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SUPREME COURT
STATE OF WASHINGTON
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Division I
State of Washington
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SUPREME COURT NO. 99944-9
COURT OF APEALS NO. 79817-1-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JOSÉ ELMER MARTÍNEZ PLATERO,

Petitioner.

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

The Honorable James Cayce, Judge
The Honorable Julia Garratt, Judge

PETITION FOR REVIEW

KEVIN A. MARCH
Attorney for Petitioner

NIELSEN KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

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A. IDENTITY OF PETITIONER/COURT OF APPEALS DECISION

Petitioner José Elmer Martínez Platero, the appellant below, seeks review of the Court of Appeals decision State v. Martínez Platero, ___ Wn. App. 2d ___, ___ P.3d ___, 2021 WL 2200998, No. 79817-1-I (Jun. 1, 2021), citing to its slip opinion, which is appended.

B. ISSUES PRESENTED FOR REVIEW

1. Does article I, section 22 of the Washington Constitution and controlling Washington Supreme Court precedent prohibit the amendment of an information at the outset of or during trial where the amended information charges entirely different crimes rather than mere inferior degree or lesser included offenses of the originally charged crimes?

2. Even if the amendments described in issue statement 1 are permissible, were the amendments nonetheless unconstitutional because they came at the end of the state's evidence and because the state indicated it intended to rest regardless of whether the amendments were permitted?

C. STATEMENT OF THE CASE

The prosecution originally charged Mr. Martínez Platero with four counts of first degree child rape. CP 8-11. At the end of its case in chief, the prosecution stated it wished to amend the information, based on the complainants' testimonies, to charge three first degree child molestations

instead of three first degree child rapes. 2RP[1] 1024-25. The defense objected to the amendments. 2RP 1025-26. Finding no prejudice, the trial court granted the motion to amend, and the second amended information charged counts II through IV as molestations rather than rapes. Compare CP 8-11 with CP 103-04; 2RP 1025-26.[2]

The jury convicted Mr. Martínez Platero of one count of first degree child rape and three counts of first degree child molestation. CP 130-33; 2RP 1250-53.

Prior to sentencing, the defense moved to dismiss the three amended molestation charges, relying on a then newly issued Washington Supreme Court decision, State v. Gehrke, 193 Wn.2d 1, 434 P.3d 522 (2009). CP 148-65; 3RP 125-32. The trial court denied the motion. 3RP 131-32.

Mr. Martínez Platero appealed, raising and arguing the issues as stated on page 1 of this petition. Br. of Appellant 2, 8-23. The Court of

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[1] Consistent with his briefing below, Mr. Martínez Platero references the verbatim reports of proceedings as follows:
1RP: Consecutively paginated 470-page transcript containing proceedings from May 14, 15, 17, 21, and 24, 2018, and June 4, 6, and 11, 2018.
2RP: Consecutively paginated 1,254-page transcript containing proceedings from May 29, 30, and 31, 2018; December 17, 18, 19, and 20, 2018; January 7, 8, 14, 15, 16, 17, 22, and 23, 2019.
3RP: Consecutively paginated 148-page transcript containing proceedings from September 21, 2018, January 10, 2019, and April 15, 2019.
4RP: 121-page transcript containing proceedings from January 3, 2019.

[2] The prosecution was subsequently allowed to file a third amended information to correct a scrivener's error. CP 106-06; 2RP 1139-41.

Appeals rejected his arguments, holding that State v. Pelkey, 109 Wn.2d 484, 491, 745 P.2d 854 (1987), and its bright line rule, supplanted or overruled State v. Carr, 97 Wn.2d 436, 645 P.2d 1098 (1982), State v. Olds, 39 Wn.2d 258, 261, 345 P.2d 165 (1951), and State v. Lutman, 26 Wn. App. 766, 614 P.2d 224 (1980). Slip op., 4-6. The Court of Appeals also discussed Gehrke, noting its lead opinion had no precedential value and that the five justices in concurrence or dissent would apply the bright line rule of Pelkey and permit any midtrial amendment, even to charges of different crimes Slip op., 5-6. The Court of Appeals also claimed it had previously rejected Mr. Martínez Platero's argument in State v. Aho, 89 Wn. App. 542, 954 P.2d 911 (1998), rev'd on other grounds, 137 Wn.2d 736, 975 P.2d 512 (1999), though it does not appear that any constitutional error or precedent was raised or discussed in that case. Slip op. at 6-7.

D. ARGUMENT IN SUPPORT OF REVIEW

1. The Court of Appeals decision in this case and in State v. Aho conflict with controlling Washington Supreme Court and Court of Appeals precedent applying article I, section 22 to prohibit the prosecution from charging different crimes from those originally charged in the midst of trial

"In criminal prosecutions the accused shall have the right . . . to demand the nature and cause of the accusation against him." CONST. art. I, § 22. The accused "must be informed of the charge he is to meet at trial and cannot be tried for an offense not charged." Carr, 97 Wn.2d at 439, 645 P.2d

1098 (1982). "[D]efendants have a right to be fully informed of the nature of accusations against them so that they may prepare an adequate defense. This right is satisfied when defendants are apprised with reasonable certainty of the accusations against them." State v. Leach, 113 Wn.2d 679, 695, 782 P.2d 552 (1989).

The federal constitution also guaranties the accused the 1. right to notice of the charge against him pursuant to the Sixth and Fourteenth Amendments. Washington v. Texas, 388 U.S. 14, 18, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967). Indeed, among the "most basic ingredients of due process of law" is "'[a] person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense.'" Id. (quoting In re Oliver, 333 U.S. 257, 273, 68 S. Ct. 499, 92 L. Ed. 682 (1948)).

Midtrial amendments to charges, such as the amendments that occurred here, are limited by these constitutional rights. Pelkey, 109 Wn.2d at 490; Olds, 39 Wn.2d at 261. Although CrR 2.1(d) "permit[s] any information or bill of particulars to be amended at any time before verdict or finding if substantial rights of the defendant are not prejudiced," this rule is necessarily limited by the text of article I, section 22. Pelkey, 109 Wn.2d at 490, 745 P.2d 854 (1987); Lutman, 26 Wn. App. at 768.

In Lutman, the defendant was initially charged with hit-and-run and failure to yield. 26 Wn. App. at 767. At the conclusion of the state's

evidence, the court granted the prosecution's motion to amend its charges to negligent driving, and Lutman was convicted of this charge. Id. The prosecution argued on appeal that the relevant criminal rule permitted the information to "be amended at any time before judgment" if the amendment did not prejudice the accused. Id. at 768. The Court of Appeals soundly rejected this argument because article I, section 22 because "[a]n amendment during trial stating a new count charging a different crime violates this provision." Id.

In Olds, the appellants were charged under one prong of the now defunct crime of grand larceny but not another. 39 Wn.2d at 259-60 (citing REM. REV. STAT. § 2601). "The two crimes are committed in different ways," so that evidence that would sustain the uncharged means would not suffice for a conviction under the charged means. Olds, 39 Wn.2d at 260. Nevertheless, the jury was instructed as to both the charged and uncharged ways of committing grand larceny. Id. This violated article I, section 22. Id. at 260-61. To be sure, the court noted that charges could be amended before or during trial, but only to better conform to the evidence presented as to the original charge. Id. The prosecution is not permitted to amend an information to charge a different crime altogether because such "would contravene article I, section 22 of the state constitution." Id. at 261.

Carr also supports this proposition. Carr was initially charged with failing to register to carry goods intrastate when the evidence showed he in fact intended to transport the good across state lines. 97 Wn.2d at 438. Just before trial, the prosecution was permitted to amend the information to charge Carr under a different statute, the statute that required he register to carry the good interstate rather than intrastate. Id. The trial court gave Carr a continuance to prepare the new charge and another continuance after the state's case for the same purpose. Id. Carr was found guilty of the amended interstate charge. Id. Relying on Lutman, the Washington Supreme Court held "amending the complaint at the start of trial violated Carr's right to be informed of the accusations against him." Carr, 97 Wn.2d at 440.

This application of article I, section 22 appears to date back to 1894, in which the Washington Supreme Court held that while the jury is permitted to find the defendant guilty of a lesser included or lesser degree offense, accusation must proceed conviction and it violates article I, section 22 to allow conviction on a crime not charged. State v. Ackles, 8 Wash. 462, 464-65, 36 P. 597 (1894). "This doctrine is elementary and of universal application, and is founded on the plainest principle of justice." Id.

These cases all stand for a clear proposition: midtrial amendments that change the crimes the accused is to face at trial violates article I, section 22. These cases have not been overruled and remain good law. Applying

them, the prosecution is not constitutionally permitted to amend its charges from first degree child rape to first degree child molestation in the midst of trial because these are different crimes with different elements in different statutes. RCW 9A.44.073 (rape of a child in the first degree); RCW 9A.44.083 (child molestation in the first degree).[3] By failing to apply these cases to Mr. Martínez Platero's case, the Court of Appeals decision conflicts with these constitutional decisions, meriting review under the first three prongs of RAP 13.4(b).

The Court of Appeals refused to apply these precedents, claiming that Pelkey did away with them by creating a bright line rule that apparently made them obsolete. Slip op., 4-6. But Pelkey did not overrule these cases, it reaffirmed them with full-throated approval. Pelkey, 109 Wn.2d at 487-88. Given that Pelkey did not disturb prior precedent, the Court of Appeals' proposition that Pelkey somehow overruled or abrogated Olds, Carr, Lutman, and/or Ackles is erroneous. The Washington Supreme Court has made it abundantly clear that the appellate courts do not overrule precedent sub silentio. See, e.g., Lunsford v. Saberhagen, 166 Wn.2d 264, 280, 208 P.3d 1092 (2009); State v. Studd, 137 Wn.2d 533, 548, 973 P.2d 1049

[3] As Mr. Martínez Platero argued below, mandatory joinder under CrR 4.3.1 requires dismissal of the improperly charged counts of child molestation with prejudice. Br. of Appellant at 20-23.

(1999). The Court of Appeals decision is inconsistent with these decisions. RAP 13.4(b)(1).

The Court of Appeals' reading of Pelkey is erroneous and conflicts with Pelkey in any event. Pelkey did not hold that the prosecution may charge whatever new or different crimes it wants in the midst of trial. It held that after the state presents its case in chief, the only amendments that are allowed are amendments to a lesser degree of the same charge or a lesser included offense. Pelkey, 109 Wn.2d at 491.

The Pelkey court first confirmed the general rule that the accused cannot face conviction of crimes not originally charged, citing the precedents as discussed above. Id. at 487. Then it noted that *this* rule was limited to "two narrowly defined statutory exceptions": "'(1) where a defendant is convicted of a lesser included offense of the one charged in the information pursuant to RCW 10.61.006; and (2) where a defendant is convicted of an offense which is a crime of an inferior degree to the one charged, pursuant to RCW 10.61.003." Id. at 488 (quoting State v. Foster, 91 Wn.2d 466, 471, 589 P.2d 789 (1979)).

The Pelkey court analyzed the statutes at issue and determined that they provided for neither lesser included nor inferior degree offenses. Id. at 488-89. Taking care to discuss how amending an information to include different crimes after trial had already begun is constitutionally

problematical because all the pretrial motions, voir dire, opening statements, and witness examination are based on the nature of the precise charges, the court noted the exceptions to this rule—midtrial amendments were allowed "where the amendment merely specified a different manner of committing the crime originally charged" or, again, "charged a lower degree of the original crime charged." Id. at 490-91 (citing State v. Brown, 74 Wn.2d 799, 447 P.2d 82 (1968); State v. Gosser, 33 Wn. App. 428, 656 P.2d 514 (1982)); cf. State v. Schaffer, 120 Wn.2d 616, 617-18, 845 P.2d 281 (1993) (allowing midtrial amendment to *same* malicious mischief charge to conform to the evidence that both tires and mailboxes rather than just mailboxes were damaged); see also State v. Wilson, 56 Wn. App. 63, 782 P.2d 224 (1989) (permitting amendment to charge one additional count of the same indecent liberties charge, but not discussing any constitutional issue).

Nowhere in Pelkey did the Washington Supreme Court state or support a rule that the prosecution may charge different crimes from those originally charged once trial has begun. Pelkey states the opposite several times. When the Pelkey court got down to applying the law to its case's facts—where the state successfully amended the information after presenting its case in chief—the Pelkey court held, "A criminal charge may not be amended after the State has rested its case-in-chief unless the amendment is to a lesser degree of the same charge or a lesser included offense. Anything

else is a violation of the defendant's article I, section 22 right to demand the nature of the accusation against him or her." Pelkey, 109 Wn.2d at 491. This holding in no way supports the Court of Appeals' reading that the prosecution may amend the information in the middle of trial before it rests to charge different crimes altogether. The Court of Appeals decision conflicts with Pelkey, Ackles, Olds, Carr, Lutman, and also conflicts with State v. Markle, 118 Wn.2d 424, 433, 823 P.2d 1101 (1992) ("automatic reversible error . . . to allow the midtrial amendment . . . to include a crime that is neither a lesser-included offense nor an offense of lesser degree"), and State v. Mahmood, 45 Wn. App. 200, 205-06, 724 P.2d 1021 (1986) ("constitution prohibits an amendment to an existing count where the amendment is essentially a different crime"). The conflict involves application of the constitutional rights of the accused and an important question about what crimes the state is permitted to change once trial has commenced. Every RAP 13.4(b) criterion is satisfied.

The Court of Appeals also relied on Aho and counting heads in the Washington Supreme Court recent split decision in Gehrke. Slip op., 6-7. Mr. Martínez addresses both in turn.

As for Aho, for the same reasons this case conflicts with the constitutional precedent discussed above, so does Aho. Permitting child rape charges to be amended to child molestation charges after trial begins violates

article I, section 22. See Aho, 89 Wn. App. at 848. Aho did not address any of the arguments Mr. Martínez Platero makes and does not appear to recognize or apply article I, section 22 or its precedent. As such, it is not controlling or authoritative. In re Electric Lightwave, Inc., 123 Wn.2d 530, 542, 869 P.2d 1045 (1994) ("We do not rely on cases that fail to specifically raise or decide an issue.").

As for Gehrke, the Court of Appeals claims that the lead opinion was not precedential and instead the concurring and dissenting opinions stated Pelkey's controlling rule. Slip op., 5-6. Mr. Martínez Platero agrees that a lead opinion is precedential, but neither is the two-justice concurrence or three-justice dissent. The Gehrke two-justice concurrence stated it agreed with the dissent's formulation of the legal rule, but agreed with the lead opinion to reverse only because Gerhke had established that the amendment prejudiced him. Gehrke, 193 Wn.2d at 20-21 (Fairhurst, C.J., concurring). Because the concurrence's agreement with the dissent's rule was not necessary to its decision to join the majority result, the concurrence's joining of the dissent's rule is obiter dictum and not precedential either. See Johnson v. Liquor and Cannabis Bd., ___ Wn.2d ___, 486 P.3d 125, 133-34 (2021). To the extent the Court of Appeals decision suggests that the Gehrke concurrence and dissent is precedential or legally supports its decision, the Court of Appeals is incorrect.

A long line of cases has consistently held that the prosecution is not constitutionally permitted to amend the information to charge different crimes once trial has begun. These cases establish as much irrespective of whether the state rests. Although Pelkey announced a bright line that after the state's case in chief, only lesser included or lesser degree amendments are permitted, Pelkey did not alter the constitutional framework that charging different crimes altogether are impermissible. Because the Court of Appeals decision conflicts with precedent on an important constitutional issue pertaining to when the state may bring its charges, Mr. Martínez Platero asks that the Washington Supreme Court grant review under RAP 13.4(b)(1), (2), (3), and (4).

2. **Review should be granted to resolve the fractured decision in Gehrke and settle the law**

Pelkey does not apply to this case and does not permit the amendment that occurred for reasons already discussed. But, even applying Pelkey, because the state had completed its case in chief and indicated it would rest regardless of whether the court permitted the amended information, the amendment was per se prejudicial under Pelkey. 2RP 1024-25.

Recently, the Washington Supreme Court was unable to resolve the question of whether the Pelkey rule applied only after the state formally rests

or whether it applies when the state has presented all its evidence and thereby concluded its case in chief. Gehrke, 193 Wn.2d at 10-11 (lead opinion) (applying Pelkey rule where state asks to amend information immediately before resting and concluding amendment violated article I, section 22), 20 (Fairhurst, C.J., concurring) (disagreeing with lead opinion's application of Pelkey but agreeing that Gehrke showed prejudice); 21-25 (González, J., dissenting) (would require state to formally rest). Mr. Martínez Platero contends the lead opinion's decision is correct and the concurrence's dicta embracing the dissents rule is not controlling. Because the law in this area remains unsettled post-Gehrke as to the precise point at which Pelkey applies, review should be granted to resolve these issues under RAP 13.4(b)(4).

E. <u>CONCLUSION</u>

Because he satisfies all RAP 13.4(b) criteria, Mr. Martínez Platero respectfully requests that the Washington Supreme Court grant review.

DATED this 1st day of July, 2021.

Respectfully submitted,

NIELSEN KOCH, PLLC

KEVIN A. MARCH
WSBA No. 45397
Office ID No. 91051
Attorneys for Petitioner

APPENDIX

FILED
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent, v. JOSE ELMER MARTINEZ PLATERO, Appellant.	))))))))))	No. 79817-1-I DIVISION ONE PUBLISHED OPINION

MANN, C.J. — Jose Elmer Martinez Platero appeals his convictions for one count of child rape and three counts of child molestation. He argues that the trial court erred by allowing the State to amend the information mid-trial. He also challenges several of his community custody conditions. Because the State moved to amend the information prior to resting its case, the trial court did not err in allowing the amendment. We affirm Martinez Platero's conviction. However, we remand to the trial court to: (1) reexamine how the community custody conditions concerning contact with minor children affect Martinez Platero's ability to parent his daughter; and (2) to strike the community custody condition requiring alcohol and drug testing because it is not crime related.

FACTS

Elva Reyes had two daughters, E.M. and G.M., when she met Martinez Platero. Martinez Platero began living with Reyes in 2013, when E.M. was six years old and G.M. was two years old. Reyes and Martinez Platero had a daughter together, W.M., in 2016.

Martinez Platero finished work earlier than Reyes and picked up the girls from their babysitter five days a week. In 2017, E.M. disclosed to a friend that her stepfather touched her inappropriately. The school principal asked Jennifer Reynolds, a school counselor from E.M. and G.M's elementary school, to check in with the girls to see if they felt safe at home.[1] E.M. and G.M. both disclosed the abuse to Reynolds. As a mandatory reporter, Reynolds immediately reported this information to Child Protective Services (CPS).

After discovering that the girls' stepfather, Martinez Platero, still lived in the home, Kent police officers took E.M. and G.M. into protective custody. Both girls participated in forensic child interviews and described the sexual abuse in detail. During the investigation, E.M. said that Martinez Platero threatened her, saying that her mother would be unable to afford rent if she told anyone what happened.

The State charged Martinez Platero with four counts of first degree child rape: count 1 committed against E.M. between September 23, 2013 and April 20, 2017; count 2 committed against E.M. between September 23, 2013 and April 20, 2017; count 3 committed against E.M. between September 23, 2013 and April 20, 2017; and count 4 committed against G.M. between February 14, 2014 and April 20, 2017.

[1] In April 2017, at the time of the incidents, E.M. was in third grade, and G.M. was in kindergarten.

E.M. and G.M. both testified at trial. Martinez Platero testified in his own defense. Martinez Platero categorically denied raping or touching either E.M. or G.M. His primary argument was that E.M. and G.M. were not credible due to inconsistencies between their testimony, their pretrial interviews, and the testimony of other witnesses.

After the State finished examining its final witness, but before formally resting its case, the State moved to amend three of the first degree rape counts to first degree child molestation. Martinez Platero objected, contending that his defense tailored their cross-examination of witnesses based on the original charges. The court granted the amendments.

The jury convicted Martinez Platero as charged in the amended information. At sentencing, Martinez Platero moved to dismiss the charges, alleging that under the amended information, he could have argued that he only molested the girls and did not commit any penetrative acts. The sentencing court denied the motion. The court imposed a sentence of 300 months to life for the rape conviction and concurrent sentences of 198 months to life for the molestation convictions. The court also imposed numerous community custody conditions. Martinez Platero appeals.

ANALYSIS

A. Amended Charges

Martinez Platero argues that the trial court erred when it allowed the State to amend three of the counts of child rape to child molestation. We disagree.

We review the trial court's decision allowing the State to amend the information for an abuse of discretion. State v. Brooks, 195 Wn.2d 91, 96, 455 P.3d 1151 (2020).

The court abuses its discretion if its decision is manifestly unreasonable or based on untenable reasons. Brooks, 195 Wn.2d at 97.

The Washington State Constitution provides defendants the right "to demand the nature and cause of the accusation against him." WASH. CONST. art. I, § 22. Under this provision, the accused cannot be tried for an offense not charged. State v. Pelkey, 109 Wn.2d 484, 487, 745 P.2d 854 (1987). "Defendants have a right to be fully informed of the nature of accusations against them so that they may prepare an adequate defense. This right is satisfied when defendants are apprised with reasonable certainty of the accusations against them." State v. Leach, 113 Wn.2d 679, 695, 782 P.2d 552 (1989).

Under CrR 2.1(d), the court may permit an amendment to the information "at any time before verdict or finding if substantial rights of the defendant are not prejudiced." In Pelkey, our Supreme Court held that

> A criminal charge may not be amended after the State has rested its case-in-chief unless the amendment is to a lesser degree of the same charge or a lesser included offense. Anything else is a violation of the defendant's article 1, section 22 right to demand the nature and cause of the accusation against him or her. Such a violation necessarily prejudices this substantial constitutional right, within the meaning of CrR 2.1(e).[2]

109 Wn.2d at 491 (emphasis added). Thus, under "the Pelkey rule" any amendment from one crime to a different crime after the State has rested is per se prejudicial. State v. Vangerpen, 125 Wn.2d 782, 791, 888 P.2d 1177 (1995).

Although Martinez Platero contends that article I, section 22 prohibits the State from amending the information to charge a different crime, Pelkey established a bright line rule. It is only a per se violation of article I, section 22, if the State amends charges

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[2] The bill of particulars was previously under section (e) in an earlier version of CrR 2.1.

to something other than a lesser degree of the same charge or to a lesser included offense, after it rests its case in chief. Under Pelkey, the State may amend the charges before resting its case in chief, which is what the State did here.

Martinez Platero argues that the recent decision in State v. Gehrke, 193 Wn.2d 1, 434 P.3d 522 (2019), supports his argument that the trial court erred in approving the amendment because even though the State had not formally rested, it had completed the presentation of its case in chief. In Gehrke, the State moved to amend the information to add a manslaughter charge to the second degree murder charge, after the State called its last witness but before it formally rested. This court affirmed, holding that, under CrR 2.1(d), Gehrke could not demonstrate prejudice because his defense at trial was self-defense and that would have also been his defense to the amended charge. The Supreme Court reversed in a fractured opinion. The lead opinion, signed by four justices, held that the Pelkey rule was "not concerned with whether the State has formally rested," but whether it has "functionally rested" by completing its presentation of evidence. Gehrke, 193 Wn.2d at 9-11.

Three justices dissented, holding that the Pelkey rule should be literally applied, and that per se prejudice does not occur until after the State has formally rested. Gehrke, 193 Wn.2d at 21-22 (Gonzalez, J., dissenting). Two additional justices concurred with the dissent in principle, but with the lead opinion's result:

> We have established a bright line rule that "[a] criminal charge may not be amended after the State has rested its case in chief unless the amendment is to a lesser degree of the same charge or a lesser included offense" because such an amendment creates prejudice per se. State v. Pelkey, 109 [Wn.2d] 484, 491, 745 P.2d 854 (1987) (emphasis added). I agree with the dissent that maintaining this bright line rule is important in order to give clarity to both judges and litigants. See dissent at 534-35. I

> also agree that because, in this case, the State moved to amend before resting its case in chief, this rule does not apply. . . . However, I write separately because I believe that . . . Gehrke demonstrated actual prejudice [under CrR 2.1(d)] in this case.

Gehrke, 193 Wn.2d at 20 (Fairhurst, J., concurring).

Thus, the "functionally rested" language relied upon by Martinez Platero was supported only by the four-justice lead opinion and not the concurrence or dissent. "A plurality has little precedential value and is not binding." State v. Johnson, 173 Wn.2d 895, 904, 270 P.3d 591 (2012). Therefore, Pelkey remains good law and draws a bright line that per se prejudice does not occur where the State amends the charges to something other than a lesser degree or lesser included offense before the State formally rests. In Martinez Platero's case, no Pelkey violations occurred because the State had not formally rested when it moved to amend the information.

Martinez Platero relies on State v. Olds, 39 Wn.2d 258, 261, 235 P.2d 165 (1951), State v. Lutman, 26 Wn. App. 766, 767, 614 P.2d 224 (1980), and State v. Carr, 97 Wn.2d 436, 437, 645 P.2d 1098 (1982), to support his assertion that article I, section 22 prohibits the State from amending the information to charge different crimes. But all of these cases predate, and were addressed, in Pelkey before the court adopted its bright line rule. 109 Wn.2d at 487-91.

Further, this court rejected Martinez Platero's different crimes argument in State v. Aho, 89 Wn. App. 842, 848, 954 P.2d 911 (1998), rev'd on other grounds, 137 Wn.2d 736, 975 P.2d 512 (1999). In Aho, we held that the defendant was not prejudiced when the State amended the charge of child rape to child molestation after both victims testified. Aho, 89 Wn. App. at 848. The State gave the defendant notice that it may

amend the charges, and the defendant was unable to point to any “fact of consequence” to demonstrate that his trial strategy or cross-examination of the witnesses was affected by the amendment. Aho, 89 Wn. App. at 849. While the defendant argued that the two crimes were different, this court held:

> While child molestation is a different crime from rape of a child, that fact is of no help to Aho here. As the trial court correctly observed below, the critical difference between the main charge of rape and the alternative charge of molestation was whether penetration had occurred. We fail to see how, on these facts, either the lack of either additional discovery or a continuance adversely affected Aho’s defense.

Aho, 89 Wn. App. at 849.

Although child rape and child molestation are different crimes, as in Aho, this distinction is of no help to Martinez Platero. Both the child rape and later amended child molestation charges were based on the same factual scenario. Martinez Platero categorically denied touching either child. Under these facts, Martinez Platero cannot demonstrate—and does not attempt to demonstrate—prejudice. For these reasons, the trial court did not abuse its discretion by granting the State’s amendments.

B. Community Custody Conditions – Right to Parent

Martinez Platero next argues that the community custody conditions limiting his contact with minors violate his fundamental right to parent. We agree.

We review community custody conditions for an abuse of discretion and will reverse them if they are manifestly unreasonable. State v. Nguyen, 191 Wn.2d 671, 678, 425 P.3d 847 (2018). “Conditions interfering with fundamental rights, such as the right to a parent-child relationship, must be ‘sensitively imposed’ so they are ‘reasonably necessary to accomplish the essential needs of the State and public order.’” State v.

Torres, 198 Wn. App. 685, 689, 393 P.3d 894 (2017) (quoting In re Pers. Restraint of Rainey, 168 Wn.2d 367, 374, 229 P.3d 686 (2010)).

The court imposed the following community custody conditions on Martinez Platero for life: (1) "have no direct and/or indirect contact with minors"; (2) "Do not hold any position of authority or trust involving minors"; and (3) no contact with "any minors without supervision of a responsible adult who has knowledge of this conviction."

Parents have a fundamental liberty interest in the care, custody, and management of their child. Santosky v. Kramer, 455 U.S. 745, 753, 102 S. Ct. 1388, 1394-95, 71 L. Ed. 2d 599 (1982). The State concedes that the trial court did not analyze whether Martinez Platero should be prohibited from contacting his biological daughter before imposing the condition.

In State v. DeLeon, 11 Wn. App. 2d 837, 839, 456 P.3d 405 (2020), the defendant pleaded guilty to molesting his stepchildren, and the trial court imposed a condition prohibiting him from having contact with all minors, including his biological children. DeLeon, 11 Wn. App. 2d at 839. This court remanded holding that the trial court failed to consider the defendant's constitutional right to parent, to include an explanation as to why the conditions applied to the defendant's biological children, or to analyze less restrictive alternatives. DeLeon, 11 Wn. App. 2d at 841.

The trial court did not consider Martinez Platero's relationship with his biological daughter. We accept the State's concession and remand to the trial court to consider whether a no-contact provision with W.M. is appropriate, and to consider how special conditions 15 and 16 apply to W.M.

C. Community Custody Condition – Sexual Contact

Martinez Platero next argues that the court erred by imposing the community custody condition requiring him to disclose his offender status prior to having sexual contact. We disagree.

The court may impose and enforce crime-related prohibitions and affirmative conditions as part of any sentence. RCW 9.94A.505(9). A "crime-related prohibition" is "an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted." RCW 9.94A.030(10). To be crime-related, there must be a reasonable relationship between the condition and the defendant's behavior, but "the prohibited conduct need not be identical to the crime of conviction." Nguyen, 191 Wn.2d at 684.

Martinez Platero challenges special condition 5:

> Inform the supervising CCO and sexual deviancy treatment provider of any dating relationship. Disclose sex offender status prior to any sexual contact. Sexual contact in a relationship is prohibited until the treatment provider approves of such.

We recently held that a nearly identical condition was constitutional as long as the condition was crime-related. See State v. Lee, 12 Wn. App. 2d 378, 403, 460 P.3d 701 (2020). Here, this condition is plainly crime-related and sensitively imposed. Martinez Platero's victims were children and he gained access to them from his relationship with their mother. Martinez Platero further exploited this relationship, threatening E.M. with her mother's financial insecurity if she disclosed the abuse. This danger will continue to exist even if Martinez Platero is only required to disclose to

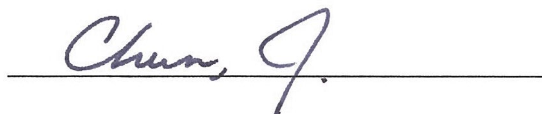
partners with children, as other adults may be a caregiver to minors. For these reasons, we affirm.

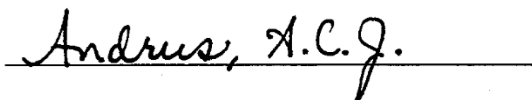
D. Community Custody Condition – Substance Testing

Finally, Martinez Platero challenges special condition 10 that requires he be available and “submit to urinalysis and/or breathanalysis upon the request of the CCO and/or chemical dependency treatment provider.” Martinez Platero argues that the condition is not crime-related. The State concedes. We accept the State’s concession and remand to strike the condition.

We remand to the trial court to reexamine how the community custody conditions concerning contact with minor children affect Martinez Platero’s ability to parent his daughter and to strike the community custody condition requiring alcohol and drug testing because it is not crime-related. We otherwise affirm.

WE CONCUR:





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