**STATE’S RESPONSE TO DEFENDANT’S MOTION TO ELECT**

**AND PROPOSED JURY INSTRUCTION**

##### State of Washington

**II.**

**STATEMENT OF LAW**

**A. Background**

In Washington, a defendant may be convicted only when a unanimous jury concludes that the criminal act charged in the information has been committed. *State v. Stephens*, 607 P.2d 304 (Wash. 1980); *State v. Badda*, 385 P.2d 859 (Wash. 1963). A defective verdict, which deprives the defendant of a unanimous verdict, invades the fundamental constitutional right to a trial by jury. See *Johnson v. Louisiana*, 406 U.S. 356 (1972); *Hawaii v. Mankichi*, 190 U.S. 197 (1903). As Justice Utter noted in *State v. Franco*, 639 P.2d 1320 (Wash. 1982),

The unanimity rule thus requires jurors to be in substantial agreement as to just what a defendant did as a step preliminary to determining whether the defendant is guilty of the crime charged. Requiring the vote of twelve jurors to convict a defendant does little to insure that his right to unanimous verdict is protected unless this prerequisite of jury consensus as to the defendant’s course of action is also required. *Id.*, 639 P.2d at 1328.

The controversy, which has been engendered from the nature of this right to a unanimous verdict and the extent of the protection that it guarantees, has focused primarily on “alternative means” cases. *See State v. Petrich*, 683 P.2d 173 (1984). It is very important when examining the cases requiring unanimity in a verdict to differentiate between an information alleging alternative means of committing a single criminal act under a statute, and a single charged count with evidence of numerous separate criminal acts. (The rules for determining whether a statute describes a single offense committable in more than one way or whether it describes multiple offenses is set forth in *State v.Arndt*, 553 P.2d 1328 (Wash. 1976)). When the State alleges alternative means of committing a single criminal act, the Supreme Court has approved instructions that require unanimity as to the crime but do not require a unanimous determination of which of several alternatives has been used to commit the crime, so long as substantial evidence supports each alternative. *See Arndt*, *supra*; *Franco*, *supra*; *State v. Parmenter*, 444 P.2d 680 (Wash. 1968); *State v. Russell*, 678 P.2d 332 (Wash. 1984), *cert. denied*, 111 S. Ct. 2915 (1991).

1. **“Election” of Acts by the State as a Remedy**

The line of cases dealing with “alternative means” of committing a single crime are inapplicable here because the case at bar is not an “alternative means” case. The State has charged the defendant with

[SUPPLY FACTS OF CHARGE(S)]

The victim has alleged numerous separate incidents, which are criminal acts, in this case. Defendant argues that when the evidence shows several incidents which could form the basis of the charge in the information, the State must “elect,” or tell the jury which act it is relying on to convict in order to ensure a unanimous verdict on the underlying crime. The rationale for this position was stated in *State v. Workman*, 119 P. 751 (Wash. 1911):

In case of conviction, where the evidence tends to show two separate commissions of the crime, unless there is an election it would be impossible to know that either offense was proved to the satisfaction of all of the jurors beyond a reasonable doubt. The verdict could not be conclusive on this question, since some of the jurors might believe that one of the offenses was so proved and the other jurors wholly disbelieve it but be just as firmly convinced that the other offense was so proved. The greater the number of offenses in evidence, the greater the possibility, or even probability, that all of the jurors may never have agreed as to the proof of any single one of them. *Id.*, 119 P. at 752.  *See also*, *State v. Markum*, 480 N.W.2d 545 (Wis. Ct. App. 1992).

The *Workman* court and a long line of cases subsequent to *Workman* have held that while evidence of separate commissions of the offense may be admitted as tending to prove the commission of the specific crime charged, a proper course, after all of the evidence is in, to require the State to elect which of such acts is relied upon for a conviction. *See State v. Rasmussen*, 215 P. 332 (Wash. 1923); *State v. Hanson*, 234 P. 28 (Wash. 1925); *State v. Oberg*, 60 P.2d 66 (Wash. 1936). That solution is obviously not always possible, however, because the witness is not always sure of the specific date or facts of any particular incident. Because of this, the law provides for an alternative remedy to election.

In the Colorado Supreme Court case of *Thomas v. People,* 803 P.2d 144 (Colo. 1990), the defendant filed a pretrial motion demanding that the prosecution specify the sexual acts and dates relied upon for conviction. The court noted that the sexual acts relied upon need to be specified; however, the particular dates on which the offenses occurred do not require the same specificity. The court reasoned:

This case demonstrates the difficulty of applying the specification requirement to certain cases involving evidence of a continuing pattern of sexual abuse of very young children. In this case, most of the evidence of sexual abuse consisted of statements of the child victims. As is common with children of this age, the testimony of [the victims] does not clearly identify discrete instances when particular acts took place, much less provide a list of dates and times … We … hold that when the evidence does not present a reasonable likelihood that jurors may disagree on which acts the defendant committed, the prosecution need not designate a particular instance. If the prosecutor decides not to designate a particular instance, the jurors should be instructed that in order to convict the defendant they must either unanimously agree that the defendant committed the same act or acts or that the defendant committed all of the acts described by the victim and included within the time period charged … What is essential is that the jury be in agreement that the defendant committed a particular act or series of acts. *Id.* at 152-153. *See, also, State v. Arceo,* 928 P.2d 843 (Haw. 1997); *State v. Horswill,* 857 P.2d 579 (Haw. 1993); *Markum*, *supra*.

**C. Alternative Remedy by the State of a “Unanimity Instruction” in Lieu of “Election”**

Under current Washington law, requiring the state to “elect” the act upon which it is relying for conviction is but one solution to the problem of guaranteeing jury unanimity where multiple incidents are in evidence. “Election” is not always appropriate or possible. *Petrich*, *supra*.

In *Petrich*, the court recognized that forcing the State to “elect” a specific act would result in many instances in dismissal of charges against a defendant charged with a crime against young children. This decision by the court was preceded by a long line of Washington decisions, which ruled that the state is not required to pinpoint exact dates of oft-repeated incidents to young victims because to do so would be impractical and contrary to reason. *State v. Ferguson*, 667 P.2d 68 (Wash. 1983); *State v. Pitts*, 382 P.2d 508 (Wash. 1963); *State v. Carver*, 678 P.2d 842 (Wash. App. 1984). As the court noted in *State v. Pickens*, 615 P.2d 537 (Wash. App. 1980), it is only when the witness fixes the exact time a charged act was committed and the defense is alibi that an “election” specifying that particular date and time is required.

The court in *Petrich* provided an alternative to “election” - an instruction to the jury that all 12 jurors must agree that the same underlying criminal act has been proven beyond a reasonable doubt. The court indicated that the State had to either elect or provide a unanimity instruction to the jury, but that either alternative guaranteed to the defendant a unanimous verdict. The court stated the rationale for the ruling:

These options are allowed because, in the majority of cases in which this issue will arise, the charge will involve crimes against children. Multiple incidents of criminal conduct with the same child victim is a frequent, if not the usual, pattern. Note, *The Crime of Incest Against the Minor Child and the States’ Statutory Responses*, 17 J. Fam. Law 93, 99 (1978-79). Whether the incidents are to be separately charged or brought as one charge is a decision within prosecutorial discretion. Many factors are weighted in making that decision, including the victim’s ability to testify to specific times and places. Our decision in this case is not intended to hamper that discretion or encourage the bringing of multiple charges when, in the prosecutor’s judgment, they are not warranted. The criteria used to determine that only a single charge should be brought, may indicate that the election of one particular act for conviction is impractical. In such circumstances, defendants right to a unanimous verdict will be protected with proper jury instructions. *Petrich*, *supra* at 178. *See, also, People v. Callan,* 220 Cal. Rptr. 339 (Ct. App. 1985); *Woertmen v.People,* 804 P.2d 188 (Colo. 1991); *State v. Bourgeois,* 945 P.2d 1120 (Wash. 1997); *State v. Noltie,* 809 P.2d 190 (Wash. 1991); *State v. Camarillo,* 794 P.2d 850 (Wash. 1990).

1. **State’s Proposed Instruction**

Pursuant to the *Petrich* ruling, the State proposed that the following instruction be given to the jury in this case:

Evidence has been introduced of multiple acts of sexual contact between \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ and the defendant.

Although the twelve of you need not agree that all of the acts have been proven, you must unanimously agree that at least one particular act has been proven beyond a reasonable doubt.

**III.**

**CONCLUSION**

Based on the authority cited, the State in this case chooses to provide the jury with a unanimity instruction rather than to elect a particular act as the basis for the charge against the defendant.

Dated:

Respectfully submitted,

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Assistant Distric