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Supreme Court No. 88905-8  
COA No. 67867-1-I

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Petitioner,

v.

JERAMIE OWENS,

Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF SNOHOMISH  
COUNTY OF THE STATE OF WASHINGTON

The Honorable Richard T. Okrent  
The Honorable Ronald Castleberry

---

RESPONDENT'S SUPPLEMENTAL BRIEF

---

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 ORIGINAL

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#### **A. STATEMENT OF THE CASE**

Jeramie Owens and a friend test-drove a Volkswagen Beetle at the Motor City dealership in Mount Vernon, leaving it with the dealer after discussing terms but deciding not to purchase the car. The following day, the Beetle went missing from the lot. Approximately a month later, one Mr. Savageau purchased a Beetle from Mr. Owens, who specializes in refurbishing classic Volkswagens. When Savageau later took the vehicle to a repair shop, a mechanic told him that the VIN number plate did not match the body of the car. A detective from the Monroe Police Department determined that the actual VIN number of the body matched the VIN number of the Beetle that had gone missing from Motor City.

On this basis, Jeramie Owens was charged with several crimes, all of which he vigorously denied. He was acquitted by his jury on the charge of taking a motor vehicle without permission. However, he was convicted of possession of a stolen vehicle, and Trafficking in stolen property in the first degree. The jury found guilt on these counts after the prosecutor argued in closing that the “knowledge” required by a person, as to whether a car might be stolen, could be determined by asking “what an average person should know” in the circumstances. 8/10/11RP at 14-45.

On appeal, Mr. Owens challenged the sufficiency of the evidence on both the possession and the Trafficking counts, and further argued that

unanimity was violated by the general verdict on the Trafficking count. The Court of Appeals reversed Mr. Owens' conviction for first degree Trafficking.

## **B. STATE'S PETITION**

This Court granted the State of Washington's Petition for Review, in which the Snohomish County Prosecuting Attorney sought review in pursuit, *inter alia*, of reversal of the Court of Appeals' ruling vacating the defendant's conviction for first degree Trafficking under RCW 9A.82.050. PFR, at pp. 1-2.

## **C. ARGUMENT**

### **1. THE COURT OF APPEALS ORDER VACATING MR. OWENS' TRAFFICKING CONVICTION SHOULD BE AFFIRMED.**

(a). Petitioner's argument and *State v. Lindsey*. The Petitioner specifically argues that the Trafficking statute, RCW 9A.82.050, given its structure and language, contains only two (2) alternative means, rather than the eight (8) alternative means identified in the statute by *State v. Strohm*, 75 Wn. App. 301, 304-05, 879 P.2d 962 (1994), and relied on by the Court of Appeals below. The statute in question provides:

#### **9A.82.050. Trafficking in stolen property in the first degree.**

(1) A person who knowingly initiates, organizes, plans, finances, directs, manages, or supervises the theft of property for sale to others, or who knowingly traffics in

stolen property, is guilty of trafficking in stolen property in the first degree.

(2) Trafficking in stolen property in the first degree is a class B felony.

(Emphasis added.) RCW 9A.82.050.

The State contends that the Court of Appeals' unanimity-grounded basis for reversal of Mr. Owens' conviction for Trafficking must be reversed because the Court of Appeals stated that the "supervises" term was unsupported by substantial evidence in the facts adduced at Mr. Owens' trial, but this word is but a single one of the many interchangeable definitions of the first of the two means in the statute, which are separated by the word "or," above. PFR, at pp. 10, 13.

A case decided after the State's Petition was filed, by Division Two of the Court of Appeals, takes the same view. State v. Lindsey, \_\_\_ Wn. App. \_\_\_, \_\_\_, 311 P.3d 61, 66 (Wash.App. Div. 2, October 15, 2013 (NO. 43219-6-II) (Trafficking statute contains only these two alternative means)).

**(b). Reversal of the decision is not warranted even under *State v. Lindsey*.** Even under State v. Lindsey and its "two means only" reasoning, the Court of Appeals decision should be affirmed, because Jeramie Owens committed none of the manners of committing the crime that are grouped under the first means of Trafficking, that being the first clause. Appeals involving the similar offense of leading organized crime shed light on the

facts required for a Trafficking conviction under the "initiates . . .[etc.]" clause. Under RCW 9A.82.060(1)(a), a person leads organized crime by intentionally organizing, managing, directing, supervising, or financing conduct of persons, with the intent to engage in a pattern of criminal profiteering activity. See, e.g., State v. Munson, 120 Wn. App. 103, 106, 83 P.3d 1057 (2004).

For example, in Munson, there was sufficient evidence of organizing, managing, directing, supervising, and financing for purposes of leading organized crime where the defendant, in order to profit from forged checks, directed persons to pass checks, and purchase certain designated items, and where he also forged identifications to facilitate use of the checks, told individuals how to use the checks, used the telephone to confirm merchant information, and organized the obtaining and the delivery of items. State v. Munson, 120 Wn. App. at 106. The defendant also monitored the activities of others with regard to items of stolen property, and paid persons doing these activities. State v. Munson, 120 Wn. App. at 106-07.

And in the case of State v. Harris, 167 Wn. App. 340, 272 P.3d 299 (2012), review denied, 175 Wn.2d 1006, 285 P.3d 885 (2012), a conviction for managing, supervising, or financing the sale of drugs to others was affirmed, where Harris supplied and coordinated both his and his associates Shipman and Boyer's drug shipments for their cocaine dealing endeavors,

and Harris directed still others, including by three-person telephone conversations, in concealing and destroying drugs and money by flushing them to hide the extent of the dealing business. State v. Harris, 167 Wn. App. at 343, 345-47.

In contrast, there is no evidence in this case that Mr. Owens directed someone to take the Beetle. There was no proof he managed or supervised its taking, which could have been committed by any number of persons. The jury concluded he did not take the car, and there was no accomplice liability instruction that could have linked him to any taking by another.

The case of State v. Strohm provides further guidance on the evidence required to prove the “initiates . . . [etc.]” element of Trafficking. State v. Strohm, 75 Wn. App. 301, 304-05, 879 P.2d 962 (1984).

The Strohm Court looked to the Webster’s Dictionary definitions and common understanding of these terms, concluding that

- “supervised” meant coordinating, directing and inspecting continuously and at first hand the accomplishment of a task, and was proved by sufficient evidence;
- “financed” was proved by sufficient evidence where Strohm promised to pay, then paid the car takers for the stolen vehicles, while also promising to pay again for future stolen cars; and
- “organized” meant arranging or constituting into a coherent unity, and was proved by sufficient evidence where Strohm decided what cars were to be stolen, obtained the keys, and gave them to his selected thief.

Strohm, at 305-06 (citing Webster's Third New International Dictionary 1596 and 2290 (1986)).

In the present case, there was no evidence that Mr. Owens engaged in any of the above. Further, he did not “initiate,” “plan,” “direct” or “manage” the theft of the Volkswagen. There was no reasonable inference from the facts of Mr. Owens’ visit to the Motor City dealership in early July of 2010, or from any other trial testimony, that he somehow initiated theft of the vehicle for sale to others, or engaged in any of the other conduct (organized, planned, financed, directed, managed, or supervised the theft) that is listed in the first clause of the trafficking statute, and the ‘to-convict’ instruction. There was no proof that Mr. Owens or his friend were the ones who took the vehicle, resulting in the jury’s proper acquittal on that count. CP 83. There was also no evidence or proof Mr. Owens told or directed any friend or person to engage in any of the above conduct, as the law of the case required.

None of the manners of committing the crime of Trafficking listed in the “first” clause of the statute, representing the first of two means of committing the crime under Lindsey, were supported by the evidence below. Mr. Owens consistently and repeatedly told law enforcement and anyone who would listen, that he had purchased the Beetle from a Craigslist advertisement, in the normal course of his established, specialty business of refurbishing and re-selling cars of this sort. Mr. Owens’ misfortune of

having taken the car for a test drive was the very same conduct engaged in by most or all of the prospective buyers who had looked at, but like Mr. Owens did not buy, the Volkswagen. 8/8/11RP at 28-30 (trial testimony of Motor City employee Michael Cassida). The Department of Licensing paperwork that Mr. Owens submitted for the car after purchasing it off of Craigslist, was the same sort submitted by any purchaser – including the documents submitted by Savageau. 8/8/11RP at 119-22 (trial testimony of buyer Craig Savageau); 8/8/11RP at 202-05 (trial testimony of Detective Paul Ryan).

The evidence was insufficient. Pursuant to the Fourteenth Amendment's Due Process Clause, the prosecution must prove guilt on the charged offense beyond a reasonable doubt. U.S. Const. amend 14; In re Winship, 397 U.S. 358, 362, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). And in criminal cases, the State assumes the burden of proving the offense as it is stated without objection in the jury instructions. State v. Lee, 128 Wn.2d 151, 159, 904 P.2d 1143 (1995). Here, the State was required to prove, but did not prove, Trafficking as defined. See also State v. Salas, 127 Wn.2d 173, 182, 897 P.2d 1246 (1995) (if “no exception is taken to jury instructions, those instructions become the law of the case”). There was no unanimity instruction or special verdict, thus the Court of Appeals could not affirm by simply relying on some other, supported, theory of guilt. This Court should affirm the decision of the Court of Appeals.

(2). **WHETHER A CASE INVOLVES  
“ALTERNATIVE MEANS” MUST BE  
DETERMINED BASED ON THE MERITS  
OF EACH CASE, AND THE  
CONSEQUENT RIGHT TO AN  
EXPRESSLY UNANIMOUS VERDICT  
MUST BE PROTECTED AT TRIAL.**

(a). There is no possible “return to a federal standard.” To the extent that the Petitioner asks this Court to conclude that each separately titled statutory crime in the Revised Code is one offense and that the presence of multiple modes of commission is of no consequence for unanimity, that argument should be rejected. The State complains that Washington unanimity law is irrational because it indulges an erroneous assumption that instructing lay juries on multiple alternative theories of criminal liability risks issuance of a general verdict premised on a theory of guilt for which insufficient evidence was adduced. PFR, at pp. 4-5.

Accordingly, the Petitioner advocates for a “return” to the “simplicity” of the federal constitutional standard, under which a general verdict of guilt, issued by a jury instructed on alternative means of committing the crime, must be affirmed - despite the absence of sufficient evidence on one or more of the means – because appellate courts should presume that the jury acted “rationally” and therefore would only have grounded its verdict upon a means that was supported by the proofs. PFR, at pp. 2, 4-5, 14. This prayer for relief should be rejected. In its Petition for

Review, the State simply does not mention that the unanimity guarantee is imposed by the state constitution, and does not cite Wash. Const. art. 1, § 21, which requires an *expressly* unanimous jury verdict. State v. Ortega-Martinez, 124 Wn.2d 702, 707, 881 P.2d 231 (1994) (discussing Wash. Const. art. 1, § 21 (“The right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases...”).

**(b). The determination of whether a statute sets forth “alternative means” is properly made based on the merits of each case.** In State v. Peterson, this Court stated that “there simply is no bright-line rule by which the court can determine whether the legislature intended to provide alternate means of committing a particular crime. Instead, each case must be evaluated on its own merits.” State v. Peterson, 168 Wn.2d 763, 769, 230 P.3d 588 (2010).

This statement is correct, as shown by many of the cases cited by the Petitioner. See, e.g., State v. Allen, 127 Wn. App. 125, 127-38, 110 P.3d 849 (2005) (discussing State v. Klimes, 117 Wn. App. 758, 765-69, 73 P.3d 416 (2003)). Indeed, because the question of unanimity is ultimately one posed in order to ensure that a conviction has not been obtained by a general verdict that merely represents certain jurors giving credence to one theory of guilt proffered by the prosecutor, and other jurors who have been swayed by an

entirely disparate theory, the question of whether a given case involves alternative means is necessarily one bound with the evidence and the argument, at trial below.

Mr. Owens has no objection to the State's request for a conversation amongst the parties and the Court regarding clarification of Washington doctrine for determining whether a given criminal prosecution involves "alternative means," and the issue of how to properly determine whether the defendant's right to an expressly unanimous jury verdict has been violated. See PFR, at p. 3-4.

This Court's existing case decisions are adequate to address most of these issues. Representative cases indicate that the Washington Courts, in accord with this Supreme Court's dictates, follow principled methods of determining whether a case involves alternative means, including looking to statutory structure, the presence of numbered or lettered clauses, the difference between elements and mere definitions, and the like. For example, the case of State v. Lindsey, supra, which relies on the Legislature's setting forth of two clauses describing certain conduct, each clause preceded by an applicable *mens rea* of "knowingly," was reasonably decided. See also State v. Mary Peterson, 174 Wn. App. 828, 301 P.3d 1060, review denied, 312 P.3d 650 (2013); State v. Smith, 159 Wn.2d 778, 784, 154 P.3d 873 (2007); State v. Kitchen, 110 Wn.2d 403, 410, 756 P.2d 105 (1988); State v. Nonog,

145 Wn. App. 802, 812, 187 P.3d 335 (2008), aff'd on other grounds, 169 Wn.2d 220 (2010); State v. Laico, 97 Wn. App. 759, 762-63, 987 P.2d 638 (1999); State v. Barefield, 47 Wn. App. 444, 458-59, 735 P.2d 1339 (1987), aff'd on other grounds, 110 Wn.2d 728, 756 P.2d 731 (1988); State v. Gillespie, 41 Wn. App. 640, 643, 705 P.2d 808 (1985).

(c). **Answering the question whether a case involves alternative means is pointless, if the right to an expressly unanimous verdict is not protected at trial.** The Petitioner's prayer for relief is broadly stated as follows:

When a person is charged with a crime under a means that consists of alternate or a series of statutory words, is the failure to prove any one of the words reversible error?

Petition for Review, at p. 2. There may be occasional difficult cases in terms of deciding whether a given prosecution involves alternative means, although the foregoing cases and their analytical touchstones adequately resolve the bulk of such cases, including those on the margin. See, e.g., In re PRP of Jeffries, 110 Wn.2d 326, 339 752 P.3d 1338 (1998) (definitions of means or elements do not create further alternative means, i.e., "means within a means").

However, the party prosecutor chooses whether one or more of a criminal statute's alternative means are charged. State v. Dixon, 78 Wn.2d 796, 802-03, 479 P.2d 931 (1971). The State is also largely in control of

what means of a criminal statute are placed before the jury, and even after instruction by the trial judge, the prosecutor can in closing argument, disavow a means that it does not wish the jury to rely on. State v. Witherspoon, 171 Wn. App. 271, 285-87, 286 P.3d 996 (2012).

After all of this, then, the State must prove the means upon which the jury is instructed, the answer to the Petitioner's prayer for relief is "yes," and the State cannot complain on appeal when review is obtained to determine if the prosecutor secured a general verdict by convincing half the jury of one theory of criminal liability, and the other half another.

Article 1, section 21, is the source of the Washington rule which says that when the State chooses to have the jury instructed on multiple alternative statutory means of committing the crime, but the prosecution fails to specify to the jury which means it should rely on for its verdict (or that it must agree on a means), and there is neither a unanimity jury instruction requiring agreement on a means, nor a special verdict attesting that there was such agreement, the State cannot defend a general verdict against a meritorious sufficiency challenge as to one of the means by insisting without basis that the jury relied on a different means as to which the evidence was sufficient.<sup>1</sup>

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<sup>1</sup> This principle highlights that the requirement of "unanimity" is not merely ancillary to the Due Process guarantee of sufficiency of the evidence to prove the offense to the jury beyond a reasonable doubt. See U.S. Const. amend. 5, amend. 6, amend. 14, In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); Jackson v. Virginia, 443 U.S. 307, 316, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979);

Once it is determined that a given criminal charge is being placed before the jury under alternative means, the defendant's right to an expressly unanimous verdict must be protected by a defendant's right to a special verdict or a unanimity instruction to the jury to protect that right.

**(d). This Court should disavow WPIC 4.20.** Even more crucially, clarity and fairness in adherence to the unanimity requirement is not threatened in Washington by the occasional difficult case, but rather by the practice of instructing jurors in a manner contrary to Article 1, section 21.

Washington Pattern Jury Instruction 4.20 is frequently utilized in criminal cases which involve alternative means, but it is contrary to the constitutional guarantee because it effectuates the erroneous statement that "jury unanimity is not required if sufficient evidence exists to support each of the alternative means." Washington Pattern Jury Instruction 4.23 (comment) (attached as Appendix A). The pattern instruction reads in pertinent part:

To return a verdict of guilty, [you] the jury need not be unanimous as to which of alternatives (4)(a) or (4)(b) has been proved beyond a reasonable doubt, as long as each juror finds that at least one alternative has been proved beyond a reasonable doubt.

WPIC 4.23. This instruction is in error. On appeal, where there was no unanimity instruction at trial in an alternative means case, the presence of

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Wash. Const. art. 1, § 3, Wash. Const. art. I, § 21, 22. Rather, Due Process involves both a quantum of proof and unanimous agreement. See also State v. Green, 94 Wn.2d 216, 220-22, 230-34, 616 P.2d 628 (1980).

sufficient evidence on both means may render that error *harmless*. However, the state constitution demands an expressly unanimous verdict. As this Court has stated:

Allowing juries of less than 12 in courts not of record, creates a right to 12-member juries in courts of record. Seattle v. Filson, 98 Wn.2d 66, 70, 653 P.2d 608 (1982), overruled on other grounds in In the Matter of Eng, 113 Wn.2d 178, 776 P.2d 1336 (1989). Additionally, by allowing verdicts of nine or more only in civil cases, the final clause implicitly recognizes unanimous verdicts are required in criminal cases. State v. Stephens, 93 Wn.2d 186, 190, 607 P.2d 304 (1980); see also State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988); State v. Workman, 66 Wn. 292, 295, 119 P. 751 (1911).

State v. Ortega-Martinez, 124 Wn.2d at 707. More recently, this Court in State v. Elmore, 155 Wn.2d 758, 771, 123 P.3d 72 (2005), stated that, "Although the federal right to a unanimous verdict does not extend to the states through the Fourteenth Amendment [citing Apodaca v. Oregon, 406 U.S. 404, 406, 92 S.Ct. 1628, 32 L.Ed.2d 184 (1972)], this court has concluded that article I, section 21 of the Washington Constitution gives criminal defendants the right to a unanimous jury verdict." State v. Elmore, 155 Wn.2d at 771 (citing Ortega-Martinez, 124 Wn.2d at 707).

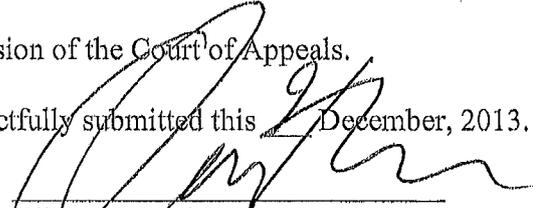
This Court's unanimity rules arise from this constitutional analysis. However, somehow, a rule that applies on appeal to determine the reversibility or harmlessness of unanimity error, has been transfigured to a pattern jury instruction for trials, that *expressly promotes non-unanimity*.

Washington Pattern Instruction 4.23. This pattern instruction should be disavowed by this Court.

**D. CONCLUSION**

Based on the foregoing, Jeramie Owens respectfully requests that this Court affirm the decision of the Court of Appeals.

Respectfully submitted this 24 December, 2013.



\_\_\_\_\_  
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Washington Appellate Project - 91052

State v. Jeramie Owens  
Supreme Court No. 88905-8

**Appendix A – Washington Pattern Jury Instruction 4.23**

WPIC CHAPTER 4.20. Elements of the Crime—Format

**WPIC 4.23 Elements of the Crime—Alternative Elements—Alternative Means for Committing a Single Offense—Form**

To convict the defendant of the crime of , each of the following (Insert the number of elements)\_\_\_\_\_ elements of the crime must be proved beyond a reasonable doubt:

(1)

(2)

(3)

(4) *[That the defendant acted by one or more of the following means or methods]:*

(a)

or

(b)

and

(5) That any of these acts occurred in the *[State of Washington] [City of ] [County of ]*.

If you find from the evidence that elements (1), (2), (3), and (5), and either of alternative elements (4)(a) or (4)(b), have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. To return a verdict of guilty, the jury need not be unanimous as to which of alternatives (4)(a) or (4)(b) has been proved beyond a reasonable doubt, as long as each juror finds that at least one alternative has been proved beyond a reasonable doubt.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of elements (1), (2), (3), (4), or (5), then it will be your duty to return a verdict of not guilty.

**Note on Use**

Use when alternative elements represent alternative means for committing a single offense rather than elements of separate and distinct alternative offenses. See the related discussion in the Introduction to WPIC 4.20.

In some cases, the final element's phrase "any of these acts" may need to be modified. If this geographical element appears in an instruction with only one other element or with a single act, then "any of these acts" may need to be changed to "this act." Also, if the judge has determined that some of the elements in the to-convict instruction are not "essential elements," then "any of these acts" will need to be replaced with more specific language, and a special interrogatory may be advisable. See the Introduction to WPIC 4.20, and the Comment to WPIC 4.21, Elements of the Crime—Form.

In the instruction's final element, choose from among the bracketed phrases depending on whether the case is in superior, municipal, or district court. See the Introduction to WPIC 4.20.

If the facts on which jurisdiction is based are in dispute, a special verdict form may need to be submitted to the jury. See the Introduction to WPIC 4.20, and WPIC 190.10, Special Verdict Form—Jurisdiction.

**Comment**

**Unanimity.** For the 2005 update, the committee has revised the instruction to provide jurors with more specific information about the unanimity requirements for alternative means instructions. The new language instructs jurors that, while they need to be unanimous as to each of the elements of the charged offense in order to return a guilty verdict, they need not be unanimous as to each of the alternatives within a particular element.

The committee based its revision on the holding in State v. Ortega-Martinez, 124 Wn.2d 702, 881 P.2d 231 (1994), in which the Supreme Court specifically held that jurors need not be unanimous as to alternative means, as long as sufficient evidence supports each of the means relied on by one or more jurors. 124 Wn.2d at 707-08, 881 P.2d 231.

Some question remains as to whether *Ortega-Martinez* accurately reflects where the law might be headed. The *Ortega-Martinez* court included a footnote potentially signaling that in a future opinion the court might unconditionally require unanimity as to each of the alternative

means. See footnote 2, 124 Wn.2d at 717, 881 P.2d 231 ("We strongly urge counsel and trial courts to heed our notice that an instruction regarding jury unanimity on the alternative method is preferable.").

Despite the footnote, however, the holding in *Ortega-Martinez* now appears to be settled law. Case law postdating *Ortega-Martinez* has consistently re-affirmed the holding that jury unanimity is not required if sufficient evidence exists to support each of the alternative means relied on by one or more jurors. See, e.g., State v. Fortune, 128 Wn.2d 464, 909 P.2d 930 (1996); State v. Klimes, 117 Wn.App. 758, 73 P.3d 416 (2003), disapproved of on other grounds by State v. Allen, 127 Wn.App. 125, 110 P.3d 849 (2005). Moreover, the *Ortega-Martinez* opinion has its roots in earlier case law. See State v. Klitcher, 110 Wn.2d 403, 756 P.2d 105 (1988) (cited in *Ortega-Martinez* and holding that unanimity in alternative means cases is required only as to the overall offense, rather than for each of the alternative means, as long as sufficient evidence supports each of the alternatives). For these reasons, the holding from *Ortega-Martinez* is now incorporated into the instruction so as to clarify for jurors the requirements for rendering a verdict.

**Use of caution.** Judges should use care when instructing jurors about alternative means. In light of the foregoing discussion, judges must make sure that the instruction lists only those alternative elements that are supported by sufficient evidence—it is easy to mistakenly use a pattern instruction that covers more situations than those involved in the particular case. Moreover, the judge should include only those alternative means that are set forth in the charging document, and should review the statute defining the charged crime to make sure that it sets forth alternative elements of a single crime rather than setting forth separate crimes. For further discussion, see the Introduction to WPIC 4.20.



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**Supplemental Brief of Respondent**

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