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COURT OF APPEALS

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STATE OF WASHINGTON

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**NO. 34280-4-II**

**COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II**

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**STATE OF WASHINGTON,**

**Respondent,**

**vs.**

**JEFFREY SCOTT ZIEGLER,**

**Appellant.**

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**BRIEF OF APPELLANT**

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pm 6-15-06

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## **I. ASSIGNMENTS OF ERROR**

- 1. THE TRIAL COURT ERRED BY ALLOWING THE STATE TO AMEND THE INFORMATION MID-TRIAL TO ADD THREE NEW CHARGES.**
- 2. THE MID-TRIAL AMENDMENT OF THE INFORMATION DEPRIVED JEFF ZIEGLER OF HIS CONSTITUTION RIGHT UNDER WASHINGTON STATE CONSTITUTION ARTICLE I, SECTION 22, TO BE APPRISED OF THE CHARGES AGAINST HIM.**

## **II. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR**

- 1. THE WASHINGTON CONSTITUTION, ARTICLE 1, SECTION 22, REQUIRES THAT CRIMINAL DEFENDANTS BE NOTIFIED OF THE CHARGES THEY MUST FACE BEFORE THE COMMENCEMENT OF THEIR TRIAL. PRIOR TO TRIAL, JEFF ZIEGLER WAS NOTIFIED VIA AN INFORMATION THAT THE CHARGES HE FACED WERE TWO COUNTS OF RAPE OF A CHILD IN THE FIRST DEGREE AND TWO COUNTS OF CHILD MOLESTATION IN THE FIRST DEGREE. MID-TRIAL, THE COURT ALLOWED AN AMENDMENT OF THE INFORMATION TO ADD THREE NEW CHARGES. AT THE TIME HIS TRIAL COMMENCED, WAS JEFF ZIEGLER NOTIFIED OF ALL THE CHARGES HE HAD TO FACE?**

## **III. STATEMENT OF THE CASE**

By an original information, Jeff Ziegler was charged in Clark County with two counts of rape of child in the first degree (counts I and II) and two counts of child molestation in the first degree (counts III and IV). CP 1-2. The victim in counts I and III is M.N.S. CP 1-2. The victim in count II and IV is I.J.S. CP 1-2. M.N.S. and

I.J.S. are Ziegler's step-daughters. RP<sup>1</sup> 55-57. Their dates of birth are 02/09/94 and 03/28/95, respectively, making their age at the time of trial 11 and 10 years-old. RP 55. The incident date for each count is the same: between December 1, 2004, and May 1, 2005. CP 1-2.

Ziegler's two-day jury trial began on September 19, 2005, with the Honorable Diane Woolard presiding. RP 21-419. Ziegler's wife, Jennifer Ziegler (hereafter "Jennifer") was the State's first witness. RP 55-130. In addition to M.N.S. and I.J.S., she has a three year-old son, Ian. RP 55. Ziegler is Ian's father. RP 55. The family moved from California to Vancouver, Washington, in August 2003. RP 58. Jennifer worked as a bookkeeper at a Portland law office. RP 59. Ziegler stayed home to care for the children while recovering from a back injury. RP 58-60. The family lived in a multi-bedroom home and each of the children had his or her own room. RP 61.

On May 4, 2005, Jennifer awoke to find Ziegler sleeping on M.N.S.'s bed. RP 71. Jennifer told Ziegler that she felt sleeping on M.N.S.'s bed was inappropriate. RP 71. She left for work. RP 71.

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<sup>1</sup> "RP" refers to the verbatim report of proceedings. There are a total of eight volumes with sequential page numbers.

After work, Jennifer spoke on the phone with her sister-in-law, Debbie, who lived in Florida. RP 72. During the conversation, Jennifer told Debbie about finding Ziegler sleeping in M.N.S.'s room. RP 73. While talking to Debbie, Jennifer noticed that I.J.S. had a look of fear on her face. RP 73-74. I.J.S. told her mother that she had something to tell her and she did not want her to get mad. RP 74. I.J.S. told Jennifer certain things as did M.N.S.<sup>2</sup> RP 75. Because of what the girls said, Jennifer called 911 and arranged to meet with a police officer, Deputy Sofianos, at a nearby Safeway parking lot. RP 76-77, 247-48.

After Jennifer and the girls met with Deputy Sofianos, she returned to the family home to collect some items so that she and the children could stay at a motel for the night. RP 79. While they were at the home, Ziegler called Jennifer twice. RP 80-82. In both instances, she tipped the phone so Deputy Sofianos could hear what Ziegler was saying. RP 81-82, 253-58. During the first tipping, Deputy Sofianos heard Ziegler say that it was consensual. RP 256. During the second tipping, Sofianos noted Ziegler said, "She wanted to know. She was curious. I just let it happen." RP 258. Jennifer testified that what Deputy Sofianos did not hear

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<sup>2</sup> Jennifer did not testify at trial as to what those certain things were.

during the two calls is that Ziegler said that I.J.S. came to him and was curious about sex. RP 80. One thing led to another and things had gotten out of hand and that he had fallen in love with I.J.S. RP 82.

M.N.S. testified after her mother. RP 131-157. She described two instances where Ziegler touched her inappropriately. RP 138-42. The first instance was in December 2004 or January 2005. RP 138. While tucking M.N.S. into bed, Ziegler pulled her underwear into a thong-shape and than rubbed his penis against her backside. RP 138-140. This lasted 10 to 20 minutes. RP 141. The second time was another tucking in after Christmas 2004. RP 142. Ziegler put his hands on her breasts under her clothing and on her vagina on top of her clothing and rubbed her thigh. RP 142-43.

M.N.S. also described seeing Ziegler rub against I.J.S. while he and I.J.S. were lying on the master bedroom floor watching TV. RP 145-46. M.N.S. also described another instance when another girl, Jamie, spent the night with the sisters. RP 147. I.J.S. again was lying on the floor with Ziegler watching TV. RP 148. Ziegler's penis was out and rubbing against I.J.S.'s clothed bottom. RP 148-49.

After M.N.S. testified, the State moved under CrR 2.1(e) to amend the information. RP 161. With respect to M.N.S., the State sought to amend count one from rape of a child in the first degree to child molestation in the first degree. RP 162; CP 6-7<sup>3</sup>. The State argued that the amendment of count I was necessary because M.N.S. did not describe an act of sexual intercourse so the rape charge could not stand. RP 161-62. As to I.J.S., the State wished to amend to add additional counts of rape of a child in the first degree. RP 162; CP 6-7. It was unclear why the State waited to this point in the trial to move to add the two child rape charges. RP 161-63. Ziegler strenuously objected to the amendment arguing that it was prejudicial and that he had prepared to meet the original charges and not the amended charges. RP 164-66. Ziegler did not ask for a continuance. RP 166.

Over defense objection, the trial court provisionally allowed the amendment noting that with children witnesses it is never clear how they are really going to testify so it makes sense to allow charges to be amended – to apparently include adding charges - during trial. RP 163.

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<sup>3</sup> CP 6-7 is captioned “Second Amended Information.” I could not find an amended information in the court file.

I.J.S. testified that things started happening with Ziegler in November or December of 2005. RP 177. She described the first time was when her mother had gone to a store at the mall and Ziegler licked her vagina and told her that he was building her muscles. RP 177. Ziegler told her not to tell or something very bad would happen if she told her mom. RP 179. The next time she remembered was when M.N.S. was at a friend's house and Jennifer was at the store. RP 181. Again, Ziegler licked her vagina. RP 181. I.J.S. also described several instances where Ziegler would play a "Girls Gone Wild" DVD and lick her vagina. RP 182. That happened more than two times. RP 182. Sometimes Ziegler would lick her when he tucked her into bed. RP 184. She recalled one instance when Ziegler wanted her to act like a Girls Gone Wild girl by showing Ziegler her "boobs" and putting on a pair of Jennifer's thong underwear. RP 186. During that instance, Ziegler also put a vibrating big red wiener in her vagina. RP 186. She tried to push it out but Ziegler pushed it back in. RP 186-87. He also handcuffed her with furry, cheetah-looking handcuffs. RP 187. I.J.S. recalled another instance where yellow stuff came out of Ziegler's penis and went on her belly. RP 190. She also told of another time when she was in the car with Ziegler

and he sucked on her "boobs" over her shirt. RP 192. The last time anything happened between I.J.S. and Ziegler was the night she told her mom about what had been happening. RP 193. Ziegler had again licked her vagina. RP 193. I.J.S. also testified that at times Ziegler would put his tongue up her "butt hole." RP 197. Sometimes Ziegler would prompt her to lick him although she never licked his penis. RP 198. I.J.S. thought this variety of things happened over twenty times. RP 198.

After I.J.S.'s direct examination, the State asked the court to permit the information to be amended. RP 209. At Ziegler's request, the court agreed to wait to rule on the amendment until after the cross-examination of I.J.S. RP 209. The court noted Ziegler's continued objection to the amended information.

The court later approved the filing of the amended information during the State's case-in-chief. RP 286. Although he noted his objection to the amendment, Ziegler entered a not guilty plea on the six counts. RP 286-87. The time frame in which the events occurred did not change. CP 6-7. During different searches of the home, police recovered a "Girls Gone Wild" DVD and a plastic red vibrator. RP 98-99, 249-50, 276. Jennifer

acknowledged keeping a pair of furry handcuffs in her closet. RP 320.

On May 5, Jennifer returned to the family home to get some more personal items for herself and the children. RP 91. When she reached the home she heard snoring. RP 92. She went into one of the girl's rooms and found Ziegler sleeping and unresponsive. RP 92. She called 911 for help. RP 92. Ziegler was taken to the hospital. RP 94. In the other girls' bedroom, Deputy Kingrey found what he described as a suicide note. RP 93, 267-68. The note was admitted at trial after Jennifer identified the handwriting as that of Ziegler's. RP 93-94, 268. The portion read into the record said that Jennifer should not blame herself. RP 94. While Ziegler was in the hospital recovering from the apparent suicide attempt, Jennifer took the children and returned to California. RP 95. While she was in California, Ziegler wrote her letters, one of which was offered and admitted. RP 101-02. Jennifer read a portion of the letter into the record: Ziegler did not see a reason to go on living, things got out of control, he prayed for Jennifer's forgiveness, he loved the girls too much but his love turned to an inappropriate love, and the girls became possessions and not daughters. RP 101-02.

The defendant testified in his own defense and adamantly denied any inappropriate touching. RP 331-43.

Neither the State nor Ziegler took any exceptions to the jury instructions. RP 347.

Ziegler was convicted on all counts. RP 410-11; CP 42-47.

A sentencing hearing was held on December 8, 2005. RP 427-74. Ziegler exercised his allocution right. The court sentenced Ziegler to the high end of the minimum term on each count and to a maximum term of life. RP 455; CP 48. Over Ziegler's objection, the Court made no contact with minors a condition of his sentence thereby prohibiting Ziegler from seeing his young son Ian. RP 465-66; CP 62. The court reasoned that Ziegler is predatory and a risk to young children. RP 466.

Ziegler filed a timely notice of appeal. RP 64-82

#### **IV. ARGUMENT**

##### **I. THE MID-TRIAL AMENDMENT OF THE INFORMATION TO ADD THREE NEW CHARGES DEPRIVED JEFF ZIEGLER OF A HIS CONSTITUTIONAL RIGHT TO NOTICE UNDER ARTICLE I, SECTION 22 OF THE WASHINGTON STATE CONSTITUTION.**

The Washington State Constitution Article I, Section 22 (Amend. 10), guarantees that criminal defendant's "shall have the right . . . to demand the nature and cause of the accusation"

against them. Under this criminal provision, an accused person must be informed of the charge he or she is to meet at trial, and cannot be tried for an offense not charged. *State v. Carr*, 97 Wn.2d 436, 439, 645 P.2d 1098 (1982); *State v. Rhinehart*, 92 Wn.2d 923, 602 P.2d 1188 (1979). Here, the State was allowed to amend the charges against Ziegler mid-trial, changing one charge from rape of a child in the first degree to child molestation in the first degree and adding two altogether new counts of rape of a child in the first degree. Ziegler strenuously objected arguing that he was prepared for trial on the original information only and was not prepared to answer to the amended charges. Finding that child witness testimony is unpredictable and that Ziegler should not be surprised by that, the court allowed the amendment citing CrR 2.1(d) for the proposition that the court may permit an amended information to be filed any time before verdict if substantial rights of the defendant are not prejudiced. But substantial, constitutional rights of Ziegler's were violated. As such, the amendment was error.

The interplay between Article 1, Section 22 of the Washington State Constitution and CrR 2.1(d)<sup>4</sup> has been addressed and is controlled by *State v. Pelkey*, 109 Wn.2d 484, 745 P.2d 854 (1987). See also *State v. Markle*, 118 Wn.2d 424, 436, 823 P.2d 1101 (1992). In *Pelkey*, the court held a mid-trial amendment to an information charging a different crime violates Article I, Section 22. *Pelkey*, 109 Wn.2d at 487 (citing *State v. Olds*, 39 Wn.2d 258, 235 P.2d 165 (1951)). There are two statutory exceptions to the otherwise constitutional violation: where a defendant is convicted of a lesser included offense of the one charged pursuant to RCW 10.61.006 and where a defendant is convicted of a crime which is an inferior degree pursuant to RCW 10.61.003. *Id* at 488. Neither exception applies in our case. Any interpretation of a court rule – specifically CrR 2.1(d) - putting the burden on a defendant to show prejudice for a mid-trial amendment adding charges or changing charges to a different crime contravenes the state constitution. *Pelkey*, 109 Wn.2d at 490. Accordingly, a mid-trial amendment of an information adding

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<sup>4</sup> *Pelkey* interpreted CrR 2.1(e) which was later renumbered as CrR 2.1(d). The text remains the same. *Pelkey*, 109 Wn.2d at 490, footnote 3.

charges is “reversible error per se even without a defense showing of prejudice.” *Pelkey*, 109 Wn.2d at 491.

While it is true that the jury may find a defendant not guilty of the crime charged, but guilty of an offense of lesser degree, or of an offense necessarily included within that charged, it is also true that “accusation must precede conviction,” and that no one can be legally be convicted of an offense not properly alleged. The accused, in criminal prosecutions, has a constitutional right to be appraised of the nature and cause of the accusation against him. Const., Art. I, § 22. And this can only be made known by setting forth in the indictment or information every fact constituting an element of the offense charged. This doctrine is elementary and of universal application, and is founded on the plainest principles of justice.” *State v. Ackles*, 8 Wash. 462, 464-65, 36 P. 597 (1894).

It is a mistake to characterize *Pelkey* as turning only on the fact that the amendment came after the State rested instead of some point earlier in trial as it is anticipated that the State will argue. The distinction actually drawn in *Pelkey* is between the constitutionality of amendments before trial starts versus amendments after trial has already begun. The *Pelkey* court stated:

During the investigatory period between the arrest of the criminal defendant and the trial, the State frequently discovers new data that makes it necessary to alter some aspect of the information. It is at this time amendments to the original information are liberally allowed, and the defendant

may, if necessary, seek a continuance in order to adequately prepare to meet the charge as altered. CrR 3.3(h).

The constitutionality of amending an information after trial has already begun presents a different question. All of the pretrial motions, voir dire of the jury, opening argument, questioning and cross examine of witnesses are based on the precise nature of the charge alleged in the information. Where a jury has already been impaneled, the defendant is highly vulnerable to the possibility that the jurors will be confused or prejudiced by a variance from the original information.

*Pelkey*, 109 Wn.2d at 490.

As *Pelkey* demonstrates, the appropriate time for an amendment adding three new counts as in Ziegler's case was sometime during pre-trial interviews, plea negotiations, attorney-client strategy sessions, but before motions in limine, voir dire, opening statement, direct and cross examinations of the victims' mother and of victim, M.N.S..

## V. CONCLUSION

Ziegler's convictions should be reversed and remanded.

Respectfully submitted this 15<sup>th</sup> day of June, 2006

  
LISA E. TABBUT/WSBA 21344  
Attorney for Appellant

## APPENDIX

### WASHINGTON STATE CONSTITUTION, ARTICLE I, SECTION 22

#### RIGHTS OF THE ACCUSED

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: Provided, The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station or depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed. [AMENDMENT 10, 1921 p 79 Section 1. Approved November, 1922.]

#### **RCW 10.61.003**

#### **Degree offenses — Inferior degree — Attempt.**

Upon an indictment or information for an offense consisting of different degrees, the jury may find the defendant not guilty of the degree charged in the indictment or information, and guilty of any degree inferior thereto, or of an attempt to commit the offense

#### **RCW 10.61.006**

#### **Other cases — Included offenses.**

In all other cases the defendant may be found guilty of an offense the commission of which is necessarily included within that with which he is charged in the indictment or information.

**RULE 2.1 THE INDICTMENT AND THE INFORMATION**

(d) Amendment. The court may permit 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.

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STATE OF WASHINGTON

BY [Signature]  
DEPUTY

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

STATE OF WASHINGTON,

Respondent,

vs.

JEFFREY SCOTT ZIEGLER,

Appellant.

) Clark County No. 05-1-01088-6  
) Court of Appeals No. 34280-4-II

) AFFIDAVIT OF MAILING

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Clark County Prosecuting Attorney  
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Vancouver, WA 98666

And

Mr. Jeffrey Ziegler/DOC# 886970  
Stafford Creek Corrections Center  
191 Constantine Way  
Aberdeen, WA 98520

AFFIDAVIT OF MAILING - 1 -

LISA E. TABBUT

ATTORNEY AT LAW

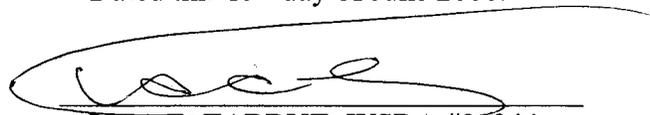
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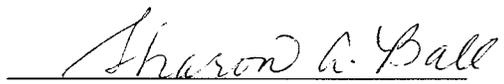
- (1) APPELLANT'S BRIEF
- (2) AFFIDAVIT OF MAILING

Dated this 15<sup>th</sup> day of June 2006.

  
 LISA E. TABBUT, WSBA #21344  
 Attorney for Appellant

SUBSCRIBED AND SWORN to before me this 15<sup>th</sup> day of June 2006.



  
 Sharon A. Ball  
 Notary Public in and for the  
 State of Washington  
 Residing at Longview, WA 98632  
 My commission expires 06/10/07