

**NO. 41944-1-II**

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

**DESHONE V. HERBIN,**

Appellant.

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

The Honorable Paula Casey, Judge

---

**BRIEF OF APPELLANT**

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**TABLE OF CONTENTS**

Page

**A. ASSIGNMENTS OF ERROR ..... 1**

- 1. The trial court erred in giving jury instructions 2 and 30...**
- 2. Jury instructions 2 and 30 misled the jury as they implied the jury must be unanimous in order to answer the special verdicts “no.” .....**
- 3. The firearm enhancements were not authorized by the jury’s verdict.....**
- 4. The firearm enhancements were improper because of errors in the court’s instructions to the jury.....**
- 5. The court’s instructions failed to make manifestly clear the jury’s duty in answering the special verdict on each sentencing enhancement.....**
- 6. The sentencing court erred in imposing 60-month firearm enhancements on each count rather than the 36 month deadly weapon enhancement found by the jury?.....**
- 7. Ineffective defense counsel deprived Mr. Herbin of his right to an attorney.....**
- 8. Defense counsel’s failure to object to hearsay evidence about the operability of a shotgun was prejudicial. ....**

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR ..... 1**

- 1. Were the jury instructions for the special verdicts erroneous under *State v. Bashaw*, 169 Wn.2d 133, 234 P.3d 195 (2010) and *State v. Goldberg*, 149 Wn.2d 888, 72 P.3d 1083 (2003)?.....**

2. When the jury is directed to determine whether or nor an offender was armed with a deadly weapon during the commission of a crime, the sentencing court may not impose a firearm enhancement. In Counts I-VIII, the court’s instructions asked the jury to consider whether or nor Mr. Herbin was armed with a deadly weapon. Did the imposition of firearm enhancements violate Mr. Herbin’s right to due process and to jury trial under the Sixth Amendment and Fourteenth Amendments and Wash. Const. Article I, §§ 21 and 22?.....

3. Was Mr. Herbin denied effective counsel when the only evidence the shotgun was operable was hearsay not objected to by defense counsel?.....

C. STATEMENT OF THE CASE..... 2

D. ARGUMENT ..... 7

1. BECAUSE THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY THAT THEY NEED NOT BE UNANIMOUS TO ANSWER “NO” ON THE SPECIAL VERDICT FORMS, THE SPECIAL VERDICTS AND MR. HERBIN’S SENTENCING ENHANCEMENTS MUST BE REVERSED. .... 7

2. THE FIREARM ENHANCEMENTS IMPOSED ON ALL EIGHT COUNTS VIOLATED MR. HERBIN’S STATE AND FEDERAL RIGHT TO DUE PROCESS AND TO A JURY DETERMINATION OF FACTS USED TO INCREASE THE PENALTY BEYOND THE STANDARD RANGE. .... 22

3. MR. HERBIN WAS DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE COUNSEL BY HIS TRIAL COUNSEL’S FAILURE TO HEARSAY TESTIMONY ABOUT THE SHOTGUN’S OPERABILITY..... 25

E. CONCLUSION ..... 28

CERTIFICATE OF SERVICE ..... 30

**TABLE OF AUTHORITIES**

	Page
<b>Cases</b>	
<i>Apprendi v. New Jersey</i> , 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).....	23
<i>Blakely v. Washington</i> , 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).....	23
<i>Davis v. Washington</i> , 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006).....	27
<i>Gideon v. Wainwright</i> , 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) .....	25
<i>In re Fleming</i> , 142 Wn.2d 853, 16 P.3d 610 (2001).....	26
<i>In re Hubert</i> , 138 Wn. App. 924, 158 P.3d 1282 (2007).....	26
<i>In re Personal Restraint of Delgado</i> , 149 Wn. App. 223, 204 P.3d 936 (2009).....	23, 24, 25
<i>McMann v. Richardson</i> , 397 U.S. 759, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970).....	25
<i>Melendez–Diaz v. Massachusetts</i> , ___, U.S. ___, 129 S.Ct. 2527, 2534, 174 L.Ed.2d 314 (2009).....	27
<i>Neder v. United States</i> , 527 U.S. 1, 19, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999).....	16
<i>State v. Bashaw</i> , 144 Wn. App. 196, 182 P.2d 451 (2009), <i>rev'd</i> , 169 Wn.2d 133 (2010).....	16
<i>State v. Bashaw</i> , 169 Wn.2d 133, 234 P.3d 195 (2010) .....	1, 8, 9, 10, 13, 16, 17, 18, 19, 20, 21, 24, 28
<i>State v. Bennett</i> , 161 Wn.2d 303, 165 P.3d 1241 (2007).....	20

<i>State v. Bertrand</i> , No. 40403-6-II, 2001 WL 6099718 (Wash. Ct. App. December 8, 2011) .....	21
<i>State v. Brown</i> , 147 Wn.2d 330, 58 P.3d 889 (2002) .....	16, 28
<i>State v. Carothers</i> , 84 Wn.2d 256, 525 P.2d 731 (1974).....	15
<i>State v. Clausing</i> , 147 Wn.2d 620, 56 P.3d 550 (2002).....	10
<i>State v. Davis</i> , 154 Wn.2d 291, 111 P.3d 844 (2005).....	27
<i>State v. Goldberg</i> , 149 Wn.2d 888, 72 P.3d 1083 (2003).....	1, 8, 9, 10, 11, .....13, 17
<i>State v. Grimes</i> , No. 40397-7-II, 2011 WL 6018399 (Wash. Ct. App. Dec. 2, 2011).....	21
<i>State v. Hendrickson</i> , 129 Wn.2d 61, 917 P.2d 563 (1996).....	26
<i>State v. Horton</i> , 136 Wn. App. 29, 146 P.3d 1227 (2006).....	26
<i>State v. Johnson</i> , 100 Wn.2d 607, 674 P.2d 145 (1983), <i>overruled on other grounds by State v. Bergeron</i> , 105 Wn.2d 1, 711 P.2d 1000 (1985) .....	15
<i>State v. Kyllo</i> , 166 Wn.2d 856, 864, 215 P.3d 177 (2009).....	24
<i>State v. Lynn</i> , 67 Wn. App. 339, 835 P.2d 251 (1992) .....	14
<i>State v. Mak</i> , 105 Wn.2d 692, 718 P.2d 407 (1986), <i>overruled on other grounds, State v. Hill</i> , 123 Wn.2d 641 (1994).....	15
<i>State v. McCullum</i> , 98 Wn.2d 484, 656 P.2d 1064 (1983) .....	14
<i>State v. McHenry</i> , 88 Wn.2d 211, 558 P.2d 188 (1977).....	14
<i>State v. Mills</i> , 154 Wn.2d 1, 109 P.3d 415 (2005).....	14
<i>State v. O’Hara</i> , 167 Wn.2d 91, 217 P.3d 756 (2009) .....	14, 15

<i>State v. Pam</i> , 98 Wn.2d 748, 659 P.3d 454 (1983), <i>overruled in part on other grounds by State v. Brown</i> , 111 Wn.2d 124, 761 P.2d 588 (1988).....	28
<i>State v. Peterson</i> , 73 Wn.2d 303, 438 P.2d 183 (1968).....	14
<i>State v. Pierce</i> , 155 Wn. App. 701, 230 P.3d 237 (2010).....	28
<i>State v. Pirtle</i> , 127 Wn.2d 628, 904 P.2d 245 (1995), <i>cert denied</i> , 518 U.S. 1026, 116 S. Ct. 2568, 135 L. Ed. 2d 1084 (1996).....	10, 11
<i>State v. Pittman</i> , 134 Wn. App. 376, 166 P.3d 720 (2006).....	26
<i>State v. Recuenco</i> , 163 Wn.2d 428, 180 P.3d 1276 (2008).....	23, 24, 25, 28
<i>State v. Reichenbach</i> , 153 Wn.2d 126, 101 P.3d 80 (2004) .....	26
<i>State v. Roberts</i> , 142 Wn.2d 471, 14 P.3d 713 (2000).....	14
<i>State v. Schaler</i> , 169 Wn.2d 274, 282, 238 P.3d 858 (2010).....	24
<i>State v. Scott</i> , 110 Wn.2d 682, 757 P.2d 492 (1988).....	15
<i>State v. Stephens</i> , 93 Wn.2d 186, 607 P.2d 304 (1980).....	13
<i>State v. Warren</i> , 165 Wn.2d 17, 195 P.3d 940 (2008), <i>cert. denied</i> , ___ U.S. ___, 129 S.Ct. 2007, 173 L.Ed.2d 1102 (2009).....	12, 20
<i>State v. Williams-Walker</i> , 167 Wn.2d 889, 225 P.3d 913 (2010).....	13
<i>State v. WWJ Corp.</i> , 138 Wn.2d 595, 980 P.2d 1257 (1999) .....	14
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).....	25, 26
<i>United States v. Salemo</i> , 61 F.3d 214 (3rd Cir. 1995) .....	25

**Statutes**

RCW 9.94A.533(3).....25, 29

RCW 9A.40.020.....6

RCW 9A.52.020.....6

RCW 9A.56.200.....6

RCW 69.50.435(1)(c) ..... 9

**Other Authorities**

ER 801.....27

ER 802.....27

RAP 2.5(a) ..... 15

RAP 2.5(a)(3)..... 14

U.S. Const. Amend. 6 ..... 1, 13, 25, 27

U.S. Const. Amend. XIV ..... 1, 14, 25

Wash. Const Art, I § 3 ..... 14

Wash. Const. Art. I §§ 21, 22 ..... 1, 13, 25, 27

**A. ASSIGNMENTS OF ERROR**

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4. The firearm enhancements were improper because of errors in the court’s instructions to the jury.
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**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

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3. Was Mr. Herbin denied effective counsel when the only evidence the shotgun was operable was hearsay not objected to by defense counsel?

**C. STATEMENT OF THE CASE**

In December 2009, Nicholas Oatfield, Zachary Dodge, Aaron Ormrod, and Nicholas Ormrod shared a house in Olympia. RP 02/23/11 at 103-04. They were all members of a paintball team. *Id.*, at 104. It was not unusual for other team members to drop by the house just to hang out or to spend the night. *Id.*, at 130-31, 147-48. For example, teammate Malcolm Moore arrived at the house around 3:30 a.m. on December 27. *Id.*, at 105, 131. The team had scheduled an early practice for that morning. *Id.*, at 131. After locking the front door and making himself a sandwich, Moore settled down on a living room couch and called his girlfriend. *Id.*, at 131-22. Another teammate, Casey Jones, was asleep on a nearby couch. *Id.*, at 133.

Within minutes, there was a loud knock at the front door. *Id.*, at 108, 133, 149. Moore and Jones went to the door. *Id.*, at 134, 149. Jones cracked the door open but quickly tried to close it after someone on the front porch tried to force the door open. *Id.*, at 149. Jones and Moore tried to push the door closed but the barrel of a shotgun in the door jamb prevented the door from closing. *Id.*, at 136, 149. Moore and Jones yelled

at the house's other occupants to call 911. *Id.*, at 136, 150. Several of the occupants did just that. *Id.*, at 136, 151.

Three intruders forced their way into the house. *Id.*, at 136, 151, 189, 198-99, 202. The intruders were all African-American men. *Id.*, at 202. At least one of the men, and possibly more, had a shotgun. *Id.* at 111, 180. Moore and Jones, at gunpoint, were told to get on the floor and crawl into the kitchen. *Id.*, at 137, 151. The intruders made their way into the bedrooms of the Oatfield, Dodge, and both Ormrods. *Id.*, 115-16, 165-66, 154, 203. At gunpoint, Oatfield, Dodge, and both Ormrods were made to crawl into the kitchen. *Id.*, at 110, 167, 189, 199. Brittany Burgess was spending the night Dodge, her boyfriend. *Id.*, at 158, 173. She too was forced into the kitchen at gunpoint. *Id.* at 180.

The intruders remained in the house about five minutes. *Id.*, at 114, 153. Their faces were covered. *Id.*, at 119, 154, 162-64, 203.

Oatfield, Dodge, and both Ormrods had personal property taken from their respective bedroom. *Id.*, 115-16, 145, 165-66, 154, 203.

Thurston County Deputy Rod Ditrich was the first police officer to arrive at the house. RP 02/22/11 at 36. As he got near the house, he noticed a red Ford Explorer in the road. *Id.*, at 25, 38. There was a person in the driver's seat and another person outside on the passenger side. *Id.* The two people took off running in opposite directions. *Id.*, at 40. Deputy

Ditrich, who is a K9 officer, sent his dog after one of the persons but later called off the track. *Id.*, at 34, 41, 45. The police found a loaded shotgun in the bushes near the front door. *Id.*, at 20, 30.

Shortly thereafter, Jessup Tillman called the police and told them he was one of the intruders. *Id.*, at 52. Jessup Tillmon owned the shotgun discovered in the bushes. *Id.*, at 85. Another K9 officer and his dog located John Burns nearby and arrested him. *Id.* at 46, 53.

The Ford Explorer was registered to Tiffany Strickland. RP 02/23/11 at 221. Items taken from the house were found in the Explorer. RP 02/22/11 at 29. The police went to Strickland's apartment complex. RP 02/23/11 at 220-21. They discovered a white Chevy Impala registered to Jessup Tillmon in Strickland's designated parking space. *Id.*, at 220-22. Strickland did not know Tillmon but she did know Deshone Herbin. RP 02/24/11 at 321, 329. Herbin dated her friend Temica Tamez. *Id.*, at 322. Mr. Herbin was at Strickland's house the previous evening for a small holiday gathering. *Id.* at 322-23. Strickland went to bed drunk and was still drunk around 3 a.m. when she thought Mr. Herbin came into her bedroom and wanted her Explorer keys. *Id.* at 324-26.

The police arrested Mr. Herbin a day later. RP 02/23/11 at 235-37. Mr. Herbin said that he was home all evening and that he knew John Burns. *Id.*, at 260-62.

Mr. Herbin's housemate, Laurie Owens, thought she heard Mr. Herbin leave the house around 3:10 a.m. but did not hear him come back inside. *Id.*, at 277-79. This was after she heard Mr. Herbin speaking loudly into a cell phone and telling someone, "Come get me. Come get me right now." *Id.*, at 279. Later that morning, between 4 and 4:10 a.m., a call rang into Owens' hardline phone from Mr. Herbin's cell phone. *Id.*, at 285-87, 297-98. Shortly after 5 a.m., a DC Cab driver picked up a fare near Temica Tamez's mother's home and drove the fare to Mr. Herbin's address at 302 X Street, Tumwater. RP 02/23/11 at 234; RP 02/24/11 at 339, 357-59.

After the arrests, pictures of Burns, Tillmon, and Mr. Herbin appeared in the local newspaper along with a story recounting details of the intrusion into the paintballers' house. From the pictures in the paper, Nicholas Oatfield recognized Mr. Herbin's eyes, and Zachary Dodge recognized Mr. Herbin's facial structure. RP 02/23/11 at 118-19, 122, 125-27, 164, 170-71. This even though the intruders wore masks covering their faces and both young men only saw the intruder whom they identified as Mr. Herbin for a very quick moment. *Id.*, at 117-19, 168-70.

Mr. Herbin's wife, Ashley, confirmed that Mr. Herbin was home all evening. RP 02/24/11 at 383-85. As such, Mr. Herbin could not have been one of the three intruders.

Despite evidence that Mr. Herbin was home all evening, the state charged Burns, Tillmon, and Mr. Herbin with eight crimes: one count of first degree burglary;<sup>1</sup> three counts of first degree kidnapping of Jones, Moore, and Burgess;<sup>2</sup> and four counts of first degree robbery of Oatfield, Dodge, Nicholas Ormrod, and Aaron Ormrod;<sup>3</sup> CP 10-15. There was an added allegation on each count that “the defendant or an accomplice was armed with a deadly weapon, to-wit, a firearm.” CP 13-15.

The three men were tried together in April 2010. RP 04/13/10. Both Burns and Tillmon were found guilty of each charge and each enhancement. *Id.*, at 10-18. As to Mr. Herbin, the judge declared a mistrial when the jury could not reach a verdict on any count. *Id.*, at 5-8, 18-19, 24-25.

The state tried Mr. Herbin a second time on November 1-4, 2010. See RP Volumes I, II, III (November 1-4, 2010). Again the jury could not reach a verdict and a mistrial was declared. RP 11/05/10 at 39-44.

Mr. Herbin was tried for the third time on February 22-24. RP 02/22/11, 02/23/11, and 02/24/11. Mr. Herbin’s counsel did not object to any of the jury instructions in the third trial. RP 02/24/11 at 373. The jury returned a guilty verdict on all eight counts and answered “yes” on

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<sup>1</sup> RCW 9A.52.020

<sup>2</sup> RCW 9A.40.020

<sup>3</sup> RCW 9A.56.200

each enhancement special verdict. CP 50-65. The court characterized each enhancement as a “firearm” enhancement. CP 70. The court imposed an exceptional sentence downward but Mr. Herbin still received a 629 month sentence. CP 68, 70, 76. Mr. Herbin makes this timely appeal. CP 78-90.

**D. ARGUMENT**

**1. BECAUSE THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY THAT THEY NEED NOT BE UNANIMOUS TO ANSWER “NO” ON THE SPECIAL VERDICT FORMS, THE SPECIAL VERDICTS AND MR. HERBIN’S SENTENCING ENHANCEMENTS MUST BE REVERSED.**

The trial court failed to properly instruct the jury that they need not be unanimous to answer “no” to the special verdicts. Although the court told the jury that they could answer “no” on the special verdicts, the jurors were given no direction how to do so and, in fact, were led to believe that they had to be unanimous to answer “no.” Such failure to instruct the jury properly is reversible error. All of the special verdicts in Mr. Herbin’s case, and the 480 months of firearm enhancements,<sup>4</sup> must be reversed.

The jury found Mr. Herbin guilty of eight crimes: one count of first degree burglary; four counts of first degree robbery; and three counts of first degree kidnapping. CP 13-15, 50-57. As to each count, the jury

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<sup>4</sup> Mr. Herbin alternatively maintains in Issue 2 that the special verdicts were actually deadly weapon enhancements rather than firearm enhancements.

was asked by way of a special verdict to decide if Mr. Herbin was armed with a “deadly weapon - firearm” at the time of the commission of the crime. CP 58-65. The jury answered “yes” on each of the special verdict forms. *Id.*

At trial, the jury was given several instructions regarding whether it had to be unanimous in deciding all aspects of the case. Instruction 2 told the jurors that they had a “duty” to deliberate “in an effort to reach a unanimous verdict.” CP 20. Instruction 30 gave conflicting information.

If you find the defendant guilty of these crimes, you will then use the special verdict forms and fill in the blank with the answer “yes” or “no” according to the decision you reach. Because this is a criminal case, all twelve of you must agree in order to answer the special verdict forms. In order to answer the special verdict forms “yes,” you must unanimously be satisfied beyond a reasonable doubt that “yes” is the correct answer. If after full and fair consideration any single juror has a reasonable doubt as to this question, you must answer “no.”

Because this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the verdict forms to express your decisions.

CP 48-49.

Under the decision in *State v. Bashaw*, 169 Wn.2d 133, 234 P.3d 195 (2010), and the prior decision in *State v. Goldberg*, 149 Wn.2d 888, 72 P.3d 1083 (2003), the combined effect of the instructions was error.

In *Bashaw*, defendant Bashaw was charged with three counts of delivery of a controlled substance based on three separate sales to a police informant. *Bashaw*, 169 Wn.2d at 137. The state sought sentencing

enhancements pursuant to RCW 69.50.435(1)(c), based on the allegations that each sale took place within 1,000 feet of a school bus stop. *Id.* The jury was given special verdict forms for each charge, which asked the jury to find whether each charged delivery took place within 1,000 feet of a school bus stop. In the jury instruction explaining the special verdict forms, jurors were instructed: “Since this is a criminal case, all twelve of you must agree on the answer to the special verdict.” *Id.* at 139. The jury found Bashaw guilty of all three counts of delivery of a controlled substance and found that each took place within 1,000 feet of a school bus stop. *Id.*

Relying on *Goldberg*, 149 Wn. 2d 888, the court held the jury need not be unanimous in a special finding for a sentence enhancement: “A non-unanimous jury decision on such a special finding is a final determination that the State has not proved that finding beyond a reasonable doubt.” *Bashaw*, 169 Wn.2d at 145. The Court explained:

The rule from *Goldberg*, then, is that a unanimous jury decision is not required to find that the State has failed to prove the presence of a special finding increasing the defendant’s maximum allowable sentence. A non-unanimous jury decision is a final determination that the State has not proved the special finding beyond a reasonable doubt.

*Bashaw*,. at 146.

The rule adopted in *Goldberg* and reaffirmed in *Bashaw*, serves several important policies: it avoids the substantial burdens and costs of a

new trial; it affects the defendant's right to have the charges resolved by a particular tribunal; and it serves the interests of judicial economy and finality. *Bashaw*, 169 Wn.2d at 146-47.

Applying the *Goldberg* rule, the court held,

The jury instruction stating that all 12 jurors must agree on an answer to the special verdict was an incorrect statement of the law. Though unanimity is required to find the presence of a special finding increasing the maximum penalty, see *Goldberg*, 149 Wn.2d at 893, it is not required to find the absence of such a special finding. The jury instruction here stated that unanimity was required for either determination. That was error.

*Bashaw*, 169 Wn.2d at 147. Further, the court held the error was not harmless, as it was impossible to discern what might have occurred had the jury been properly instructed. *Id.* at 148. The court therefore vacated the sentence enhancements. *Id.*

The same error that occurred in *Bashaw* also occurred in this case.

Jury instructions are sufficient if they are supported by substantial evidence, allow the parties to argue their theories of the case, do not mislead the jury and, when taken as a whole, properly inform the jury of the applicable law. *State v. Clausing*, 147 Wn.2d 620, 626, 56 P.3d 550 (2002). Instructions are reviewed de novo to determine whether they meet those standards. *State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245

(1995), *cert denied*, 518 U.S. 1026, 116 S. Ct. 2568, 135 L. Ed. 2d 1084 (1996). The instructions in this case did not meet those standards.

First, Instruction 2, the instruction on deliberation, told the jurors their duty was to “deliberate in an effort to reach a unanimous verdict.” CP 20. Instruction 30 also told them “[b]ecause this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the verdict forms to express your decisions.” CP 49. But Instruction 30, also told the jury, confusingly, that

If you find the defendant guilty of these crimes, you will then use the special verdict forms and fill in the blank with the answer “yes” or “no” according to the decision you reach. Because this is a criminal case, all twelve of you must agree in order to answer the special verdict forms. In order to answer the special verdict forms “yes,” you must unanimously be satisfied beyond a reasonable doubt that “yes” is the correct answer. If after full and fair consideration any single juror has a reasonable doubt as to this question, you must answer “no.”

CP 48.

Taken together, these instructions are misleading and incorrect because they give the improper impression that unanimity is required not only in order to conclude that the state has met its burden of proving the special verdicts but also to find that it has *not*. Under *Goldberg, supra*, while unanimity is required to *convict* on a special verdict, it is not required for the jury to conclude that the state has not satisfied its burden of proving the special verdict. *Goldberg*, 149 Wn.2d at 890. Instead, the

Supreme Court held, for special verdicts on such things as aggravating factors or enhancements, “the jury *must be unanimous* to find the state has proven the existence of the aggravating factors beyond a reasonable doubt” but is not required to be unanimous in order to answer the special verdict “no.” 149 Wn.2d at 893 (emphasis in original).

Thus, not all jurors have to agree that the State has not proven an enhancement in order to answer “no” on a special verdict. *See id.* This has the practical effect of ensuring that Mr. Herbin receives the benefit of any reasonable doubt – a benefit to which he is clearly entitled as part of the presumption of innocence. *State v. Warren*, 165 Wn.2d 17, 26-27, 195 P.3d 940 (2008), *cert. denied*, \_\_\_ U.S. \_\_\_, 129 S. Ct. 2007, 173 L. Ed. 2d 1102 (2009). If some jurors have such doubts whether the state has met its burden of proving a special verdict, the special verdict is answered “no” and the defendant is given the benefit of those doubts.

It is anticipated the state will argue that Mr. Herbin waived his right to challenge the special verdict jury instructions because he did not object at trial and because the claimed error is not one of constitutional magnitude. To the contrary, Mr. Herbin had a constitutional right to have the jury correctly instructed on the unanimity requirement for the special verdict forms and he may challenge the instructions for the first time on appeal.

Criminal defendants have both a federal and state constitutional right to have a jury determine, beyond a reasonable doubt, the facts required to impose a sentence enhancement. *State v. Williams-Walker*, 167 Wn.2d 889, 896, 225 P.3d 913 (2010); U.S. Const. Amend. 6; Wash. Const. Art. I §§ 21, 22. Article 1, § 21 of the Washington Constitution requires that jury verdicts in criminal cases be unanimous. Const. Art. 1 § 21; *State v. Stephens*, 93 Wn.2d 186, 190, 607 P.2d 304 (1980). As noted above, where a sentencing factor is submitted to the jury via special verdict, the jury must be unanimous to find the state has proven the special finding beyond a reasonable doubt. *Goldberg*, 149 Wn.2d at 892-93. But the jury need not be unanimous to find the state failed to prove the special allegation. *Bashaw*, 169 Wn.2d at 146.

In *Bashaw*, the court concluded that the defendant was entitled to have the jury correctly instructed that it need not be unanimous in order to answer “no” on the special verdict form. *Id.* at 147. The jury instructions were erroneous because they informed the jury they must be unanimous in order to answer the special verdict form. *Id.* Thus, the error “was the procedure by which unanimity would be appropriately achieved.” *Id.* The result was a “flawed deliberative process” that “tells us little about what result the jury would have reached had it been given a correct instruction.”

*Id.* By implication, the error affected Bashaw’s constitutional right to have a jury determine the special allegation beyond a reasonable doubt.

Generally, an error may be raised for the first time on appeal if it is a manifest error affecting a constitutional right. RAP 2.5(a)(3); *State v. Roberts*, 142 Wn.2d 471, 500, 14 P.3d 713 (2000). An error is “manifest” if it had “practical and identifiable consequences in the trial of the case.” *Id.* (citing *State v. WWJ Corp.*, 138 Wn.2d 595, 603, 980 P.2d 1257 (1999) (quoting *State v. Lynn*, 67 Wn. App. 339, 345, 835 P.2d 251 (1992))).

As noted above, “To satisfy the constitutional demands of a fair trial, the jury instructions, when read as a whole, must correctly tell the jury of the applicable law, not be misleading, and permit the defendant to present his theory of the case.” *State v. O’Hara*, 167 Wn.2d 91, 105, 217 P.3d 756 (2009) (citing *State v. Mills*, 154 Wn.2d 1, 7, 109 P.3d 415 (2005)); U.S. Const. Amend. 14; Wash. Const. Art, 1 § 3. This court has held the following jury instruction errors are manifest constitutional errors that may be challenged for the first time on appeal: directing a verdict, *State v. Peterson*, 73 Wn.2d 303, 306, 438 P.2d 183 (1968); shifting the burden of proof to the defendant; *State v. McCullum*, 98 Wn.2d 484, 487-88, 656 P.2d 1064 (1983); failing to define the “beyond a reasonable doubt” standard, *State v. McHenry*, 88 Wn.2d 211, 214, 558 P.2d 188

(1977); failing to require a unanimous verdict, *State v. Carothers*, 84 Wn.2d 256, 262, 525 P.2d 731 (1974); and omitting an element of the crime charged, *State v. Johnson*, 100 Wn.2d 607, 623, 674 P.2d 145 (1983), *overruled on other grounds by State v. Bergeron*, 105 Wn.2d 1, 711 P.2d 1000 (1985); In contrast, instructional errors not falling within the scope of RAP 2.5(a), that is, not constituting manifest constitutional error, include the failure to instruct a lesser included offense, *State v. Mak*, 105 Wn.2d 692, 745-49, 718 P.2d 407 (1986), *overruled on other grounds, State v. Hill*, 123 Wn.2d 641 (1994), and the failure to define individual terms, *State v. Scott*, 110 Wn.2d 682, 690-91, 757 P.2d 492 (1988).

In this case the jury instructions misstated the law regarding the unanimity requirement for the special verdict forms. The error is similar to the instructional errors that may be challenged for the first time on appeal. In Mr. Herbin's case, the jury instructions did not merely fail to define a term or fail to inform the jury of a lesser included offense. Because the instructions misstated the law regarding jury unanimity they deprived Mr. Herbin of his constitutional right to a fair trial. *O'Hara*, 167 Wn.2d at 105. The error is therefore a manifest error that may be raised for the first time on appeal. RAP 2.5(a); *O'Hara*, 167 Wn.2d at 100, 105.

Consistent with this reasoning, the court addressed an identical error in *Bashaw*, even though the error was never raised at the trial court level. See *State v. Bashaw*, 144 Wn. App. 196, 199-99, 182 P.2d 451 (2009), *rev'd*, 169 Wn.2d 133 (2010) (defense counsel did not object to challenged jury instruction). In addition, in determining whether the error was harmless, the court applied the constitutional harmless error standard. *Bashaw*, 169 Wn.2d at 147 (citing *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002)); *Neder v. United States*, 527 U.S. 1, 19, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999).

*Bashaw* controls Mr. Herbin's case. In *Bashaw*, after concluding that it was error to instruct the jury it had to be unanimous in order to answer the special verdict, the Supreme Court then turned to the question of whether the error could be deemed harmless and concluded it could not. 169 Wn.2d at 202-03. The court reached this conclusion after looking at "several important policies" behind prohibiting retrial on an enhancement alone. A second trial "exact[s] a heavy toll on the society and defendant," crowds court dockets, delays other cases and helps "drain state treasuries," the court noted, so that the "costs and burdens of a new trial, even if limited to the determination of a special finding, are substantial." *Id.* at 202. Further, the Court declared:

Retrial of a defendant implicates core concerns of judicial economy and finality. Where, as here, a defendant is already subject to a penalty for the underlying substantive offense, the prospect of an additional penalty is strongly outweighed by the countervailing policies of judicial economy and finality.

*Id.*

Considering those policies, the court rejected the idea that the polling of the jury to have them affirm the verdict somehow rendered the error “harmless.” *Bashaw*, 169 Wn.2d at 201-02. To find the error “harmless,” the court said it would have to be able to conclude beyond a reasonable doubt that the jury would have reached the same verdict absent the error. *Id.* at 202. This it could not do because the error in the procedure so tainted the conclusion:

The result of the flawed deliberative process tells us little about what result the jury would have reached had it been given a correct instruction. *Golderg* is illustrative. There, the jury initially answered “no” to the special verdict, based on a lack of unanimity, until told it must reach a unanimous verdict, at which point it answered “yes.” Given different instructions, the jury returned different verdicts. We can only speculate why this might be so. For instance, when unanimity is required, jurors with reservations might not hold to their positions or may not raise additional questions that would lead to a different result.

*Bashaw*, 169 Wn.2d at 203 (citations omitted).

As a result, the Supreme Court held, it was not possible to “say with any confidence what might have occurred had the jury been properly

instructed” and “[w]e therefore cannot conclude beyond a reasonable doubt that the jury instruction error was harmless.” *Id.* at 203.

Notably, the *Bashaw* court reached this conclusion even though it had already found that evidentiary error in relation to two of the three special verdicts and sentencing enhancements was harmless in light of the evidence in the case. *Bashaw*, 169 Wn.2d at 203. There, the three enhancements were for three counts of delivery of a controlled substance, alleged to have occurred within 1,000 feet of a school bus stop and thus subject to a “school bus stop” sentencing enhancement. *Id.*, at 198-99. The prosecution relied on evidence from a measuring device which was not properly shown to be reliable. *Id.*, at 199-200. The measuring device indicated that the three deliveries occurred (1) within 924 feet of a school bus stop, (2) within 100 feet of a school bus stop, and (3) within 150 feet of a school bus stop. *Id.* Officers also testified that the first delivery was approximately 1/10 mile (528 feet) or ¼ mile (1,320 feet) from the stop. *Id.*, at 201.

After first finding that the measuring device evidence should have been excluded, the court concluded that admission of that evidence was harmless error as to the second and third deliveries because the evidence was such that there was “no reasonable probability” that the jury would have concluded that those deliveries had not taken place within 1,000 feet

of the stop if the measuring device evidence had not been excluded. *Id.*, at 201.

Despite the evidence, however, the court reversed the enhancements for the second and third deliveries based upon the error in the instructions for the special verdicts. *Id.*, at 203. The court was not concerned with whether there was sufficient evidence to support the enhancements despite the improper instruction because the issue was whether the procedure in gaining the verdicts was fundamentally flawed. *Id.*, at 202-03. Indeed the court did not examine the issue in the light of the strength or weakness of the evidence on the enhancements, instead focusing on how the “flawed deliberative process” was such that the court could not determine what result the jury would have reached had it been properly instructed. *Id.*, at 203.

As a result, under *Bashaw*, reversal and dismissal of the sentencing enhancements did not depend upon whether there was evidence which the jury could have relied on in saying “yes” to the special verdicts, nor did the court substitute its own belief about whether the evidence would have supported verdicts of “yes.” Instead, the court refused to engage in such speculation in light of the jury instruction error, finding that the error compelled reversal.

Here, as in *Bashaw*, there is no way to be sure that the jury instruction error was harmless beyond a reasonable doubt, despite the verdicts of “yes” for the aggravating factors. As in *Bashaw*, the misleading, confusing, and improper jury instructions tainted the entire process. As in *Bashaw*, the question is not whether there was evidence from which the jurors could have entered “yes” to the special verdicts, nor is it the court’s role to substitute its own belief about the strength or weakness of that evidence in order to uphold the special verdicts. Because the instructional error tainted the deliberation process and misled the jury into thinking that it had to be unanimous in order to answer “no” to the special verdicts, reversal and dismissal of the aggravating factors special verdicts and remand for resentencing without the verdicts is required.

Finally, although the *Bashaw* court did not address this issue, the improper instructions also deprived Mr. Herbin of his constitutional right to the “benefit of the doubt” under the presumption of innocence. That presumption is the “bedrock upon which the criminal justice system stands.” *State v. Bennett*, 161 Wn.2d 303, 315-16, 165 P.3d 1241 (2007). A defendant is constitutionally entitled to the benefit of the doubt when it comes to determining whether the state has proven its case. *Warren*, 165 Wn.2d at 26-27. In the context of a special verdict, indicating to jurors that they have to be unanimous to not only answer “yes” but also to

answer “no” deprives defendants of the benefit of the doubt some jurors may have had. As the *Bashaw* court noted, where, as here, the jury is under the mistaken belief that unanimity is required, “jurors with reservations might not hold to their positions or may not raise additional questions that would lead to a different result.” *Id.*, at 203.

Because the jury was improperly instructed and misled about whether it had to be unanimous in order to answer the special verdict forms “no,” the special verdict on the aggravating factors must be stricken as in *Bashaw*. Reversal and remand for resentencing without the aggravating factors is required.

Mr. Herbin is aware that this court has reached a contrary result and disallows *Bashaw* challenges for the first time on appeal. It is this Court’s opinion that such challenges are not a constitutionally manifest error under RAP 2.5(a)(3)(3). See *State v. Grimes*, No. 40397-7-II, 2011 WL 6018399 at 7 (Wash. Ct. App. Dec. 2, 2011) and *State v. Bertrand*, No. 40403-6-II, 2011 WL 6099718 at 3 (Wash. Ct. App. December 8, 2011). Mr. Herbin is also aware that the Supreme Court is currently reviewing the issue. See No. 85789-0 (consol. w/85947-7, *State (petitioner) v. Ryan (respondent) v. Guzman-Nunez (petitioner)*). Oral argument was heard January 12, 2012. Mr. Herbin makes this argument here to preserve the issue for further appellate review.

**2. THE FIREARM ENHANCEMENTS IMPOSED ON ALL EIGHT COUNTS VIOLATED MR. HERBIN'S STATE AND FEDERAL RIGHT TO DUE PROCESS AND TO A JURY DETERMINATION OF FACTS USED TO INCREASE THE PENALTY BEYOND THE STANDARD RANGE.**

The state, by its Third Amended Information, notified Mr. Herbin of its intent to seek sentencing enhancements on all eight counts. CP 13-15. The operative language for each enhancement alleged that Mr. Herbin, or another participant in the crime, “was armed with a deadly weapon, to wit: a firearm.” CP 13-15. The court instructed the jury to determine, for purpose of a special verdict, whether or not “the defendant was armed with a firearm at the time of the commission of the crime in Counts I through VIII.” CP 45. In the same instruction, the court also instructed jurors, “A ‘firearm’ is a weapon or device from which a projectile may be fired by an explosive such as gunpowder.” CP 45.

All eight special verdict forms shared the same basic format: “Was the defendant...armed with a firearm at the time of the commission of the crime BURGLARY IN THE FIRST DEGREE WHILE ARMED WITH A DEADLY WEAPON – FIREARM as charged in Count I?” The jury answered “yes” to each special verdict, and the court imposed firearm enhancements. CP 58-65, 70.

Any fact, besides the fact of a prior conviction, that increases the penalty for a crime beyond the prescribed statutory maximum must be

submitted to a jury and proved beyond a reasonable doubt. *In re Personal Restraint of Delgado*, 149 Wn. App. 223, 232, 204 P.3d 936 (2009) (citing *Apprendi v. New Jersey*, 530 U.S. 466, 476, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) and *Blakely v. Washington*, 542 U.S. 296, 303, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004)).

The trial court may not impose a firearm enhancement when the state has charged a deadly weapon enhancement. *Delgado*, at 234 (citing *State v. Recuenco*, 163 Wn.2d 428, 180 P.3d 1276 (2008)). This is so for two reasons: (1) a person can only be convicted of and sentenced for enhancements actually charged by the prosecution, and (2) imposition of a firearm enhancement without prior notice violates due process. *Delgado*, at 234-235. In addition, a firearm enhancement may not be imposed unless the state proves that the offender was armed with a working firearm. *Id.* Nor may a firearm enhancement be imposed when jury instructions outline the requirements for a deadly weapon special verdict. *Id.*

In *Delgado*, the state alleged that the defendant was “armed with a deadly weapon, to wit: a firearm.” *Id.*, at 235. The jury was instructed to answer “yes” on a special verdict form if it found that the defendant was armed with a deadly weapon. *Id.* Despite the clarity of the charges and instructions, some of the preprinted special verdict forms reflected jury findings that the defendant was armed with a firearm, rather than a deadly

weapon. *Id.*, at 235-236. The sentencing court imposed firearm enhancements rather than deadly weapon enhancements. *Id.*, at 236.

In accordance with *Recuenco*, the Court of Appeals vacated Delgado's firearm enhancements and remanded for resentencing with deadly weapon enhancements. First, the Court noted that the jury findings were actually deadly weapon findings (even though some of the special verdict forms used the word "firearm" in place of the phrase "deadly weapon"). *Delgado*, at 237. Second, the court noted that the defendant was not charged with firearm enhancements, and thus could not receive firearm enhancements under the theory that the disparity between the instructions and the special verdicts created only harmless error. *Id.*, at 237-238. Constitutional violations and jury instructions are both reviewed de novo. *State v. Schaler*, 169 Wn.2d 274, 282, 238 P.3d at 858 (2010); *Bashaw*, at 140. Instructions must be manifestly clear to the average juror. *State v. Kylo*, 166 Wn.2d 856, 864, 215 P.3d 177 (2009).

Under *Recuenco* and *Delgado*, Mr. Herbin's firearm enhancements must be vacated and the case remanded for sentencing with deadly weapon enhancements. The Third Amended Information alleged that Mr. Herbin "was armed with a deadly weapon, a firearm," on all counts. CP 13-15. Upon a proper finding by the jury, this charging language authorized the sentencing court to impose deadly weapon enhancements; the sentencing court was not authorized to impose the lengthier firearm

enhancements. *Recuenco, supra; Delgado, supra*; RCW 9.94A.533(3). For this reason, Mr. Herbin’s firearm enhancements must be vacated. *Delgado, supra*.

**3. MR. HERBIN WAS DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE COUNSEL WHEN HIS TRIAL COUNSEL FAILED TO OBJECT TO HEARSAY TESTIMONY ABOUT THE SHOTGUN’S OPERABILITY.**

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defense.” U.S. Const. Amend. VI. This provision is applicable to the states through the Fourteenth Amendment. U.S. Const. Amend. XIV; *Gideon v. Wainwright*, 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Likewise, Article I, § 22 of the Washington Constitution provides, “In criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel...” The right to counsel is the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970)). Effective counsel is “one of the most fundamental and cherished rights guaranteed by the Constitution.” *United States v. Salemo*, 61 F.3d 214, 221-222 (3rd Cir. 1995).

An ineffective assistance claim presents a mixed question of law and fact requiring de novo review. *In re Fleming*, 142 Wn.2d 853, 865, 16 P.3d 610 (2001); *State v. Horton*, 136 Wn. App. 29, 146 P.3d 1227 (2006). An appellant claiming ineffective assistance must show (1) that defense counsel's conduct was deficient, meaning that it fell below an objective standard of reasonableness; and (2) that the deficient performance resulted in prejudice, meaning "a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have different." *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004) (citing *Strickland*); see also, *State v. Pittman*, 134 Wn. App. 376, 383, 166 P.3d 720 (2006).

There is a strong presumption of adequate performance; however, this presumption is overcome when "there is no conceivable legitimate tactic explaining counsel's performance." *Reichenbach*, 153 Wn.2d at 130. Any trial strategy "must be based on reasoned decision-making..." *In re Hubert*, 138 Wn. App. 924, 929, 158 P.3d 1282 (2007). Furthermore, there must be some indication in the record that counsel was actually pursuing the alleged strategy. See, e.g., *State v. Hendrickson*, 129 Wn.2d 61, 78-79, 917 P.2d 563 (1996) (the state's argument that counsel "made a tactical decision by not objecting to the introduction of evidence of prior convictions has no support in the record").

Here the police found a shotgun in the bushes just outside of the paintballers' house. There were shells in the shotgun. Apparently, a Sergeant Davis test fired the shotgun and determined that it was capable of firing a shotgun shell. RP 02/22/11 at 85-86. But Sergeant Davis did not testify at trial. Instead, the lead detective on the case, Detective Hamilton, testified that Sergeant Davis test fired the shotgun. *Id.*, at 85-86. Defense counsel did not object to this testimony even though Mr. Herbin has a right to confront Sergeant Davis about the testing of the shotgun and the conclusion he reached. *Id.*, at 85-86.

The state and federal constitutions guarantee criminal defendants the right to confront the witnesses that bear testimony against them. U.S. Const. Amend. VI; Wash. Const. Art I, § 22; *Davis v. Washington*, 547 U.S. 813, 823, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006); *State v. Davis*, 154 Wn.2d 291, 300, 111 P.3d 844 (2005). The right to confrontation may be waived by a failure to object. *Melendez-Diaz v. Massachusetts*, \_\_\_, U.S. \_\_\_, 129 S.Ct. 2527, 2534 n.3, 174 L.Ed.2d 314 (2009).

The statements attributed to Sergeant Clark by Detective Hamilton were otherwise inadmissible hearsay. ER 801, 802. Although the shotgun had shells in it, there was no evidence the shotgun was actually operable absent Detective Hamilton's hearsay. RP 02/22/11 at 30-31. A firearm enhancement cannot be imposed unless the firearm proves to be operable.

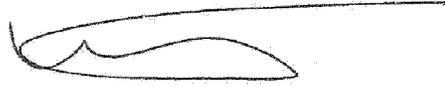
CP 45 (Instruction 27); *State v. Pam*, 98 Wn.2d 748, 659 P3d 454 (1983), *overruled in part on other grounds by State v. Brown*, 111 Wn.2d 124, 761 P.2d 588 (1988); *State v. Recuenco*, 163 Wn.2d 428, 437, 180 P3d 1276 (2008) (“We have held that a jury must be presented with sufficient evidence to find a firearm operable under this definition in order to uphold the enhancement”); *State v. Pierce*, 155 Wn. App. 701, 714 n. 11, 230 P.3d 237 (2010) (Where the firearm is not presented as evidence, there must be “other evidence of operability, such as bullets found, gunshots heard”). Without Sergeant Clark findings, the evidence of operability was insufficient.

Mr. Herbin is serving 40 years of enhancement time in prison because his counsel failed to object to hearsay. RCW 9.94A.533(3); CP 70. It goes without saying that forty years in prison due to defense counsel’s error is prejudicial.

#### **E. CONCLUSION**

Because of the *Bashaw* error, all eight enhancements should be dismissed. The same remedy holds true because of the ineffective assistance of counsel Mr. Herbin received. Alternatively, what is now a firearm enhancements should be remanded to be corrected characterized and resented as a deadly weapon enhancement.

Respectfully submitted on January 20, 2012.

A handwritten signature in black ink, appearing to read 'L. Tabbut', is written over a horizontal line.

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LISA E. TABBUT, WSBA #21344  
Attorney for Deshone V. Herbin

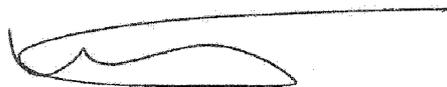
**CERTIFICATE OF SERVICE**

Lisa E. Tabbut declares as follows:

On today's date, I efiled via the Court's web filing portal the Brief of Appellant with: (1) Jon Tunheim, Thurston County Prosecutor's Office at paoappeals@co.thurston.wa.us; and (2) the Court of Appeals, Division II; and (3) I mailed it to Deshone V. Herbin/DOC#348158, Washington State Penitentiary, 1313 N. 13<sup>th</sup> Avenue, Walla Walla, WA 99362.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed January 20, 2012, in Longview, Washington.



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Lisa E. Tabbut, WSBA No. 21344  
Attorney for Deshone V. Herbin

# COWLITZ COUNTY ASSIGNED COUNSEL

## January 20, 2012 - 1:10 PM

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