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COURT OF APPEALS DIV. #1
STATE OF WASHINGTON

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NO. 63069-5-1

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

STATE OF WASHINGTON,

Respondent,

v.

DINDO PANGILIAN,

Appellant.

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

The Honorable Charles R. Snyder, Judge

REPLY BRIEF OF APPELLANT

KARY DADY
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Attorneys for Appellant

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A. ARGUMENT IN REPLY

DEFENSE COUNSEL HAD A DUTY TO BRING THE UNANIMITY ISSUE RAISED IN STATE v. GOLDBERG¹ TO THE TRIAL COURT'S ATTENTION AND SHOULD HAVE OBJECTED TO WPIC 160.00 AS A MISSTATEMENT OF THE LAW.

The State contends that WPIC 160.00 is an accurate statement of the law because the Goldberg holding is limited to the facts of that case. Br. of Resp't at 10. But the Supreme Court did not limit the Goldberg opinion. The first sentence in the concluding paragraph of the opinion sets forth the court's expansive holding: "In sum, special verdicts do not need to be unanimous in order to be final." Goldberg, 149 Wn.2d at 895.

Neither the Supreme Court nor Division One of the Court of Appeals has subsequently published an opinion limiting Goldberg as the State suggests. Therefore, defense counsel had an obligation to present the issue to the trial court and request a jury instruction stating that the jury need not be unanimous in order to answer "no" on the special verdict form.

The State contends that even if Pangilinan's reading of Goldberg is accurate, he cannot demonstrate actual prejudice since the jury unanimously answered "yes" on the special verdict form.

¹ State v. Goldberg, 149 Wn.2d 888, 72 P.3d 1083 (2003).

Br. of Resp't at 10. The State overlooks the fact that the jurors sent a question to the court indicating that they were deadlocked on the issue of whether Pangilinan committed the burglary with sexual motivation: "Does the jury have to answer the special verdict form if they cannot agree unanimously yes or no?" CP 35. Had jurors properly received the previous version of WPIC 160.00, they would have been told:

You will also be given a special verdict form for the crime of Burglary in the First Degree charged in Count I. If you find the defendant not guilty of this crime, do not use the special verdict form. If you find the defendant guilty of the crime of Burglary in the First Degree, you will then use the special verdict form and fill in the blank with the answer "yes" or "no" according to the decision you reach. In order to answer the special verdict form "yes", you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If any one of you has a reasonable doubt as to the question, you must answer "no."

11A Washington Practice: Washington Pattern Jury Instructions: Criminal 160.00, at 274 (Supp. 2005)(emphasis added). With an accurate instruction, the jury would have simply answered "no" on the special verdict form when unable to agree on the special verdict rather than asking the court for direction on how to proceed further.

Further, the jury had a non-discretionary duty to answer the special verdict once they concluded that Pangilinan was guilty of

burglary: “If you find the defendant guilty of the crime of Burglary in the First Degree, you will then use the special verdict form and fill in the blank with the answer “yes” or “no” according to the decision you reach.” See CP 60-61(emphasis added). The State argues that “juries are not generally required to be informed as to what to do when they are *not* in agreement.” Br. of Resp’t at 17. But the State does not address the fact that here, the instructions did tell the jury what to do if they could not agree on either Verdict A or Verdict B. (“If you cannot agree on a verdict, do not fill in the blank for this count as provided in Verdict Form A [and B].”) See CP 60-61. The directive to answer the special verdict form coupled with the absence of direction on how to proceed if unable to agree signaled to the jury that it had to return a verdict on this issue.

Lastly, the State contends that the Supreme Court does not intend to review the conclusion from State v. Bashaw² that Goldberg does not apply to all special verdicts. The State has failed to include a citation for the issue statement attributed to Bashaw. Presumably, this statement came from the Supreme Court’s website. Also on the Supreme Court’s website is a

² State v. Bashaw, 144 Wn. App. 196, 182 P.3d 451 (2008).

statement explaining that issues and classifications are not drafted by the justices who will review the case:

When this court accepts review of cases, the Commissioner's Office attempts to identify, summarize, and classify the principal issue or issues each case presents. Those issues appear below. Please note that the Justices have not reviewed or approved the issues or classifications, and there can be no guarantee that the court's opinions will address these precise questions.

Washington Courts, "Supreme Court Issues," http://www.courts.wa.gov/appellate_trial_courts/supreme/issues/ (last visited January 11, 2010).

Defense counsel should have recognized that in light of Goldberg, Bashaw is incorrect and does not control.

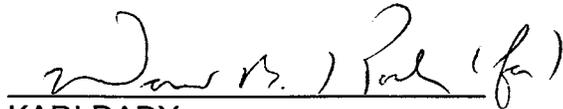
B. CONCLUSION

Because defense counsel rendered ineffective assistance of counsel, jurors failed to receive an accurate instruction stating that they need not be unanimous in order to answer "no" on the special verdict form. This Court should strike the sentencing enhancement.

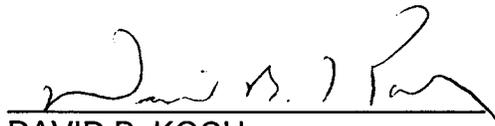
DATED this 14th day of January, 2010.

Respectfully submitted,

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 63069-5-1
)	
DINDO PANGILIAN,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 14TH DAY OF JANUARY, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] WHATCOM COUNTY PROSECUTOR'S OFFICE
WHATCOM COUNTY COURTHOUSE
311 GRAND AVENUE
BELLINGHAM, WA 98227

- [X] DINDO PANGILIAN
DOC NO. 328091
COYOTE RIDGE CORRECTIONS CENTER
P.O. BOX 769
CONNELL, WA 99326

SIGNED IN SEATTLE WASHINGTON, THIS 14TH DAY OF JANUARY, 2010.

x *Patrick Mayovsky*