Supreme Court No. 100029-4
(Court of Appeals No. 36763-1-III)

IN THE WASHINGTON SUPREME COURT

STATE OF WASHINGTON,

Petitioner,

v.

DAVIEL CANELA,

Respondent.

ANSWER TO STATE'S PETITION FOR REVIEW

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A. IDENTITY OF RESPONDENT AND RELIEF REQUESTED

Daviel Canela, the respondent,[1] asks that this Court deny the State's petition for review.

B. ISSUE FOR WHICH REVIEW SHOULD BE DENIED

As both this Court and the Court of Appeals have held, to properly charge attempted murder in the first degree, the charging document must allege premeditation. Without the allegation of premeditation, a charging document stating a person took a substantial step toward committing first degree murder fails to state a crime. In this case, the charging document alleging attempted first degree murder failed to include premeditation. Consistent with precedent, did the Court of Appeals properly hold that the charging document was constitutionally deficient?

C. STATEMENT OF THE CASE

Mr. Canela's statement of the case is set forth in his petition for review, filed on July 26, 2021. To briefly summarize, Mr. Canela was convicted of attempted first degree murder and unlawful possession of a firearm in the second degree. The Court of Appeals reversed the conviction for attempted first degree murder because the charging

[1] Mr. Canela filed a petition for review on the same date as the State. Mr. Canela seeks review on several different issues. Because the State filed its petition for review first, this Court designated Mr. Canela the respondent.

document was constitutionally defective. The State seeks review of that decision.

D. ARGUMENT WHY REVIEW SHOULD BE DENIED

For a charge of attempted first degree murder, this Court and the Court of Appeals have uniformly held that the failure to allege premeditation renders the charging document deficient. Without a good reason, the State seeks to disturb this settled precedent. Its petition should be denied.

To afford notice to a defendant of the nature and cause of the accusation, the State must include all the essential elements of the crime in the charging document. State v. Kjorsvik, 117 Wn.2d 93, 97, 812 P.2d 86 (1991); Const. art. I, §§ 3, 22; U.S. Const. amends. VI, XIV. "An offense is not properly charged unless the information sets forth every essential statutory and nonstatutory element of the crime." State v. Pry, 194 Wn.2d 745, 751, 452 P.3d 536 (2019). "The 'essential elements' rule requires that a charging document *allege facts supporting every element of the offense,* in addition to adequately identifying the crime charged." State v. Leach, 113 Wn.2d 679, 689, 782 P.2d 552 (1989). Thus, the "manner of committing a crime is an element and the defendant must be informed of this element in the information in order to prepare a proper defense." State v. Bray, 52 Wn. App. 30, 34, 756 P.2d 1332 (1988). The failure of a charging document to allege the required elements and acts means the charging document fails to charge a crime and it must be dismissed. State

v. Hugdahl, 195 Wn.2d 319, 324, 458 P.3d 760 (2020); Pry, 194 Wn.2d at 752.

One means of committing murder in the first degree is "[w]ith a *premeditated* intent to cause the death of another person, he or she causes the death of such person or of a third person." RCW 9A.32.030(1)(a) (emphasis added). In addition to premeditated intentional murder, the statute sets out two other means of first degree murder: extreme indifference murder and felony murder. RCW 9A.32.030(1)(b), (c). Criminal attempt is committed "if, with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime." RCW 9A.28.020(1).

For purposes of a charging document, a charge of attempted first degree murder under RCW 9A.32.030(1)(a) must allege that the intent to kill was *premeditated*. If it does not, it is constitutionally deficient. State v. Vangerpen, 125 Wn.2d 782, 791, 888 P.2d 1177 (1995); State v. Murry, 13 Wn. App. 2d 542, 551-53, 465 P.3d 330, review denied, 196 Wn.2d 1018 (2020).

In this case, the prosecution charged Mr. Canela in count one with attempted murder in the first degree. The charging document used the following language, which did not allege an intent to kill that was *premeditated*:

> **ATTEMPTED MURDER IN THE FIRST DEGREE, [RCW 9A.28.020(1) AND 9A.32.030(1)(a)], A CLASS A FELONY**, maximum penalty of LIFE and $50,000, committed as follows:
>
> That the said Daviel Davis Canela in the County of Franklin, State of Washington, on or about March 29, 2018, then and there, with intent to commit the crime of Murder in the First Degree, committed an act, to wit: did shoot the victim with a handgun, which was a substantial step toward that crime.

CP 9.

The necessary fact of premeditation is absent and cannot be fairly implied. Consistent with this Court's decision in Vangerpen and the Court of Appeals' decision in Murry, the Court of Appeals properly held the charging document was deficient. Slip op. at 12-15.

In seeking review, the prosecution argues that a charge of attempted first degree murder does not require the prosecution to plead premeditation in the charging document. This is incorrect. Vangerpen, 125 Wn.2d at 791; Murry, 13 Wn. App. 2d at 551-53.

Beyond precedent, leaving premeditation out of an attempted first degree murder charging document results in the document not providing notice and failing to state a crime. As the Court of Appeals has explained:

> First degree murder can be committed in three ways: (1) premeditated intentional murder, (2) extreme indifference, and (3) felony murder. RCW 9A.32.030(1)(a)-(c). However, it is impossible to attempt murder by extreme indifference or felony murder because neither offense

> requires proof of intent to kill. *State v. Dunbar*, 117 Wash.2d 587, 817 P.2d 1360 (1991) (extreme indifference); *State v. Wanrow*, 91 Wash.2d 301, 311, 588 P.2d 1320 (1978) (intent to kill not an element of felony murder). Thus, a charging document that merely states that a defendant took a substantial step toward committing first degree murder would fail to state a crime unless premeditated murder was identified as the basis for the charge.
>
> Since only attempted premeditated murder can constitute attempted first degree murder, the charging document must, in some manner, identify the premeditation element lest it commit the same error as in *Vangerpen*.

Murry, 13 Wn. App. 2d at 552-53.

In challenging Murry and the meaning of Vangerpen, the State relies on this Court's recent decision in State v. Orn, 197 Wn.2d 343, 482 P.3d 913 (2021). Orn addressed a challenge to *the jury instructions*, not the charging document. 197 Wn.2d at 361-64. There, the "to-convict" instruction for attempted first degree murder properly set out the essential elements of the offense by requiring the jury find that "the defendant did an act that was a substantial step toward the commission of murder in the first degree" and that "the act was done with the intent to commit murder in the first degree." Id. at 362-63. Although the to-convict instruction did not set out the elements of the substantive crime of first degree murder, which would include a premeditation element, this was appropriate because "the elements of the substantive crime attempted may be

contained in a separate, definitional jury instruction." Id. at 362.

Because Orn concerns what must be in a "to-convict" instruction rather than in a charging document, the State's reliance on that case is misplaced. This Court has rejected "the argument that charging documents must mirror pattern to-convict instructions." State v. Porter, 186 Wn.2d 85, 93, 375 P.3d 664 (2016). As this Court explained, "charging documents and jury instructions serve very different purposes." Id. Unlike jury instructions, which inform the jury what the prosecution must prove beyond a reasonable doubt in order to convict, "[c]harging documents serve to put the defendant on notice of the crime against him." Id. (citing Vangerpen, 125 Wn.2d at 787).

In short, nothing in Orn is contrary to the Court of Appeals' decision in this case. Contrary to the State's contention, there is no "confusion" about this Court's precedents that merit review. State's Pet. for Rev. at 3. The only one confused about the meaning of this Court's decisional law is *the State*, not the Court of Appeals. The State's position that the Court of Appeals' decision in this case is in conflict with this Court's precedents is incorrect. Review is not warranted under RAP 13.4(b)(1).

Although not citing RAP 13.4(b)(2), the State contends the unpublished decision in this case conflicts with the Court of Appeals'

unpublished decision in Orn. State's Pet. for Rev. at 9. But Orn did not involve a challenge to the charging document in the Court of Appeals. State v. Orn, No. 78089-1-I, noted at 11 Wn. App. 2d 1022 (2019) (unpublished). There is no conflict. And even if there were a conflict, RAP 13.4(b)(2) only authorizes review "[i]f the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals." (emphasis added). Review is not warranted under RAP 13.4(b)(2).

The prosecution asserts that the review is warranted because the issue presents a significant constitutional question. RAP 13.4(b)(3). But any significant constitutional question was addressed and settled in Vangerpen. Short of overruling Vangerpen,[2] which the State does not ask, the only question is the application of Vangerpen to this case. That is not a question worthy of this Court's review.

In any event, the Court of Appeals got it right. Even under a liberal standard, the missing requirement of premeditated intent cannot "be fairly implied from language within the charging document. Kjorsvik, 117 Wn.2d at 104. In arguing otherwise, the prosecution contends that the language in the charging document alleging that Mr. Canela "did shoot the

[2] To overrule Vangerpen, stare decisis would require this Court to conclude not only that the decision is "incorrect," but that it is "harmful." In re Stranger Creek & Tributaries in Stevens Cty., 77 Wn.2d 649, 653, 466 P.2d 508 (1970).

victim with a handgun" fairly conveyed the requirement of *premeditated* intent to kill. This language does not fairly convey the requirement of premeditation. A person can shoot another person with a handgun with intent to kill and still lack premeditated intent to kill. See State v. Brooks, 97 Wn.2d 873, 876, 651 P.2d 217 (1982) ("[i]ntent and premeditation are not synonymous. They are separate and distinct elements of the crime of murder in the first degree."). The prosecution's contrary argument is illogical and converts all charges of attempted intentional murders by means of a firearm into attempted premeditated intentional murders. The Court of Appeals properly rejected it. Cf. State v. McCarty, 140 Wn.2d 420, 427, 998 P.2d 296 (2000) (rejecting contention that, liberally construed, language that the defendant conspired to deliver a controlled substance fairly conveyed requirement of involvement of a person outside the agreement to deliver drugs); State v. Guzman, 119 Wn. App. 176, 185, 79 P.3d 990 (2003) (language in rape charge alleging that victim "did not in actual words or conduct clearly and freely indicate agreement to have sexual intercourse" did not fairly convey requirement that victim clearly expressed her lack of consent by words or conduct)

E. CONCLUSION

The Court of Appeals properly reversed Mr. Canela's conviction for attempted first degree murder because the charging document was

constitutionally defective. There is no "confusion" for this Court to clarify. The State's petition for review should be denied.

Respectfully submitted August 19, 2021.

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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. 100029-4**, 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:

☒ respondent Frank Jenny II
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☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant Date: August 19, 2021
Washington Appellate Project

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