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NO. 90246-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Petitioner,

v.

KENNETH SANDHOLM,

Respondent.

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**SUPPLEMENTAL BRIEF OF PETITIONER**

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ORIGINAL

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**A. ISSUES PRESENTED**

1. Jury unanimity as to alternative means is unnecessary when sufficient evidence supports each means presented to the jury. When one of the alternative means is not supported, this Court should clarify that the failure to properly instruct on unanimity is harmless beyond a reasonable doubt when there is no plausible basis for a rational juror to rely on the unsupported alternative while rejecting all supported alternatives. Here, when the “alcohol only” and “combined influence of alcohol and drugs” alternative means of committing felony Driving Under the Influence (“DUI”) were presented to the jury, but there was no evidence that Sandholm was affected by drugs, was the failure to properly instruct the jury on unanimity harmless error?

2. Does former RCW 9.94A.525, read as a whole, considering all of its provisions in context, in relation to one another, and with the goal of achieving harmony, authorize the inclusion of Sandholm’s prior felony drug convictions in his offender score for felony DUI?

**B. STATEMENT OF THE CASE**

On October 29, 2009, State Trooper Poague noticed a truck driven by Petitioner Sandholm drift over the right fog line and then slowly correct back into the lane of travel. 1/31/12 RP 96-99. A short distance later, the

truck then veered over the line in the other direction. 1/31/12 RP 107. This time, the truck was half in each lane and straddled the lane divider for approximately eight to ten car lengths. 1/31/12 RP 108-09. The truck slowly drifted back into its original lane of travel. 1/31/12 RP 108-09. After going a little farther, the truck again drifted over the fog line to the right. 1/31/12 RP 110. Trooper Poague observed that the truck did not maintain a constant speed, dropping down below 50 miles per hour twice during his observations. 1/31/12 RP 103.

Trooper Poague stopped the truck and observed that Sandholm had watery, bloodshot eyes, and that he smelled of alcohol. 1/31/12 RP 124-25. Sandholm's speech pattern was slow, and his face was flushed. 1/31/12 RP 124-25, 155. When Poague asked Sandholm for his identification and paperwork, Sandholm immediately put a breath mint into his mouth. 1/31/12 RP 126-27. His movements were slow and deliberate. Id. He denied having had anything to drink. Id.

Trooper Poague asked Sandholm to step out of the truck and to spit out the mint. 1/31/12 RP 128. Sandholm slowly complied, at which point Poague observed that the odor of intoxicants was "obvious" and Sandholm's coordination was "poor." 1/31/12 RP 128, 154. Sandholm declined to perform some of the field sobriety tests due to trouble with his knees, but he performed the horizontal gaze nystagmus (HGN) test. 1/31/12

RP 132-33, 149-50. Out of six possible intoxication “clues,” Sandholm exhibited all six. 1/31/12 RP 144, 146, 147-48. Following his arrest, Sandholm submitted to a breath alcohol test. 2/1/12 RP 43. The samples, taken approximately two hours after Poague first observed the truck, provided results of 0.079 and 0.080. 2/1/12 RP 49, 56; 2/7/12 RP 31.

Sandholm was charged and convicted by a jury of felony DUI based on having at least four prior qualifying offenses within ten years of the current offense. CP 329, 1440-41, 1660. At sentencing, the court calculated Sandholm’s offender score as “8,” including Sandholm’s two prior felony convictions for controlled substance violations. CP 1661, 1666. The court sentenced Sandholm to a standard range term of incarceration. CP 1661, 1663. Sandholm appealed, arguing, among other things, that his right to a unanimous verdict was denied when the State presented insufficient evidence of the alternative means that he drove while under the “combined influence” of alcohol and drugs, and the jury was instructed that it did not need to be unanimous as to the means relied on. Sandholm also challenged the trial court’s inclusion of his prior drug convictions in his offender score.

In an unpublished opinion, the Court of Appeals determined that the jury was erroneously instructed as to unanimity on the “combined influence” alternative means, but nonetheless affirmed Sandholm’s conviction because

it was clear that the jury's verdict rested solely on proof of the sufficiently supported alternative means of "alcohol alone." State v. Sandholm, No. 68413-2-I (Wn. App. Feb. 18, 2014) (unpublished). However, the court concluded that Sandholm's prior drug felonies were improperly included in his offender score because former RCW 9.94A.525(2)(e) "lists the only prior convictions relevant to the calculation of an offender score for Felony DUI." Sandholm, No. 68413-2-I at 17. This Court accepted the State's petition for review of the offender score issue and Sandholm's cross-petition for review of the unanimity issue.

**C. ARGUMENT**

**1. AN ERRONEOUS UNANIMITY INSTRUCTION REGARDING ALTERNATIVE MEANS IS HARMLESS WHEN THERE IS NO PLAUSIBLE BASIS FOR A RATIONAL JUROR TO ACCEPT AN UNSUPPORTED MEANS OF COMMISSION WHILE REJECTING ALL SUPPORTED MEANS.**

Sandholm contends that there was insufficient evidence to support one of the two alternative means of committing a felony DUI presented to the jury. Thus, he argues, reversal is automatically required. He is mistaken. Where one or more alternative means is not supported by sufficient evidence, reversal is unwarranted when the failure to properly instruct the jury regarding unanimity is harmless beyond a reasonable doubt.

This Court should conclude that such an error is harmless beyond a reasonable doubt when there are no plausible grounds for a rational juror to accept the unsupported means while rejecting all properly supported means of commission. Here, there was no evidence that drugs contributed in any manner to Sandholm's impairment. Because no rational juror could have based its verdict on the "combined influence" alternative means while rejecting the "alcohol only" means, the failure to properly instruct the jury on unanimity is harmless beyond a reasonable doubt.

Alleged instructional errors are reviewed de novo. State v. Sibert, 168 Wn.2d 306, 311, 2310 P.3d 142 (2010). In Washington, criminal defendants have the right to a unanimous jury verdict. Wash. Const. art. I, § 21; State v. Stephens, 93 Wn.2d 186, 190, 607 P.2d 304 (1980). In 1976, this Court stated the rule that where a single offense is committed in more than one way, so long as "there is substantial evidence to support each of the alternative means, and the alternative means are not repugnant to one another, unanimity of the jury as to the mode of commission is not required." State v. Arndt, 87 Wn.2d 374, 376, 553 P.2d 1328 (1976).

Several years later, this Court applied the Arndt rule to a sufficiency of the evidence challenge in State v. Green, 91 Wn.2d 431, 442, 588 P.2d 1370 (1979) (Green I), reversed on rehearing, 94 Wn.2d 216, 616 P.2d 628 (1982) (Green II). There, the defendant was found

guilty of aggravated murder based on the State's alternative allegations that the crime was committed in the course of a rape or a kidnapping. This Court initially determined that there was sufficient evidence of kidnapping. Green I, 91 Wn.2d at 442-43. Later, based upon an intervening decision of the United States Supreme Court relating to the appropriate standard of review for sufficiency of the evidence,<sup>1</sup> the court found the evidence of kidnapping insufficient. Green II, 94 Wn.2d at 232. The court concluded that the aggravated murder statute required unanimity as to the specific underlying crime. Because the evidence of kidnapping was insufficient under the Jackson standard, the court found Green's right to jury unanimity was violated. Green II, 94 Wn.2d at 221-22, 232. In so holding, the court carefully distinguished Arndt and the situation where sufficient evidence supported each means presented to the jury. Id. at 232.

This Court later clarified that separate jury verdicts regarding each method of committing the offense are *not* required, so long as sufficient evidence supports all charged alternatives. State v. Whitney, 108 Wn.2d 506, 511, 739 P.2d 1150 (1987). Whitney rejected any implication in Green II that a distinction is to be drawn where the alternative means are themselves separate crimes. Id. Over the years, this Court has repeatedly reaffirmed its holding in Whitney that unanimity as to alternative means is

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<sup>1</sup> Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979).

unnecessary when sufficient evidence supports each means presented to the jury. State v. Kitchen, 110 Wn.2d 403, 410, 756 P.2d 105 (1988); In re Pers. Restraint of Jeffries, 110 Wn.2d 326, 338, 752 P.2d 1338 (1988); State v. Ortega Martinez, 124 Wn.2d 702, 707, 881 P.2d 231 (1994); State v. Smith, 159 Wn.2d 778, 154 P.3d 873 (2007); State v. Owens, 180 Wn.2d 90, 95, 323 P.3d 1030 (2014).

Sandholm contends that a particularized expression of unanimity as to means is *always* required, and when it is absent, the “error” only becomes harmless when there is sufficient evidence to support each alternative means presented to the jury. However, no case cited by Sandholm suggests that to be true. Rather, a unanimous verdict is *presumed* in such a situation. Simply put, where sufficient evidence supports each mode of commission charged, there is no error in failing to require express unanimity. Error occurs only when one or more of the presented alternative means is not supported by sufficient evidence *and* the jury is not properly instructed that it must be unanimous as to the means relied on.

Moreover, even when the jury is not properly instructed on unanimity, and when one or more of the alternative means presented is not supported by sufficient evidence, the court must still decide whether the error is harmless. See State v. Camarillo, 115 Wn.2d 60, 65, 794 P.2d 50

(1990) (error in unanimity instructions does not require reversal when appellate court finds it harmless beyond a reasonable doubt). This Court has not clearly articulated the harmless error test applicable to alternative means cases, and should take this opportunity to do so. This Court should conclude that the failure to properly instruct on unanimity is harmless *unless there was a rational basis for a juror to rely on the unsupported alternative while rejecting all supported alternatives.*

This Court's decisions in Green support the application of this harmless error test. In the initial decision, the court found sufficient evidence of kidnapping. Green I, 91 Wn.2d at 442-43. On re-hearing, however, the court held that there was insufficient evidence as to the kidnapping alternative. Green II, 94 Wn.2d at 225-30. The court concluded that the defendant's right to jury unanimity was violated:

As instructed, it was possible for the jury to have convicted Green with six jurors resting their belief of guilt upon kidnapping and the other six resting their belief upon rape. Thus, it is impossible to know whether the jury unanimously decided that the element of rape had been established beyond a reasonable doubt.

94 Wn.2d at 233. Under the facts, this was correct. The original majority of this Court had believed sufficient evidence of kidnapping existed.

Three members of the court adhered to that belief in Green II. 94 Wn.2d at 241-43 (Rosellini, J., dissenting). A rational juror could have held the

same belief. Since that belief was wrong as a matter of law, it was possible that a rational juror could have convicted the defendant on an erroneous basis. Thus, there was no way for the court to be certain that the jury unanimously agreed on a proper basis for conviction. Green II, 94 Wn.2d at 233.

Contrast the theft case of State v. Linehan, 147 Wn.2d 638, 56 P.3d 542 (2002). The court did not consider that to be an alternative means case. Nonetheless, it held that it was error to instruct the jury on embezzlement when there was no evidence to support the instruction. Linehan, 147 Wn.2d at 654. However, the court found the error harmless, concluding that there was ample evidence of a taking. There was no reason to believe that any juror rejected the “taking” theory and relied solely on the “embezzlement” theory. Thus, the court could conclude the error was harmless beyond a reasonable doubt. Id.

The harmless error test proposed here is similar to the one employed in “multiple acts” cases. In the absence of a specific election by the State, the jury must be instructed that unanimity is required as to the specific incident constituting the charged crime. State v. Bobenhouse, 166 Wn.2d 881, 893, 214 P.3d 907 (2009). In the absence of an election, the failure to give a unanimity instruction is harmless error if “a rational trier of fact could find that each incident was proved beyond a reasonable

doubt.” Camarillo, 115 Wn.2d at 65. The evidence as to each act need not be overwhelming. Rather, the court asks whether there is any basis for the jury to rationally distinguish between the multiple acts. Bobenhouse, 166 Wn.2d at 894. If the case presents the jury with an “all or nothing” choice, the error is harmless. Id. at 894-95. The harmless error test in “multiple acts” cases thus turns on whether there is any reason to believe that a rational jury could have been non-unanimous.

These cases suggest an appropriate harmless error test when the jury is improperly instructed on unanimity in alternative means cases. Such error is harmless when there is no plausible basis for a rational juror to accept the unsupported means while rejecting all properly supported means.<sup>2</sup>

Here, there was no plausible basis for a rational juror to have found that Sandholm drove while under the combined influence of alcohol and drugs, and yet reject the conclusion that he was under the influence of

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<sup>2</sup> Although the wording is somewhat different, this proposed standard is substantively the same as the one applied by the Court of Appeals below. The court determined that “the record amply demonstrates that the State’s case against Sandholm and the jury’s verdict rested solely on proof of the ‘alcohol only’ alternative.” Sandholm, No. 68413-2-I at 14. When employing this standard, the court cited to State v. Rivas, 97 Wn. App. 349, 984 P.2d 432 (1999), disapproved of on other grounds by State v. Smith, 159 Wn.2d 778 (2007). Other Court of Appeals decisions have applied this same standard. See State v. Lobe, 140 Wn. App. 897, 167 P.3d 627 (2007); State v. Bland, 71 Wn. App. 345, 354, 860 P.2d 1046 (1993), disapproved of on other grounds by Smith, 159 Wn.2d at 778; State v. Witherspoon, 171 Wn. App. 271, 285-87, 286 P.3d 996 (2012). While the only difference between the standard cited in these cases and the one the State asks this Court to adopt is one of semantics, the State respectfully suggests that its proposed standard is more easily understood and concise.

alcohol alone. There was *no* evidence presented by either party that Sandholm was under the influence of, or affected by, any drug at all. The State neither argued nor attempted to prove the “combined influence” means. 2/9/12 RP 122-49; 2/10/12 RP 22-36. The only mention of it by the State in closing argument was when the prosecutor briefly referred to the jury instructions. 2/9/12 RP at 126-28.

Instead, the State focused its case solely on the “alcohol only” alternative means. The prosecutor referred to the odor of alcohol on Sandholm when stopped by Trooper Poague (2/9/12 RP 132), his bloodshot, watery eyes and how that can be caused by alcohol expanding the blood veins (2/9/12 RP 132), his poor coordination and that gross motor functions are affected by alcohol (2/9/12 RP 133), his poor performance of the HGN test and that alcohol contributes to such poor performance (2/9/12 RP 134, 141), the results of his breath alcohol test performed two hours after being stopped by Trooper Poague (2/9/12 RP 134-37), and his own testimony that he had consumed whiskey (2/9/12 RP 144-45). The State explained to the jury that all of the evidence led to the conclusion that Sandholm was under the influence of *alcohol*, concluding:

And so what I’m asking you to do, ladies and gentlemen, when you go back to the jury room is look at all of the facts and all of the evidence regarding this particular element and as a whole evaluate them as to whether or not he was affected by *alcohol* when he was driving. And the answer

to the question beyond a reasonable doubt is yes. So I ask you to return a verdict of guilty. Thank you.

2/9/12 RP 147-49 (emphasis added). Indeed, Sandholm himself told the jury in his closing remarks that there was “zero evidence that [he was] under the influence of any kind of drug. So let’s set that aside.” 2/9/12 RP 155. He proceeded to argue that based on the evidence, the jury should conclude that he had not driven while under the influence of, or affected by, *alcohol*.<sup>3</sup> 2/9/12 RP 155-74; 2/10/12 RP 5-21.

Undoubtedly, it would have been the better practice to omit the “combined influence” alternative means from the jury instructions altogether.<sup>4</sup> However, not all instructional errors are prejudicial.

See Hedgpeth v. Pulido, 555 U.S. 57, 129 S. Ct. 530, 172 L. Ed. 2d 388 (2008) (alternative means error); Neder v. United States, 527 U.S. 1, 119

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<sup>3</sup> The only references to “drugs” in Sandholm’s testimony and closing argument were made in the context of explaining *why* he had consumed whiskey; Sandholm claimed to have had an abscessed tooth, and that after Ibuprofen and Orajel failed to dull his pain, he used whiskey to numb his mouth. 2/8/12 RP 157-59, 161, 164, 166-67; 2/9/12 RP 165-67. Additionally, while Sandholm testified that he used an asthma inhaler at some point that evening to address his allergies, which he asserted was the *real* reason for his watery, bloodshot eyes, he never discussed its relevance in closing argument. 2/8/12 RP 159-60, 164; 2/9/12 RP 165-67. The State’s cross-examination of Sandholm regarding his use of Orajel, Ibuprofen, and the asthma inhaler was a clear attempt to discredit his testimony that he only drank two shots of whiskey to numb his tooth pain, and that his eyes were watery and red due to allergies instead of alcohol. 2/9/12 RP 27-79.

<sup>4</sup> Error is inevitable. However, reversing for those errors that do not call into question the fundamental fairness of the trial or affect the outcome in any manner causes unnecessary retrials along with their associated costs, encourages abuse of the judicial process, and subjects the system to ridicule. State v. Coristine, 177 Wn.2d 370, 388, 300 P.3d 400 (2013) (Gonzalez, J., dissenting) (citing Delaware v. Van Arsdall, 475 U.S. 673, 681, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986)).

S. Ct. 1827, 144 L. Ed. 2d 35 (1999) (omission of an element); California v. Roy, 519 U.S. 2, 117 S. Ct. 337, 136 L. Ed. 2d 266 (1996) (erroneous accomplice instruction); Pope v. Illinois, 481 U.S. 497, 107 S. Ct. 1918, 95 L. Ed. 2d 439 (1987) (misstatement of an element); Rose v. Clark, 478 U.S. 570, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986) (erroneous burden of proof as to element); State v. DeRyke, 149 Wn.2d 906, 912-13, 73 P.3d 1000 (2003) (erroneous “to convict” instruction).

When engaging in harmless error analysis, courts assume a rational trier of fact. Kitchen, 110 Wn.2d at 411; Bobenhouse, 166 Wn.2d at 894. Applying that assumption in the present case – where there was absolutely no evidence that Sandholm was impaired by drugs, and all of the evidence pointed to alcohol impairment alone – there is no reason to believe that any rational juror relied on the “combined influence” means of committing the offense while rejecting the “alcohol only” means. Erroneously instructing the jury on unanimity in this case was harmless error.

**2. THE OFFENSES PROPERLY INCLUDED IN SANDHOLM’S OFFENDER SCORE ARE NOT LIMITED SOLELY TO THOSE OFFENSES OUTLINED IN FORMER RCW 9.94A.525(2)(e).**

The Court of Appeals erred by reading former RCW 9.94A.525(2)(e), a provision of the offender score statute governing the “wash out” of certain criminal history, as identifying the *only type* of

prior convictions that are properly *included* in an offender score for felony DUI. Former RCW 9.94A.525(2)(e) speaks only to when a defendant's prior convictions for felony DUI/physical control and serious traffic offenses will wash out, or be *eliminated* from the offender score of a present felony DUI/physical control conviction. It does not supersede or suspend the normal rules for determining the prior convictions to include in the offender score.

An offender score calculation is reviewed *de novo*. State v. Bergstrom, 162 Wn.2d 87, 92, 169 P.3d 816 (2007). Statutory construction claims are also reviewed *de novo*. State v. Sweat, 180 Wn.2d 156, 159, 322 P.3d 1213 (2014). The primary goal of statutory construction is to discern and carry out the legislature's intent. State v. Alvarado, 164 Wn.2d 556, 561-62, 192 P.3d 345 (2008). When the text of a statute is clear, its meaning is derived from its language alone. State v. Jones, 168 Wn.2d 713, 722, 230 P.3d 576 (2010). If the legislature's intent cannot be discerned from the plain text of the statute, the court should resort to principles of statutory construction, legislative history, and relevant case law to discern that intent. Cockle v. Dep't of Labor & Indus., 142 Wn.2d 801, 808, 16 P.3d 583 (2001). The entire legislative scheme must be considered so that its provisions are analyzed in context:

'The plain meaning of a statute may be discerned from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question.' Further, '[a]n act must be construed as a whole, considering all provisions in relation to one another and harmonizing all rather than rendering any superfluous.'

State v. Bunker, 169 Wn.2d 571, 577-78, 238 P.3d 487 (2010) (internal citations omitted).

This Court has previously applied the rules of statutory construction to the offender score statute, concluding that RCW 9.94A.525 sets out a three-step process for calculating offender scores. State v. Moeurn, 170 Wn.2d 169, 175, 240 P.3d 1158 (2010). The first step is to "identify *all* prior convictions" using the statutory definition of "prior conviction" contained in subsection (1). Moeurn, 170 Wn.2d at 175 (emphasis added). The second step is to sift through all of the defendant's prior convictions to *eliminate* those that wash out under subsection (2). Id. The third step is to count the *remaining* convictions according to the specific scoring rules set out in the rest of the section. Id.

Thus, the first step is to identify all of Sandholm's prior convictions. "A prior conviction is a conviction which exists before the date of sentencing for the offense for which the offender score is being computed." Former RCW 9.94A.525(1) (2009). Sandholm's two prior

drug convictions existed prior to the date of his current sentencing hearing, and are thus properly considered “prior convictions.” CP 1666.

The next step, according to Moeurn, is to determine whether Sandholm’s two prior felony drug convictions “wash out.” 170 Wn.2d at 175. Former RCW 9.94A.525(2) includes several provisions dictating when prior convictions wash out, or are “eliminated,” according to the Moeurn analysis. First, subsection (2)(a) provides that certain felonies never wash out: “Class A and sex prior felony convictions shall always be included in the offender score.” Subsection (2)(b) provides that class B felonies, other than sex offenses, wash out after the offender spends ten crime-free years in the community. Subsection (2)(c) and (2)(d) provide that class C felonies (other than sex offenses) and “serious traffic offenses” wash out after the offender spends five crime-free years in the community, *except* as provided in subsection (2)(e). Former subsection (2)(e) contains special rules relating to when certain traffic-related offenses will wash out when the present offense being scored is felony DUI or felony physical control. In essence, it provides that prior convictions for serious traffic offenses and felony DUI/physical control wash out after five years *except* if they were considered “prior offenses within ten years,” as defined elsewhere.

Thus, the plain language of the statute (“*except as provided in subsection (2)(e)*”) makes clear that subsection (2)(e) operates as an exception to the regular wash-out provisions of subsections (2)(c) and (2)(d), reviving certain class C felonies and serious traffic offenses that would otherwise wash out under (2)(c) and (2)(d), but *only* where the present conviction is for felony DUI or felony physical control:

(e) If the present conviction is felony driving while under the influence of intoxicating liquor or any drug (RCW 46.61.502(6)) or felony physical control of a vehicle while under the influence of intoxicating liquor or any drug (RCW 46.61.504(6)), prior convictions of felony driving while under the influence of intoxicating liquor or any drug, felony physical control of a vehicle while under the influence of intoxicating liquor or any drug, and serious traffic offenses shall be included in the offender score if: (i) The prior convictions were committed within five years since the last date of release from confinement (including full-time residential treatment) or entry of judgment and sentence; or (ii) the prior convictions would be considered “prior offenses within ten years” as defined in RCW 46.61.5055.

Former RCW 9.94A.525(2)(e) (emphasis added). By its plain language, this provision addresses only when prior convictions for felony DUI/physical control and serious traffic offenses wash out when the defendant is convicted of felony DUI or felony physical control. It does not address the wash-out of felony convictions other than those specified, so it does not govern whether such convictions are included in the offender score, or under what circumstances they are eliminated from the

offender score. Simply put, subsection (2)(e) is irrelevant to whether prior drug convictions count toward the offender score of one convicted of felony DUI.

After identifying all prior convictions under subsection (1), and eliminating those that wash out under subsection (2), the final step is to “count” the prior convictions that remain in order to arrive at an offender score.” Moeurn, 170 Wn.2d at 175. In the version of the statute applicable here, subsections (3) through (20) provide specific rules regarding the calculation of offender scores, instructing courts to count prior offenses by assigning different numerical values to the prior offenses. Former RCW 9.94A.525(3)-(20) (2009). Subsection (11) applies “[i]f the present conviction is for a felony traffic offense,” which includes felony DUI. Former RCW 9.94A.525(11); RCW 9.94A.030(25)(a). It directs the court to count one point for each prior adult felony conviction. Id. Because Sandholm did not complete five crime-free years in the community, the trial court properly counted both of his prior felony drug convictions as one point each. CP 1661, 1666.

In concluding that the prior drug convictions could not be included in Sandholm’s offender score, the Court of Appeals failed to apply the scoring statute as this Court directed in Moeurn. Rather than begin by identifying all of Sandholm’s prior convictions and then applying the

relevant wash-out provisions to eliminate those that cannot be counted, the court concluded that “subsection (2)(e) lists the *only* prior convictions relevant to the calculation of the offender score for felony DUI, which does not include drug convictions.” Sandholm, No. 68413-2-I at 17 (emphasis added). In other words, the court held that in felony DUI/physical control cases, the first step is not to identify *all* prior convictions, but rather it is to refer to the wash out provisions of subsection (2) to identify the *only type* of prior convictions that can be included in the offender score. This reading of the statute not only conflicts with Moeurn, but is patently inconsistent with subsection (2)(a), which provides that, “Class A and sex prior felony convictions shall *always* be included in the offender score.” Former RCW 9.94A.525(2)(a) (emphasis added). Under the Court of Appeals’ analysis, prior class A and sex offenses would *never* count if the current offense being scored was a felony DUI/physical control. This contravenes the requirement that the entire legislative scheme be analyzed in context, considering all provisions in relation to one another in an effort to reach harmony, rather than rendering any provision superfluous. Bunker, 169 Wn.2d at 577-78.

Both Sandholm and the opinion below rely on State v. Morales, 168 Wn. App. 489, 278 P.3d 68 (2012), for the conclusion that only felony DUI/physical control and serious traffic offenses can be included in an

offender score for a current felony DUI/physical control charge. A careful reading of Morales does not support that conclusion. Indeed, the issue of whether felonies other than those listed in subsection (2)(e) are properly included in an offender score for felony DUI was not even before the court in Morales. Rather, the issue was whether an intervening misdemeanor assault conviction<sup>5</sup> kept certain serious traffic offense convictions that were more than ten years old from washing out under subsection (2)(e)(i). Morales, 168 Wn. App. at 496-98. The court concluded that the only types of convictions that could keep older convictions for felony DUI/physical control and serious traffic offenses from washing out were other convictions of the same nature. Id.

In sum, former RCW 9.94A.525(2)(e), and Morales, are properly read as follows. When scoring a present conviction for felony DUI or physical control, prior convictions for felony DUI/physical control and serious traffic offenses do not wash out if *either* of the following exist:

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<sup>5</sup> In its opinion below, the court erroneously reasoned that the State's argument rendered subsection (2)(e)(i) "superfluous" because, in "a scenario like that in Morales . . . where the defendant's prior conviction for assault washed out under subsection (2)(e)(i) . . . it could be revived by analysis under subsection (2)(c), rendering subsection (2)(e)(i) meaningless." Sandholm, No. 68413-2-I at 17. This statement represents a misunderstanding of both the facts and the holding of Morales. The defendant's misdemeanor assault conviction was at issue in Morales only to the extent that the State argued that it *prevented* wash-out of a serious traffic offense under subsection (2)(e)(i). A misdemeanor assault would never be included in the offender score for felony DUI. Moreover, because the present offense was a felony DUI, subsection (2)(d) did not apply to the question of whether Morales's prior serious traffic offenses washed out, and thus it could not "revive" a prior conviction that washed under subsection (2)(e)(i). See former RCW 9.94A.525(d) ("*Except as provided in (e) of this subsection*") (emphasis added).

(1) they are within ten years of the date of arrest for the current offense, *or*

(2) no matter the date, the intervals between one conviction for a serious traffic offense/felony DUI/felony physical control and the date of the next is five years or less. Stated differently, once a defendant has completed a five-year window with no convictions for serious traffic offenses or felony DUI/physical control, all prior convictions for those offenses wash out, unless they are within ten years of the date of the current arrest. Morales does not support the proposition that prior adult felonies unrelated to felony DUI/physical control/serious traffic offenses should not be included in an offender score. Indeed, the Morales court implicitly established as much when it *included* the defendant's current felony conviction for attempting to elude in his offender score. Morales, 168 Wn.2d at 501. By including an offense not listed in subsection (2)(e) in the offender score, the Morales court necessarily rejected the very proposition for which it is cited in Sandholm's case, and confirmed that felonies other than those listed in subsection (2)(e) are properly included in a felony DUI defendant's offender score.

Division Two's recent decision in State v. Jacob, 176 Wn. App. 351, 308 P.3d 800 (2013), does not compel a different result. To support its holding that only certain types of traffic-related offenses can be included in the offender score for a felony DUI, Jacob cited solely to

Morales, which, as demonstrated above, does not stand for that conclusion. Jacob, 176 Wn. App. at 360. Like the Court of Appeals in this case, the Jacob court did not address Moeurn, and overlooked the fact that the Morales court itself affirmed the inclusion of an offense not specified in subsection (2)(e) in the defendant's offender score.<sup>6</sup>

In sum, when construing RCW 9.94A.525 as a whole, considering all of its provisions in context, in relation to one another, and with an eye toward achieving harmony, the offender score statute applicable to Sandholm plainly dictates that his two prior felony drug convictions must be included in his offender score.

#### D. CONCLUSION

This Court should clarify that the failure to properly instruct on unanimity is harmless when there is no plausible basis for a rational juror to rely on the unsupported alternative means, while rejecting all supported alternatives. Where, as here, there was no evidence that Sandholm was affected by drugs, and all of the evidence was that he was affected by

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<sup>6</sup> Additionally, the Jacob court made the same error as the Court of Appeals here, and mistakenly believed that one of the issues in Morales was whether the defendant's misdemeanor assault conviction should have been included in his offender score. See Jacob, 176 Wn. App. at 360 ("Accordingly, we agree with Jacob and hold that, *like the improper inclusion of Morales' prior assault conviction in his offender score*, the trial court here similarly erred in including Jacob's 1993 drug conviction in his offender score because drug convictions are not among the statutorily specified prior convictions for offender score inclusion under subsection (i) of RCW 9.94A.525(2)(c) [sic]." (emphasis added)).

alcohol alone, there is no reason to believe that any rational juror relied on the “combined influence” means of committing the offense while rejecting the “alcohol only” means. Erroneously instructing the jury on unanimity in this case was harmless error.

Further, when construing RCW 9.94A.525 as a whole, considering all of its provisions in context, in relation to one another, and with the goal of achieving harmony, this Court should conclude that the offender score statute at issue plainly authorizes inclusion of Sandholm’s two prior felony drug convictions in his offender score.

DATED this 26<sup>th</sup> day of September, 2014.

Respectfully submitted,

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By:   
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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorney for the appellant, Gregory Link, at [greg@washapp.org](mailto:greg@washapp.org), containing a copy of the SUPPLEMENTAL BRIEF OF RESPONDENT, in STATE V. KENNETH WAYNE SANDHOLM, Cause No. 90246-1, in the Supreme Court, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 26 day of September, 2014

A handwritten signature in black ink, appearing to be 'Gregory Link', written over a horizontal line.

Name  
Done in Seattle, Washington