

FILED
SUPREME COURT
STATE OF WASHINGTON
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BY ERIN L. LENNON
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IN THE SUPREME COURT OF THE STATE OF
WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

MICHAEL JOHN KELLY,
Petitioner.

NO. 100703-5

REPLY TO STATE'S
CROSS-PETITION

Michael Kelly filed a petition for review asking this Court to accept review of several issues: (1) whether, under the law of the case doctrine, sufficient evidence exists to uphold Mr. Kelly's failure to register conviction in light of all of the instructions the court gave to the jury; (2) whether, because the court instructed the jury that the crime Mr. Kelly was accused of committing could be committed by two alternative means, this required that the State either present sufficient evidence of both means or that the court issue a unanimity instruction; and (3) whether the doctrine of invited error prohibited Mr. Kelly

from raising his alternative means challenge on appeal. PFR at 1-4.

The State filed a response, which primarily asked this Court to deny Mr. Kelly's petition for review. However, should this Court grant the petition for review, the State requested that this Court "address the issues not reached by the Court of Appeals[.]" Response at 15. Specifically, this is "whether the to-convict instruction in this case converted the charge against [Mr.] Kelly into an alternative means offense, and, if so, whether the second alleged 'means' was also supported by sufficient evidence." Response at 15.

Mr. Kelly agrees this Court should accept review of these two issues, as this Court necessarily must reach them in order to assess the issues Mr. Kelly presents to this Court. This Court has held the crime of failing to register as a sex offender is not an alternative means offense and that residential status is not an element of the crime. *See State v. Peterson*, 168 Wn.2d 763, 771, 774, 230 P.3d 588 (2010). However, this Court noted the

defendant in *Peterson* had “not shown that [his] case was tried as an alternative means case.” *Id.* at 771 n.6. However, here, unlike in *Peterson*, the State tried, and the court instructed, Mr. Kelly’s case as an alternative means case. And in *State v. Tyler*, this Court left open the possibility that jury instructions may transform a single means offense into an alternative means offense. 191 Wn.2d 205, 422 P.3d 436 (2018).

A lack of authority from this Court exists regarding when an instruction transforms a single means crime into an alternative means crime. Guidance on this issue is necessary. Accordingly, this Court should also accept review of whether the instructions at issue here transformed Mr. Kelly’s crime into an alternative means offense.

This Court should also determine whether the State presented sufficient evidence of each alternative mean. The Court of Appeals did not assess this issue because it erroneously believed Mr. Kelly could not raise his alternative means argument due to the invited error doctrine. But

resolution of whether sufficient evidence exists to uphold both means is necessary should this Court accept review and hold the instruction presented two alternative means of committing the offense.

C. CONCLUSION

For the reasons stated in this reply and in his petition for reivew, Mr. Kelly requests that this Court accept review of the issues he raised and the issues the State raised in its response.

In compliance with RAP 18.7(b), counsel certifies the word processing software calculates the number of words in this document, exclusive of the words exempted by the rule, as 511 words.

DATED this 15th day of April, 2022

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Sara S. Taboada", written in black ink on a white background.

SARA S. TABOADA (WSBA 51225)
Attorney for Appellant
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DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original of the document to which this declaration is affixed/attached, was filed in the **Washington State Supreme Court** under **Case No. 100703-5**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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Date: April 15, 2022

WASHINGTON APPELLATE PROJECT

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