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STATE OF WASHINGTON
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No. 96599-4

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

ARNOLD MAFNAS CRUZ,

Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KITSAP COUNTY

ANSWER TO PETITION FOR REVIEW

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A. <u>INTRODUCTION</u>

The prosecutor omitted three of the four essential elements of the crime from the charging document in this case, including both *mens rea* elements. Applying settled law in an unpublished opinion, the Court of Appeals reversed the conviction and remanded for dismissal of the charge without prejudice to the State's ability to refile.

This Court should deny the prosecutor's petition for review. The petition meets none of the criteria of RAP 13.4(b). There is no conflict: in the cases the State relies on, this Court endorsed the charging documents because they *included* the *mens rea* elements. Here, the *mens rea* elements were missing. It is well-settled that *mens rea* elements are not merely "definitional" and instead are essential elements that must be alleged in the information. Most counties correctly charge this crime; therefore, there is no matter of public interest warranting this Court's review.

B. <u>ISSUE</u>

The Court of Appeals reversed because the information omitted three of the four essential elements of the crime,

including both *mens rea* elements. The prosecutor claims a conflict with *State v. Porter*,[1] but in that case this Court endorsed the information because it *included* both *mens rea* elements, and the language the defendant claimed was missing was a mere definition. Should this Court deny review because it is well-settled that *mens rea* elements must be included in an information and there is no conflict?

C. <u>STATEMENT OF THE CASE</u>

Robert Pry and Joshua Rodgers Jones beat and robbed 89-year-old Archie Hood. Mr. Hood eventually died of his injuries. RP (5/9/16) 1393; RP (7/6/16) 5280-83. Arnold Cruz had nothing to do with these events.

Mr. Pry subsequently enlisted the help of others to attempt to break into Mr. Hood's bank accounts. RP (5/18/16) 2420; RP (6/9/16) 4036. Arnold Cruz had nothing to do with it.

When Mr. Pry became concerned about the possibility of law enforcement discovering Mr. Hood's remains, he sought assistance in disposing of the evidence. Detectives

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[1] 186 Wn.2d 85, 93, 375 P.3d 664 (2016).

suspected that Mr. Pry asked Mr. Cruz, whom he viewed as an "uncle," for help. RP (5/23/16) 2756-58. After police discovered Mr. Hood's remains, Cruz was one of many people whose names and faces were released to the press as being sought in connection with the crimes. CP 733-46.

Mr. Cruz immediately turned himself in. RP (3/15/16) 490; RP (5/10/16) 1552-53. The State charged Mr. Cruz with the felony of first-degree rendering criminal assistance, and the misdemeanor of concealing a deceased body. CP 578-80. Mr. Cruz was tried with Mr. Pry, who was convicted of murder and other crimes, and Robert Davis, who was convicted of identity theft. RP (7/6/16) 5280-83.

Mr. Cruz was convicted of rendering and concealment as charged. RP (7/6/16) 5284. The State sought an exceptional sentence, which the court imposed over Mr. Cruz's objection.

Mr. Cruz appealed and argued the information was constitutionally deficient and the exceptional sentence was improper. The Court of Appeals agreed with the first argument so did not reach the second. Because the State

omitted three of the four essential elements of the crime from the information, the court reversed the rendering conviction and remanded for dismissal of the charge without prejudice to the State's ability to refile. Slip Op. at 34-43.[2] Kitsap County prosecutors petitioned for this Court's review.

D. ARGUMENT

Review is unwarranted. The Court of Appeals followed settled law in reversing where the information omitted three essential elements.

1. An information is constitutionally deficient if it fails to set forth every element of the crime charged.

Article I, section 22 of our state constitution[3] and the Sixth Amendment to the federal constitution[4] require the State to provide an accused person with notice of the offense charged. *State v. Pelkey*, 109 Wn.2d 484, 487, 745 P.2d 854 (1987). An offense is not properly charged unless the

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[2] The appeal was consolidated with the appeals of Pry and Davis.

[3] "In criminal prosecutions the accused shall have the right … to demand the nature and cause of the accusation against him …." Const. art. I, § 22.

[4] "In all criminal prosecutions, the accused shall … be informed of the nature and cause of the accusation …." U.S. Const. amend VI.

information sets forth every essential element of the crime, both statutory and nonstatutory. *State v. Kjorsvik*, 117 Wn.2d 93, 97, 812 P.2d 86 (1991). The charging document must contain: (1) the elements of the crime charged, and (2) a description of the specific conduct of the defendant which allegedly constituted that crime. *Auburn v. Brooke*, 119 Wn.2d 623, 630, 836 P.2d 212 (1992). "This doctrine is elementary and of universal application, and is founded on the plainest principle of justice." *Pelkey*, 109 Wn.2d at 488 (quoting *State v. Ackles*, 8 Wash. 462, 464-65, 36 P. 597 (1894)).

Where, as here, the issue is raised for the first time on appeal, the standard of review set forth in *Kjorsvik* applies. This Court asks: (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 show that he or she was nonetheless actually prejudiced by the inartful language which caused a lack of notice? *Kjorsvik*, 117 Wn.2d at 105-06. If the answer to the first question is "no," reversal is required without reaching the second

question. *State v. McCarty*, 140 Wn.2d 420, 425-28, 998 P.2d 296 (2000).

2. *Intent* to hinder, *knowledge* of another's crime, and *concealing* evidence are each elements of the crime that were omitted from the information.

The State acknowledges the above requirements, but avers it correctly alleged the elements of rendering criminal assistance. Petition at 5. The Court of Appeals correctly concluded to the contrary. Slip Op. at 34. In holding the information was deficient, the court applied the statute and this Court's case law. Slip Op. at 37-43.

The statute at issue provides, in relevant part:

> As used in RCW 9A.76.070, 9A.76.080, and 9A.76.090, a person "renders criminal assistance" if, **with intent** to prevent, hinder, or delay the apprehension or prosecution of another person who he or she **knows** has committed a crime or juvenile offense or is being sought by law enforcement officials for the commission of a crime or juvenile offense or has escaped from a detention facility, he or she:
>
> (1) Harbors or conceals such person; or
>
> (2) Warns such person of impending discovery or apprehension; or

(3) Provides such person with money, transportation, disguise, or other means of avoiding discovery or apprehension; or

(4) Prevents or obstructs, by use of force, deception, or threat, anyone from performing an act that might aid in the discovery or apprehension of such person; or

(5) **Conceals, alters, or destroys any physical evidence** that might aid in the discovery or apprehension of such person; or

(6) Provides such person with a weapon.

RCW 9A.76.050 (emphases added).

This Court has described the essential elements consistent with the statute: "a person renders criminal assistance if he or she **(1) knows** that another person (a) 'has committed a crime or juvenile offense' or (b) 'is being sought by law enforcement officials for the commission of a crime or juvenile offense' or (c) 'has escaped from a detention facility' and **(2) intends** 'to prevent, hinder, or delay the apprehension or prosecution' of that other person and **(3) undertakes one of the six specified actions**." *State v. Budik*, 173 Wn. 2d 727, 734, 272 P.3d 816 (2012) (emphases

added).[5]

All three of these elements were missing from the amended information. The information included only the name of the crime and the single element elevating the crime to rendering in the first degree:

> Count I
> Rendering Criminal Assistance in the First Degree [Non-Relative]
>
> On or about or between December 17, 2015 and December 30, 2015, in the County of Kitsap, State of Washington, the above-named Defendant, rendered criminal assistance to a person who had committed or was being sought for any class A felony; contrary to the Revised Code of Washington 9A.76.070(1).

CP 578. [6]

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[5] An additional element raises the crime to rendering in the first degree: "A person is guilty of rendering criminal assistance in the first degree if he or she renders criminal assistance to a person who has committed or is being sought for murder in the first degree or any class A felony or equivalent juvenile offense." RCW 9A.76.070(1).

[6] This problem does not appear to be widespread. For example, in another case the defendant was properly charged with rendering as follows:

> That the defendant JERRY ALLEN FLUKER in King County, Washington, on or about August 12, 2015, with intent to prevent, hinder or delay the apprehension or prosecution of Marque Deandre Fluker, did render criminal assistance to Marque Deandre Fluker, a person who he knew committed Murder in the Second Degree, a Class A felony, or

Thus, the Court of Appeals properly reversed under RCW 9A.76.050 and *Budik*. Slip Op. at 38-40.

3. The Court of Appeals properly followed this Court's opinion in *Budik*.

The State argues that *Budik* is inapplicable because it evaluated the sufficiency of the evidence to support a conviction, rather than the sufficiency of an information. Petition at 9. The Court of Appeals properly rejected this claim. Slip Op. at 38-40.

Budik applies because this Court determined the essential elements of the crime in order to evaluate whether the State had presented sufficient evidence to support each element. As this Court explained, "In a challenge to the sufficiency of the evidence supporting a criminal conviction, the question is whether, viewing the evidence in the light most favorable to the State, any rational fact finder could

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> Assault in the First Degree, a Class A felony, by providing such person with transportation, disguise, or other means of avoiding discovery or apprehension;
> Contrary to RCW 9A.76.070(1), (2)(a) and 9A.76.050, and against the peace and dignity of the State of Washington.

State v. Fluker, No. 74859-9-I, at CP 92-93.

have found **the essential elements** of the crime beyond a reasonable doubt." *Budik*, 173 Wn.2d at 733 (emphasis added; internal citation omitted).

Similarly, "a charging document is constitutionally adequate only if **all essential elements** of a crime, statutory and non-statutory, are included in the document[.]" *State v. Vangerpen,* 125 Wn.2d 782, 787, 888 P.2d 1177, 1180 (1995). Because a determination of the essential elements is required in both circumstances, the State cannot ignore *Budik*'s explication of the essential elements of rendering criminal assistance. This Court already concluded that intent, knowledge, and one of the six specified acts are essential elements of the crime. *Budik*, 173 Wn.2d at 738. The Court of Appeals properly followed this case. Slip Op. at 38-40.

4. <u>The Court of Appeals properly followed this Court's opinions in *Porter* and *Johnson*</u>.

The prosecution alleges the Court of Appeals' decision conflicts with *Porter*, 186 Wn.2d at 90 and *State v. Johnson*, 180 Wn.2d 295, 302, 325 P.3d 135 (2014). Petition at 5-8, 10. The State is wrong. Unlike in Mr. Cruz's case, in both

Porter and *Johnson* the State alleged the *mens rea* elements in the information. Because the information here omitted these elements, the Court of Appeals properly reversed.

In *Johnson*, the State charged the defendant with unlawful imprisonment. *Johnson,* 180 Wn.2d at 301. In addition to naming the crime in the information, the State included both the *mens rea* element and the *actus reus* element: it averred the defendant "did knowingly restrain" the victim. *Id.* The defendant argued the State was required to define "restrain" in the information, but this Court disagreed because the information need only contain the essential elements. *Id.* at 301-02. Here, unlike in *Johnson*, the information omitted the essential *mens rea* and *actus reus* elements.

Like the crime at issue here, the crime at issue in *Porter* had two *mens rea* elements. *See Porter*, 186 Wn.2d at 88. Unlike in this case, in *Porter* the State included these elements in the information. The information alleged the defendant "did unlawfully and feloniously **knowingly** possess a stolen motor vehicle, **knowing** that it had been

stolen[].” *Porter*, 186 Wn.2d at 88 (emphases added). This Court held the State was not required to allege the defendant “withheld or appropriated the vehicle for the use of a person other than the true owner,” because this description merely defined an element. *Id.* at 87. But this Court did not hold the State may omit the mental state elements, and in fact, the *mens rea* elements were alleged. *See id.* at 87-94.

Because the *mens rea* elements were alleged in *Porter*, this Court distinguished an earlier case in which it had reversed a conviction for failure to allege one of the mental-state elements of the crime. *Porter*, 186 Wn.2d at 93 (discussing *State v. Moavenzadeh*, 135 Wn.2d 359, 956 P.2d 1097 (1998)). In *Moavenzadeh*, the information contained no language alleging the defendant knew the property was stolen. *Porter*, 186 Wn.2d at 93 (citing *Moavenzadeh*, 135 Wn.2d at 363). Reversal was therefore required in that case, because all essential elements must be in the information. *Moavenzadeh*, 135 Wn.2d at 363-64. The Court of Appeals properly recognized that reversal was required in this case for the same reason. Slip Op. at 41-42 & n.13.

5. <u>The Court of Appeals properly applied the statute</u>.

The State's argument is not only contrary to this Court's case law, it also reflects a misunderstanding of the structure of criminal statutes. The State argues that because Mr. Cruz was charged with rendering criminal assistance in the first degree, the information need only name the crime ("rendered criminal assistance") and reveal the single element that increases the degree of the crime. Petition at 5. The State is wrong.

The "definitional" statute discloses the essential elements of the base crime, and these elements must be alleged in addition to any element that increases the degree of a crime. RCW 9A.76.050. These are essential elements because they are "necessary to establish the very illegality of the behavior[.]" *State v. Zillyette*, 178 Wn.2d 153, 158, 307 P.3d 712 (2013).

For example, like the rendering statute, the robbery "definitional" statute contains the essential elements of the crime of robbery:

> 9A.56.190. Robbery--Definition
>
> A person commits robbery when he or she unlawfully takes personal property from the person of another or in his or her presence against his or her will by the use or threatened use of immediate force, violence, or fear of injury to that person or his or her property or the person or property of anyone. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking; in either of which cases the degree of force is immaterial. Such taking constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of the person from whom taken, such knowledge was prevented by the use of force or fear.

The subsequent statutes simply specify which *additional* elements distinguish the various degrees of the crime. For instance, a person could commit first-degree robbery by committing all of the elements of the base crime plus inflicting bodily injury. RCW 9A.56.200. If a person commits only the elements of the base crime, he is guilty of robbery in the second degree: "A person is guilty of robbery in the second degree if he or she commits robbery." RCW 9A.56.210(1).

By the State's logic here, the government could charge a person with second-degree robbery by alleging simply that

the person “did commit robbery.” And it could charge first-degree robbery by alleging merely that a person “did commit robbery and inflicted bodily injury.” That is not the law. The “Definition” statute contains the elements of the crime, and these essential elements must be included in the information.

For example, in *Witherspoon* the Court of Appeals held the information included the essential elements of second-degree robbery where the charging document stated:

> On or about the 12th day of November, 2009, in the County of Clallam, State of Washington, the above-named Defendant, with intent to commit theft thereof, did unlawfully take personal property that the Defendant did not own from the person of another, to-wit: B. Pittario, or in said person's presence against said person's will by the use or threatened use of immediate force, violence, or fear of injury to said person or the property of said person or the person or property of another; contrary to Revised Code of Washington 9A.56.210(1) and 9A.56.190, a Class B felony.

State v. Witherspoon, 171 Wn. App. 271, 294–95, 286 P.3d 996 (2012), *aff'd,* 180 Wn. 2d 875, 329 P.3d 888 (2014). In concluding the information contained the essential elements

of the crime, the court cited the "definition" statute, RCW 9A.56.190. *Id.* at 295.

Like the "definition" statute for robbery, the "definition" statute for rendering criminal assistance sets forth the essential elements of the crime. RCW 9A.76.050. The subsequent statutes set forth additional elements that distinguish degrees of the crime. *E.g.* RCW 9A.76.070. All essential elements, not just the element establishing the degree of the crime, must be alleged in the information. Because the information here omitted several elements, it is constitutionally deficient, and the Court of Appeals properly reversed. CP 578; Slip Op. at 35.

Since the State believes the information included the elements of the crime, even if "vague," it moves on to the second prong of the *Kjorsvik* test and argues there is no prejudice in light of the probable cause statement. Petition at 10-13. But the Court does not reach the prejudice prong here. Multiple elements are missing from the information and do not appear by any fair construction. That "end[s] the inquiry." *State v. Brown*, 169 Wn.2d 195, 198, 234 P.3d 212

(2010); *accord McCarty*, 140 Wn.2d at 425-28. Slip Op. at 37, 43.

The Court of Appeals properly applied the statute and followed this Court's settled case law in reversing and remanding for dismissal without prejudice where the prosecutor omitted three essential elements of the crime from the information. This Court should deny review.

E. CONCLUSION

This Court should deny the petition for review because the Court of Appeals applied settled law and there is no conflict.

Respectfully submitted this 17th day of December, 2018.

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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 **Answer to Petition for Review** to which this declaration is affixed/attached, was filed in the **Washington State Supreme Court** under **Case No. 96599-4**, 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:

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