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STATE OF WASHINGTON
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NO. 95115-2

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DIANA JOLINE MERRITT,

Petitioner.

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

The Honorable Jeffrey Ramsdell, Judge

SUPPLEMENTAL BRIEF OF PETITIONER (CORRECTED)

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TABLE OF CONTENTS

	Page
A. <u>ISSUE</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
C. <u>ARGUMENT</u>	3
1. THE CHARGING DOCUMENT IS DEFECTIVE BECAUSE IT FAILS TO ALLEGE FACTS SHOWING THE OFFENSES WERE COMMITTED WITHIN THE STATUTE OF LIMITATIONS.....	3
a. The information fails to state an offense for which Merritt can be prosecuted because it does not show on its face that the State commenced prosecution within the statute of limitations period, in violation of RCW 10.37.050(5).....	4
b. Aside from violating the statutory requirement, the information is constitutionally defective as well	9
D. <u>CONCLUSION</u>	18

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

<u>Alexander v. Food Servs. of Am., Inc.</u> , 76 Wn. App. 425, 886 P.2d 231 (1994).....	12
<u>Ferree v. Doric. Co.</u> , 62 Wn.2d 561, 383 P.2d 900 (1963).....	7
<u>Goodman v. Goodman</u> , 128 Wn.2d 366, 907 P.2d 290 (1995).....	13
<u>In re Rights to Waters of Stranger Creek</u> , 77 Wn.2d 649, 466 P.2d 508 (1970).....	6
<u>In re Pers. Restraint of Scott</u> , 173 Wn.2d 911, 271 P.3d 218 (2012).....	15
<u>In re Pers. Restraint of Stoudmire</u> , 141 Wn.2d 342, 5 P.3d 1240 (2000).....	12, 15, 17
<u>In re Pers. Restraint of Swagerty</u> , 186 Wn.2d 801, 383 P.3d 454 (2016).....	11-12, 14, 17
<u>State v. Bixby</u> , 27 Wn.2d 144, 177 P.2d 689 (1947).....	6
<u>State v. Cozza</u> , 71 Wn. App. 252, 858 P.2d 270 (1993).....	18
<u>State v. Dash</u> , 163 Wn. App. 63, 259 P.3d 319 (2011), <u>abrogated on other grounds by</u> <u>State v. Peltier</u> , 181 Wn.2d 290, 332 P.3d 457 (2014)	10
<u>State v. Davis</u> , 53 Wn.2d 387, 333 P.2d 1089 (1959).....	13

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

State v. Fischer,
40 Wn. App. 506, 699 P.2d 249,
review denied, 104 Wn.2d 1004 (1985),
abrogated on other grounds by
State v. Peltier, 181 Wn.2d 290, 332 P.3d 457 (2014) 7

State v. Franks,
105 Wn. App. 950, 22 P.3d 269 (2001)..... 17

State v. Glover,
25 Wn. App. 58, 604 P.2d 1015 (1979),
abrogated on other grounds by
State v. Peltier, 181 Wn.2d 290, 332 P.3d 457 (2014) 6, 16

State v. Gottfreedson,
24 Wash. 398, 64 P. 523 (1901) 6

State v. Greathouse,
113 Wn. App. 889, 56 P.3d 569 (2002),
review denied, 149 Wn.2d 1014, 69 P.3d 875 (2003) 15

State v. Head,
136 Wn.2d 619, 964 P.2d 1187 (1998)..... 7

State v. Hodgson,
108 Wn.2d 662, 740 P.2d 848 (1987)..... 14, 17

State v. Humphries,
181 Wn.2d 708, 336 P.3d 1121 (2014)..... 14

State v. Hundley,
126 Wn.2d 418, 895 P.2d 403 (1995)..... 15

State v. Jefferson,
79 Wn.2d 345, 485 P.2d 77 (1971)..... 3

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

State v. Jim,
173 Wn.2d 672, 273 P.3d 434 (2012)..... 9

State v. Kjorsvik,
117 Wn.2d 93, 812 P.2d 86 (1991)..... 7

State v. Levan,
23 Wash. 547, 549, 63 P. 202 (1900) 5

State v. Mehrabian,
175 Wn. App. 678, 308 P.3d 660,
review denied, 178 Wn.2d 1022, 312 P.3d 650 (2013) 10

State v. Mermis,
105 Wn. App. 738, 752, 20 P.3d 1044 (2001)..... 10, 13

State v. Merritt,
200 Wn. App. 398, 402 P.3d 862 (2017),
review granted, 409 P.3d 1069 (2018)..... 3, 8-10

State v. Myrberg,
56 Wash. 384, 105 P. 622 (1909) 5-6

State v. Newton,
39 Wn. 491, 81 P. 1002 (1905)..... 13

State v. Nonog,
169 Wn.2d 220, 237 P.3d 250 (2010)..... 17

State v. Osborne,
39 Wash. 548, 81 P. 1096 (1905) 5

State v. Peltier,
181 Wn.2d 290, 332 P.3d 457 (2014)..... 12, 16

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

State v. Reeder,
181 Wn. App. 897, 330 P.3d 786 (2014),
aff'd, 184 Wn.2d 805, 365 P.3d 1243 (2015)..... 12

State v. Schaffer,
31 Wash. 305, 71 P. 1088 (1903)5, 7-8, 10-11, 17

State v. Vangerpen,
125 Wn.2d 782, 888 P.2d 1177 (1995)..... 9, 14

State v. Williams,
162 Wn.2d 177, 170 P.3d 30 (2007)..... 9, 14

State v. Zillyette,
178 Wn.2d 153, 307 P.3d 712 (2013)..... 11

FEDERAL CASES

Hamling v. United States,
418 U.S. 87, 94 S. Ct. 2887, 41 L. Ed. 2d 590 (1974)..... 9

In re Winship,
397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)..... 15

OTHER STATE CASES

People v. Hawkins,
34 Ill.App.3d 556, 340 N.E.2d 223 (1975)..... 16

People v. Gilmore,
63 Ill. 2d 23, 344 N.E.2d 456 (Ill. 1976) 16

People v. Lutter,
42 N.E.3d 843 (Ill. App. Ct.),
appeal denied, 42 N.E.3d 373 (Ill. 2015)..... 14

TABLE OF AUTHORITIES

Page

OTHER STATE CASES

People v. Morris,
135 Ill. 2d 540, 554 N.E.2d 150 (Ill. 1990) 16

People v. Strait,
72 Ill. 2d 503, 381 N.E.2d 692 (Ill. 1978) 16

People v. Zamora,
18 Cal. 3d 538, 557 P.2d 75, 134 Cal. Rptr. 784 (Cal. 1976)..... 13

State v. Tuzman,
145 Ga. App. 481, 243 S.E.2d 675 (Ga. Ct. App. 1978),
abrogated on other grounds by
State v. Outen,
289 Ga. 579, 714 S.E.2d 581 (Ga. 2011)..... 13

OTHER AUTHORITIES

Ballinger's Ann. Codes & Statutes..... 5

CR 8(c)..... 11

CrR 2.1(b) 18

RCW 10.37.050(3)..... 18

RCW 10.37.050(5)..... 4-9

RCW 19.144.090(2)..... 3-4, 8

U.S. Const. amend. VI 9

Wash. Const. art. I, § 22 9

A. ISSUE

Whether the charging document is insufficient to charge the crimes because it does not, on its face, show the alleged offenses were committed within the statute of limitations, a necessary predicate for the prosecution to proceed and the court to exercise its authority over the case?

B. STATEMENT OF THE CASE

The State charged Diana Merritt by amended information with the crime of mortgage fraud in counts 45-55. CP 70-77. All counts are identically worded, except for the name of the borrower and the alleged date of the criminal occurrence, specified in each count. Count 45 serves as an example. It states:

That the defendants Douglas Ross White and Diana Joline Merritt and each of them in King County, Washington, between June 12, 2008 and August 6, 2008, in connection with making, brokering, obtaining, or modifying a residential mortgage loan, did directly or indirectly: (1)(a) knowingly employ any scheme, device, or artifice to defraud or materially mislead a borrower, to-wit: Kirk Lakey, during the lending process; and (b) knowingly defraud or knowingly materially mislead a lender, or any person, to wit: Kirk Lakey, in the lending process, or knowingly engage in any unfair or deceptive practice toward any person, to-wit: Kirk Lakey, in the lending process; and (c) knowingly obtain property by fraud or material misrepresentation in the lending process; and (2) knowingly make any misstatement, misrepresentation, or omission during the mortgage lending process knowing that it might be relied on by a mortgage lender, borrower, or any other party to the mortgage lending process, to-wit: Kirk Lakey; and (3) knowingly use or facilitate the use of

any misstatement, misrepresentation, or omission, knowing the same to contain a misstatement, misrepresentation, or omission, during the mortgage lending process with the intention that it be relied on by a mortgage lender, borrower, or any other party to the mortgage lending process, to-wit: Kirk Lakey; and (4) knowingly receive any proceeds or anything of value in connection with a residential mortgage closing that the defendant knew resulted from a violation of RCW 19.144.080; Contrary to RCW 19.144.080 and 19.144.090, and against the peace and dignity of the State of Washington. And further do allege the crime was a major economic offense or series of offenses, so identified by consideration of the following: multiple incidents per victim, monetary loss substantially greater than typical for the offense, occurred over a long period of time, and the defendants used their position of trust to facilitate the commission of the current offense, under the authority of RCW 9.94A.535(3)(d). CP 70.

Count 45, with an alleged offense date of June 12, 2008 to August 6, 2008, is the earliest alleged crime. Among the 10 charged counts, the latest offense date is for count 55, with a charging period of May 7, 2009 to June 10, 2009. CP 77. The amended information was filed on February 20, 2015, more than five years since the last alleged offense date. CP 48.

Merritt's case proceeded to a bench trial. 2RP¹ 3-4. In an oral ruling, the trial court found Merritt guilty on the mortgage fraud counts. 1RP 33-40. Before entry of written findings and conclusions of law, substitute counsel argued the information was defective because it did not

¹ The verbatim report of proceedings is referenced as follows: 1RP - five consecutively paginated volumes consisting of 8/18/15, 9/24/15, 10/30/15, 12/3/15, 1/22/16; 2RP - 8/19/15, 9/2/15, 9/8/15, 9/9/15, 9/10/15, 9/14/15, 9/15/15, 9/16/15, 9/17/15, 9/21/15; 3RP - 8/24/15.

show the offenses were committed within the statute of limitations, the State did not prove the offenses occurred within the statute of limitations, and the evidence was insufficient to convict. CP 296-99, 314-427, 428-35, 438-50. The trial court rejected these arguments. 1RP 144-46, 160-61, 165-67. It formally entered findings and conclusions for the convictions. CP 469-70. On appeal, the Court of Appeals held the information was sufficient and otherwise affirmed. State v. Merritt, 200 Wn. App. 398, 403-06, 402 P.3d 862 (2017). This Court granted review of the issue.

C. ARGUMENT

1. THE CHARGING DOCUMENT IS DEFECTIVE BECAUSE IT FAILS TO ALLEGE FACTS SHOWING THE OFFENSES WERE COMMITTED WITHIN THE STATUTE OF LIMITATIONS.

To be valid, the charging document must show the criminal offenses were charged within the statute of limitations period. The relevant statute is unequivocal on the matter. The due process right to notice likewise carries this requirement.

Criminal charges may be commenced against a defendant by filing an information in superior court. State v. Jefferson, 79 Wn.2d 345, 347, 485 P.2d 77 (1971). The statute of limitations for mortgage fraud is found at RCW 19.144.090(2), which provides "No information may be returned more than (a) five years after the violation, or (b) three years after the

actual discovery of the violation, whichever date of limitation is later." The dates alleged in the information for the commission of the crimes are not within five years of the filing of the information. The amended information adding the mortgage fraud counts was filed on February 20, 2015 and the earliest fraud count alleged has a June 12, 2008 to August 6, 2008 offense period. CP 48, 70-77. The information, on its face, therefore does not show it was filed no more than "five years after the violation." RCW 19.144.090(2). Nor does the information allege any facts regarding when the violations were actually discovered. The information, on its face, therefore does not show it was filed within "three years after the actual discovery of the violation." RCW 19.144.090(2). The information is defective in failing to show the State complied with the statute of limitations in bringing the charges.

- a. **The information fails to state an offense for which Merritt can be prosecuted because it does not show on its face that the State commenced prosecution within the statute of limitations period, in violation of RCW 10.37.050(5).**

RCW 10.37.050(5) expressly requires the information show the charged offenses were committed within the time limited by law: "The indictment or information is sufficient if it can be understood therefrom-- . . . That the crime was committed at some time previous to the finding of the indictment or filing of the information, and within the time limited by

law for the commencement of an action therefor." RCW 10.37.050(5) is the successor statute to the one located in Ballinger's Annotated Codes & Statutes, in existence since the early days of statehood. State v. Myrberg, 56 Wash. 384, 385-86, 105 P. 622 (1909); see also State v. Levan, 23 Wash. 547, 549, 63 P. 202 (1900) ("The rules by which the sufficiency of pleadings in criminal actions shall be determined are those prescribed in sections 6839-6861, inclusive, 6800, 2 Ballinger's Ann. Codes & St.").

For over 100 years, then, the rule has been that the information must show on its face "that the right to prosecute for the crime charged is not barred by the statute of limitations." State v. Osborne, 39 Wash. 548, 551, 81 P. 1096 (1905). Cases are dismissed for failing to comply with this requirement. State v. Schaffer, 31 Wash. 305, 310-12, 71 P. 1088 (1903).

In Schaffer, the defendant objected to the complaint on the grounds, first, that the justice's court had no jurisdiction of the subject matter of the offense; and, second, that the complaint did not state facts sufficient to constitute a crime. Id. at 305-06. The superior court dismissed the case and the State appealed. Id. at 306. The Supreme Court affirmed dismissal. Id. at 312. The Supreme Court first held the lower courts had subject matter jurisdiction. Id. at 308. It then turned its attention to the sufficiency of the complaint, inquiring "whether the complaint states facts

sufficient to constitute a misdemeanor." Id. at 308. Under the statute, currently codified at RCW 10.37.050(5), the Supreme Court stated it was "essential" to allege facts sufficient to show that the criminal acts were committed within the time limited by law for the commencement of an action. Id. at 310. No such facts were alleged in the complaint. Id. at 310-11. Dismissal was therefore appropriate. Id. at 311-12.²

The State makes no argument that this precedent should be overturned. See In re Rights to Waters of Stranger Creek, 77 Wn.2d 649, 653, 466 P.2d 508 (1970) (Supreme Court requires "a clear showing that an established rule is incorrect and harmful before it is abandoned."). It is the controlling law. "An indictment or information which indicates that the offense is barred by the statute of limitations fails to state a public offense." State v. Glover, 25 Wn. App. 58, 61-62, 604 P.2d 1015 (1979), abrogated on other grounds by State v. Peltier, 181 Wn.2d 290, 332 P.3d 457 (2014). If not amended, the information is subject to being set aside.

² Cf. State v. Bixby, 27 Wn.2d 144, 153-54, 177 P.2d 689 (1947) (information sufficient where it charged date within statute of limitations under RCW 10.37.050(5)); Myrberg, 56 Wash. at 385-86 ("The limitation for an information for rape was therefore three years, and the information charging the commission of the crime 'within three years next preceding its filing,' was a sufficient compliance with these statutes"); State v. Gottfreedson, 24 Wash. 398, 399, 64 P. 523 (1901) (information sufficient where it did not specify date of crime but alleged that it was committed "within three years next before the filing of this information.").

State v. Fischer, 40 Wn. App. 506, 510, 699 P.2d 249 (1985), abrogated on other grounds by State v. Peltier, 181 Wn.2d 290, 332 P.3d 457 (2014).

Under Schaffer and RCW 10.37.050(5), the charging document in Merritt's case is deficient. The State argued below that a charging document challenged after the verdict must be liberally construed. 1RP 112. Merritt challenged the information before formal entry of the verdict,³ at which time the trial court's informal oral opinion was subject to change or abandonment. State v. Head, 136 Wn.2d 619, 622, 964 P.2d 1187 (1998); Ferree v. Doric. Co., 62 Wn.2d 561, 566-67, 383 P.2d 900 (1963). But even liberally construed, the dates alleged in the information for the commission of the crimes are obviously not within five years of the filing of the information and no facts are alleged regarding when the violation was discovered. The information therefore fails to state a mortgage fraud offense for which Merritt can be convicted.

The State contends Merritt was given notice that she was charged within the statute of limitations because the information cites the date of each offense and the statute setting forth the relevant statute of limitations period. Brief of Respondent (BOR) at 9. "[D]efendants should not have to search for the rules or regulations they are accused of violating." State v. Kjorsvik, 117 Wn.2d 93, 101, 812 P.2d 86 (1991). More than that, the

³ 1RP 89, 137.

State's argument on the point is self-defeating. The information is insufficient if it does not show it was filed within the limitations period. RCW 10.37.050(5). Looking at the alleged offense dates and comparing them to the limitations period set forth in RCW 19.144.090(2) does not show the information was filed within the limitations period. The citation to the statute containing the limitations period does not change the fact. Rather, it confirms the deficiency.

The Court of Appeals missed the mark in complaining "Merritt has not cited any case from any jurisdiction holding that the information must state the applicable statute of limitations." Merritt, 200 Wn. App. at 405-06. The information need not state the statute of limitations. Rather, the information must in some manner show compliance with the statute of limitations on its face. Schaffer, 31 Wash. at 310-12. In the usual case, simply citing the date of offense will be sufficient to determine whether the alleged offenses occurred within the limitations period. One need only compare the date of offense to the date of filing of the information. The statute of limitations for mortgage fraud contains an alternative limitations period of three years from the date of actual discovery of the violation. The information, however, does not state the violation was discovered within that three-year period, and no facts are alleged by which one could arrive at the conclusion.

The Court of Appeals stated "Merritt's counsel conceded that he was not aware of any case where the State introduced a copy of the information as an exhibit or otherwise presented evidence informing the jury when the State filed the information. A jury would need this information to find that the State timely charged a defendant." Merritt, 200 Wn. App. at 406. This contention does not address whether the information is defective. The sufficiency of the information is a question of law for the court, not a question of fact for the jury. See State v. Williams, 162 Wn.2d 177, 182, 170 P.3d 30 (2007) (sufficiency of information is reviewed de novo); State v. Jim, 173 Wn.2d 672, 678, 273 P.3d 434 (2012) ("This court reviews questions of law de novo."). Under that standard, the convictions must be reversed because the information is defective under RCW 10.37.050(5).

b. Aside from violating the statutory requirement, the information is constitutionally defective as well.

A charging document is constitutionally defective if it fails to include all "essential elements" of the crime. State v. Vangerpen, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995); Hamling v. United States, 418 U.S. 87, 117, 94 S. Ct. 2887, 41 L. Ed. 2d 590 (1974); U.S. Const. Amend. VI; Wash. Const. Art. I, § 22.

The Court of Appeals held compliance with the statute of limitations is not an essential element that needs to be proven by the State. Merritt, 200 Wn. App. at 400. That position conflicts with appellate decisions recognizing reversal is required when the State fails to prove the offense was committed within the statute of limitations. State v. Dash, 163 Wn. App. 63, 69-71, 259 P.3d 319 (2011) (reversing where State failed to prove offenses committed within limitations period), abrogated on other grounds by State v. Peltier, 181 Wn.2d 290, 332 P.3d 457 (2014); State v. Mermis, 105 Wn. App. 738, 741, 752, 20 P.3d 1044 (2001) (reversing where unclear whether jury found defendant committed theft by an alternative means on a date outside the statute of limitations); State v. Mehrabian, 175 Wn. App. 678, 696, 308 P.3d 660, review denied, 178 Wn.2d 1022, 312 P.3d 650 (2013) ("If the to-convict instruction permits the jury to convict the defendant based solely on acts committed beyond the statutory limitation period, reversal is required.").

The Supreme Court in Schaffer stated it was "essential" that the charging document show the alleged criminal acts were committed within the limitations period. Schaffer, 31 Wash. at 310. The failure to do so constitutes a failure to state a crime for which the accused can be prosecuted. Id. at 308, 310-11. Schaffer addressed the statutory requirement, but the same points carry over into the realm of constitutional

error. The statute of limitations for a crime has the same effect as an essential element of a crime. Even if the statute of limitations is not labeled an "essential element," it should be substantively treated as one for purposes of assessing the sufficiency of the charging document.

Essential elements are those facts that must be proved to convict a defendant of the charged crime. State v. Zillyette, 178 Wn.2d 153, 158, 307 P.3d 712 (2013). The State likewise cannot obtain a conviction without showing the information was filed within the limitations period. In re Pers. Restraint of Swagerty, 186 Wn.2d 801, 808, 383 P.3d 454 (2016). A charging document that fails to state facts showing the crime was committed within the limitations period does not charge a crime at all. Schaffer, 31 Wash. at 308, 310-11. The fact of compliance with the statute of limitations should therefore be treated as an essential element. The State did not charge a crime for which Merritt could be prosecuted because the information does not show the mortgage fraud charges were filed within the limitations period.

Lack of compliance with the statute of limitations for a criminal offense is not, as argued by the State, an affirmative defense. The general rule in *civil cases*, as set forth in CR 8(c),⁴ is that an affirmative defense is

⁴ Civil Rule 8(c) provides: "Affirmative Defenses. In pleading to a preceding pleading, a party shall set forth affirmatively . . . statute of

waived if not pleaded, and the statute of limitations constitutes one such defense. Alexander v. Food Servs. of Am., Inc., 76 Wn. App. 425, 428-29, 886 P.2d 231 (1994).

In contrast, criminal charges brought outside the statute of limitations cannot be prosecuted and are beyond the statutory authority of the court. State v. Peltier, 181 Wn.2d 290, 297, 332 P.3d 457 (2014); In re Pers. Restraint of Stoudmire, 141 Wn.2d 342, 355, 5 P.3d 1240 (2000). The statute of limitations for filing criminal charges is not waived unless the waiver is expressly made as part of a plea deal. Peltier, 181 Wn.2d at 297; Swagerty, 186 Wn.2d at 809-10. The statute of limitations error need not be raised at the trial level and is not even subject to the time bar for collateral attacks. Swagerty, 186 Wn.2d at 808. From this, it is obvious a statute of limitations challenge to the filing of criminal charges is not an affirmative defense that is waived unless affirmatively pleaded. Rather, it is a defense that endures so long as it is not expressly waived.

As with the particular elements of an offense, the State bears the burden of proving it charged the defendant within the applicable limitations period. State v. Reeder, 181 Wn. App. 897, 921, 330 P.3d 786 (2014), aff'd, 184 Wn.2d 805, 365 P.3d 1243 (2015). This is nothing new.

limitation . . . and any other matter constituting an avoidance or affirmative defense."

Over a century ago, the Supreme Court recognized compliance with the statute of limitations is a question of fact, which the prosecution has the burden of proving. State v. Newton, 39 Wash. 491, 493-94, 81 P. 1002 (1905); see also State v. Davis, 53 Wn.2d 387, 391, 333 P.2d 1089 (1959) ("In the absence of the defense of alibi, it is sufficient if the state charge and prove the commission of the offense on any date within the period of the statute limiting the time within which the prosecution must be commenced.").

The Court of Appeals' suggestion that the statute of limitations is not an element of the State's case because juries cannot decide the issue is baseless. "Whether the statute of limitations bars a suit is a legal question, but the jury must decide the underlying factual questions unless the facts are susceptible of but one reasonable interpretation." Goodman v. Goodman, 128 Wn.2d 366, 373, 907 P.2d 290 (1995). The jury is capable of deciding factual issues relating to the statute of limitations in criminal cases. See Mermis, 105 Wn. App. at 746 ("Whether a criminal impulse continues into the statute of limitations period is a question of fact for the jury").⁵

⁵ Other jurisdictions recognize juries decide statute of limitations issues in criminal cases where material facts are in dispute and the issue cannot be decided by the court as a matter of law. See, e.g., People v. Zamora, 18 Cal. 3d 538, 562, 565, 557 P.2d 75, 134 Cal. Rptr. 784 (Cal. 1976); State

The facts necessary for conviction and the fact of compliance with the statute of limitations share other salient characteristics. The legislature defines elements of a crime. Williams, 162 Wn.2d at 183. The legislature defines the statute of limitations for a crime. State v. Hodgson, 108 Wn.2d 662, 667-68, 740 P.2d 848 (1987). The State must prove every element of the crime unless the defendant stipulates to the element, in which case the requirement is waived. State v. Humphries, 181 Wn.2d 708, 714-15, 336 P.3d 1121 (2014). The State similarly must prove compliance with the statute of limitations absent express waiver. Swagerty, 186 Wn.2d at 808.

The purpose of the essential element rule is to "apprise the accused of the charges against him or her and to allow the defendant to prepare a defense." Vangerpen, 125 Wn.2d at 787. Lack of compliance with the statute of limitations is a complete defense to the charges. Hodgson, 108 Wn.2d at 667-68. Alleging facts showing compliance with the statute of limitations, as with alleging the essential elements of a crime, puts the defendant on notice of what the State needs to prove in order to obtain a conviction. When the charging document omits that necessary fact, it

v. Tuzman, 145 Ga. App. 481, 482-83, 243 S.E.2d 675 (Ga. Ct. App. 1978), abrogated on other grounds by State v. Outen, 289 Ga. 579, 714 S.E.2d 581 (Ga. 2011); People v. Lutter, 42 N.E.3d 843, 847 (Ill. App. Ct.), appeal denied, 42 N.E.3d 373 (Ill. 2015).

subverts the defendant's ability to prepare a defense based on the statute of limitations.

Judgment cannot be entered when the State fails to prove an essential element of the crime. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Hundley, 126 Wn.2d 418, 421, 895 P.2d 403 (1995). Judgment likewise cannot be entered when the State fails to prove compliance with the statute of limitations. In re Pers. Restraint of Scott, 173 Wn.2d 911, 916, 271 P.3d 218 (2012) ("a judgment for a crime charged after the statute of limitations has run is not valid on its face," in which case "the trial judge simply did not have authority to entertain the charges," citing Stoudmire, 141 Wn.2d at 353-54). The failure to prove compliance with the statute of limitations is even more fundamental than failure to prove an element of the crime because lack of compliance bars prosecution altogether. Stoudmire, 141 Wn.2d at 355. The court in that instance has no statutory authority to hear the case. The State is not even given the opportunity to prove the elements of the crime.

"When an information omits a statutory element of a charged crime, it is constitutionally insufficient because it fails to state an offense." State v. Greathouse, 113 Wn. App. 889, 899, 56 P.3d 569 (2002), review denied, 149 Wn.2d 1014, 69 P.3d 875 (2003). Likewise, "[a]n indictment or information which indicates that the offense is barred by the statute of

limitations fails to state a public offense." Glover, 25 Wn. App. at 61-62 (citing People v. Hawkins, 34 Ill.App.3d 556, 340 N.E.2d 223 (1975)).

This aspect of Glover is still good law. In Peltier, the Supreme Court held the statute of limitations does not affect a court's subject matter jurisdiction. Peltier, 181 Wn.2d at 296-97. But the rule that a charging document fails to state a public offense when it does not show the charges were filed within the limitation period still holds. Glover cited Hawkins, an Illinois case, in support of the proposition. Glover, 25 Wn. App. at 61-62. Like Washington, Illinois does not treat the statute of limitations as a jurisdictional bar, but the information must show on its face that it was filed within the limitations period.⁶ Criminal charges are beyond the statutory authority of the court to entertain when they are outside the statute of limitations. Peltier, 181 Wn.2d at 296. Absent express waiver,

⁶ See People v. Gilmore, 63 Ill. 2d 23, 27, 344 N.E.2d 456 (Ill. 1976) ("An examination of the statutory scheme shows clearly that failure to charge an offense does not, as contended by defendants, serve to deprive the circuit court of jurisdiction. On the contrary, the relevant statutes draw a clear distinction between the absence of jurisdiction and the failure to state an offense."); People v. Strait, 72 Ill. 2d 503, 505-06, 381 N.E.2d 692 (Ill. 1978) ("This court has consistently held that although the precise allegation and proof of time or date are not necessary, the charging document must allege that the crime was committed at some time prior to the return of the indictment or the filing of the information and within the period fixed by the statute of limitations."); People v. Morris, 135 Ill. 2d 540, 546, 554 N.E.2d 150 (Ill. 1990) ("Where an indictment on its face shows that an offense was not committed within the applicable limitation period, it becomes an element of the State's case to allege and prove the existence of facts which invoke an exception to the limitation period.").

"once the statute of limitations expires for a crime, the State lacks the authority to charge a defendant." Swagerty, 186 Wn.2d at 808. Statutes of limitation are matters of legislative grace, but prosecution is barred once the statute of limitations has run. Hodgson, 108 Wn.2d at 667-68; Stoudmire, 141 Wn.2d at 355. An information that does not show compliance with the statute of limitations does not state a public offense because the State cannot prosecute the offense and the court cannot enter judgment on it.

The Supreme Court's decision in Schaffer cements the point. In that case, the Court recognized there was no jurisdictional problem with the complaint. Schaffer, 31 Wash. at 308. But it affirmed dismissal because the complaint failed to show the alleged criminal acts occurred within the limitations period, thereby failing to state facts sufficient to constitute the misdemeanor crime at issue. Id. at 308, 310-11.

Further, "[m]ore than merely listing the elements, the information must allege the particular facts supporting them." State v. Nonog, 169 Wn.2d 220, 226, 237 P.3d 250 (2010). Even if compliance with the statute of limitations is not an essential element, it is at the very least a factual predicate necessary to sustain a conviction. Where the information fails to include a necessary fact, the remedy is reversal. State v. Franks, 105 Wn. App. 950, 958-60, 22 P.3d 269 (2001). In Franks, for example,

the State failed to name the defendant in the charging portion of the information. Id. at 952. The Court of Appeals held the information was deficient, explaining, "[t]he identity of the person charged is just as important and essential as the other requirements of the information, including the title of the action and the statement of the acts constituting the crime." Id. at 958. RCW 10.37.050(3), found in the same statute addressing the statute of limitations requirement, requires that the defendant be named in the information.

Compliance with the statute of limitations is likewise a necessary factual predicate to sustaining a conviction that must be shown on the face of the information. The information must contain "a plain, concise and definite written statement of the essential facts constituting the offense charged." State v. Cozza, 71 Wn. App. 252, 255, 858 P.2d 270 (1993) (quoting CrR 2.1(b)). "An information is sufficient if *inter alia* it imparts that the crime was committed before the information was filed and within the statute of limitation." Id. at 255. As argued, the information in Merritt's case is constitutionally defective in failing to satisfy this requirement.

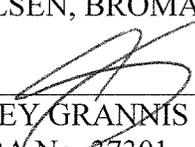
D. CONCLUSION

For the reasons stated, Merritt requests that this Court reverse the convictions.

DATED this 26th day of March 2018

Respectfully Submitted,

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