

NO. 41715-4-II

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

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STATE OF WASHINGTON,

Respondent,

v.

**DELWYN GIBBONS,**

Appellant.

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

The Honorable Diane Woolard, Judge

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**APPELLANT'S OPENING BRIEF**

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**A. ASSIGNMENTS OF ERROR**

1. The aggravating factors special verdicts and the resulting exceptional sentences must be stricken because the jury was improperly instructed in such a way that the jurors had to be unanimous to answer the special verdict forms “no.”

2. Jury instructions 2, 5 and 24 improperly misled the jury about the law by implying that the jury needed to be unanimous in order to answer the special verdicts “no” and thus those instructions deprived Gibbons of his right to the benefit of any reasonable doubt and the presumption of innocence for the special verdicts.

**B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR**

1. Were the jury instructions for the special verdict forms 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)?

**C. STATEMENT OF THE CASE**

Delwyn Gibbons was tried on seven charges: three counts of second degree assault by strangulation (counts 1, 2, 3); one count of felony harassment (count 4); two counts of fourth degree assault (counts 5 and 7); and one count of unlawful imprisonment (count 6). CP 18-21. All the charges pertain to incidents said to have occurred over a three day window, April 25-28, 2010. CP 18-21. All of the charges were against

D.C.,<sup>1</sup> Gibbons paraplegic girlfriend and mother of his young son. CP 18-21; RP 3A at 352, 358.

Gibbons was tried on a Fifth Amended Information. CP 18-21. For each felony offense, the state pled two exceptional sentence aggravating factors: (1) the defendant's conduct during the crime manifested deliberate cruelty to D.C.<sup>2</sup> and (2) Gibbons knew or should have know that D.C. was particularly vulnerable or incapable of resistance.<sup>3</sup>

The jury returned guilty verdicts on all counts but the harassment. CP 64, 68, 72, 76, 80, 81, 85. The jury acquitted Gibbons on that charge. CP 76. The jury answered "yes" on all the aggravating factors special verdicts except one. CP 65, 66, 69, 70, 73, 74, 83. They answered "no" to the question of whether Gibbons manifested deliberate cruelty on the unlawful imprisonment charge. CP 82.

Defense counsel did not object to any of the jury instructions. RP 5 at 800. The instructions told the jury that they had to be unanimous to reach a verdict on each of the seven charges. The instructions also told the jury that they had to be unanimous to return a "yes" or "no" finding on the special verdicts. CP 26, 29-30, 24 (Instructions 2, 5, and 24).

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<sup>1</sup> Initials are used in lieu of the name.

<sup>2</sup> See RCW 9.94A.535(3)(a)

<sup>3</sup> See RCW 9.94A.535(3)(b)

At sentencing, the trial judge found that the law and facts supported the aggravating factors found by the jury. RP 6 at 922-23; CP 108-11. The court imposed an exceptional sentence on all of the felonies by going out to the statutory maximum of 120 months on the three second degree assaults and 60 months on the unlawful imprisonment. CP 99. Gibbons standard range on the second degree assaults was 22-29 months and 9-12 months on the unlawful imprisonment. CP 98. The court entered written findings of fact and conclusions of law in support of the exceptional sentence. CP 108-11.

Gibbons made a timely appeal. CP 115-36.

**D. ARGUMENT**

**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 GIBBONS’ EXCEPTIONAL SENTENCES MUST BE REVERSED.**

*(i) The trial court’s error.*

The trial court failed to properly instruct the jury how to reach a verdict on the aggravating factor special verdicts. Specifically, the court told the jury that they had to be unanimous in order to return a “yes” finding on each aggravating factor. 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 Gibbons’ case, and the 91 months of exceptional sentences, must be reversed.

Gibbons was convicted of four felonies: three counts of second degree assault and one count of unlawful imprisonment.<sup>4</sup> On each charge, the jury was asked, by way of a special verdict, to decide: (1) if Gibbons knew, or should have known, that D.C was particularly vulnerable or incapable of resistance; and (2) did Gibbons, during the commission of the crime, manifest deliberate cruelty to D.C. CP 65, 66, 69, 70, 73, 74, 77, 78, 82, 83. As to each charge, with one exception, the jury filled out the special verdict form with the answer “yes.” The jury answered “no” to whether Gibbons manifested deliberate cruelty on the unlawful imprisonment charge.

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 26. Instruction 5 also told the jurors, “[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

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<sup>4</sup> Gibbons was also convicted of two counts of fourth degree assault. Those convictions are not germane to this argument.

decisions.” CP 30. Instruction 24, the instruction on special verdicts, told the jury:

If you find the defendant guilty of any of the crimes charged in counts 1 – 7, 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.

CP 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*, 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 nonunanimous 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 nonunanimous jury decision is a final determination that the State has not proved the special finding beyond a reasonable doubt.

*Id.* 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 instructions on deliberation, told the jurors their duty was to “deliberate in an effort to reach a unanimous verdict.” CP 26. Instruction 5 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 30. But the special verdict, Instruction 24, told the jury:

If you find the defendant guilty of any of the crimes charged in counts 1 – 7, you will then use the special verdict forms and fill in

the blank with the answer “yes” or “no” according to the decision your 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.

CP 49.

Taken together, these instructions were misleading and incorrect because they gave the improper impression that unanimity was required not only in order to conclude that the state had met its burden of proving the special verdicts but also to find that it had *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 892-93 (emphasis in original).

Thus, not all jurors have to agree that the prosecution has not proven an enhancement in order to answer “no” on a special verdict. *See id.* This has the practical effect of ensuring that the defendant 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.

(ii) *Right to appeal under RAP 2.5(a).*

It is anticipated the state will argue that Gibbons 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, Gibbons 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, Section 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 under section (i) 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). *O’Hara*, 167 Wn.2d at 100. 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). *O'Hara*, 167 Wn.2d at 100.

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 Gibbons' 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 Gibbons 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)).

(iii) *The remedy.*

*Bashaw* controls Gibbons' 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 next rejected the idea that the polling of the jury to have them affirm the verdict somehow rendered the error "harmless." 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.

*Id.* 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. *Id.* 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 Gibbons 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.

**E. CONCLUSION**

For the reasons stated herein, reversal and remand for resentencing without the aggravating factors is required.

Respectfully submitted this 22nd day of September 2011.

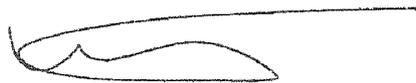


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Attorney for Delwyn Gibbons

**CERTIFICATE OF SERVICE**

I certify under the penalty of perjury for the State of Washington that on September 22, 2011, in Mazama, Washington, I did the following with this document: (1) emailed it Anne Mowry Cruser, Clark County Prosecutor's Office at prosecutor@clark.wa.gov; and (2) emailed it to the Court of Appeals, Division II. In Longview, Washington, on the same date I mailed this to Delwyn Gibbons /DOC#346362; Clallam Bay Corrections Center, 1830 Eagle Crest Way, Clallam Bay, WA 98326.



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LISA E. TABBUT, WSBA #21344

# COWLITZ COUNTY ASSIGNED COUNSEL

September 22, 2011 - 9:51 AM

## Transmittal Letter

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Case Name: State v. Delwyn Gibbons

Court of Appeals Case Number: 41715-4

Designation of Clerk's Papers                      Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: \_\_\_\_

Answer/Reply to Motion: \_\_\_\_

■ Brief: Appellant's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: \_\_\_\_

Hearing Date(s): \_\_\_\_\_

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Other: \_\_\_\_\_

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