102679-0

SUPREME COURT

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

CLAUDE LEROY MERRITT, PETITIONER

AMENDED ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

The state and federal constitutions establish an accused's right to notice of all charged crimes, to afford an opportunity to prepare a defense. Specifically, the essential elements of the crime charged must be expressed in the charging document. The essential elements of felony murder are that a person caused the death of another during the commission or attempted commission of a predicate felony. The elements of the predicate felony are not themselves elements of felony murder; the predicate felony substitutes as the mens rea for felony murder.

Merritt asks this Court to overrule its prior cases, hold the elements of a predicate felony must also be alleged in an information though they are not elements of the charged crime, and reverse his conviction without any showing of prejudice. Merritt challenged the charging language for other crimes below, suggesting the current challenge is sandbagging. This Court

should decline to grant this petition because Merritt does not demonstrate those decisions are incorrect and harmful or that the legal underpinnings of those decisions have changed.

If this Court grants this petition, it should also review related issues raised by the State. Errors of this magnitude should be reviewed for constitutional harmless error rather than be treated as structural, or review of a charging document should include review of information contained in an accompanying affidavit of probable cause. The underpinnings of the rule have eroded in this respect, considering modern legal practice and other constitutional protections. Principles of finality and judicial economy do not favor automatic reversal for errors which did not affect an accused's ability to prepare a defense.

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

Claude Merritt filed a petition for review of the unpublished opinion affirming his convictions in part: *State v. Merritt*, No. 38763-1-III, 2023 WL 8235170 (Wash. Ct. App. Nov. 28, 2023) (Op.). The State seeks denial of this petition. If this Court grants Merritt's petition, it should also review additional related issues raised by the State.

IV. ISSUES PRESENTED

1. Are the elements of the predicate crime essential elements of felony murder, such that they must be included in the charging document to provide constitutionally sufficient notice adequate to enable an accused to prepare a defense, and should this Court overturn its precedent to the contrary?
2. Should a reviewing court be permitted to consider the information contained in an affidavit of probable cause filed concurrently with an information to determine if an accused

received constitutionally required notice in order to prepare a defense?

3. Do defects in charging documents rise to the level of structural error, where other jurisdictions review the entire record, and require an affirmative showing of prejudice before reversing a conviction, because other procedural safeguards which did not exist at the time the rule was created may provide constitutionally-required notice?

V. STATEMENT OF THE CASE.

Merritt petitions this Court for review of his convictions, primarily his conviction for first degree felony murder, for the kidnapping and murder of Jason Fox. CP 945, 958.

Original and amended information documents.

Both the original and amended information charged Merritt with first degree felony murder:

> On or between the 15th day of September, 2020 and the 4th day of October, 2020, in the County of Pend Oreille, State of Washington, the above-named

> Defendant did commit or attempt to commit the crime of either kidnapping in the first or second degree, and in the course of or in furtherance of such crime or in immediate flight therefrom, the Defendant, or another participant, caused the death of a person other than one of the participants, to-wit Jason Fox; contrary to Revised Code of Washington 9A.32.030(l)(c), and/or was an accomplice to said crime pursuant to RCW 9A.08.020.

CP 18, 598.

Both informations charged Merritt with second degree murder under the felony murder prong predicated on assault, as well as: first degree manslaughter, first degree kidnapping, unauthorized removal or concealment of a body, tampering with physical evidence, unlawful disposal of remains, and failure to notify the coroner of the location of a body. CP 19-25, 600-06.

Other procedure.

Defense counsel reviewed each information with Merritt in court, lodging no objection. CP 56, 589. A statement of probable cause accompanied the original charging document,

was filed the same day as the information and formed the basis for the court's probable cause determination. CP 34-37. The amended information was filed because the original charges included co-defendants whose cases were severed. CP 1-32; 567, 845.

Merritt's omnibus application requested all discoverable information, and he did not allege any subsequent discovery violation. CP 42-46, 73-76, 153. Merritt requested a bill of particulars regarding only the charge of tampering with evidence, asking for clarification of which evidence was allegedly tampered with. CP 92-93.

After the State rested its case-in-chief, Merritt successfully challenged the charging language for Count V of the amended information: removal or concealment of a body, alleging the information omitted the mens rea element. CP 845; RP 2042-47. Merritt made no similar motion regarding the kidnapping or

felony murder charges, instead simply moving to dismiss the count of felony murder based on insufficient evidence. RP 2049-50, 2056-58; *see also* CP 845; RP 2042-47.

The jury found Merritt guilty of all counts other than unlawful disposal of remains. CP 768-74.

Appeal.

On appeal, Merritt raised double jeopardy and common law merger challenges to his convictions for second degree felony murder, first degree kidnapping, and manslaughter, which the Court of Appeals ordered vacated after the State conceded. Op. 9-10. For the first time on appeal, in a supplemental brief, Merritt challenged the charging language for felony murder, preserving his current requested change in the law. App. Supp. Br. no. 38763-1-III at 55. Merritt did not allege any prejudice or lack of notice that rendered him unable to adequately prepare a defense. *Id*. at 55-65. Both parties agreed this Court's rule

controlled; the State preserved its current request to change the law. Amended Resp. Br. no. 38763-1-III at 47-63.[1] The Court of Appeals applied this Court's rule. Op. at 22-23.

VI. ARGUMENT

A. MERRITT DOES NOT DEMONSTRATE THIS COURT'S PRIOR DECISIONS MUST BE REJECTED.

Merritt's precise claim is that the legal underpinnings supporting this Court's prior reasoning that the elements of a predicate crime are not themselves essential elements of felony murder have changed. Merritt does not make that showing, nor does he show that the prior decisions are both incorrect and harmful.

Merritt received adequate notice of all elements of predicate crimes for his conviction for first degree felony

[1] The appellate court appeared to misconstrue the State's argument. Op. at 22.

murder[2] under his proposed rule change because the State charged first degree kidnapping and second degree kidnapping is both an inferior degree and lesser included offense of that charge.

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 state or federal constitutions. RAP 13.4(b)(3). Stare decisis requires this Court to follow its precedent unless it determines an earlier decision is (1) both incorrect and harmful, or (2) the rare occasion where the legal underpinnings of prior decisions have changed or disappeared. *State v. Otton*, 185 Wn.2d 673, 678, 374 P.3d 1108 (2016).

While challenges to the sufficiency of a charging document are constitutional in nature, the question presented is

[2] Merritt's other homicide convictions must be vacated pursuant to double jeopardy, which renders his challenge to second degree felony murder moot.

not significant as Merritt does not clearly demonstrate stare decisis should be set aside.

2. No error occurred.

Merritt's sole valid homicide conviction is for first degree felony murder. The State charged first degree felony murder predicated on first or second degree kidnapping. First degree kidnapping was charged in the information; the elements of that predicate crime are present. The State did not charge second degree kidnapping.

However, second degree kidnapping is an inferior degree offense of first degree kidnapping. RCW 10.61.003. Second degree kidnapping is also a lesser included offense of first degree kidnapping; any abduction is kidnapping; first degree kidnapping is an aggravated abduction which requires the State to prove the abduction occurred for a specific reason. *Compare* RCW 9A.40.020 *with* RCW 9A.04.030; RCW 10.61.006. No other

degrees of the crime exist. Because Merritt did not raise this challenge below, the liberal standard of construction Washington uses applies. *State v. Kjorsvik*, 117 Wn.2d 93, 104, 812 P.2d 86 (1991).

Because a jury may always return a verdict on a lesser degree offense, and the elements of first degree kidnapping were present in the information, including the abduction element, both crimes predicate to Merritt's conviction for first degree felony murder were adequately charged in the information. No notice defect occurred even under Merritt's requested change in the law.

3. The legal underpinnings of this Court's prior decisions remain sound.

This Court has long held that while a predicate offense is an element of a felony murder charge, an information need not include the elements of the predicate offense itself. *State v. Kosewicz*, 174 Wn.2d 683, 691-92, 278 P.3d 184 (2012); *see also State v. Anderson*, 10 Wn.2d 167, 180, 116 P.2d 346 (1941).

This is consistent with other jurisdictions. *See State v. Reese*, 687 S.W.2d 635, 638 (Mo. Ct. App. 1985); *Glowacki v. Sacks*, 176 N.E.2d 844 (Ohio App. 1960); *Smith v. State*, 540 S.W.2d 693 (Tex.Crim.App. 1976).

This is because an accused is not charged with the predicate crime, so the predicate crime's elements are not essential elements. *Kosewicz*, 174 Wn.2d at 691-92. Instead, the predicate offense substitutes for the mens rea the State is otherwise required to prove. *Id*. at 692.

Substitution of another offense for a mental state is not uncommon. The mens rea for burglary is the intent to commit a crime against person or property inside a building. *State v. Bergeron*, 105 Wn.2d 1, 4, 711 P.2d 1000 (1985); *State v. Moreno*, 198 Wn.2d 737, 745-46, 499 P.3d 198 (2021). The specific crime need not be included in the information or the jury instructions. *Bergeron*, 105 Wn.2d at 16.

Inchoate offenses are analogous. The essential elements of any conspiracy offense are an agreement to commit a predicate crime with one or more persons and the taking of a "substantial step" toward the completion of that agreement. *State v. Moavenzadeh*, 135 Wn.2d 359, 364, 956 P.2d 1097 (1998). Nine members of this Court recently held that an information charging attempted first degree murder need not contain the "premeditation" element—an essential element of first degree murder—because the only essential elements of attempted first degree murder are intent to commit first degree murder and a substantial step towards the crime. *State v. Canela*, 199 Wn.2d 321, 335, 505 P.3d 1166 (2022).

Merritt's main argument appears to be that because the State must prove a predicate felony occurred to sustain a conviction for felony murder, the predicate's elements must be alleged in the information. Pet. at 14-15. This Court rejected a

similar argument in *Canela*, observing that even if premeditation must be proven at a trial for attempted first degree murder, that argument "conflates the standard of proof needed at trial with the requirements of charging documents. An information need only inform the defendant 'of the nature and cause of the accusation'; the State does not need to prove the accusation at the charging stage." *Id*. The legal underpinnings have not changed; they were recently reinforced by this Court in *Canela*.

Felony murder may be predicated on either a completed or attempted felony. RCW 9A.43.030(1)(c); RCW 9A.32.050(1)(b). A jury can return a verdict on an inferior degree or lesser included offense regardless of whether it is charged so long as some evidence supports the theory. RCW 10.61.003-.006; *State v. Coryell*, 197 Wn.2d 397, 415, 483 P.3d 98 (2021). Requiring an information alleging felony murder to

include additional, non-essential elements would require an even greater number of permutations to be logically consistent.

Here, had the jury returned a verdict on second degree kidnapping under an inferior degree instruction request, Merritt's conviction would be valid, and he would have been provided notice of the *charged* offense. However, as this Court observed, an inferior degree offense is distinct from a lesser included offense, and the elements need not be the same when a request is made for an inferior degree offense. *See Coryell*, 197 Wn.2d 397. Merritt's requested rule change could have the unintentional consequence of requiring the State to charge every possible permutation of attempt or inferior degree or lesser included offense in order to remain logically consistent.

4. This Court's prior decisions are not harmful.

Merritt fails to demonstrate this Court's prior decisions are harmful. As demonstrated by the procedural history of this case,

a bill of particulars, limitations of evidence, and even mid-trial dismissal of a charge are potential remedies when an information is defective. CrR 2.1(c); CrR 8.3(b); *State v. Devine*, 84 Wn.2d 467, 471, 527 P.2d 72 (1974).

Merritt has never alleged prejudice from the charging language for felony murder. Merritt did not challenge the felony murder charging language at trial, though he requested a bill of particulars for another charge. He successfully moved for the dismissal of a third charge at the conclusion of the State's case-in-chief, predicated on deficient notice. This strongly suggests Merritt's current challenge is sandbagging, not a genuine notice defect rendering him unable to adequately prepare a defense.

B. IF THE BARE INDICTMENT OMITS ESSENTIAL ELEMENTS OF A CRIME, THE REMEDY OF AUTOMATIC REVERSAL IS NO LONGER LEGALLY SUPPORTED, AND BOTH INCORRECT AND HARMFUL.

The legal underpinnings of the ancient rule requiring automatic reversal of omitted elements in a bare information, without a chance for the State to demonstrate harmless error, including review of affidavits of probable cause, have dramatically changed. The rule is also both incorrect and harmful. This Court should revisit the *Kjorsvik* test pursuant to RAP 13.4(b)(3) and RAP 13.4(d).

Substantial modern procedural protections now exist which did not when this ancient rule was adopted. Effectively treating this type of error as structural is incorrect because it conflicts with the clear definition of structural error and the purpose of an information. The rule is harmful because it leads to unnecessary reversals where there is absolutely no showing or

allegation of prejudice, and it fails to account for the interests of judicial economy, finality, and prevention of sandbagging.

Two possible changes could correct the law. First, charging document defects could be subject to constitutional harmless error analysis. Multiple other jurisdictions use this approach, including jurisdictions which Merritt now relies on. Second, as recently suggested by Justice Yu, reviewing courts could be permitted to consider affidavits of probable cause submitted with an indictment as one "charging document" in determining whether an accused received an adequate description of the offense. *State v. Pry*, 194 Wn.2d 745, 452 P.3d 536 (2019) (Yu, J., dissenting). Justice Yu notes the phrase "charging document" has not been subject to prior judicial construction, and prior Supreme Court charging document cases have already explicitly considered incorporated police reports. *Id.* at 764-65 (citing *State v. Leach*, 113 Wn.2d 679, 684, 782

P.2d 552 (1989)). Under Justice Yu's reasoning, adopting this approach would not require this Court to overrule any precedent. This makes sense, because the current approach requires any reviewing court to turn a blind eye to the entire record created after an information is filed.

1. Legal underpinnings.

The purpose of the charging document has ancient common law roots:

> First, to furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform form [sic] the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated; not conclusions of law alone. A crime is made up of acts and intent; and these must be set forth in the indictment with reasonable particularity of time, place, and circumstances.

United States v. Hess, 124 U.S. 483, 487-88, 8 S.Ct. 571, 31 L.Ed. 516 (1888). The purpose of the rule, adopted prior to

Chapman, was "*to secure the basic institutional purpose of the grand jury*, by ensuring that a defendant is not convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury that indicted him." *United States v. Keith*, 605 F.2d 462, 464 (9th Cir. 1979)(emphasis added). Washington does not provide a constitutional right to a grand jury proceeding.

These historic policies undergirding charging documents support change. Although one of the purposes of the information is to assist the trial court's evidentiary analysis, Washington trial courts are *not* limited to the plain language of the information when engaging in a preliminary determination of the facts alleged, and instead consider the accompanying affidavits of probable cause. CrR 2.1, 2.2(a); CrR 3.2.1(b); *see also People v. Jones*, 51 Cal.3d 294, 792 P.2d 643, 656-57 (1990) (review of evidence presented at the preliminary hearing and pretrial

discovery procedures can inform a claim of defective notice in an information). This fact is not lost on other jurisdictions:

> modern procedures in criminal cases have eroded if not eliminated … concerns about fair notice in the indictment process ... It is clear that in modern criminal prosecutions initiated by informations, the transcript of the preliminary hearing, not the accusatory pleading, affords defendant practical notice of the criminal acts against which he must defend.

People v. Gordon, 165 Cal.App.3d 839, 868-869, 212 Cal.Rptr. 174 (1985) (Sims, J., concurring).

In direct response to Merritt's claim that it is unfair to place any burden of reading the information on an accused, one of the historical purposes of a sufficient charging document was to ascertain whether double jeopardy protections applied, so that an accused could plead double jeopardy as an affirmative bar to the charge. This requires more than just a bare statement of the elements; the information necessary for an accused to determine if a double jeopardy protection is relevant is best provided by the

affidavit of probable cause, not the plain language of the criminal information. The constitution requires notice; the affidavit of probable cause, coupled with the information, provide the best notice.

Subsequent to adoption of the ancient common law rule, criminal legal practice modernized substantially. Trial by ambush no longer exists. Robust, reciprocal rules of discovery now exist. *See* CrR 4.7. The federal constitution imposes mandatory burdens on the State to protect an accused's constitutional rights. *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). An accused who cannot afford an attorney is provided a constitutionally effective one at public expense. *Gideon v. Wainwright*, 372 U.S. 335, 345, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Outside the law, technology has advanced to the point that statutes are

posted on public websites, which may even be accessed in real time, in court, on a cellular phone.

The test Washington uses to assess the sufficiency of a charging document was created long before the Supreme Court adopted the constitutional harmless error analysis. *Compare e.g.*, *Rosen v. United States*, 161 U.S. 29, 33, 16 S.Ct. 434, 40 L.Ed. 606 (1896), *with Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) (adopting constitutional harmless error). Our current test was developed precisely because the Court no longer thought it appropriate to reverse convictions "because of minor and technical deficiencies which did not prejudice the accused." *Smith v. United States*, 360 U.S. 1, 9, 79 S.Ct. 991, 997, 3 L.Ed.2d 1041 (1959). If the Supreme Court had the benefit of *Chapman* earlier, it likely would have utilized constitutional harmless error, precisely to avoid

reversing convictions for errors which do not deprive an accused of notice.

2. Constitutional error analysis.

The above evolution of the law demonstrates automatic reversal due to the lack of one word in one of the many documents filed with a court and shared with any accused at a preliminary hearing is no longer an appropriate rule or remedy. "Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it." *Rose v. Clark*, 478 U.S. 570, 577, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986).

Accordingly, almost all alleged errors, even constitutional errors, are subject to harmless error analysis. *Chapman*, 386 U.S. 18; *and see*, *e.g.*, *Milton v. Wainwright*, 407 U.S. 371, 372-73, 92 S.Ct. 2174, 33 L.Ed.2d 1 (1972) (post-indictment/pretrial confession); *Chambers v. Maroney*, 399 U.S. 42, 52-53, 90 S.Ct.

1975, 26 L.Ed.2d 416 (1970) (search and seizure); *Price v. Georgia*, 398 U.S. 323, 331, 90 S.Ct. 1757, 26 L.Ed.2d 300 (1970) (double jeopardy); *Harrington v. California*, 395 U.S. 250, 253-54, 89 S.Ct. 1726, 23 L.Ed.2d 284 (1969) (right to confrontation); *Fontaine v. California*, 390 U.S. 593, 595-96, 88 S.Ct. 1229, 20 L.Ed.2d 154 (1968) (comment on silence); *United States v. Wade*, 388 U.S. 218, 242, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967) (due process). The "errors to which *Chapman* does not apply ... are the exception and not the rule." *Rose*, 478 U.S. at 578.

"A challenge to the sufficiency of an indictment is not a game in which the lawyer with the sharpest eye or the cleverest argument can gain reversal for his client." *United States v. Coleman*, 656 F.2d 509, 510 (9th Cir. 1981) (internal quotations omitted).

> The ancient forms and technicalities of the common law, which subserved no purpose except to

> embarrass and impede the administration of justice, have been wisely discarded, and we now have a system of criminal pleading which neither disregards any of the substantial rights of the accused nor permits him to shield himself from just punishment by requiring the insertion in the indictment or information of allegations in nowise necessary to inform him of the 'nature and cause of the accusation against him, but which under the old system were necessary to be alleged and proved, or an acquittal would result, though the fact of guilt were otherwise manifest.

State v. Fillpot, 51 Wash. 223, 227, 98 P. 659 (1908) (internal citations omitted).

Structural error is a special category of error that "affect[s] the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Arizona v. Fulminante*, 499 U.S. 279, 310, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991). Where there is structural error "'a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair.'" *Id*. (quoting *Rose*, 478 U.S. at 577-78).

"Structural errors are rare and encompass only the most egregious constitutional violations." *Matter of Lewis*, 200 Wn.2d 848, 857-58, 523 P.3d 760 (2023). Structural errors are presumed prejudicial because "it is often difficult to assess the effect of the error." *State v. Shearer*, 181 Wn.2d 564, 572-73, 334 P.3d 1078 (2014) (quoting *United States v. Marcus*, 560 U.S. 258, 263, 130 S.Ct. 2159, 176 L.Ed.2d 1012 (2010)). Creating a category of structural error "makes sense because … structural defects 'defy analysis by harmless-error standards.'" *In re Stockwell*, 179 Wn.2d 588, 608, 316 P.3d 1007 (2014) (Gordon-McCloud, J., concurring) (quoting *Fulminante*, 499 U.S. at 309 (Rehnquist, C.J., concurring)).

Put differently, "[a] structural error requires per se reversal because it cannot be fairly determined how a trial would have been resolved if the grave error had not occurred." *People v. Bush*, 213 Cal. Rptr. 3d 593, 608, 7 Cal. App. 5th 457 (2017).

As an example, "[i]t is especially hard to make a showing of harm resulting from public trial rights violations because the consequences are difficult to prove in any particular case." *Shearer*, 181 Wn.2d at 572-73.

Defects in charging language do not satisfy this high standard. Other jurisdictions observe that a defective information is capable of judicial review: "constitutional right to notice of the charge brought against him can be satisfied by the availability of other means of obtaining notice of the factual or legal basis of the charge against him, *such as a bill of particulars, a preliminary examination and criminal pre-trial discovery*." *Dowell v. C.M. Lensing*, 805 F. Supp. 1335, 1343 (M.D. La. 1992) (emphasis added)

Merritt relies on Illinois law. While Illinois requires the elements of the predicate offenses to be alleged in a felony murder charging document, Illinois does not automatically

reverse convictions. Instead, Illinois permits a reviewing court to assess the entire record to see if the appellant can affirmatively demonstrate prejudice before reversing a conviction. *People v. Carey*, 104 N.E.3d 1150, 1156 (Ill. 2018). During review,

> the appellate court should consider whether the defect in the information or indictment prejudiced the defendant in preparing his defense … the question is whether, in light of the facts of record, the indictment was so imprecise as to prejudice defendant's ability to prepare a defense…If the reviewing court cannot say that the charging instrument error inhibited the defendant in the preparation of his or her defense, then the court cannot conclude that the defendant suffered any prejudice.

Id. (internal quotations omitted). Merritt wishes to have the benefit of a stricter rule while avoiding robust review from this Court.

Illinois is not alone. When reconciling the three types of challenges to an information, Kansas observed a violation of the

constitutional right results in review for constitutional harmless error:

> certainly, if the defendant's challenge grows out of the Fifth and Fourteenth or the Sixth Amendments, the court will be guided by the test for harmlessness applicable to federal constitutional error. *See Chapman*[, 386 U.S. at 22-24].

State v. Dunn, 304 Kan. 773, 817, 375 P.3d 332 (2016).

When reviewing a California state conviction, the Ninth Circuit distinguished between a curable lack of notice in an information versus a lack of notice which arose because "of a pattern of government conduct" which "affirmatively misled the defendant" by ambushing him *after* the close of evidence at trial with a new theory of the case. *Sheppard v. Rees*, 909 F.2d 1234, 1236 (9th Cir. 1989). The Court held structural error applied to the latter circumstance, but observed a notice defect alone could be cured by reviewing the record:

> for example, a complaint, an arrest warrant, or a bill of particulars. (citation omitted). Similarly, it is

> possible that an accused could become apprised of the particular charges during the course of a preliminary hearing. Any or all of these sources-or perhaps others-might provide notice sufficient to meet the requirements of due process, although precise formal notice is certainly the most reliable way to comply with the Sixth Amendment.

Id. at 1236 n.2; *see also Usher v. Gomez*, 775 F. Supp. 1308, 1314 (N.D. Cal. 1991) (consulting entire record to decide lack of notice claim). The Ninth Circuit observed on direct appeal from a federal conviction that information error is not subject to constitutional harmless error only when challenged timely pretrial. *U.S. v. Du Bo*, 186 F.3d 1177 (9th Cir. 1999). "In a later unpublished opinion, that court declined to abandon harmless error analysis where the claim was not timely made at or before trial." *United States v. Mojica-Baez*, 229 F.3d 292, 308 (1st Cir. 2000). Not every circuit follows *Du Bo*. *United States v. Gray*, 260 F.3d 1276 (11th Cir. 2001).

Analogously, this Court determined omitted elements of an offense in a jury instruction may be harmless:

> The United States Supreme Court has held that an erroneous jury instruction that omits an element of the offense is subject to harmless error analysis:
>
> > Unlike such defects as the complete deprivation of counsel or trial before a biased judge, an instruction that omits an element of the offense does not necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.
>
> *Neder v. United States*, 527 U.S. 1, 18, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999). We find no compelling reason why this Court should not follow the United States Supreme Court's holding in *Neder*.

State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002). An omitted element in a jury instruction may be harmless when the omitted element is established by "uncontroverted evidence." *Id*. at 341.

If a verdict may be sustained notwithstanding an omitted element, it is inconsistent that it may not be sustained where an information omits it, regardless of the affidavit of probable cause, procedural safeguards, and indicia of notice which accompanied or followed the filing of the information. This is the result the First Circuit reached when trying to square the holding in *Neder* with a claim that an information lacking an essential element required automatic reversal. *Mojica-Baez*, 229 F.3d at 311-12 (sentencing enhancement error).

At a minimum, the affidavit of probable cause provides better notice than a charging document, and any court must be provided a factual basis supporting probable cause before a case may proceed. A challenge to a charging document, in the context of modern legal practice, does not warrant automatic reversal akin to structural error for omitted elements. Constitutional harmless error would be impossible to establish if any accused

person was prosecuted for conduct absent any notice, including review of probable cause, discovery, or other protections. The error is not difficult to assess: the report of proceedings, probable cause affidavit and other clerk's papers like the jury instructions, or opening and closing arguments would demonstrate whether an accused received notice. The current test is no longer supported by modern procedural law and is both incorrect and harmful.

VII. CONCLUSION

This Court should deny Merritt's petition for review. If this Court grants Merritt's petition, it should fully grant review of the issues addressed in this answer.

This document contains 4,995 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Dated this 25 day of January, 2024.

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COURT OF APPEALS, DIVISION III
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STATE OF WASHINGTON, Respondent, v. CLAUDE MERRITT, Appellant.	NO. 38763-1-III CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on January 25, 2024, I e-mailed a copy of the Amended Answer to the Petition for Review in this matter, pursuant to the parties' agreement, to:

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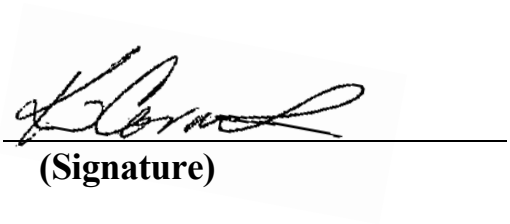
1/25/2024 **(Date)** Spokane, WA **(Place)**  **(Signature)**

SPOKANE COUNTY PROSECUTOR

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