102530-1

SUPREME COURT

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

IVAN VALENTINOVICH KRIGER, PETITIONER

ANSWER TO PETITION FOR REVIEW

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TABLE OF AUTHORITIES

State Cases

State Statutes

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I. INTRODUCTION

Review is not warranted in this case. The Court of Appeals employed the well-established standard of construction applicable to challenges to the language of a charging document raised for the first time on appeal. This standard requires a reviewing court to presume validity and construe the language present in the charging document liberally in favor of validity.

The petitioner's primary authority is a case that employed strict construction, as the challenge in that case had been preserved below. Neither party requests a change in the law at this time.[1] This Court should decline this petition for review pursuant to RAP 13.4(b)(4).

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[1] Potential changes could include expanding the definition of "charging document," as recently suggested by Justice Yu, *see State v. Pry*, 194 Wn.2d 745, 764-68, 452 P.3d 536 (2019) (Yu, J., dissenting), or analyzing omitted elements under the constitutional harmless error doctrine, rather than treating them as structural error. Neither party preserved a request to change the law below.

II. IDENTITY OF PARTY

Respondent, State of Washington, was the plaintiff in the trial court and the respondent in the Court of Appeals.

III. STATEMENT OF RELIEF SOUGHT

Ivan Valentinovich Kriger has filed a petition for review. The State seeks denial of Mr. Kriger's petition for review of the unpublished opinion issued by the Court of Appeals on October 3, 2023, *State v. Kriger*, No. 38983-9-III, 2023 WL 6442528 (Wash. Ct. App. Oct. 3, 2023) (Op.).[2]

IV. ISSUE PRESENTED FOR REVIEW

When an appellant challenges the language of a charging document for the first time on appeal, the reviewing court presumes the document provided sufficient notice and construes its language liberally, in favor of validity. Does Mr. Kriger

[2] This case is unpublished and cited pursuant to GR 14.1(a) for context only.

present a significant constitutional question which requires review, where the Court of Appeals applied the appropriate presumption and standard of construction, notwithstanding Mr. Kriger's reliance on a case which applied strict construction to the language of a charging document to analyze a challenge preserved in the trial court?

V. STATEMENT OF THE CASE

Mr. Kriger filed a water loss claim with his homeowner's insurance provider, alleging water from frozen water pipes had damaged his home after the pipes burst. Op. at 1. The insurance provider assigned a claims adjuster to investigate; the adjuster discovered Mr. Kriger's water service had been shut off for over three months at the time Mr. Kriger alleged the damage occurred in his water loss claim. Op. at 1.

The State charged Mr. Kriger with attempted first degree theft and presenting a false claim for insurance purposes. Op. at 1. Relevant to the petition, the charging document alleged:

> IVAN V. KRIGER aka EVAAN S. SOLOMON, in the State of Washington, on or about January 03, 2018, did present or cause to be presented, a false or fraudulent claim or any proof in support of such claim, for the payment of a loss under a contract of insurance, and said claim being in excess of $1,500.00.

Op. at 1.

For the first time on appeal, Mr. Kriger challenged the language of the charging document. Op. at 1-2. Mr. Kriger contended the charging document did not give fair notice that Mr. Kriger knew the claim was false or fraudulent. Op. at 1-2; *see also* RCW 49.30.230(1)-(2)(a) ("It is unlawful for any person, knowing it to be such, to: … present, or cause to be presented, a false or fraudulent claim, or any proof in support of

such a claim, for the payment of a loss under a contract of insurance").

The Court of Appeals rejected the challenge. Op. at 2. The court identified two phrases as central to analysis: the verb "present," which conveyed active conduct, and the phrase "false or fraudulent" which implied knowledge of the falsity of the claim. Op. at 2. Addressing the second prong of the applicable test, the court also observed Mr. Kriger did not allege any prejudice from the inartful language, and so affirmed the judgment. Op. at 2.

VI. ARGUMENT

A. THIS COURT SHOULD DENY REVIEW OF MR. KRIGER'S CLAIM.

This Court should deny Mr. Kriger's petition for review, which was brought solely under RAP 13.4(b)(3). Although Mr. Kriger's issue is constitutional in nature, the Court of Appeals, pursuant to well-settled standards applicable to

charging documents challenged for the first time on appeal, properly analyzed and rejected Mr. Kriger's claim of insufficient notice.

1. RAP 13.4(b)(3).

This Court has the discretion to grant review when a case involves a significant question of law under the Constitution of the State of Washington or the United States. RAP 13.4(b)(3). Mr. Kriger relies on this rule of appellate procedure in his petition for review. While challenges to the sufficiency of a charging document are constitutional in nature, the question presented is not significant, for the reasons explained below.

2. Challenges to the sufficiency of a charging document.

In Washington, a charging document must imply or contain all statutory and nonstatutory essential elements of a crime to satisfy the state and federal constitutional requirements of notice. *Pry*, 194 Wn.2d at 751.

An appellate court reviews a purportedly deficient charging document de novo, but the method of construction the court applies is modified depending on when the challenge is made. *State v. Goss*, 186 Wn.2d 372, 376, 378 P.3d 154 (2016). This challenge may be raised for the first time on appeal, but this Court has established "a presumption in favor of the validity of charging documents when the challenge is made after conclusion of the trial." *State v. Canela*, 199 Wn.2d 321, 329, 505 P.3d 1166 (2022).

Therefore, "when a deficiency is raised for the first time on appeal, this [C]ourt should examine the document to determine if there is any fair construction by which the elements are all contained in the document." *State v. Hopper*, 118 Wn.2d 151, 155–56, 822 P.2d 775 (1992). This is a two-step inquiry: "(1) do the necessary facts appear in any form, or by fair construction can they be found, in the charging document, and if

so, (2) can the defendant nevertheless show [they were] nonetheless actually prejudiced by the inartful language, which caused a lack of notice?" *State v. Kjorsvik*, 117 Wn.2d 93, 105-06, 812 P.2d 86 (1991). This differs from the analysis applicable when a challenge is preserved at trial; a court will construe the language of the charging document strictly. *State v. Tinker*, 155 Wn.2d 219, 221, 118 P.3d 885 (2005)

"Liberal construction" is cross-referenced with "liberal interpretation" in Black's Law Dictionary. *See* CONSTRUCTION, BLACK'S LAW DICTIONARY 391-92 (11th ed. 2019). "Liberal interpretation" means "a broad interpretation of a text in light of the situation presented and possibly beyond the language's permissible meanings, usu. with the object of effectuating the spirit and broad purpose of the text or producing the result that the interpreter thinks desirable." INTERPRETATION, BLACK'S LAW DICTIONARY 978-80 (11th ed. 2019)

Pursuant to the liberal standard of construction, a court has "considerable leeway to imply the necessary allegations from the language of the charging document." *Kjorsvik*, 117 Wn.2d at 104. Furthermore, loosely or inartfully drawn charging documents satisfy the liberal construction level of scrutiny. *Hopper*, 118 Wn.2d at 155. The purpose of the liberal standard of construction is defeat the practice of "sandbagging," which is a potential practice wherein a person recognizes a defect in a charging document but foregoes an objection at trial to chance an acquittal, when the usual result would require only an amendment of a pleading, rather than reversal and remand for a new trial. *Kjorsvik*, 117 Wn.2d at 103.

3. Review should not be granted.

Applying the liberal standard of construction, the common and dictionary definitions of the verb "present" denote only active conduct. Op. at 3; Merriam Webster Online Dictionary,

https://www.merriam-webster.com/dictionary/present (last accessed Mar. 29, 2023). The adjective "fraudulent" implies knowledge of the falsity of the presented object, as Mr. Kriger conceded below; construed liberally, "false" is simply a synonym of fraudulent. Op. at 3. To the extent Mr. Kriger argues the simple presence of the conjunction "or" creates alternative means to commit the crime of presenting a false insurance claim, that approach to statutory construction has been rejected by this Court. *State v. Barboza-Cortes*, 194 Wn.2d 639, 643, 451 P.3d 707 (2019) (citing *State v. Sandholm*, 184 Wn.2d 732, 734, 364 P.3d 87 (2015)); *cf. State v. Mau*, 178 Wn.2d 308, 317, 308 P.3d 629 (2013) (González, J., dissenting) (recognizing in dicta there are only two ways to commit the crime of presenting a false insurance claim: presenting the false or fraudulent claim itself, or preparing false or fraudulent documentation intended to be used to support a false claim). Construed liberally and in favor of

validity, this language is sufficient.

The State primarily responds to contest Mr. Kriger's heavy reliance on *State v. Johnson*, 119 Wn.2d 143, 829 P.2d 1079 (1992); Pet. at 6-9. Mr. Kriger, citing *Johnson*, claims "alleging a volitional act is insufficient to imply a knowing act." Pet. at 8 (citing *Johnson*, 119 Wn.2d at 147-50).

The reasoning in *Johnson* is not applicable here, because *Johnson* analyzed the language in the charging document at issue subsequent to a preserved pre-trial challenge. *Johnson*, 119 Wn.2d at 145, 149. Because the challenge was preserved, this Court strictly construed the language at issue, rather than presuming validity and interpreting the language in favor of validity. *Id*. at 149 ("While it is true informations challenged for the first time after verdict are reviewed for validity under a liberal standard, the same is not true for informations challenged, as these were, before trial"). In rejecting the State's argument

that the term "unlawfully" could satisfy "knowledge" during review of a preserved challenge, the *Johnson* Court recognized the standard of review had practical consequences:

> We do not, therefore, hold "unlawfully," standing alone, will never be enough to allege knowledge. In fact, when liberally construing an information challenged for the first time on appeal, we have held "unlawfully" sufficient to allege intent, unless there is prejudice to the defendant.

Id. at 148-49 (citing *Kjorsvik*, 117 Wn.2d at 106, and *Hopper*, 118 Wn.2d at 155-56).

When applying liberal construction, alleging a volitional act can be, depending on the language, sufficient to imply knowledge. This Court has observed that because the common understanding of the word assault connotes both "knowing conduct" and "a willful act"—as opposed to an "unknowing" or "accidental" act—an information which alleged "assault" was enough to provide notice of the knowledge element of the crime of assault, pursuant to a liberal interpretation. *Hopper*, 118

Wn.2d at 158.[3] Under the same reasoning, this Court determined the word "assault" also provides fair notice of the element requiring knowledge of the status of a victim, for a third degree assault prosecution. *State v. Tunney*, 129 Wn.2d 336, 341, 917 P.2d 95 (1996).

As in *Johnson*, a different result may have followed had Mr. Kriger challenged the language of the charging document prior to his direct appeal. As is common when a challenge to the sufficiency of a charging document is raised for the first time on appeal, Mr. Kriger did not allege prejudice from the inartful language. Op. at 2. The charging document provides adequate notice of the knowledge element of this crime, when analyzed pursuant to the liberal standard of construction. Op. at 2. This

[3] *See also State v. Sutherland*, 104 Wn. App. 122, 132, 15 P.3d 1051 (2001) (because the word "accident" is commonly understood as an unintended or unforeseen occurrence, the word "accident" could not supply the omitted knowledge element of felony hit and run).

Court should decline to grant review under the circumstances present here.

VII. CONCLUSION

When construed liberally, the charging document in this case fairly implies the essential element of knowledge. Mr. Kriger's reliance on a strict construction case is misplaced. The State respectfully requests this Court decline review.

This document contains 1,977 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Dated this 15 day of November, 2023.

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IN THE SUPREME COURT OF
THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. IVAN V. KRIGER, Appellant,	NO. 102530-1 CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on November 15, 2023, I e-mailed a copy of the Answer to Petition for Review in this matter, pursuant to the parties' agreement, to:

Andrea Burkhart
Andrea@2arrows.net

11/15/2023 **(Date)** Spokane, WA **(Place)** **(Signature)**

SPOKANE COUNTY PROSECUTOR

November 15, 2023 - 2:23 PM

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