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IN THE CIRCUIT COURT OF THE STATE OF OREGON  
FOR THE COUNTY OF MULTNOMAH

STATE OF OREGON,	)	
	)	No. xxx
Plaintiff,	)	
	)	REQUESTED SPECIAL JURY
vs.	)	INSTRUCTION #1
	)	
xxx	)	<b>ORAL ARGUMENT REQUESTED</b>
	)	
Defendant.	)	

COMES NOW the defendant, by and through his attorney Ryan Scott, and requests the following special jury instruction:

If you find the defendant guilty of either count 1 or count 2, you then must determine if any of the enhancements exist. The only two choices for the enhancements are “proven” or “not proven.” In order to find an enhancement proven, at least ten or more of the jurors who found the defendant guilty of the underlying offense must vote for “proven.” If any number less than ten jurors vote for “proven,” your answer should be “not proven.”

DATED this \_\_\_\_\_ day of April, 2012

\_\_\_\_\_  
Ryan Scott, OSB #95526  
Attorney for Defendant

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IN THE CIRCUIT COURT OF THE STATE OF OREGON  
FOR THE COUNTY OF MULTNOMAH

STATE OF OREGON,	)	No.
	)	
Plaintiff,	)	MEMORANDUM IN SUPPORT OF
	)	REQUESTED SPECIAL JURY
vs.	)	INSTRUCTION #1
	)	
xxxxxxx,	)	
	)	
Defendant.	)	

ORS 136.760 defines an “enhancement fact” as follows:

(2) “Enhancement fact” means a fact that is constitutionally required to be found by a jury in order to increase the sentence that may be imposed upon conviction of a crime.

The commercial drug offense (CDO) factors and substantial quantity (SQ) factors alleged in counts 1 and 2 easily satisfy that definition. For example, the allegation in count 1 that the “delivery” involved more than 50 grams of a mixture of a substance containing a detectable amount of heroin increases the presumptive sentence substantially. It raises what might otherwise be a 4 or 6 or 8 on the sentencing grid to a level 9. The fact of more than 100 grams of that same mixture increases the crime seriousness to a level 10.

Further, under the 6<sup>th</sup> Amendment to the United States Constitution, as interpreted by *Blakely v. Washington*, 542 US 296, 124 S Ct 2531, 159 L Ed 2d 403 (2004) and its progeny, those types of enhancement facts must be proven to a jury.

We may not automatically think of CDO and SQ factors as *Blakely* factors, since the statutory requirement that they must be proven to a jury pre-dates *Blakely*. Nevertheless, they easily satisfy the definition in ORS 136.760(2).

Because the CDO and SQ factors satisfy the definition of enhancement fact, the statutes pertaining to enhancement facts applies to them as well. That means that if eight or nine jurors – or any number less than ten – does not find the enhancement fact proven, then the fact is not proven. ORS 136.785(3)(b). In other words, there can be no hung jury on an enhancement fact.

Other statutory limitations of enhancement facts also apply to CDO and SQ factors, but they are not relevant to this jury instruction.

DATED this 2nd day of April, 2012.

Ryan Scott, OSB #95526  
Attorney for Defendant

**Certificate of Service**

On December 1, 2011, a certified true copy of the attached Motion to Suppress was hand-delivered to the Multnomah County District Attorney's office, and left with a person in charge.

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Ryan Scott, OSB #95526  
Attorney for Defendant