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SUPREME COURT
STATE OF WASHINGTON

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NO. 81314-1

THE SUPREME COURT OF THE STATE OF WASHINGTON
BY RONALD R. CARR

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STATE OF WASHINGTON,

Respondent,

v.

MICHAEL WEBB,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

PETITIONER'S SUPPLEMENTAL BRIEF

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A. ISSUE FOR WHICH REVIEW HAS BEEN GRANTED.

Michael Webb was murdered while pursuing a direct appeal from a criminal conviction. Relying on State v. Devin,¹ the Court of Appeals dismissed Mr. Webb's appeal and ruled that his conviction cannot be challenged and all financial penalties imposed must be enforced. Did the Court of Appeals misinterpret Devin and mistakenly adopt an extreme standard of denying any relief from an untested criminal conviction, when the *dicta* in Devin expressly reserves the availability of equitable relief based on the circumstances of the case?

B. STATEMENT OF THE CASE.

Upon re-trial following a mistrial, Michael Webb was convicted of one count of presenting a false insurance claim on February 2, 2007. CP 29. The court imposed sentence on February 5, 2007, and he timely filed a notice of appeal. CP 29-38.

Shortly thereafter, Seattle police discovered Mr. Webb's body in a crawl space under his home. See Man Pleads Innocent in Death of Former Talk Show Host, Seattle Post Intelligencer, July

¹ State v. Devin, 158 Wn.2d 157, 142 P.3d 599 (2006).

30, 2007;² Carol Smith, Webb Was Killed With an Ax, Seattle Post Intelligencer, July 20, 2007.³ He had died in April, several months before his body was discovered. Id. King County authorities charged another individual with first degree murder for killing Mr. Webb. Id.

Because Mr. Webb's case had been transferred to the Court of Appeals upon his filing of a notice of appeal, appellate counsel filed a motion in the Court of Appeals to abate Mr. Webb's appeal and dismiss the conviction when his death came to public light. Alternatively, counsel asked for the opportunity to provide briefing on any meritorious issues presented in the appeal.

The Court of Appeals abated the appeal but insisted that Mr. Webb's conviction, and all fines and fees imposed as part of his sentence, must remain enforced and cannot be appealed. This Court granted review.

² Article attached as Appendix D to Motion to Abate and available at http://seattlepi.nwsource.com/local/6420ap_wa_radio_host_killing.html.

³ Article attached as Appendix E to Motion to Abate and available at http://seattlepi.nwsource.com/printer2/index.asp?ploc=b&refer=http://seattlepi.nwsource.com/local/324514_webb21.html.

C. ARGUMENT.

THE FUNDAMENTAL RIGHT TO APPEAL A
CRIMINAL CONVICTION AND THE SOCIETAL
NEED FOR FAIR, CERTAIN, AND ACCURATE
JUSTICE MANDATE RETAINING A COURT'S
AUTHORITY TO ABATE A CRIMINAL CONVICTION
AB INITIO, UPON THE DEATH OF AN APPELLANT
WHILE THE APPEAL IS PENDING

1. Historically, Washington has accorded substantial societal importance to ensuring that criminal convictions are fairly and accurately entered. Upon the initiative of the framers of the Washington Constitution, Washington was the first state in the nation to expressly guarantee the right to appeal to all individuals convicted of crimes. J. Lobsenz, "A Constitutional Right to an Appeal: Guarding Against Unacceptable Risks of Erroneous Conviction," 8 Puget Sound L.Rev. 375, 376 (1985). Article I, § 22 of the Washington Constitution mandates that any person convicted of a crime has "the right to appeal in all cases." City of Seattle v. Klein, 161 Wn.2d 554, 566-67, 166 P.3d 1149 (2007).

Consequently, an appeal from a criminal conviction is "an absolute right" in Washington, unless it is knowingly, intelligently, and voluntarily waived. Lobsenz, 8 Puget Sound L.Rev. at 380; Klein, 161 Wn.2d at 566 ("right to appeal is a constitutional right that applies in 'all cases'"); State v. Sweet, 90 Wn.2d 282, 286, 581

P.2d 579 (1978) (“The presence of the right to appeal in our state constitution convinces us it is to be accorded the highest respect by this court.”). Only by extremely dilatory conduct does an appellant forfeit the right to appeal a criminal conviction. See State v. French, 157 Wn.2d 593, 141 P.3d 54 (2006) (defendant does not forfeit right to appeal by fleeing to Mexico upon convictions for multiple counts of child sexual abuse in effort to escape sentencing).

Washington is not alone in treating an appeal as a fundamental component of ensuring the integrity of the criminal process. When “death has deprived the accused of his right to our decision, the *interests of justice ordinarily require that he not stand convicted without resolution of the merits of his appeal*, which is an ‘integral part of [our] system for finally adjudicating [his] guilt or innocence.’” United States v. Parsons, 367 F.3d 409, 413-14 (5th Cir. 2004) (emphasis added by Parsons, quoting United States v. Pauline, 625 F.2d 684, 685 (5th Cir. 1980) and Griffen v. Illinois, 351 U.S. 12, 18, 76 S.Ct. 585 100 L.Ed. 891 (1956)); see also United States v. Christopher, 273 F.3d 294, 297-99 (3rd Cir 2001) (and cases cited therein).

An appeal of right not only serves to correct actual errors

and claims of innocence, but also maintains a legitimizing function ensuring the accuracy of and public trust in the criminal process by reviewing all claims of error even if they do not lead to reversal. R. Cavallaro, Better Off Dead: Abatement, Innocence, and the Evolving Right of Appeal, 73 U. Colo. L. Rev. 943, 980-81 (2002) (“The abatement remedy relies significantly on a larger premise: a conviction that cannot be tested by appellate review is both unreliable and illegitimate; the constitutionally guaranteed trial right must include some form of appellate review.”). While a conviction will extinguish the presumption of innocence, the right to pursue an appeal remains the bulwark that underlies our faith in the legitimacy of a conviction. See Herrera v. Collins, 506 U.S. 390, 398-99, 113 S.Ct. 390, 122 L.Ed.2d 203 (1992).

In the immigration context, a criminal conviction does not require deportation until the completion of an appeal of right. Because an erroneously-ordered deportation is not readily reversible, such severe consequences follow only from a conviction reviewed on appeal. Pino v. Landon, 349 U.S. 901, 901, 75 S.Ct. 576, 99 L.Ed.2d 1239 (1955) (A conviction must “attain[] . . . finality [in order] to support an order of [removal]”); Fong Haw Tan v. Phelan, 333 U.S. 6, 10, 68 S.Ct. 374, 92 L.Ed.2d 433 (1948)

("severe" consequences from deportation).

An appeal is not a superfluous exercise even if the odds of prevailing do not favor an appellant. One study found 31 percent of appeals in Washington were modified or reversed upon review. Washington Appellate Practice Deskbook, Wash. State Bar Assoc. 3d ed. § 3.3(1)(f) (2005). In 2007, federal circuit courts of appeal reversed criminal convictions on their merits in percentages ranging from 16.5 percent in the D.C. Circuit Court of Appeals to 4.3 percent in the Fourth Circuit.⁴ The federal statistics for direct appeals treat cases "reversed in part" as if they were affirmed and thus underrepresent cases for which relief was granted. Id. at n.2.⁵

This Court in Devin shied away from announcing a clear rule as to how courts should proceed when an appellant dies while pursuing a direct appeal from a criminal conviction. Crafting the appropriate policy for Washington courts requires weighing the constitutional importance of an appeal of right in Washington, the interests of the defendant, his or her family, society, victims, as well

⁴ U.S. Courts of Appeal - Appeals Terminated on the Merits, By Circuit, During the 12-Month Period Ending September 30, 2007, Table B-5; available at: <http://www.uscourts.gov/judbus2007/appendices/B05Sep07.pdf>.

the court system.

2. In Devin, the appellant did not file a notice of appeal or ask to challenge his conviction. In Devin, the appellant filed a notice of appeal six months after his sentencing rather than within 30 days of sentencing as strictly required by court rule. 158 Wn.2d at 160; see RAP 5.2(a); RAP 18.8(b). Devin's untimely notice of appeal stated he wished to challenge his sentence, not his conviction. Id. Devin died while litigating whether he would be allowed to proceed with this untimely appeal.

This Court refused to abate Devin's conviction *ab initio*. Id. at 166. The Devin Court reasoned that other Washington cases abating a conviction rested on the fact that the appellant had timely and properly sought to appeal from his or her conviction. Additionally, Devin challenged only his sentence, not his conviction, so abating the conviction would be an improper remedy.

The reasoning and holding of Devin is consistent with widespread application of the doctrine of abatement. When a person does not appeal from a conviction, there is no justification for abating that conviction upon the person's death during an

⁵ State courts do not generally maintain accessible statistics of reversal rates for criminal convictions. See M. Arkin, Rethinking the Constitutional Right

appeal. See e.g., United States v. Demichael, 461 F.3d 414, 416 (3rd Cir. 2006) (defendant who dies while appealing sentence has waived appeal of conviction and conviction not abated due to death). The person convicted has not challenged the fairness of that conviction and the doctrine of abatement *ab initio* rests largely on the notion that a conviction should not be treated as fairly entered and final for all purposes when the appellant is unable to proceed with the appeal by virtue of his or her death.

However, Devin “took the opportunity” to expound upon the proper course of action when any person dies while pursuing a timely filed appeal. 158 Wn.2d at 172; see State v. Fontaga, 148 Wn.2d 350, 364, 60 P.3d 1192 (2003) (when court goes “beyond what is necessary to decide case,” resulting discussion is not mandatory authority).

The Devin decision acknowledged this discussion is *dicta*. Nevertheless, this *dicta* unambiguously directed future courts that the doctrine of abatement *ab initio* would no longer be the presumptive remedy when an appellant dies while challenging a conviction on direct appeal. The *dicta* in Devin does not fairly and

to a Criminal Appeal, 39 UCLA L. Rev. 503, 514 (1992).

fully discuss the appropriate and proper response for an appellant who died during an appeal, and thus this matter requires further examination of the underlying policy and legal interests at stake.

3. Devin misconstrued the current viewpoints of other jurisdictions. Devin proffered that abatement *ab initio* upon an appellant's untimely death is outmoded and unsupported by modern jurisprudence. 158 Wn.2d at 171. Yet a majority of the federal courts and state court adhere to this doctrine. Thus, abatement *ab initio* cannot be disregarded as a remedy from a time gone-by. See Parsons, 367 F.3d at 415-16 (rejecting argument that victim's modern day right to restitution trumps concern that wrongfully entered conviction should stand when defendant dies).

Even though Devin contended that the modern trend is otherwise, it remains the majority view that an appeal should abate *ab initio* when an appellant dies while appealing from a conviction. See Cavallaro, 73 U. Colo. L. Rev. at 955 n.38, n.39, n.40 (cataloguing cases adopting, rejecting, or modifying doctrine).⁶ A

⁶ Devin is not the only source mistakenly identifying a purported "modern trend" against abatement. Cavallaro incorrectly lists three states as rejecting the doctrine when they have either reaffirmed or newly adopted it. See People v. Robinson, 719 N.E.2d 662 (Ill. 1999) (reaffirming abatement *ab initio*); Gollot v. State, 646 So.2d 1297, 1304 (Miss. 1994) (adopting doctrine); State v. Holland, 955 P.2d 1360 (Mont. 1998) (overturning prior rule and adopting doctrine).

majority of the federal courts follow this policy as well. United States v. Pogue, 19 F.3d 663, 665 (D.C. Cir. 1994); United States v. Mollica, 849 F.2d 723, 725-26 (2nd Cir. 1988); Christopher, 273 F.3d at 296-97 (3rd Cir.); United States v. Dudley, 739 F.2d 175, 176-78 (4th Cir. 1984); United States v. Williams, 874 F.2d 968, 970 (5th Cir. 1989); United States v. Wilcox, 783 F.2d 44 (6th Cir. 1986); United States v. Moehlenkamp, 557 F.2d 126, 127-28 (7th Cir. 1977); United States v. Littlefield, 594 F.2d 682, 683 (8th Cir. 1979); United States v. Oberlin, 718 F.2d 894, 895-96 (9th Cir. 1983); United States v. Davis, 953 F.2d 1482, 1486 (10th Cir.), cert. denied, 504 U.S. 945 (1992); United States v. Schumann, 861 F.2d 1234, 1236 (11th Cir. 1988). Military courts of appeal abate *ab initio* a conviction for a pending appeal of right. United States v. Hubbert, 61 M.J. 70, 75 (C.G. C.C.A. 2005).

Abatement *ab initio* is a straightforward rule. It respects the

In State v. Korson, 11 P.3d 130, 133 (Idaho 2005), the court used inapplicable cases to illustrate a "trend" away from abatement *ab initio*. See e.g., People v. Ekinici, 743 N.Y.S.2d 651 (N.Y. Sup. Ct. 2002) (deceased never appealed and estate sought abatement three years after sentence imposed); State v. Hoxsie, 570 N.W. 2d 379, 382 (S.D. 1997) (affirming abatement *ab initio* but finding restitution does not abate when appeal did not challenge restitution); State v. Salazar, 945 P.2d 996, 1004 (N.M. 1997) (refusing automatic abatement but ruling that if substitute party does not proceed with appeal, case will be abated *ab initio*); State v. Clements, 668 So.2d 980 (Fla. 1996) (representative may proceed with appeal on merits); State v. Makaila, 537 N.W.2d 967 (Haw. 1995) (same).

significance of the right of appeal and enforces court orders only after they are reviewed and determined to be fairly entered. When the deceased had not sought review and thus implicitly conceded the futility of appeal, the conviction is not abated. It relieves the court system from deciding cases that cannot be truly enforced because the person responsible is no longer there to be punished while guarding against the enforcement of erroneous orders. See In re Winship, 397 U.S. 358, 372, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1967) (Harlan J., concurring) (the “fundamental value determination of our society is that it is far worse to convict an innocent man than to let a guilty man go free.”); 4 William Blackstone Commentaries ch. 27, p. 358 (1769) (“[B]etter that ten guilty persons escape, than one innocent suffer.”).

At the other end of the spectrum, a small number of states dismiss the appeal but enforce the conviction and all associated penalties. Korson, 111 P.3d at 450. This is the policy the Court of Appeals adopted in the case at bar. This approach is straightforward but is a significant departure from the long-standing recognition in Washington that an appeal is a valued part of our criminal justice system and a fundamental right in our constitution. It does not account for the possibility that a deceased’s family

suffers unjustly when a wrongfully entered conviction is enforced, by financial penalties and on-going liability, as well as by stigma of a mistaken verdict. See State v. McDonald, 424 N.W.2d 411, 537-38 (Wis. 1988) (listing civil consequences of conviction). Barring any relief from an unresolved appeal of right leaves no room for the possibility of error or undue harm from a judgment or sentence.

In the middle of the spectrum are courts that try to weigh the various interests at play. One commentator suggests that trial courts hold a hearing to determine the societal interests, the decedent's interests, and the victim's emotional and financial interests so the abatement determination is predicated on the circumstances of an individual case. Note: Dying to Get Away With It: How the Abatement Doctrine Thwarts Justice - And What Should Be Done Instead, 75 Fordham L. Rev. 2193, 2223-27 (2007). The trial court may flexibly and efficiently consider factors such as the need for restitution, the victim's emotional stake in prosecuting the case, the effects of the conviction on the decedent's survivors, and the legal issues at stake. Id. at 2224-26.

Some courts let an appeal proceed on its merits, as the Devin Court suggested as a possibility. 158 Wn.2d at 172. Some states proceed on the merits only if a substitute party endorses the

continued appeal. State v. McGettrick, 509 N.E.2d 378, 380-82 (Ohio 1987) (reasoning survivors' interest in result of case justifies substitution); Surland v. State, 895 A.2d 1034, 1045 (Md. 2006). Some courts abate *ab initio* the conviction but permit restitution orders or other compensatory orders to stand, which Devin also suggested as a possibility. 158 Wn.2d at 172. Alabama is the sole state which notes in the record that the appeal was undecided upon the appellant's death. State v. Wheat, 907 So.2d 461, 464 (Ala. 2004).

4. The dicta in *Devin* directed counsel for a deceased appellant to pursue a meritorious appeal or for the court to determine whether punishment should be voided. In Devin, this Court did not entirely abandon a court's role in assessing the issues of law and equity that arise upon an appellant's death. Devin permits a court to consider the merits of the appeal, and gives discretion to a court to abate penalties that are not directly compensating a crime victim for financial loss. 158 Wn.2d at 172.

These hybrid approaches, endorsed in Devin but rejected by the Court of Appeals in the case at bar, appease some of the competing interests in the finality of a criminal conviction where the appellant dies pending appeal. To the extent there is a "modern

trend” away from abatement *ab initio*, there are a number of states that have adopted such partial measures, either allowing an appeal to proceed on its merits, requiring a substitute party, or enforcing financial penalties to the extent they compensate the victim. See 75 Fordham L. Rev. at 2214-21 (describing various “compromise” approaches to abatement *ab initio*).

5. Restitution orders do not trump the importance of an appeal in all cases. The court in Devin predicated its analysis largely upon the importance that a crime victim receive statutorily entitled compensation, and cited the restitution statute as the legal basis to depart from abatement *ab initio*. 158 Wn.2d at 168-69.

It is undeniable that “victim’s rights” have authority in Washington that did not exist when State v. Furth, 82 Wash. 665, 144 P. 907 (1914), abated a conviction *ab initio* due to the appellant’s death. By constitutional amendment, courts must accord dignity and respect to the named victim of a prosecution, including keeping the victim informed of the status of a pending case, offering a victim the opportunity to speak at sentencing, and awarding restitution for financial loss suffered as the result of a crime of conviction. Wash. Const. Art. I, § 35; RCW 7.68.035.

But it is also true that “victims” are not parties to a prosecution. See Surland, 895 A.2d at 1037 n.1 (dignity accorded crime victims does not give right to file briefing or be treated as party to court proceeding). The “victim’s rights” amendment to the constitution does not speak to abatement of a conviction. Robinson, 719 N.E.2d at 663.

Victims are not the entity authorized with guaranteeing a fair trial, accurate charging documents, or lawfully authorized sentences. Victims may be frustrated by the fact of prosecution as much as they are frustrated by the untimely death of a perpetrator of a crime. See e.g., State v. D.T.M., 78 Wn.App. 216, 896 P.2d 108 (1995) (recanting witness).

Restitution orders are not immune from the underlying purpose of an appeal: to ensure the conviction and sentence were fairly and properly entered. An appeal from a timely filed restitution order may show the order was incorrectly entered. The person awarded restitution may not be entitled to it. The amount of restitution awarded may be wrong. The fact that a person filed a notice of appeal may provide a reasoned basis for the court to consider whether the appeal has merit, as opposed to a situation

as in Devin where the appellant did not file a timely notice of appeal and belatedly asked to contest his sentence.

One way to examine the societal importance of an appeal, even if the issue is only the amount of restitution ordered, is by looking at recent decisions involving challenges to restitution orders. From January to October 2008, the Court of Appeals remanded restitution orders in criminal cases at approximately the same rate as it affirmed them. A LEXIS search conducted on October 24, 2008, for restitution orders affirmed, vacated, or remanded in 2008, reveals five cases in which the appellate court found errors in the restitution order and six cases in which the court rejected a challenge to restitution. These predominantly unpublished cases are cited herein not as authority for any legal proposition but rather as an illustration of the possibility that a trial court may not correctly award permissible compensation under the restitution statute, as the error rate from January to October 2008 was approximately 50 percent. Compare *State v. D.K.J.*, 2008 Wash. App. LEXIS 2196 (Sept. 3, 2008) (remanding to correct portion of restitution order improperly entered); *State v. Patey*, 2008 Wash. App. LEXIS 1731 (July 21, 2008) (accepting the State's concession that the restitution award includes improper

reimbursement for the victims' time and trouble.); State v. Hadley, 2008 Wash. App. LEXIS 1385 (June 16, 2008) (remanding to correct minor miscalculation in restitution amount); State v. Regan, 2008 Wash. App. LEXIS 905 (April 21, 2006); State v. Alexander, 2008 Wash. App. LEXIS 147 (Jan. 22, 2008) (remanding and vacating restitution order); With affirmed restitution orders, State v. Piper, 2008 Wash. App. LEXIS 1736 (July 21, 2008); State v. Slocum, 2008 Wash. App. LEXIS 1499 (June 26, 2008); State v. Harrah, 2008 Wash. App. LEXIS 1500 (June 26, 2008); State v. Prado, 144 Wn. App. 227, 350-51, 181 P.3d 981 (April 29, 2008); State v. Williams, 2008 Wash. App. LEXIS 946 (April 28, 2008); State v. C.I., 2008 Wash. App. LEXIS 891 (April 21, 2008).

The criminal justice system relies on the appellate courts to correct errors, and society expects this system to review convictions for the purpose of error correction. Regardless of whether a convicted person was innocent, society has an interest in ensuring that the process upon which the conviction was obtained was fair.

6. Weighing the competing concerns favors abatement *ab initio*, or alternatively, a court hearing on the appropriate force and effect of the conviction and sentence. Here, the Court of Appeals

dismissed the appeal and enforced all sentencing consequences. It would not permit briefing on potentially meritorious issues, and affirmed all financial penalties, including a punitive \$1,000 fine, \$100 DNA fee, and \$500 victim's penalty assessment. CP 29-37.

Mr. Webb was indigent at the time he filed his appeal.⁷ His estate should not owe a fine imposed for the purpose of punishing Mr. Webb. The \$100 DNA fee is similarly nonsensical, as the purposes of the DNA data bank are to deter future crimes and identify the perpetrators of crimes. State v. Surge, 160 Wn.2d 65, 77-78, 156 P.3d 208 (2007). Mr. Webb cannot be deterred from committing future crimes or prosecuted for a past crime, and his human remains no longer need identification.

The legislative purpose of the crime victim's penalty assessment is to compensate the family members of people killed by a criminal act. Laws of 1996, ch. 122 § 1 (legislative intent expressed as, "Specifically, the increased funds from offender penalty assessments will allow more appropriate compensation for families of victims who are killed as a result of the criminal act, including reasonable burial benefits."). Although money collected

for any fee necessarily compensates some entity, this fee is a penalty imposed upon a conviction that is immediately refunded if a person's conviction is overturned. RCW 7.68.035; RCW 7.68.230.

The victim's compensation program specifically allots Mr. Webb's family death benefits. RCW 7.68.070. It was created precisely to help the families of people who are murdered. Laws of 1996, ch. 122 § 1. The \$500 penalty is particularly nonsensical here, where Mr. Webb's family is entitled to compensation from this very fund by virtue of his horrific death by bludgeoning. The Court of Appeals erred by refusing to abate these financial penalties.

In sum, the criminal justice system does not elevate protecting the emotional and financial toll a prosecution takes on a crime victim above all other concerns, no matter how one's heartstrings may prefer this approach. Rather, it fundamentally values upholding convictions only for those whose convictions are fairly entered. See Winship, 397 U.S. at 372 ("it is far worse to convict an innocent man than to let a guilty man go free."). Civil courts remain open to victims seeking financial redress. Parsons, 367 F.3d at 416 n.17 (civil court offers lower standard of proof and

⁷ The Court of Appeals appointed the undersigned counsel to represent Mr. Webb by letter dated March 22, 2007, "[p]ursuant to the Order of Indigency"

opportunity to seek reimbursement for loss); RCW 9.94A.753(9) (“This section does not limit civil remedies . . . available to the victim [or] survivors of the victim . . .”). A victim’s interest in the outcome of a conviction must be equated with society’s interest in a fair and just outcome of a criminal prosecution.

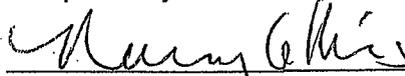
This Court should allow for abatement *ab initio* in the interest of justice. Alternatively, the appellate court should remand the case to the trial court, who is best positioned to weigh competing concerns and determine the fair allocation of resources, including the appropriateness of abatement *ab initio*.

D. CONCLUSION.

For the foregoing reasons, counsel for Mr. Webb respectfully requests this Court reverse his conviction as abated, or alternatively, remand the case to the trial court to determine the appropriate resolution.

DATED this 3rd day of November 2008.

Respectfully submitted,



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entered by the trial court on March 13, 2007.