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**Court of Appeals, Div. II,
of the State of Washington**

State of Washington,

Respondent,

v.

Ernest Jackson Kornegay,

Appellant.

Amended Reply Brief of Appellant

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1. Reply Argument

1.1 This Court should reverse Kornegay’s life sentence as a persistent offender because recent statutory amendments removed Robbery 2 from the list of strike offenses.

In his opening brief, Kornegay argued that a recent amendment to the persistent offender statutes applies to his sentence in this case. Br. of App. at 9-11. The amendment, which became effective after sentencing but while this appeal is still pending, removed Robbery in the second degree from the list of strike offenses. Br. of App. at 10. Kornegay argued that the amendment applies to him because his judgment and sentence are not yet final while the appeal is still pending. Br. of App. at 10-11 (citing, *e.g.*, *State v. Jefferson*, 192 Wn.2d 225, 246-47, 429 P.3d 467 (2018) (“when the new statute concerns a postjudgment matter like the sentence ... the new statute or court rule will apply to the sentence ... while the case is pending on direct appeal”). The amendment left Kornegay with only one prior strike offense, making his life sentence as a persistent offender invalid. Br. of App. at 10-11.

The State’s reliance on a footnote in *State v. Moretti*, 193 Wn.2d 809, 819 n.4, 446 P.3d 609 (2019), is misplaced. The footnote is merely informational, placed in a section of the opinion recounting the history of the persistent offender statute.

The *Moretti* court's analysis and holding were focused on the constitutionality of applying the persistent offender law to defendants whose prior strike offenses were committed in their youth. *See Moretti*, 193 Wn.2d at 818. The court was not asked to address the recent amendment removing Robbery 2 from the list of strike offenses. Whether the amendment applies to a defendant in Kornegay's position remains an open question for this Court to address.

The State erroneously relies on the "savings clause" in the SRA as authority that the recent amendment should not have retroactive effect. But this misses the point, which is that application of the amendment to Kornegay is a **prospective effect**, not a retroactive one.

The question of whether application of a change in the law is prospective or retroactive depends on the triggering event for the law. Here, the triggering event is the application of the "persistent offender" label, which does not become final until the offender's third conviction of a "most serious offense" becomes final. This result follows from the statutory language.

The requirement of a sentence of life without parole for a persistent offender is set forth in RCW 9.94A.570: "A persistent offender shall be sentenced to a term of total confinement for life without the possibility of release." The question then is, when does a defendant become a "persistent offender"? The answer is

in the statutory definition of that term: “Persistent offender’ is an offender who: (a)(i) Has been convicted in this state of any felony considered a most serious offense; and [has two prior strike offenses].” RCW 9.94A.030(38)(a). Thus, a person is not a “persistent offender” until that person has been convicted of the third strike offense. A conviction is not final until it is affirmed on appeal. Therefore, the “triggering event” for a persistent offender sentence is, just as the court explained in *Jefferson*, the termination of the case at the conclusion of the direct appeal. *See State v. Jefferson*, 192 Wn.2d 225, 247, 429 P.3d 467 (2018).

Because the “triggering event” in this case is at the end of the direct appeal, the amendment applies **prospectively**, and Kornegay is not a persistent offender. Because this is a prospective effect, not a retroactive one, the “savings clause” has no application here.

Another relevant question for this Court is whether the amendment was substantive or procedural. The “savings clause” applies only to substantive changes, not procedural or remedial ones. *State v. Pillatos*, 159 Wn.2d 459, 472, 150 P.3d 1130 (2007). The amendment’s change to the list of predicate strike offenses does not affect any substantive rights and is therefore only procedural or remedial. It is analogous to the change to the list of aggravating factors that was found to be merely procedural in *State v. Hylton*, 154 Wn. App. 945, 955-56, 226 P.3d 246 (2010).

The “savings clause” does not apply to the amendment at issue in this case. The removal of Robbery 2 as a predicate strike offense was a procedural change, with a triggering event that does not occur until the end of the direct appeal. As a result, the amendment applies to all cases pending on appeal on the effective date of the amendment. That includes this case. Kornegay is not a persistent offender. This Court should remand for resentencing under the standard range for any convictions that survive this appeal.

1.2 This Court should reverse the convictions for Counts 4 and 6 (Robbery and Felony Harassment) because essential elements of the crimes were not supported by the trial court’s findings of fact.

Kornegay argued that the convictions for Counts 4 and 6 should be reversed because they were not supported by the trial court’s findings of fact. Br. of App. at 11-14. The State concedes that Kornegay is correct. Br. of Resp. at 13-14.

Because the State concedes the trial court’s error, this Court should reverse and vacate the convictions on Counts 4 and 6.

1.3 This Court should vacate the convictions on Counts 1 through 4 and 6 due to State misconduct that materially affected Kornegay’s right to a fair trial.

Kornegay argued in his brief that the Court should vacate the convictions on Counts 1 through 4 and 6 because the State improperly withheld those charges until the last court day before trial, forcing Kornegay to choose between his speedy trial right and being able to adequately prepare to face the new charges. Br. of App. at 14-18 (citing, *e.g.*, *State v. Price*, 94 Wn.2d 810, 814, 620 P.2d 994 (1980) (“Such unexcused conduct by the State cannot force a defendant to choose between these rights”)).

Kornegay compared his case to *State v. Michielli*, 132 Wn.2d 229, 239, 937 P.2d 587 (1997). Br. of App. at 15-18. In *Michielli*, the State withheld four charges, for which it had all necessary information from the beginning, and did not add them to the information until just three business days before trial. *Michielli*, 132 Wn.2d at 233, 243. The court held that the State’s delay in amending the charges, forcing the defendant to waive his speedy trial right in order to prepare a defense to the new charges, constituted mismanagement and prejudice justifying dismissal of the new charges under CrR 8.3(b). *Id.* at 245.

Kornegay argued that the prejudice in his case was even worse than in *Michielli*. Br. of App. at 16-17. For nine months, there were only four charges against Kornegay, even though the

State had knowledge of evidence that could support fourteen more charges. Br. of App. at 17-18. Yet the State waited until the last court day before trial to amend the information to add these fourteen new charges. Br. of App. at 17-18. Just like Michielli, Kornegay had no choice but to waive his speedy trial right in order to prepare to face the new charges. Br. of App. at 18.

The State asks the Court to decline to address this issue, pointing out that whether this was a manifest constitutional error that can be raised for the first time on appeal depends on whether there was prejudice. Br. of Resp. at 15-17. But contrary to the State's arguments, there was prejudice here. The State's mismanagement in holding back fourteen charges¹ until the last day before trial prejudiced Kornegay's ability to prepare a defense. Simply being faced with the choice between speedy trial and adequate preparation is in itself enough to prove prejudice. *See State v. Salgado-Mendoza*, 189 Wn.2d 420, 443, 403 P.3d 45 (2017) (Madsen, J., dissenting) (quoting *State v. Brooks*, 149 Wn. App. 373, 387, 203 P.3d 397 (2009)).

The State is wrong when it argues there was no "surprise" because the underlying facts were in the original statement of

¹ In fact, the State not only withheld fourteen counts but with those additional counts on the eve of trial also added for the first time the domestic violence aggravator. *Compare* CP 409-10 (first amended information, with no aggravators) *with* CP 1-2 (second amended information, with aggravators on Counts 1-6).

probable cause. The State's argument actually illustrates the prejudice here: Even if Kornegay knew that the State was aware of certain allegations, he was also aware that the State had not charged him with any crimes arising from those allegations. Knowing that he was not charged, and that the State cannot try him for a crime that is not charged, Kornegay had no reason to prepare a defense to those uncharged allegations. Kornegay cannot be held responsible to be prepared to go to trial on one-day's notice of fourteen new charges and six aggravators.

The State's argument that Kornegay should have known the charges were coming is not supported by anything in the record. The State cites to the deputy prosecutor's personal experience and to a policy document outside of the record to argue that Kitsap County has a "standard policy" of holding back charges for trial but notifying the defense "early" of what the held back charges will be. Br. of Resp. at 23. The State hopes to create an inference that Kornegay knew the full extent of the charges even though they were not filed until the day before trial.

But even if Kornegay knew informally what the State may have told him it intended to do, he cannot know what the State will actually try him for until the formal charge is filed. The law, and this Court, cannot hold a defendant responsible to answer criminal charges until the formal processes of the court

have taken place. That is to say, in the eyes of the law and this Court, until the Second Amended Information was filed on September 15, the last court day before trial, Kornegay was only charged with four counts and no aggravators. Until the new charges and aggravators were formally added to the case with the filing of the Second Amended Information, Kornegay had no reason under the law to prepare a defense to the fourteen counts and the aggravators for which he had never been charged. The State's withholding of the fourteen counts and the aggravators until the day before trial was deceptive and unfair.

Nothing in the record supports the State's claim that "in the normal case, the defense is advised early what the held back charges will be." The Charging Standard referred to also does not support this assertion. Instead it describes a process in which the initial charges are made conservatively, hoping that the defendant will enter a guilty plea, with additional counts or enhancements added "to fully reflect the criminal conduct" if the defendant does not plead guilty to the initial charges:

2. Counts, Degrees, and Enhancements - Counts, degrees, and enhancements should initially be filed conservatively. The defendant will be expected to plead guilty to the initial Complaint or Information. However, multiple counts, higher degrees and sentence enhancements should be charged when they more accurately reflect the defendant's criminal activity.

3. Charge Upgrade - If the defendant does not plead guilty to the initial charge or charges, or if the defendant commits additional crimes following charging, additional counts may be added, the degree of the crime may be increased, and enhancements may be added to the original charges in order to fully reflect the criminal conduct, or to ensure restitution to all victims of the defendant's criminal conduct.

Kitsap County Prosecutor, *Charging and Sentencing Standards*, www.kitsapgov.com/pros/Pages/ChargingSentencingStandards.aspx (viewed Feb 10, 2020). This policy does not suggest that holding back charges until the eve of trial is justified or even acceptable. Rather, it appears to indicate that the prosecutor should amend the information “to fully reflect the criminal conduct” **once a defendant has entered a plea of not guilty**. The prosecutor did not do that here, and instead waited until the last day before trial to provide Kornegay with formal notice of the additional counts and aggravators.

This Court must decide the case on the record. The record shows that Kornegay spent nine months preparing for a trial on four counts with no aggravators, only to be told on the last day before trial that the State was actually charging him with fourteen additional counts and aggravators on six counts. The prejudice here is worse than that in *Michielli*: In *Michielli*, the new charges arose from same underlying facts as the original charge, yet the court held the late amendment was prejudicial.

Michielli, 132 Wn.2d at 244-45. Here, the new charges arise from incidents that were not a part of the original charges, injecting new facts and allegations into the case at the last minute. *See State v. Brooks*, 149 Wn. App. 373, 388, 203 P.3d 397 (2009).

The County’s “standard policy” is exactly the kind of mismanagement that justified dismissal in *Michielli*. In *Michielli*, the additional charges were based on acts fully described in the initial probable cause statement. *Michielli*, 132 Wn.2d at 243. The State admitted that it possessed all of the information necessary to file all of the charges at the time of the original information. *Id.* The State here essentially says the same when it bases its arguments on the two original probable cause statements.

Despite this, the State filed only one theft charge in July and delayed over three months before adding the four other charges, just five days before trial was scheduled to begin. These facts strongly suggest that the prosecutor's delay in adding the extra charges was done to harass Defendant. There appears to be no other reasonable explanation...

The long delay, without any justifiable explanation, suggests less than honorable motives.

Id. at 243-44.

To the extent the prosecutor may have relied on the Kitsap County “standard policy” of holding back charges, the

mismanagement here is systemic. While there may be reasons for making initial charges conservatively in hopes of a guilty plea, once a defendant pleads not guilty to the initial charges there is no justifiable explanation for delaying additional charges “to fully reflect the criminal conduct.” To delay such charges until the day before trial is negligent at best, at worst deceptive and misleading.

The State cannot pawn off its mismanagement onto Kornegay. Kornegay objected to all continuances prior to the new charges. RP, Dec. 15, 2017, at 9-10; CP 415 (Feb. 13, 2017), 424 (Mar. 14, 2017), 427 (Apr. 3, 2017), 435 (July 21, 2017), 439 (Aug. 18, 2017), 459 (“does not want to continue trial,” Sept. 8, 2017). Only **after the new charges** did Kornegay himself ask for more time to prepare. CP 441 (Sept. 15, 2017, the day of the amendment), 460 (Jan. 5, 2018). But even this is irrelevant to the question before this Court.

The question for this Court is whether, on September 15, 2017, when the State filed the fourteen additional charges and the six aggravators, Kornegay was forced to choose between his right to go to trial within the then-current speedy trial date and his right to have counsel prepared to adequately defend him on all charges. The answer is a resounding “yes!” The State’s mismanagement prejudiced Kornegay’s rights. The additional charges should have been dismissed. This Court should reverse

the convictions on Counts 1-4 and 6 and remand to give Kornegay the opportunity to withdraw his guilty plea to Counts 10-17 and have those charges dismissed as well.

2. Conclusion

Under recent amendments to the persistent offender statutes, Kornegay is no longer a persistent offender. The Court should reverse his life sentence and remand for resentencing under the standard sentencing grid.

Kornegay's convictions on Counts 4 and 6 were not supported by the trial court's findings of fact. This Court should reverse the convictions and dismiss the charges.

The State unreasonably delayed charging Kornegay with Counts 1 through 4, 6, and 10-17 until the last court day before trial, forcing him to waive his speedy trial rights in order to adequately prepare to face the charges. This Court should reverse the convictions and dismiss the charges.

Respectfully submitted this 5th day of March, 2020.

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I certify, under penalty of perjury under the laws of the State of Washington, that on March 5, 2020, I caused the foregoing document to be filed with the Court and served on counsel listed below by way of the Washington State Appellate Courts' Portal.

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