trial court level. There were also no objections to the contents of the findings or the form of the findings.

The victim, C.M, (*See* 1RP 3-58) his mother, Amy McCormick (*See* 1RP 58-75, 2RP 4-44) and the child interviewer, Kim Brune (*See* 4RP 127-145) all testified at the trial. As such, there is no constitutional issue that can be raised for the first time on appeal.

The court should decline to review defendant's claims relating to the child hearsay statements as the claims were not preserved for appeal.

2. AS A JUVENILE RESPONDENT, DEFENDANT DID NOT HAVE A CONSTITUTIONAL RIGHT TO A JURY TRIAL AS THE PURPOSES OF THE JUVENILE SYSTEM DIFFER FROM THE ADULT SYSTEM.

The constitutional right to a jury trial does not apply to juvenile respondents. The United States Supreme Court held a, “trial by a jury in the juvenile court’s adjudicative stage is not a constitutional requirement.” *State v. J.H.*, 96 Wn. App. 167, 170, 978 P.2d 1121 (1999), *citing McKeiver v. Pennsylvania*, 403 U.S. 528, 545, 91 S.Ct. 1976, 29 L. Ed. 2d 647 (1971). The Washington State Supreme Court found that juveniles do not have a right to a jury trial under the Juvenile Justice Act. *State v. Lawley*, 91 Wn.2d 654, 655, 591 P.2d 772 (1979). The court has continually reaffirmed their position, most recently in *State v. Chavez*, ___ Wn.2d ___, ___ P.3d ___ (2008 Wash. LEXIS 262, *15) where the court held that, “the juvenile justice system has not been so altered that juveniles charged with violent and serious violent offenses have the right to a jury trial.”

The courts have examined the focus on rehabilitation at the juvenile level as well as the lesser penalties in the juvenile system and have noted how these points differ from the adult criminal justice system. Current case law holds that juvenile offenders do not have a constitutional right to a jury trial.

- a. The juvenile justice system focuses on rehabilitation.

The purpose of the juvenile system is very different from the purpose of the adult system. The Juvenile Justice Act (JJA) declares the purpose of the juvenile system as follows:

It is the intent of the legislature that a system capable of having primary responsibility for, being accountable for, and responding to the needs of youthful offenders and their victims, as defined by this chapter, be established. It is the further intent of the legislature that youth, in turn, be held accountable for their offenses and that communities, families, and the juvenile courts carry out their functions consistent with this intent.

RCW 13.40.110(2). The JJA has been amended since its inception, but the courts have continued to find that the focus remains on rehabilitation and is distinguishable from the adult system. *State v. Schaaf*, 109 Wn.2d 1, 4, 743 P.2d 240 (1987), *J.H.* at 182, *Chavez* at *15. “We first note that the legislature’s statement of intent and purpose changed with enactment of the 1997 amendments only insofar as it increased the emphasis on responding to the needs of juvenile offenders. *J.H.* at 172.

This statement of purpose is very different than the purpose of the Sentencing Reform Act (SRA) which governs the adult criminal system. Rather than focusing on responding to the needs of the offenders, the adult system focuses on punishment of the offenders. *J.H.* at 173, *Schaff* at 10. Only one of the purposes of the SRA addresses the possibility of treatment and it is fifth on the list of six purposes, seemingly not a priority. RCW

9.94A.010. In contrast, one of the purposes of the JJA is to hold the offenders accountable. *J.H.* at 173. With rehabilitation as the focus of the JJA and only a small part of the SRA, the differences between the two systems are evident. It is that rehabilitative focus that sets the juvenile system apart and as such, does not entitle juvenile offenders to a jury trial. *J.H.* at 175, *Chavez* at *15.

Defendant here was not ineligible for all special rehabilitation programs, despite his charge that is classified both as a sex offense and a violent offense. Defendant admits that a SSODA, which differs from the adult SSOSA, was available to him. *See* Appellant's Opening Brief at ix, RCW 13.40.160(3), RCW 9.94A.670. Further, it is clear from defendant's sentencing process that treatment was the focus. 2/13/07 RP 3-4. Probation was involved and sentencing was set over to allow them to complete a report. 2/13/07 RP 3, 6-7. At the hearing on February 13, 2007, the prosecutor agreed to defendant being taken off electronic home monitoring pending sentencing because:

For every day that he is on electronic home monitoring, it's a day that he does not get in JRA. He is facing a sentence at JRA where he would be undergoing treatment and counseling that the State feels he needs.

2/13/07RP 4. If the focus of the juvenile system had turned to punishment, then the fact that defendant was serving his sentence on electronic home monitoring would not matter to the State or the court. The emphasis was not on the length of the sentence but on defendant

being able to take advantage of his treatment and rehabilitation time. This shows that the focus of the system is still on meeting the needs of the offender.

- b. There is no constitutional right to a jury trial for juvenile offenders because the penalties in the juvenile justice system are much different than the penalties imposed in the adult system.

The juvenile system and the adult system have distinctions and are not so similar as to require a jury trial for juvenile offenders. *See J.H.* at 175. The JJA seeks to rehabilitate the juvenile offender, but also to hold the offender responsible for his or her actions. *State v. Posey*, 161 Wn.2d 638, 645, 167 P.3d 560 (2007). The fact that punishment is a part of the JJA does not mean the right to a jury trial attaches. *See Schaff* at 6-8 (addressing the argument that a jury trial is required under *Pasco v. Mace*, 98 Wn.2d 87, 100, 653 P.2d 618 (1982)). The court in *Schaff* made it clear that the distinguishing factor in the two systems is the penalty imposed for the actions. *Schaff* at 7-8. “No amount of analogizing between the adult and juvenile offenders serves to make the two classes equally accountable for their criminal actions.” *Id.* at 8.

The range of sentencing options for the juvenile offender is much broader than for an adult offender. Juveniles may be able to avoid prosecution through the benefit of a diversion agreement or deferred dispositions. *Schaff* at 8,12, *J.H.* at 180-1. The juvenile court can use

these sentencing options, which are not available at all or very limited in adult court, to tailor the sentence to the individual juvenile. *J.H.* at 180-1. The juvenile court can also determine the best course of treatment for the juvenile whereas the adult court can only order treatment if certain requirements are met. *J.H.* at 180-1.

The fact that juveniles can be transferred to adult facilities to serve their time does not take away from the purpose of the juvenile system and does not cause the right to a jury to attach. *Monroe v. Solitz*, 132 Wn.2d 414, 420, 939 P.2d 205 (1997). Adult convictions have more serious consequences. *Id.* No matter where the juvenile serves the time, the consequences of an adult conviction versus a juvenile adjudication are decidedly different. *Id.*

A “stigma” is now associated with a juvenile adjudication but that has not been found to take away from the rehabilitative nature of the juvenile justice system. *J.H.* at 176-7. This stigma includes the fact that juvenile offenders have their DNA taken, their fingerprints taken, their photos taken, they can’t possess a firearm and there may be license and public assistance consequences. *Chavez* at *7, *J.H.* at 176-7. It is true that defendant will not be able to have the record of his sex offense sealed, but the court of appeals in *J.H.* noted that the overall policy for records, and the stigma associated with a juvenile adjudication, did not eliminate the differences between the two systems nor take away from the rehabilitative nature of the juvenile system. *J.H.* at 176-7.

As the court of appeals noted in *J.H.*, the fact that a “juvenile adjudication will be considered as criminal history in a later adult prosecution is not new.” *J.H.* at 175. The fact that the juvenile adjudications have to be used in sentencing calculations does not equal an extra penalty for the juvenile offender. *State v. Randle*, 47 Wn. App. 232, 241, 734 P.2d 51 (1987). Future consequences as an adult offender are not punishment for the current juvenile crime and the court must look at whether the juvenile is being treated differently than an adult at the time of the juvenile offense. *J.H.* at 179.

The fact that juveniles have to pay restitution has been found to be remedial and not punitive. *J.H.* at 182 (citing *State v. Hartke*, 89 Wn. App. 143, 147, 948 P.2d 402 (1997)).

Defendant is correct that he will have to register as a sex offender. However, RCW 9A.44.140(4) specifically deals with juveniles who are required to register as a sex offender and provides separate standards for juveniles seeking to be released from the registration requirement. Again, juveniles are treated differently than adult offenders.

Here there is a difference in the penalties that defendant would have faced in the adult court versus what he was sentenced to in the juvenile court. As noted above, the focus of the sentence was on defendant’s rehabilitation. 2/13/07 RP 4. In addition, the court followed the recommendations of both the prosecution and probation and sentenced defendant to 15-36 weeks (about 4- 9 months). Sentencing RP 6-7, CP

23-9. If defendant had been tried in adult court, he would have been sentenced to 51-68 months (a little over four years –to over five and half years). Adult Sentencing Guidelines Manual 2006, III-86. By sentencing defendant to the standard term in JRA, where he will be able to participate in treatment and rehabilitation, the court was able to meet the dual goals of the juvenile justice system by meeting the needs of the defendant as well as holding him accountable for his actions.

If defendant truly believed that the adult system would be no different than the treatment he received in the juvenile system, defendant had the option of asking jurisdiction to be declined to the adult court. *See* RCW 13.40.100(1). Defendant did not ask for a decline hearing. The lenient penalties in the juvenile system and the access to treatment highlight the difference between the adult and juvenile system and show why defendant, and others before him, did not asked to be transferred to the adult system. *See J.H.* at 183, *Chavez* at *12-3.

- c. Defendant argues that juveniles charged with a sex offense should receive jury trials even if other juvenile offenders do not.

The court has analyzed the right to a jury trial for juveniles under the factors enumerated in *State v. Gunwall*, 106 Wn.2d 54, 61-62, 720 P.2d 808 (1986). *Schaff* at 13-17. In analyzing the factors, the court rejected the argument that juveniles should have the right to a jury trial since they would have been guaranteed a jury trial when the state became

a territory. *Id.* at 14. The court noted, “territorial lawmakers did not anticipate the enactment of a separate juvenile justice system.” *Id.* The court again reiterated that adult and juvenile systems are not mirror images of each other and that regressing to a time where juveniles were not afforded any special protections was not a desirable outcome. *Id.* at 15. After analyzing all the *Gunwall* factors, the court concluded that they should remain in the majority of the states that do not have jury trial for juvenile offenders and that those offenders are not entitled to a jury trial under the state constitution. *Id.* at 16. Since then, case law has continued to uphold the *Schaff* analysis of the *Gunwall* factors. *See J.H.* at 185, *Chavez* at *9-10.

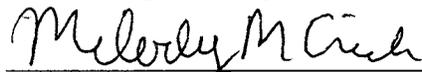
Like the defendant in *Chavez*, defendant here asks the court to consider his case as deserving of a jury trial even if the court finds that juvenile offenders are not entitled to a jury trial. *Chavez* at *3. As in *Chavez*, defendant cites no case authority for a case by case analysis. *See Chavez* at *14-5. Further, defendant has cited no authority granting him a right to a jury trial, dictating that a waiver of jury trial is necessary when there is no constitutional right to a jury trial or showing that the proper remedy is reversal of his convictions. Defendant has failed to show that he had a right to a jury trial as a juvenile offender in the juvenile justice system.

D. CONCLUSION.

For the reasons stated above, the State respectfully requests the Court affirm the convictions below.

DATED: MAY 7, 2008

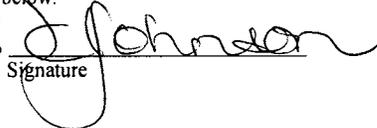
GERALD A. HORNE
Pierce County
Prosecuting Attorney



MELODY M. CRICK
Deputy Prosecuting Attorney
WSB # 35453

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

5/8/08 
Date Signature

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