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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

No. 28441-7-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION THREE

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STATE OF WASHINGTON,

Respondent,

v.

FRANCISCO CONTRERAS,

Appellant.

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

The Honorable F. James Gavin  
The Honorable Michael G. McCarthy

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REPLY BRIEF OF APPELLANT

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A. ARGUMENT

THE OFFENSE OF POSSESSION OF A STOLEN  
MOTOR VEHICLE WAS BARRED BY THE  
STATUTE OF LIMITATIONS

“[A] criminal statute of limitations is not merely a limitation upon the remedy, but is a ‘limitation upon the power of the sovereign to act against the accused.’” *State v. Glover*, 25 Wn.App. 58, 61, 604 P.2d 1015 (1979), quoting *State v. Fogel*, 16 Ariz.App. 246, 248, 492 P.2d 742 (1972). It is jurisdictional. *Id.* An information that “indicates that the offense is barred by the statute of limitation fails to state a public offense.” *Glover*, 25 Wn.App. at 61-62. It is not subject to amendment and must be dismissed. *Id.* at 62.

The decision in *State v. Ladely* unambiguously holds that the statute of limitations for possession of stolen property begins to run on the date the stolen property is first possessed by the defendant.

It is clear, and we so hold, that the commission of the crime defined and prohibited in RCW 9.54.010(5) occurs at the time of coming into possession with guilty knowledge.

82 Wn.2d 172, 177, 509 P.2d 658 (1973).

As anticipated, the State argues that the slight difference between former RCW 9.54.010(5), interpreted by *Ladely*, and the

current possession of stolen property statute, RCW 9A.56.140(1), evidences the legislature's intent to abrogate *Ladely*. No court has recognized the abrogation of *Ladely* because it has not been abrogated. Further, contrary to the State's analysis, a closer look at the language of the statute evidences no such legislative intent to abrogate *Ladely*. The former statute read:

(5) Every person who, knowing the same to have been so appropriated, shall bring into this state, or buy, sell, receive or aid in concealing or withholding any property wrongfully appropriated, whether within or outside of this state, in such manner as to constitute larceny under the provisions of this chapter

Steals such property and shall be guilty of larceny.

*Ladely*, 82 Wn.2d at 174, *quoting* former RCW 9.54.010(5). The current version reads:

"Possessing stolen property" means 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.

RCW 9A.56.140(1).

The State essentially argues that the use of the words "possess" and "retain" in the new statute radically changes the former statute and makes clear that the legislature intended that possession of stolen property now be classified as a continuing

crime. Brief of Respondent at 2-5. This Court should reject the State's argument. Although the former statute did not use the words "possess" or "retain," it did use the term "withhold." *Ladely*, 82 Wn.2d at 174. "Withhold" is defined as "to keep in check; restrain" and "to refrain from giving, granting, or permitting." *The American Heritage Dictionary of the English Language* (3d ed. 1992) at 2050. "Possess" is defined to mean "have as property; own" and "to gain or exert influence or control over; dominate." *Id.* at 1413. "Retain" is defined as "to maintain possession of." *Id.* at 1539. Certainly if one is exerting control over an object, one is also refraining from giving or granting that object to another person. The difference between former RCW 9.54.010(5) and current RCW 9A.56.140 is merely semantic and does not reflect any intention to create a new crime of possession of stolen property. At the time *Ladely* was decided, the State could have charged a defendant with the crime of possession of stolen property under former RCW 9.54.010(5) by alleging that the accused person wrongfully aided in withholding the property from its rightful owner. The distinction between "withholding" and "possessing" is simply not important enough to have effectively abrogated *Ladely*.

The State's reliance on the decision in *State v. Mermis*, 105 Wn.App. 738, 20 P.3d 1044 (2001), is unavailing. Brief of Respondent at 7. *Mermis* simply does not control the outcome of this case. *Mermis* applied the "continuing criminal impulse" test to the crime of theft by deception, not to the crimes of possession of stolen property or possession of a stolen motor vehicle. *Id. Ladely*, on the other hand, laid down the rule for when the limitations period begins to run for the crime of possession of stolen property, the crime with which Mr. Contreras is charged. 82 Wn.2d at 177; CP 97 (Information); CP 52 (Am. Information).

Second, the "continuing criminal impulse" of *Mermis* lasted for a period of twenty days, while the State argues that Mr. Contreras had a continuing criminal impulse that lasted for three years, but with no outward manifestations of that impulse (other than driving the car, not an element of the crime charged) from 2004 until October 1, 2007. See *Mermis*, 105 Wn.App. at 741-42 (Mermis obtained car September 6 and obtained title and bill of sale September 26). Mr. Contreras was charged over four years after he began to possess the vehicle. See CP 90 (Contreras Decl.) As a matter of policy, courts should be hesitant to apply the "continuing criminal impulse" test over such long periods.

[Statutes of limitations are] designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far distant past. Such a time limit may also have the salutary effect of encouraging law enforcement officials promptly to investigate suspected criminal activity. For these reasons and others, we have stated before the principle that criminal limitations statutes are to be liberally interpreted in favor of repose.

*Toussie v. United States*, 397 U.S. 112, 90 S. Ct. 858, 25 L.Ed.2d 156 (1970) (quotations marks and citations omitted).

Because the crime of possession of stolen property is not a continuing offense under controlling Washington case law, the statute of limitations in this case began to run when Mr. Contreras first acquired the stolen property with knowledge that it was stolen. *See Ladely*, 82 Wn.2d at 177 (possession of stolen property not continuing offense); RCW 9A.56.140(1) (defining “possessing stolen property”).

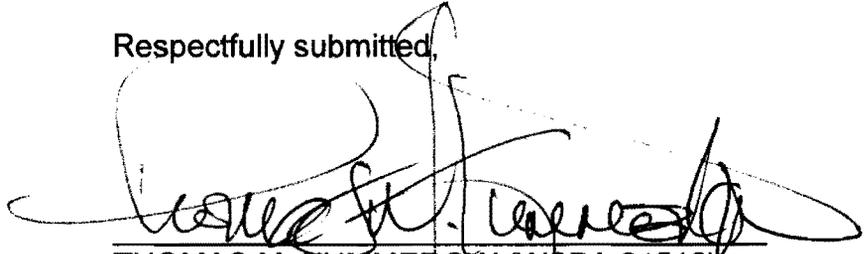
The State was prohibited from initiating this prosecution more than three years after the crime was committed. RCW 9A.04.080(h). Mr. Contreras is entitled to reversal of his conviction with instructions to dismiss.

**B. CONCLUSION**

For the reasons stated, Mr. Contreras requests this Court reverse his conviction as being barred by the statute of limitations.

DATED this 13<sup>th</sup> day of January 2011.

Respectfully submitted,



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