Supreme Court No. 91577-6
COA No. 71311-6-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DAVID EARL WOODLYN,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER/DECISION BELOW

David Earl Woodlyn requests this Court grant review pursuant to RAP 13.4 of the unpublished decision of the Court of Appeals in State v. Woodlyn, No. 71311-6-I, filed March 9, 2015. A copy of the opinion is attached as an appendix.

B. ISSUE PRESENTED FOR REVIEW

Article I, section 21 of the Washington Constitution requires a unanimous jury verdict in criminal cases. When the State alleges that a defendant committed a crime by alternative means, the right to a unanimous jury is violated unless the State elects the means upon which it is relying or the jury is instructed it must unanimously agree on a single means. In State v. Ortega-Martinez, this Court held that, where neither of these options is met, reversal is required unless the evidence supporting each alternative is sufficient to support the conviction. State v. Ortega-Martinez, 124 Wn.2d 702, 707-08, 881 P.2d 231 (1994). Here, the State alleged two alternative means of committing second degree theft and the jury was instructed on both alternatives, yet the jury was not instructed it must unanimously agree on a single means and the State did not elect a single means. The Court of Appeals acknowledged—and the State conceded—that the evidence

was insufficient to prove one of the charged alternatives. Nonetheless, the Court of Appeals held that the conviction need not be reversed. Is the Court of Appeals' holding in direct conflict with Ortega-Martinez and in violation of Mr. Woodlyn's constitutional right to jury unanimity, warranting review? RAP 13.4(b)(1), (3).

C. STATEMENT OF THE CASE

For several years, David Woodlyn mowed lawns and did yard work for people who lived near his home in West Seattle. RP 716. One day during summer 2011, Mr. Woodlyn was walking through a residential neighborhood and noticed that the lawn in front of Dora Kjellerson's home needed mowing. RP 719. He knocked on her front door and asked if she wanted him to cut her grass. RP 719. Ms. Kjellerson was an elderly woman who needed help taking care of her lawn and yard because both her partner and her son, who used to do the yard work, had recently passed away. RP 579, 598-99.

Ms. Kjellerson agreed to allow Mr. Woodlyn to cut the grass and when he finished she paid him $60. RP 719-20. Mr. Woodlyn returned two to three weeks later and pruned Ms. Kjellerson's trees. RP 721. He returned again several times that summer to cut her grass. RP 722.

Ms. Kjellerson had a Bank of America checking account and was a regular customer at the White Center branch. RP 606. One day, Mr. Woodlyn came into the bank to cash a check on Ms. Kjellerson's account. RP 609. The check was signed by Ms. Kjellerson and was for an amount between $60 and $100. RP 610. The bank assistant manager called Ms. Kjellerson on the telephone and asked if she had written the check. Id. After speaking with Ms. Kjellerson, the assistant manager processed the check and gave the cash to Mr. Woodlyn. RP 611-12.

From July 22 to August 12, 2011, Mr. Woodlyn cashed a total of seven checks on Ms. Kjellerson's account. RP 746-51. The amounts of the checks varied from $60 to $440. Id. All of the checks were signed by Ms. Kjellerson but Mr. Woodlyn wrote in his name and the dollar amounts. RP 648-49, 676, 746-51.

On August 27, 2011, Mr. Woodlyn accompanied Ms. Kjellerson to the White Center branch and asked to withdraw some money from her account. RP 612-13. The assistant manager asked how much money they needed. RP 613. According to the assistant manager, Mr. Woodlyn asked how much money Ms. Kjellerson had. RP 614. The

assistant manager refused to withdraw any money from the account. RP 614. She called the police. RP 684-85.

Soon afterward, Ms. Kjellerson was evaluated by a geriatric mental health specialist. RP 523-52. The evaluator concluded that Ms. Kjellerson had moderate to severe dementia and could no longer live independently without help. Id. After that, the bank froze Ms. Kjellerson's bank accounts. RP 583-84.

The State charged Mr. Woodlyn with one count of second degree theft based on the seven checks he cashed on Ms. Kjellerson's account. CP 1-2. The information alleged two alternative means of committing the crime: that Mr. Woodlyn "did wrongfully obtain and exert unauthorized control" over Ms. Kjellerson's property, and that he "did obtain control over such property . . . by color and aid of deception." CP 1.

At trial, the jury was instructed on the two alternative means. In the to-convict instruction, the jury was informed it could find Mr. Woodlyn guilty if it found beyond a reasonable doubt that, with an intent to deprive another of property, he either (1) "wrongfully obtained the property of another"; or (2) "by color or aid of deception, obtained control over property of another." CP 72. The jury was explicitly

instructed it need not be unanimous as to which alternative was proved beyond a reasonable doubt as long as each juror found that at least one alternative was proved. CP 72-73.

The jury found Mr. Woodlyn guilty of second degree theft. CP 87. There was no special verdict form indicating which of the two alternative means of committing the crime the jury relied upon.

Mr. Woodlyn appealed, arguing his constitutional right to jury unanimity was violated because the jury was not instructed it must be unanimous as to which alternative means it was relying upon and the State did not elect a particular means. The Court of Appeals acknowledged the lack of express jury unanimity. The court also acknowledged—and the State conceded—that the State had presented no evidence to support one of the charged alternatives. Slip Op. at 6. But the court nonetheless affirmed, characterizing the error as an instructional error subject to harmless error review. Slip Op. at 7-10.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

The Court of Appeals applied the wrong standard in concluding that the violation of Mr. Woodlyn's constitutional right to jury unanimity did not require reversal of the conviction[1]

Article I, section 21 requires a unanimous jury verdict in criminal cases. When the State alleges a defendant committed a crime by alternative means, and the jury is instructed on multiple means, the right to a unanimous jury requires the jury unanimously agree on the means by which it finds the defendant committed the offense. State v. Owens, 180 Wn.2d 90, 95, 323 P.2d 1030 (2014). If the jury returns "a particularized expression" as to the means relied upon for the conviction, the unanimity requirement is met. State v. Ortega-Martinez, 124 Wn.2d 702,707-08,881 P.2d 231 (1994). But "[a] general verdict of guilty on a single count charging the commission of a crime by alternative means will be upheld only if sufficient evidence supports each alternative means." State v. Kintz, 3 169 Wn.2d 537, 552, 238 P.3d 470, 477-78 (2010) (citing Ortega-Martinez, 124 Wn.2d at707-08); Owens, 180 Wn.2d at 99.

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[1] A similar issue is pending in this Court in State v. Sandholm, No. 90246-1.

Two alternative means of committing theft were charged in this case, *i.e.*, by wrongfully exerting control over someone's property, and by deceiving someone to give up their property. State v. Peterson, 168 Wn.2d 763, 770, 230 P.3d 588 (2010); RCW 9A.56.020(1)(a), (b); CP 1.

The jury was instructed on both of the charged alternatives. The jury was instructed it could find Mr. Woodlyn guilty if it found either that he (1) "wrongfully obtained" Ms. Kjellerson's property; or that (2) "by color or aid of deception," he "obtained control over" Ms. Kjellerson's property. CP 72. The jury was expressly instructed it need not be unanimous as to which means it relied upon. CP 72-73. The State did not elect a particular means. Thus, in order to preserve Mr. Woodlyn's constitutional right to a unanimous jury verdict, the State was required to present sufficient evidence to prove each of these alternatives beyond a reasonable doubt. Owens, 180 Wn.2d at 95.

The Court of Appeals recognized the State had not presented any evidence that Mr. Woodlyn committed theft by "wrongfully obtaining" Ms. Kjellerman's property. Slip Op. at 6. That recognition requires reversal of the conviction. Ortega-Martinez, 124 Wn.2d at 707-08. But rather than simply apply this Court's opinion, the Court of

Appeals concluded this was merely an instructional error, and thus applied a harmless error analysis. Slip Op. at 7-10. That analysis is directly at odds with Ortega-Martinez, and therefore review is warranted. RAP 13.4(b)(1), (3).

The jury was not instructed that it must unanimously agree as to the alternative means. Indeed, the trial court affirmatively instructed the jury they need not unanimously agree. CP 72-73. That instruction is directly contrary to this Court's repeated urging that trial courts should instruct on the requirement of unanimity for alternative means crimes. Ortega-Martinez, 124 Wn.2d 717, n.2 (citing State v. Whitney, 108 Wn.2d 506, 511, 739 P.2d 1150 (1987)). In the absence of a particularized finding of unanimity as to the means, Mr. Woodlyn's conviction must be reversed unless each alternative is supported by sufficient evidence. Owens, 180 Wn.2d at 99. They are not.

It is undisputed the State did not prove Mr. Woodlyn committed theft by "wrongfully obtaining" Ms. Kjellerman's property. The State conceded as much in the Court of Appeals, and the Court of Appeals agreed. Slip Op. at 6. The absence of sufficient evidence of both alternatives requires reversal of the conviction. Owens, 180 Wn.2d at 95; Ortega-Martinez, 124 Wn.2d at 707-08.

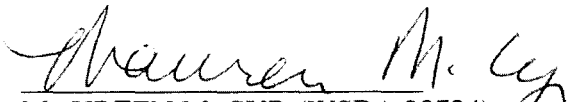
Rather than apply this Court's analysis from Ortega-Martinez to determine whether reversal was required, *i.e.*, determine whether sufficient evidence supported each alternative, the court instead engaged in a harmless-error analysis of the to-convict instruction. From that analysis, the court concluded that because there is insufficient evidence of one alternative contained in the instruction, the error is harmless. Slip Op. at 7-10. But as this Court has made clear, it is precisely the absence of sufficient evidence which establishes the error. It would be a curious rule if insufficient evidence of the alternative both gives rise to the error and renders it harmless.

Moreover, the impropriety of the to-convict instruction provided to the jury here is not at issue. Mr. Woodlyn did not challenge that instruction on appeal. He pointed to the improper instruction to demonstrate that not only was the jury not instructed it need be unanimous, it was instead expressly told unanimity was unnecessary. CP 72-73. Under this Court's clearly established precedent, because the State did not offer sufficient evidence to support the theft by wrongfully obtaining alternative, the conviction must be reversed and remanded for a new trial. Owens, 180 Wn.2d at 95; OrtegaMartinez, 124 Wn.2d at 707-08.

E. CONCLUSION

For the reasons given, this Court should grant review, hold Mr. Woodlyn's constitutional right to jury unanimity was violated, and remand for a new trial.

Respectfully submitted this 7th day of April, 2015.



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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. DAVID EARL WOODLYN, Appellant.	)	No. 71311-6-I DIVISION ONE UNPUBLISHED OPINION FILED: March 9, 2015

APPELWICK, J. — Woodlyn appeals his conviction for theft in the second degree. The State charged and the trial court instructed the jury on two alternative means of committing theft. He claims the evidence was insufficient to support one of the means so his conviction should be reversed. We can determine from the record that the jury's verdict was based on only one means and it is undisputed that substantial evidence supports that means. We affirm.

FACTS

In the summer of 2011, Dora Kjellerson was in her mid-70s and living in her home in the White Center neighborhood in Seattle where she had resided for many years. A niece was staying with Kjellerson off and on during that summer. Family members were increasingly concerned about the decline in Kjellerson's mental status. For instance, Kjellerson would sometimes forget who her sister was or would get lost on walks around her neighborhood.

Kjellerson did her banking at the White Center branch of the Bank of America, which was walking distance from her house. Cynthia Cleary worked at the branch since 1998. In the summer of 2011, Cleary was the assistant branch manager and had noticed that Kjellerson was finding it increasingly difficult to remember things.

According to Cleary, Kjellerson had always been "very on top of her banking," but by 2011, she no longer knew how much money she had in the bank and appeared to be confused by changes in her balance amount.

David Woodlyn performed yard work around Kjellerson's neighborhood in the summer months to supplement his social security income. Woodlyn did not have a bank account at the White Center Bank of America branch, but he went there on occasion to cash checks written to him as payment for yard work. The amount of the checks generally ranged between $40 and $60. Sometime around August 2011, Woodlyn went to the White Center branch to cash a check written by Kjellerson. The amount of the check was less than $100. Because Kjellerson's signature on the check looked a "little off," Cleary called Kjellerson to verify that she wrote the check. Based on her conversation with Kjellerson, Cleary cashed the check.

On August 27, 2011, Woodlyn and Kjellerson came to the bank together. Although they approached a different teller window, Cleary saw them and stepped in to assist them. Woodlyn, speaking for Kjellerson, told Cleary they wanted to make a withdrawal from Kjellerson's account. When Cleary asked how much they needed to withdraw, Woodlyn responded, "How much does she have[?]" Cleary asked to speak to Woodlyn and Kjellerson in the lobby and told Woodlyn she would not provide that information. Woodlyn became agitated and appeared to want to leave with Kjellerson. To prevent him from doing so, Cleary took Kjellerson to the manager's office and called the police. Woodlyn left the bank. Cleary asked Kjellerson what the withdrawal was for, and Kjellerson said Woodlyn needed money to cut the grass. Kjellerson could not tell Cleary how much Woodlyn needed or how much she had already paid him.

King County Sheriff's Deputy Michael McDonald responded to the call from the bank. Kjellerson also told the deputy that she was withdrawing money that day so Woodlyn could mow her grass. When the deputy asked how much Kjellerson had already paid Woodlyn in the month of August, she said, "about $60." Deputy MacDonald drove Kjellerson home and noticed that the grass in her yard was overgrown and about a foot high.

After this incident, Bank of America investigated Kjellerson's account and discovered that during an approximately three week period in July and August 2011, Woodlyn cashed seven checks written from Kjellerson's account. The amounts of the initial checks were less than $100, but gradually rose to figures above $400 and the total amount of the checks exceeded $1,800.

Also following this incident, Kjellerson's sister obtained power of attorney over Kjellerson's accounts. And on September 9, 2011, geriatric mental health specialist Judith Newman evaluated Kjellerson. Newman concluded that Kjellerson was suffering from moderate to severe dementia. Newman determined that Kjellerson had "[n]o short term memory" and needed supervision. Newman described Kjellerson's deficits as obvious and said that "by about the second or third sentence somebody would know something was wrong."

Also in September 2011, a detective from the King County Sheriff's office and an investigator from Adult Protective Services attempted to interview Kjellerson about the money paid to Woodlyn in the previous two months. Kjellerson, however, was not able to answer their questions or even basic background questions.

The State charged Woodlyn with theft in the second degree alleging that he "did wrongfully obtain and exert unauthorized control" over property belonging to Kjellerson and did obtain control over such property by "color and aid of deception." See RCW 9A.56.020.

Woodlyn testified at trial that he met Kjellerson when he knocked at her door in 2011 and offered to mow her lawn. He said Kjellerson accepted his offer, he charged her $60 because her yard was large, and she paid him in cash.[1] Woodlyn said he returned to Kjellerson's home a few weeks later and spoke to a woman he assumed to be Kjellerson's daughter who paid him $90 to do additional yard work. Woodlyn said that on August 27, the yard needed to be mowed again, but Kjellerson did not have the money. Because Kjellerson said she could not remember where her bank was, he offered to take her. Woodlyn said he had cut Kjellerson's grass three to five times before that date. According to Kjellerson's niece, however, Kjellerson's yard was unmaintained and overgrown during that period in the summer of 2011.

With regard to the checks, Woodlyn testified that he cashed them as a favor to Kjellerson and gave the cash to her. Woodlyn admitted that he filled in his name and the amounts of the checks. He said he did other favors for Kjellerson, including purchasing cigarettes and groceries for her, and cleaning up her house on a couple of occasions. Kjellerman did not testify.

[1] Two other lawn customers who testified on Woodlyn's behalf said they paid him approximately half that amount to mow their yards.

The jury found Woodlyn guilty as charged.[2]

ANALYSIS

Woodlyn alleges a violation of his right to a unanimous verdict, because the State failed to present sufficient evidence to support both of the charged alternative means of committing theft.

In Washington, criminal defendants have a constitutional right to a unanimous jury verdict. WASH. CONST. art. I, § 21; State v. Ortega-Martinez, 124 Wn.2d 702, 707, 881 P.2d 231 (1994). "This right may also include the right to a unanimous jury determination as to the means by which the defendant committed the crime when the defendant is charged with (and the jury is instructed on) an alternative means crime." State v. Owens, 180 Wn.2d 90, 95, 323 P.3d 1030 (2014).

Alternative means statutes identify a single crime and provide more than one means of committing that crime. State v. Williams, 136 Wn. App. 486, 497, 150 P.3d 111 (2007). Theft is an alternative means crime. State v. Linehan, 147 Wn.2d 638, 644-45, 647, 56 P.3d 542 (2002); RCW 9A.56.020. With respect to each alternative means of committing theft set forth in the statute, the prohibited conduct varies significantly. State v. Peterson, 168 Wn.2d 763, 770, 230 P.3d 588 (2010).

Consistent with the information, the trial court's instructions required the jury to find that that Woodlyn committed the crime of theft by two alternative means: (1) wrongfully obtaining the property of another or (2) obtaining control over the property of

[2] A jury convicted Woodlyn following a second trial. The first trial ended in a mistrial after a juror disclosed personal knowledge of one of the State's witnesses midway through the trial.

another by color or aid of deception.[3] These two means are commonly referred to as "theft by taking" and "theft by deception." State v. Smith, 115 Wn.2d 434, 438, 798 P.2d 1146 (1990). The instructions also informed the jury that it did not need to be unanimous as to the means relied upon.

When there is sufficient evidence to support each of the charged alternative means of committing the crime, express jury unanimity as to which means is not required. Owens, 180 Wn.2d at 95. "If, however, there is insufficient evidence to support any means, a particularized expression of jury unanimity is required." Owens, 180 Wn.2d at 95.

In this case, the parties do not dispute the insufficiency of the evidence to establish that Woodlyn committed theft by "wrongfully obtaining" Kjellerman's property. The State expressly concedes "[n]o evidence of theft by taking was presented to the jury." And, indeed, the State did not allege that Kjelleman did not give the checks to Woodlyn or that she did not sign them. Instead, the State advanced only the theory that, taking advantage of Kjellerman's compromised memory and diminished mental capacity, Woodlyn deceived her into believing she owed him payment for work.

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[3] RCW 9A.56.020 defines the crime of theft and provides, in relevant part:

(1) "Theft" means:

(a) To wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services; or

(b) By color or aid of deception to obtain control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services.

But, the State argues that the defendant's constitutional right to a unanimous verdict is protected when, as here, the State presented argument and evidence as to only one means. State v. Witherspoon, 171 Wn. App. 271, 285, 286 P.3d 996 (2012), aff'd, 180 Wn.2d 875, 329 P.3d 888 (2014); see also State v. Johnson, 132 Wn. App. 400, 410, 132 P.3d 737 (2006) (general verdict on burglary will generally stand "[s]o long as there is sufficient evidence as to each means or so long as a reviewing court can tell that the verdict was based on only one means which was supported by substantial evidence"). Essentially, the State argues that the absence of express jury unanimity is harmless when the reviewing court can be assured that the verdict was not based on an unsupported alternative means.[4]

Error in the "to convict" instruction may be subject to a harmless error analysis. State v. DeRyke, 149 Wn.2d 906, 912, 73 P.3d 1000 (2003) (failure of to convict instruction to specify the degree of rape attempted was harmless because another instruction did so; therefore, the State was not relieved of its burden of proof). Even constitutional error related to a to convict instruction, such as the omission of an essential element, is harmless error if it is clear beyond a reasonable doubt that the error did not contribute to the verdict. Neder v. United States, 527 U.S. 1, 15, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999); State v. Thomas, 150 Wn.2d 821, 844, 83 P.3d 970 (2004), abrogated in part on other grounds by Crawford v. Wasington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

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[4] In Owens, our Supreme Court recently declined to "articulate a harmless error standard in the context of alternative means cases" finding no need to do so because in that case, sufficient evidence supported both means of trafficking in stolen property. Owens, 180 Wn.2d at 101.

This court has affirmed convictions in analogous cases where there was insufficient evidence to support a charged alternative means but the State did not argue or otherwise attempt to prove that means. For example, in State v. Rivas, 97 Wn. App. 349, 352, 984 P.2d 432 (1999), disapproved on other grounds by State v. Smith, 159 Wn.2d 778, 154 P.3d 873 (2007), the State charged the defendant with assault in the second degree. Because "assault" is not defined by the criminal code, courts use the common law to define the crime. Id. The trial court instructed the jury on three common law means of committing assault: (1) battery; (2) attempted battery; and (3) assault.[5] Id. at 352-53. Rivas argued and we agreed that no evidence was offered at trial to support battery or attempted battery. Id. at 351-52. However, the charging document alleged only that Rivas "held a knife to the [victim's] throat." Id. at 353. And, during argument, the State "focused only" on the third common law definition of assault. Id. On that record, we determined that the jury verdict was based entirely on one alternative means of committing assault, of which there was substantial evidence in the record. Id. at 354-55. We affirmed the conviction because "there was no danger that the jury's verdict rested on an unsupported alternative means." Id. at 355.

More recently, Division Two of this court considered a similar case where the jury was instructed on an unsupported means of committing the crime. Witherspoon, 171

[5] The Supreme Court disapproved of our decision in Rivas to the extent that it "can be read as endorsing a hard and fast rule that the common law definitions of assault constituted alternative means of committing assault, thereby requiring substantial evidence to support each of the alternative means charged or instructed." Smith, 159 Wn.2d at 787.

Wn. App. at 286-87.[6] In that case, the State charged the defendant with all three alternative means of witness tampering and the jury was instructed as to all three means. Id. at 285. The parties conceded that the State did not argue or attempt to prove one of the charged means, but there was substantial evidence to support the other two alternative means. Id. at 286-87. Based upon its determination that there was no danger the jury's verdict was based on the single unsupported alternative means, the court affirmed Witherspoon's conviction. Id. at 287.

Here also, the trial record shows that the State focused on proving only the "theft by deception" alternative. The prosecution's examination of witnesses during its case in chief developed facts related to Kjellerman's mental state, her apparent belief that she was paying Woodlyn for lawn maintenance work, and her lack of awareness as to how much she had already paid him. In closing argument, the prosecutor omitted the reference to the "theft by taking" alternative means when she read the to convict instruction to the jury and discussed only "theft by deception."

Nevertheless, Woodlyn argues that this court cannot tell whether the jury's verdict rested on the unsupported alternative means. Woodlyn points out that theft by wrongfully obtaining property of another requires proof of nonconsent. See State v. D.H., 31 Wn. App. 454, 458, 643 P.2d 457 (1982) ("[n]onconsent of the owner is an element of the crime of theft"). But, the court's instructions did not specifically inform the jury that Woodlyn could not wrongfully obtain Kjellerman's property unless he took her property without her consent. Accordingly, Woodlyn maintains that although the

[6] The Supreme Court's grant of review in Witherspoon did not encompass any issue specifically pertaining to his witness tampering conviction. Witherspoon, 180 Wn.2d at 882.

State did not seek to prove theft by taking, the instructions allowed the jury to rely on this alternative means. But, deception was the only basis for the jury to have concluded that Woodlyn's acceptance of Kjellerman's checks she voluntarily gave him was "wrongful." And as explained, alternative means are "distinct acts" that constitute the same crime. Peterson, 168 Wn.2d at 770. According to Woodlyn's argument, the jury would have to interpret theft by taking as indistinct from theft by deception.

The record amply demonstrates that the State's case against Woodlyn and the jury's verdict rested solely on proof that he obtained control of her property by color or aid of deception. And, because, as Woodlyn acknowledges, this alternative means was supported by sufficient evidence, any error was harmless.

We affirm.

WE CONCUR:

Cox, J.

Becker, J.

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MARIA ANA ARRANZA RILEY, Legal Assistant Date: April 7, 2015
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