NO. 97116-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

Pamela Woodall,
Respondent.

ANSWER TO PETITION FOR REVIEW

LISE ELLNER
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RULES, STATUTES, AND OTHERS

A. IDENTITY OF RESPONDING PARTY

Respondent Pamela Woodall through her attorney, Lise Ellner, asks this court to deny review of the Court of Appeals decision designated in Part B of this answer.

B. COURT OF APPEALS DECISION

Pamela Woodall requests this Court deny review of the Court of Appeals opinion in *State v. Woodall*, COA No. 50953-9-II, issued on April 2, 2019.

C. RESPONSE TO STATE'S ISSUES IN ITS PETITION FOR REVIEW.

1. This court should deny review because the state's petition does not meet the criteria for discretionary review under RAP 13.4(b). Specifically, the state's claim that *State v. Woodall* conflicts with *State v. Porter*, 186 Wn.2d 85, 375 P.3d 664 (2016), is incorrect, and the state does not present a shred of argument or discussion on this purported conflict.

2. This Court should deny review because the state's argument that S*tate v. Kjorsvik*, 117 Wn.2d 93, 105-06,

812 P.2d 86 (1991) is incorrect lacks merit and does not fit the criteria for review under RAP 13.4(b)

D. STATEMENT OF THE CASE

In the interests of judicial economy, respondent adopts the statement of the case set forth in the Court of Appeals opinion.

E. ARGUMENT WHY REVIEW SHOULD NOT BE ACCEPTED

In addition to the following argument, Pamela Woodall adopts the arguments set forth in his opening brief.

1. This Court Should Deny Review

This court should deny review because the state's petition does not meet the criteria for discretionary review under RAP 13.4(b).

RAP 13.4(b) provides in relevant part as follows:

> (b) Considerations Governing Acceptance of Review. A petition for review will be accepted by the Supreme Court only:
>
> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
>
> (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or
>
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or

The state's petition does not meet any of the above criteria.

Specifically, the state's claim that *State v. Woodall* conflicts with *Porter*, is incorrect. *Porter* acknowledged that the definition of "possession" in RCW 9A.56.140(1) almost identical for possession of a stolen vehicle and possession of stolen mail statutes. *Porter*, 186 Wn.2d at 87-88 (*citing and quoting*, RCW 9A.56.068; 9A.56.380). RCW 9A.56.140(1) defines "possessing stolen property" as to, "knowingly to receive, retain, possess, conceal, or dispose of stolen property knowing that it has been stolen and to withhold or appropriate the same to the use of any person other than the true owner or person entitled thereto." This definition is almost identical to RCW 9A.56.380(2) - charged in Woodall's case. CP 1-6.

In *Porter* the prosecutor charged the defendant with "unlawfully and feloniously *knowingly* possess[ing] a stolen motor vehicle" but it did *not* state that possession includes "'to 'withhold or appropriate [stolen property] to the use of any person other than the true owner or person entitled thereto.'" *Porter*, 186 Wn.2d at 88 (emphasis added) (alternation in original) (quoting RCW

9A.56.140(1)).

Porter held that the charging document was constitutionally sufficient because to "withhold or appropriate" merely "define[d] and limit[ed] the scope of the essential elements of the crime of unlawful possession of a stolen motor vehicle." *Id*. at 91. The court emphasized that the charging document "sufficiently articulated the essential elements of the crime for which Porter was charged, making further elaboration of what it mean[t] to unlawfully possess stolen property unnecessary." *Id*. at 92**.** ***Porter*** **clarified that "the knowledge element of possession of stolen property is an essential element." (Emphasis added).** *Porter*, 186 Wn.2d at 93.

The state's petition falsely claims that the Court of Appeals decision is in conflict with *Porter*, when in fact, the holding in *Porter* is not a new concept and precisely on point in Woodall's case, requiring reversal for the state's failure to include the essential element of "knowledge" in the charging document. *See, State v. Moavenzadeh,* 135 Wn.2d 359, 363, 956 P.2d 1097 (1998) (This Court reversed a defendant's conviction when an information charging three counts of first degree possession of stolen property

"contain[ed] no language which c[ould] fairly be read to allege that [the defendant] knew the property was stolen.").

Here, it is undisputed, that the state failed to allege in the charging document that Woodall "knowingly" possessed stolen mail. CP 1-6. The Court of Appeals in *Woodall*, correctly held that under *Porter* and *Moavenzadeh,*, the language " "knowingly" is an essential element of the charge of possession in RCW 9A.56.380(1), the state must allege in the charging document. The state's failure to include this essential element correctly required reversal of the conviction. *Woodall,* opinion at pp. 7-8.

Rather than accept responsibility for making a mistake in the charging document in Woodall's case, the state argues that cases upholding the constitutionality of providing a defendant with fair novice should be abandoned. (State's Petition for Review at 3-20). Specifically, the state attacks *Kjorsvik* on grounds that defense counsel (in general) use the *Kjorsvik* opinion for "sandbagging". (State's Petition for Review at 20).

This is an offensive claim when considering that the right of a defendant to be informed of the charges against her derives from the constitution, and this Court has repeatedly provided guidance

on this issue. U.S. Const. Amend. VI; Wash. Const. art. I, § 22; *Porter*, 186 Wn.2d at 89; *State v. Johnson*, 180 Wn.2d 295, 300, 325 P.3d 135 (2014); *State v. Zillyette*, 178 Wn.2d 153, 158, 307 P.3d 712 (2013); *State v. Ward*, 148 Wn.2d 803, 811, 64 P.3d 640 (2003); *State v. Vangerpen*, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995); *Kjorsvik*, 117 Wn.2d at 105-06. Further, CrR 2.1(a)(1) mandates that a charging document" shall be a plain, concise and definite written statement of the essential facts constituting the offense charged." Id.

There is no conceivable construction under our state constitution or any of this Court's decisions to support the state's claim that the absence of the essential element "knowledge" provided Woodall with her constitutional right to be fairly apprised of the charges against her. U.S. Const. Amend. VI; art. I, § 22.

In sum, the underbelly of the state's argument must fail; that this Court should craft an opinion to immunize the state's failure to do its job: here, to provide constitutionally adequate notice in a charging document. P4R___.

In a perfect world, where attorneys are not over worked, and all are exceptionally well trained, it would certainly be beneficial if

the prosecution understood how to craft a constitutionally adequate charging document and defense counsel was able to hold the state to this responsibility, but on occasion the state fails, and defense counsel does not catch the failure until appellate review.

The trial attorneys' failures do not however undermine the defendants' constitutional right to fair notice, and it is precisely appellate counsels' obligation to point out errors to the reviewing courts so the appellate courts may correct the errors to uphold defendants' constitutional rights. Art. I, § 22 (amendment 10) grants not a mere privilege but a "right to appeal in all cases". *State v. Sweet,* 90 Wn.2d 282, 286, 581 P.2d 579 (1978) (*quoting State v. Schoel*, 54 Wn.2d 388, 392, 341 P.2d 481 (1959)).

"Appointed counsel on appeal has a duty to raise and conscientiously advocate nonfrivolous arguments on behalf of his client. "*State v. Woods,* 34 Wn. App. 750, 762-63, 665 P.2d 895 (1983) (*quoting, Anders v. California*, 386 U.S. 738, 741-42, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1966)). *See also Gideon v. Wainwright,* 372 U.S. 335, 83 S.Ct. 792, 796, 9 L.Ed.2d 799 (1963) (quoting Sixth Amendment: 'the accused shall enjoy the right * * * to

have the Assistance of Counsel for his defence'1 was made obligatory on the States by the Fourteenth Amendment).

Here the Court of Appeals correctly reversed Woodall's conviction where the state failed to provide Woodall with constitutionally adequate notice of the charges against her, and appellate counsel identified this error on appeal.

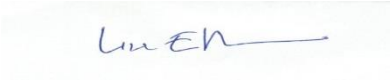
F. CONCLUSION

For the reasons stated herein and in the opening brief, this Court should deny review.

DATED THIS 29th day of April 2019.

Respectfully submitted,

LAW OFFICES OF LISE ELLNER



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LISE ELLNER, WSBA 20955
Attorney for Respondent

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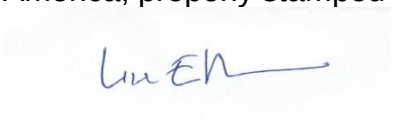
I, Lise Ellner, a person over the age of 18 years of age, served the Kitsap County Prosecutor's Office kcpa@co.kitsap.wa.us and Pamela Woodall, DOC#791137, Washington Corrections Center for Women, 9601 Bujacich Rd. NW, Gig Harbor, WA 98332 on April 29, 2019. Service was made electronically to the prosecutor and to Pamela Woodall by depositing in the mails of the United States of America, properly stamped and addressed.



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