Supreme Court No. __
(COA No. 39866-8-III)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

GILBERT GARCIA, JR.,

Petitioner.

PETITION FOR REVIEW

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TABLE OF AUTHORITIES

A. IDENTITY OF PETITIONER AND DECISION BELOW

Gilbert Garcia, Jr. asks this Court to accept review of a Court of Appeals opinion that affirmed his conviction for child molestation in the first degree. The Court of Appeals issued the opinion on April 10, 2025. Mr. Garcia has attached the opinion to this petition.

B. ISSUE PRESENTED FOR REVEW

A charging document must inform the defendant of the facts underlying the charge. Other than stating the charging period and naming the complaining witness, the charging document does not describe the facts of Mr. Garcia's alleged offense. The charging document was deficient. RAP 13.4(b)(2), (3).

C. STATEMENT OF FACTS

Gilbert Garcia, Jr., dated Deborah Fox for seven years, and the two lived together for six years. RP 359. For part of their relationship, Ms. Fox's daughter, Crystal Fox, and Ms.

Fox's granddaughter, M.M., lived upstairs in a separate duplex apartment. RP 397-98. M.M. frequently spent the night downstairs with Ms. Fox and Mr. Garcia. RP 401-02.

One day, Crystal found pornography on M.M.'s tablet. RP 408-09. When Crystal confronted M.M., M.M. "just kind of shook her head" and "wouldn't say a word." RP 410-11. Crystal sent M.M. upstairs and took her tablet away for weeks. RP 374, 411.

Crystal also told her friend, Carrie Jenkins, that she found pornography on M.M.'s tablet. RP 411-12. A few weeks after the discovery, Ms. Jenkins confronted M.M. about the pornography. RP 412. M.M. claimed Mr. Garcia showed it to her. RP 374.

When Ms. Jenkins informed Crystal about M.M.'s accusation, Crystal asked M.M. if Mr. Garcia touched her. RP 379. M.M. said yes, and Crystal contacted the police. RP 417-18.

Consequently, the State charged Mr. Garcia with two counts of child molestation in the first degree. CP 22-23. Other than identifying the charging period and the complaining witness, the charging document does not contain any other facts detailing the basis for the State's charges. Mr. Garcia vehemently denied the accusations and proceeded to trial. RP 596, 806-07.

At trial, the State relied on two alleged incidents to prove the charges. RP 830-31. The jury acquitted Mr. Garcia of the first count. RP 902. However, the jury found Mr. Garcia guilty of the second count. RP 902. At sentencing, the court stated it was relying on the facts relating to the charge the jury acquitted Mr. Garcia of committing to impose a sentence at the top of the standard range. RP 969. The court also imposed legal financial obligations (LFOs). CP 112.

Mr. Garcia raised several challenges on appeal, including a challenge based on a violation of the real facts doctrine. Op. at 1. The court agreed with this challenge and reversed for

resentencing. Op. at 1. However, the court rejected his contention that the information was constitutionally defective. Op. at 4.

D. ARGUMENT

This Court should accept review because the information did not allege the particular facts to support Mr. Garcia's charges.

a. To provide notice and to protect against the risk of double jeopardy, a charging document must allege facts supporting every element of the offense.

The State may prosecute by information or indictment. Const. art. I, § 25; CrR 2.1(a). To afford notice of the nature and cause of the accusation, the State must include all of 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.

Additionally, the charging document must "allege facts supporting every element of the offense[.]" *State v. Leach*, 113 Wn.2d 679, 689, 782 P.2d 552 (1989). Thus, the State must do

more than simply state every element of the charged crime. *Id.* The rule "requires that the defendant be apprised of the elements of the crime charged and the conduct of the defendant which is alleged to have constituted that crime." *Kjorsvik*, 117 Wn.2d at 98 (emphasis added). "The information is constitutionally adequate only if it sets forth all essential elements of the crime, statutory or otherwise, and the particular facts supporting them." *State v. Hugdahl*, 195 Wn.2d 319, 324, 458 P.3d 760 (2020). "The State bears this burden and failure to set forth the required elements and facts renders the information deficient in charging the crime." *Id.*

The constitutional rule serves two fundamental purposes. First, it helps ensure that defendants can prepare a defense to the underlying facts that support the State's accusation. *Kjorsvik*, 117 Wn.2d at 101. Second, it protects the double jeopardy rights of defendants by allowing them to plead the first judgment as a bar to a future prosecution for the same offense. *Leach,* 113 Wn.2d at 688; *State v. Royse*, 66 Wn.2d

552, 557, 403 P.2d 838 (1965); *State v. Carey*, 4 Wash. 424, 432-33, 30 P. 729 (1892). Thus, to be constitutionally sufficient, a charging document must both fairly inform the defendant of the charge and enable the defendant to plead double jeopardy in a future prosecution. *United States v. Resendiz-Ponce*, 549 U.S. 102, 108, 127 S. Ct. 782, 166 L. Ed. 2d 591 (2007).

A challenge to the validity of a charging document may be raised for the first time on appeal as manifest constitutional error. *Leach*, 113 Wn.2d at 691; RAP 2.5(a)(3). When hearing a challenge to the sufficiency of the information for the first time on appeal, this Court liberally construes the document, and analyzes whether "the necessary facts appear in any form, or by fair construction can they be found, in the charging document [.]" *Kjorsvik*, 117 Wn.2d at 105. If the necessary facts do not appear, this Court presumes prejudice, requiring reversal. *State v. Zillyette*, 178 Wn.2d 153, 162-63, 307 P.3d 712 (2013). This

Court reviews challenges to the sufficiency of a charging document de novo. *Id*. at 158.

b. The information did not detail the particular facts pertaining to every element, rendering it constitutionally deficient.

The State charged Mr. Garcia with two counts of child molestation in the first degree. CP 22-24. However, the only charge at issue in this case is the second count of child molestation because the jury acquitted him of the first count. RP 902.

Although the information recited the essential elements of this offense, it failed to allege specific facts in support. The deficient information reads as follows:

> On or about between July 1, 2017 and July 31, 2017, in the State of Washington, the above-named Defendant, being at least thirty-six (36) months older than the victim, had sexual contact with another person who was less than twelve (12) years old and not married to the perpetrator, to-wit: M.M., (06/11/2009), contrary to RCW 9A.44.083.

CP 23.

Excluding the allegation that the crimes occurred between July 1 and July 31, 2017 in the State of Washington and that the alleged crime was committed against M.M., this charge is generic. The information does not allege the particular "what," "where," or "how" of the offense. The conduct the State alleged Mr. Garcia committed is left for him to guess. No person reading the charging document would have a clue. Consequently, the charging document was deficient.

City of Seattle v. Termain supports this conclusion. There, a jury found the defendant guilty of two counts of violating a domestic violence order. *City of Seattle v. Termain*, 124 Wn. App. 798, 801, 103 P.3d 209 (2004). For the first time on appeal in the Superior Court, he challenged the sufficiency of the language in the charging document. *Id.* at 801. Like the charging document in this case, the language was largely generic. *Id.* at 800. The Superior Court agreed the charging document was deficient and dismissed the charges. *Id.* at 800-01.

This Court granted review and affirmed. *Id.* This Court reasoned that while the charging document tracked the language of the ordinance, it failed to identify the order claimed to be violated and lacked any factual basis in support of the charges. Because the information lacked sufficient facts that fairly conveyed what conduct was being charged, the information was insufficient. *Id.* at 805-06.

As in *Termain*, the information here did not "fairly imply what actual conduct was being charged." *Id.* at 806. Rather than inform Mr. Garcia of the nature of the charges, the charging document "instead left the prosecution free to roam at large—to shift its theory of criminality so as to take advantage of each passing vicissitude of the trial and appeal." *Russell v. United States*, 369 U.S. 749, 768, 82 S. Ct. 1038, 8 L. Ed. 2d 240 (1962). Thus, the charges were constitutionally defective. *See also State v. Sloan,* 79 Wn. App. 553, 556, 903 P.2d 522 (1995) (charging document alleging theft by deception was deficient because it failed to allege the "necessary facts" in support).

In addition to failing to provide Mr. Garcia adequate notice, the charging document was inadequate to satisfy the double jeopardy rationale of the essential elements rule. The charging document must enable the defendant to plead an acquittal or conviction in bar of future prosecutions for the same offense. *Zillyette,* 178 Wn.2d at 159; *Resendiz-Ponce*, 549 U.S. at 108.

An opinion this Court is illustrative. There, the defendant was convicted of practicing medicine without a license. *State v. Carey*, 4 Wash. 424, 430, 30 P. 729 (1892). This Court found the charging document inadequate. This Court reasoned that the facts alleged in the charging document would be inadequate to protect the defendant's double jeopardy rights:

> Supposing this defendant had seen fit to plead guilty to the indictment, and had paid the fine imposed, and had afterwards been indicted for practicing medicine on the same day, there could have been nothing in the record to show that it was not for the same offense, and no plea in bar could possibly have been made; for there would have been no way to determine that fact, unless it be concluded that a man cannot practice medicine but

> once in a given day, which is a conclusion unfortunately not warranted by the common experience of mankind. If defendant, Carey, practiced medicine on that day by prescribing for a fee for somebody, that fact should have been stated, with the name of the person for whom he prescribed. It is no hardship on the state to be held to this particularity, and it is nothing more than common justice that the defendant should know the particular unlawful acts he is charged with committing.

Carey, 4 Wash. at 432-33.

Here, the same is true. If Mr. Garcia pleaded guilty to the second charge and was charged again for child molestation against M.M. during the charging period stated in the information, he would have been subject to multiple prosecutions in violation of the prohibition against double jeopardy. *Cf. Resendiz-Ponce*, 549 U.S. at 108 ("the time-and-date specification in respondent's indictment provided ample protection against the risk of multiple prosecutions for the same crime" of illegally reentering the United States).

In sum, the generic charges failed to allege facts in support of the elements of the offense. They did not provide fair

notice to Mr. Garcia of the nature of the charges or protect his double jeopardy rights. This Court should accept review.

E. CONCLUSION

For the reasons stated in this petition, Mr. Garcia respectfully requests that this Court accept review.

This petition uses Times New Roman Font, contains 1,878 words, and complies with RAP 18.17.

DATED this 9th day of May, 2025.

Respectfully submitted,

/s Sara S. Taboada
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON, Respondent, v. GILBERT GARCIA, JR., Appellant.	)))))))))	No. 39866-8-III UNPUBLISHED OPINION

LAWRENCE-BERREY, C.J. — Gilbert Garcia appeals his conviction for child molestation in the first degree. He argues he should receive a new trial because the second amended information was constitutionally deficient. He alternatively argues that he should be resentenced because the trial court violated the real facts doctrine when it imposed a high-end standard range sentence. We disagree with his first argument, agree with his second, and remand for resentencing.

FACTS

Gilbert Garcia dated Deborah F., and the two lived together for several years. Deborah is the grandmother of M.M.,[1] born in 2009. On June 20, 2018, M.M.'s mother reported to law enforcement that her daughter told her Garcia had shown her pornographic material, had shown her how to access it on the Internet, and would touch her private parts and butt. Based on this report, law enforcement directed the mother to take M.M. to the hospital for a sexual assault examination. M.M. described to the nurse how Garcia had molested her.

The mother told law enforcement that M.M. had slept in her mother's camper with Garcia a couple nights earlier, and the mother gave law enforcement the nightgown her daughter had worn that night. The nightgown tested positive for Garcia's semen.

M.M. told law enforcement of an occasion, around July 2017, when she had stayed the night at "Lisa's house" with Garcia. Clerk's Papers (CP) at 6. At the time, Lisa was not at her house. M.M. described how, on that occasion, she was molested by Garcia.

[1] To protect the privacy interests of the child victim, we use their initials throughout this opinion. Gen. Order 2012-1 of Division III, *In re the Use of Initials or Pseudonyms for Child Victims or Child Witnesses*, (Wash. Ct. App. June 18, 2012), https://www.courts.wa.gov/appellate_trial_courts/?fa=atc.genorders_orddisp&ordnumber=2012_001&div=III.

By amended information, the State charged Garcia with two counts of molestation in the first degree. The first count read:

> On or between June 18, 2018 and June 19, 2018, in the State of Washington, the above-named Defendant, being at least thirty-six (36) months older than the victim, had sexual contact with another person who was less than twelve (12) years old and not married to the perpetrator, to-wit: M.M., [DOB], contrary to RCW 9A.44.083.

CP at 22. The second count read:

> On or about between July 1, 2017 and July 31, 2017, in the State of Washington, the above-named Defendant, being at least thirty-six (36) months older than the victim, had sexual contact with another person who was less than twelve (12) years old and not married to the perpetrator, to-wit: M.M., [DOB], contrary to RCW 9A.44.083.

CP at 23.

At trial, Garcia cast doubt on the first count by questioning Deborah and her daughter about their handling of the nightgown and the possibility of DNA contamination.

The jury found Garcia not guilty of the first count (involving the nightgown), but guilty of the second (involving the overnight at Lisa's house). At sentencing, the trial court imposed the maximum standard range sentence. Just prior to imposing its sentence, the court stated, "I never heard a good explanation why Mr. Garcia's sperm ended up in multiple locations on this girl's nightgown. . . . [I]f your sperm is on her nightgown in

multiple locations and all you can say is I don't know, you've got yourself a problem there." Rep. of Proc. at 963-64.

Garcia appeals.

ANALYSIS

SUFFICIENCY OF AMENDED INFORMATION

Garcia argues he is entitled to a new trial because the amended information was constitutionally deficient in that it failed to allege particular facts to protect him from double jeopardy. We disagree.

"A charging document must describe the essential elements of a crime with reasonable certainty such that the accused may prepare a defense and plead the judgment as a bar to any subsequent prosecution for the same offense." *City of Seattle v. Termain*, 124 Wn. App. 798, 802, 103 P.3d 209 (2004). "An 'essential element is one whose specification is necessary to establish the very illegality of the behavior' charged." *State v. Pry*, 194 Wn.2d 745, 752, 452 P.3d 536 (2019) (quoting *State v. Johnson*, 119 Wn.2d 143, 147, 829 P.2d 1078 (1992)). "In an information or complaint for a statutory offense, it is sufficient to charge in the language of the statute if the statute defines the crime sufficiently to apprise an accused person with reasonable certainty of the nature of the accusation." *State v. Leach*, 113 Wn.2d 679, 686, 782 P.2d 552 (1989).

If the charging document is challenged for the first time on appeal, we construe it liberally in favor of validity. *State v. Derri*, 199 Wn.2d 658, 691, 511 P.3d 1267 (2022). While our courts have "required charging documents to include facts that support the stated charges, there is no requirement above the 'plain, concise and definite written statement of the essential facts.' CrR 2.1(a)(1)." *State v. Canela*, 199 Wn.2d 321, 335, 505 P.3d 1166 (2022).

With respect to Garcia's particular argument, count 2 of the amended information satisfies CrR 2.1(a)(1)'s requirement of a plain, concise, and definite written statement of the essential facts. Here, the facts in the amended information stated that Garcia had sexual contact with M.M. in the State of Washington during July 2017, and sufficiently described M.M.'s age at the time of the offense, the difference in her and Garcia's ages, and stated that the two were not married.

Garcia relies heavily on *Termain*. There, the charging document alleged that the defendant had knowingly violated a domestic violence order, but failed to identify the particular order, the protected person, and it described various city codes and state statutes that were potentially violated. 124 Wn. App. at 800-01. In *Termain*, we explained for an information to be sufficient, it must "'allege facts supporting every element of the offense, in addition to adequately identifying the crime charged.'" *Id.* at 802 (internal quotation marks omitted) (quoting *State v. Kjorsvik*, 117 Wn.2d 93, 98, 812

P.2d 86 (1991)). We stated that the purpose of the rule is to apprise the defendant of the charge so they can present a defense. *Id.* In the opinion, we described the information filed by the city of Seattle as "gobbledygook" and concluded that the charging document failed to sufficiently apprise the defendant of the facts so that he could present a defense and also failed to specifically identify the statute that supported the charge. *Id.* at 806.

There is no comparable infirmity here. Here, the amended information contains a sufficient description of the facts and lists the specific statutory violation so Garcia could present a defense.

REAL FACTS DOCTRINE

Garcia next argues he is entitled to be resentenced because the trial court violated the real facts doctrine when it partly based its maximum standard range sentence on count 1, the count of which he was acquitted. We agree.

"In determining any sentence other than a sentence above the standard range, the trial court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing." RCW 9.94A.530(2). This statute codifies the "real facts" doctrine. Our Supreme Court has interpreted the doctrine as "excluding consideration during sentencing of uncharged crimes or charged crimes which were later dismissed." *State v. Houf*, 120 Wn.2d 327, 332, 841 P.2d 42 (1992).

Here, the jury acquitted Garcia of count 1, the charge involving M.M.'s nightgown. Because the jury acquitted him of this charge, the trial court dismissed it. By considering this dismissed charge, the trial court violated the real facts doctrine. We remand for resentencing.

Affirmed in part, remanded for resentencing.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Lawrence-Berrey, C.J.

WE CONCUR:

Staab, J.

Cooney, J.

WASHINGTON APPELLATE PROJECT

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