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Signed at the Snohomish County Prosecutor's Office
this 13th day of Oct, 2016

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

In re the Personal Restraint of

v.

NOEL EVAN CALDELLIS,

Appellant

NO. 89585-6

STATEMENT OF ADDITIONAL
AUTHORITY

As permitted by RAP 10.8, the State of Washington, respondent, submits the following additional authority:

WPIC 0.10 Introduction to Washington Pattern Jury Instructions (updated October 2016) noting that updates to instructions are more often an attempt to improve the wording of what was already an accurate statement of the law. (copy attached)

Respectfully submitted this 13th day of October, 2016.

MARK K. ROE
Snohomish County Prosecuting Attorney

By: Kathleen Webber
KATHLEEN WEBBER, WSBA 16040
Deputy Prosecuting Attorney
Attorney for Respondent

11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 0.10 (4th Ed)

Washington Practice Series TM
Washington Pattern Jury Instructions--Criminal
October 2016 Update

Washington State Supreme Court Committee on Jury Instructions

Part I. General Instructions
WPIC CHAPTER 0. Introduction to WPIC

WPIC 0.10 Introduction to Washington's Pattern Jury Instructions for Criminal Cases

This introduction provides background information about Washington's criminal pattern jury instructions and how they are best used.

Overview of material. Washington's pattern jury instructions for criminal cases are found in Volumes 11 and 11A of the Washington Practice series of books, through Westlaw (www.westlaw.com), and via a free-access public website (<http://government.westlaw.com/linkedslice/default.asp?SP=WCCJI-1000>). Accompanying each instruction is a Note on Use, which addresses the instruction's scope and applicability, and a Comment, which summarizes the underlying law. Comments are not intended to address all issues for the particular area of law, only instruction-related issues.

The chapters in Parts I through III deal with issues of general applicability, including the stages of a criminal trial, common definitions, the burden of proof, lesser included offenses, elements of the crime, frequently used oral instructions, evidentiary issues, and principles of liability. Parts IV through XIII set forth pattern instructions that apply more specifically to particular criminal charges and defenses. Parts XIV and XV contain the concluding pattern instructions and verdict forms. And finally, Part XVI covers the pattern instructions for the jury's findings as to aggravating circumstances for the imposition of exceptional sentences under the Sentencing Reform Act.

Several appendices provide additional information for practitioners. For example:

Appendix D illustrates how the pattern instructions can be compiled for a few typical cases and fact situations. For example, the Appendix begins by showing how the pattern instructions might be assembled for a case involving a single defendant charged with second degree burglary. Additional compilations of instructions, supplemented with commentary, are found in Fine, 11B Washington Practice, Criminal Jury Instruction Handbook (15-16).

Several of the chapters begin with an introduction that covers some of the more general points of law underlying the chapter's instructions. Users of a particular instruction are encouraged to carefully review the instruction's entire chapter, including any introductory material.

Nature of pattern instructions. The pattern instructions are not authoritative primary sources of the law; rather, they restate otherwise existing law for jurors. The pattern instructions do not receive advance approval from any court, although they are often treated as "persuasive." See, e.g., *State v. Mills*, 116 Wn.App. 106, 64 P.3d 1253 (2003), reversed on other grounds, 154 Wn.2d 1, 109 P.3d 415 (2005). Judicial review of the instructions instead occurs after the fact, when individual instructions are reviewed in appellate opinions. The pattern instructions are not binding on trial courts; they are intended to guide trial courts in drafting appropriate instructions for individual cases.

Use of pattern jury instructions—In general. The committee writes pattern jury instructions to assist the trial judge and the attorneys in preparing clear, accurate, and balanced jury instructions for individual criminal cases. Pattern instructions are examples that apply to a general category of cases, rather than an exact blueprint for use in every individual case. They provide a neutral starting point for the preparation of instructions that are individually tailored for a particular case. Trial judges and attorneys must consider whether modifications are needed to fit the individual case.

Sometimes, this process can involve adding new language for points not addressed in the pattern instructions; it can mean omitting language that does not apply to an individual case; it can involve substituting more specific language for the necessarily general language of a pattern instruction; it can involve combining or reorganizing instructions that address related points. The goal, always, is to finish with a set of instructions that clearly and accurately state the law that applies to the particular case, no more and no less.

Plain language. Jury instructions need to express legal concepts in plain language for lay jurors. When feasible, the committee translates complicated legal jargon into a series of simple, declarative, easy-to-understand sentences, while being careful to retain legal accuracy. For this reason, the pattern instructions do not always precisely follow the language of the governing statute or judicial opinion, as these are not written with the lay juror in mind. See *Bell v. State*, 147 Wn.2d 166, 177, 52 P.3d 503 (2002) (an instruction that uses statutory language is "appropriate only if the statute is applicable, reasonably clear, and not misleading"); *Barrett v. Lucky Seven Saloon, Inc.*, 152 Wn.2d 259, 267, 96 P.3d 386 (2004) (quoting *Bell*); *Turner v. City of Tacoma*, 72 Wn.2d 1029, 1034, 435 P.2d 927 (1967) ("That [a court] may have used certain language in an opinion does not mean that it can be properly incorporated into a jury instruction."); *Swope v. Sundgren*, 73 Wn.2d 747, 750, 440 P.2d 494 (1968) (the language used by the Supreme Court "is not ordinarily designed or intended as a model for jury instructions").

The committee urges trial judges and attorneys to use plain language when preparing jury instructions. For a good discussion of plain-language drafting principles, see Professor Peter Tiersma's article, *Communicating with Juries: How to Draft More Understandable Jury Instructions*, National Center for State Courts, Williamsburg, VA, 2006 (also available on-line from the website for the National Center for State Courts at <http://ncsc.contentdm.oclc.org/cdm/singleitem/collection/juries/id/263/rec/1>). Many other resources are also available.

Evolution of pattern instructions—earlier versions not necessarily erroneous. The committee regularly updates the pattern instructions. Changes to an instruction do not necessarily mean that earlier versions of the instruction were erroneous. Sometimes the committee updates an instruction to incorporate a change in law; more often, updated language merely reflects an intent to improve the wording of what was already an accurate statement of the law.

This latter point has been succinctly stated by the Court of Appeals: "Clarification of [a pattern jury] instruction does not amount to an indictment of earlier versions." *State v. Holzknecht*, 157 Wn.App. 754, 238 P.3d 1233, 1239 (2010). The *Holzknecht* court expressly disagreed with a contrary analysis from *State v. Hayward*, 152 Wn.App. 632, 217 P.3d 354 (2009). In *Hayward*, another division of the Court of Appeals had concluded, in part, that a former pattern instruction was erroneous because the committee had later revised it to more closely follow statutory language. *State v. Hayward*, 152 Wn.2d at 644-46 ("The revision to WPIC 10.03 shows that the previous version of WPIC 10.03 did not adequately follow [the governing statute]"). *Hayward* thus could be interpreted as holding that a change in instructional language is presumptive evidence of earlier error. The committee hopes that *Hayward* will not be interpreted in this manner, and that courts will consider whether an instructional change is mere clarification, as in *Holzknecht*.

To assist in this regard, the committee will strive to explain instructional changes in the accompanying Comments. For example, when an instruction has undergone extensive revision for purposes of plain language improvements, the committee intends to indicate that the changes were made to improve juror understanding rather than to substantively change the statement of the applicable law. The absence of such a statement, however, should not be interpreted as implying a contrary intent.

Bracketed language. Many of the pattern instructions include bracketed language. The brackets signify that the enclosed language may or may not be appropriate for a particular case.

Often, bracketed language appears in pairs, with a choice being presented as to which of the bracketed alternatives applies to the particular case. Sometimes a pattern instruction includes a series of bracketed terms, and one or more of the terms could be applicable. The judge and attorneys should carefully consider which terms should be included. Inclusion of terms that do not apply to the facts of a case could confuse the jury or inadvertently insert unintended issues into the case.

In any event, the brackets are not meant to be included in the final jury instructions; they are inserted to alert the judge and attorneys that a choice in language needs to be made.

Blank lines. Pattern instructions occasionally include blank lines. Most of the blank lines are intended to be filled in by the judge, so that the final jury instruction would use the judge's inserted language instead of the blank line. These

blank lines are designated with parenthetical information that appears above the blank line, as in: "(describe conduct or activity)." Practitioners should make sure that the inserted information does not amount to a judicial comment on the evidence.

Other blank lines are intended to be left in the final jury instructions, to be filled in by the jury. These blank lines are usually designated with parenthetical information that appears below or next to the blank line, as in: "ANSWER: _____ (Write "yes" or "no")." The context should make clear which blank lines are to be filled in by the jury and which by the judge.

Effective dates. A notation appears at the end of each Comment indicating the instruction's "current as of" date. These dates remind users as to the need to research any changes in law that may have occurred since the date when the committee last considered the instruction.

State and local rules. State and local rules address instruction-related issues, such as the number of copies of proposed instructions the attorney must submit, particular formatting requirements, and the like. State rules are cited throughout the chapters and appendices. Local rules, however, are beyond the scope of the Comments and appendices for these volumes. Attorneys should carefully consider local rules when preparing their proposed instructions.

Feedback requested. The committee is always interested in receiving feedback as to these instructions. Suggestions for improvements may be sent to the committee at JuryInstructions@courts.wa.gov.

[Effective as of December 2015.]

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To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>; jeffreyerwinellis@gmail.com
Subject: In Re PRP of Noel Even Caldellis

Good Morning...

RE: In Re Personal Restraint Petition of: Noel Evan Caldellis
Supreme Court No. 89585-6

Oral Argument: October 18, 2016 (first case)

Please accept for filing the following attached document: State's Statement of Additional Authority

Thanks.

Diane.

Diane K. Kremenich
☞☞☞ Snohomish County Prosecuting Attorney - Criminal Division
Legal Assistant/Appellate Unit
Admin East, 7th Floor
(425) 388-3501
Diane.Kremenich@snoco.org

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