

No. 91268-8

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

IN RE THE PERSONAL RESTRAINT  
PETITION OF:

JERRY LEE SWAGERTY,  
  
Petitioner.

NO. 45862-4

SUPPLEMENTAL RESPONSE PER  
COURT'S REQUEST

A. PROCEDURAL HISTORY

On May 22, 2012, the State charged the petitioner with one count of rape of a child in the first degree and one count of child molestation in the first degree. These crimes were committed on February 14, 2004. On January 4, 2013, petitioner entered a guilty plea by way of an amended information to one count of rape of a child in the third degree, one count of luring, one count of burglary in the second degree, and one count of intimidating a witness. The amended information retained the date of the original crimes, February 14, 2004.

The petitioner filed a Personal Restraint Petition on January 24, 2014. The State filed a response on May 30, 2014. On August 6, 2014, Commissioner Bearse directed the State to file a supplemental response addressing the impact of the amended information on the statute of limitation for each offense charged. On August 11, 2014, the State moved to

1 stay proceedings pending a decision in *State v. Pelteir*, SC #89502-3. *Pelteir* was decided  
2 on August 21, 2014, nullifying the need for these proceedings to be staid.

3 B. ARGUMENT

- 4 1. THIS CASE SHOULD BE REMANDED FOR FUTHUR PROCEEDINGS  
5 ON THE ORIGINAL CHARGES BECAUSE THREE OF THE  
6 AMENDED CHARGES RESULT IN A VIOLATION OF THE STATUTE  
7 OF LIMITATIONS.

8 With regard to the charges of the amended information, luring, burglary in the  
9 second degree, and intimidating a witness are subject to a three year statute of limitations  
10 pursuant to RCW 9A.04.080(1)(h). Rape of a child in the third degree falls under  
11 9A.04.080(1)(c), and can be prosecuted until the victim reaches her 30th birthday.

12 Therefore, the court should remand this matter for further proceedings to correct this issue.  
13 In the trial court, the petitioner can elect to withdraw his guilty plea and go to trial on the  
14 original charges or execute an express waiver to the statute of limitations on the amended  
15 charges to correct the issue.

16 The expiration of the statute of limitations deprives the trial court of authority to  
17 permit prosecution or enter judgment on a time-barred offense. *In re Stoudmire*, 141  
18 Wn.2d 342, 355, 5 P.3d 1240 (2010).

19 If it proves more advantageous for a defendant to waive a statute of  
20 limitations that has not expired, he or she should be able to do so. This  
21 will allow a defendant to plead guilty to lesser charges instead of standing  
22 trial on greater ones and facing a lengthy prison sentence. Accordingly, a  
23 defendant may expressly waive any objections to timeliness when the  
24 statute of limitations has not yet run on the underlying charges and the  
25 court thus still has authority to sentence on the charges if convicted.

23 *State v. Peltier*, SC #89502-3, --- P.3d --- (Wash. Aug. 21, 2014). Pursuant to *Peltier*,  
24 there must be an express waiver of the statute of limitations for a guilty plea on charges  
25 outside the statute of limitations. As this plea was entered prior to *Peltier*, there is no

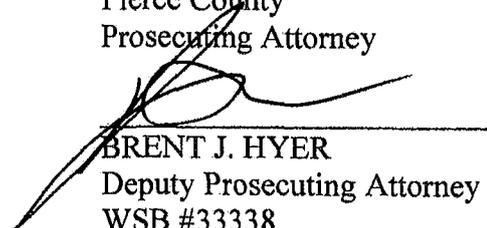
1 express waiver, which deprived the court of the ability to pass judgment on the charges of  
2 luring, burglary in the second degree and intimidating a witness.

3 If the petitioner elects to withdraw his guilty plea, then it must be to all of the  
4 charges. This was an indivisible, "package deal" as the petitioner plead guilty to all of  
5 these charges at the same time, in the same proceedings and in the same document. See  
6 *State v. Turley*, 149 Wn.2d 395, 69 P.3d 338 (2003).

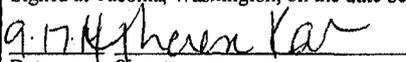
7 An amended information does not supersede the original when a defendant  
8 procures the filing of an amended information to facilitate a plea bargain, then successfully  
9 withdraws the associated guilty plea in a subsequent proceeding. See *State v. Oestreich*, 82  
10 Wn. App. 648, 651, 652, 922 P.2d 1369 (1996)(citing *State v. Johansen*, 69 Wn.2d 187,  
11 193-94, 417 P.2d 844 (1966); see also *State v. Korum*, 157 Wn.2d 614, 625-26, 141 P.3d  
12 13 (2006)). Under those circumstances, a defendant's case should be remanded for further  
13 proceedings on any charge timely filed in the original information. See *Id.* The petitioner  
14 is in the same circumstances. If he successfully withdraws his plea, then the matter will be  
15 reset for trial on the original charges.  
16

17 DATED: September 17, 2014.

18 MARK LINDQUIST  
19 Pierce County  
20 Prosecuting Attorney

21   
22 BRENT J. HYER  
23 Deputy Prosecuting Attorney  
24 WSB #33338

23 Certificate of Service:  
24 The undersigned certifies that on this day she delivered by U.S. mail  
25 to petitioner true and correct copies of the document to which this certificate  
is attached. This statement is certified to be true and correct under  
penalty of perjury of the laws of the State of Washington.  
Signed at Tacoma, Washington, on the date below.

9-17-14   
Date Signature

STATE'S SUPPLEMENTAL RESPONSE  
PER COURT'S REQUEST

**PIERCE COUNTY PROSECUTOR**

**September 17, 2014 - 10:40 AM**

**Transmittal Letter**

Document Uploaded: prp2-458624-Response~2.pdf

Case Name: PRP SWAGERTY

Court of Appeals Case Number: 45862-4

**Is this a Personal Restraint Petition?**  Yes  No

**The document being Filed is:**

Designation of Clerk's Papers

Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: \_\_\_\_\_

Answer/Reply to Motion: \_\_\_\_\_

Brief: \_\_\_\_\_

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: \_\_\_\_\_

Hearing Date(s): \_\_\_\_\_

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: \_\_\_\_\_

**Comments:**

SUPP. RESPONSE TO PRP

Sender Name: Therese M Kahn - Email: [tnichol@co.pierce.wa.us](mailto:tnichol@co.pierce.wa.us)