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STATE OF WASHINGTON
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Supreme Court No: 956359
Court of Appeals No.34360-0-III

**IN THE SUPREME COURT
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON

Respondent

v.

MICHAEL L. GEHRKE,

Petitioner

Supplemental Brief of Petitioner

Appeal from Spokane County Superior Court

The Honorable Michael P. Price

John C. Julian, WSBA #43214
5 W. Alder St., Ste. 238
Walla Walla, WA 99362
Attorney for Petitioner

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A. ISSUE ADDRESSED IN SUPPLEMENTAL BRIEF

Petitioner sought review of two issues in its petition. This Court granted review “on the issue whether the trial court properly allowed the state to amend the information.”

1. Whether the trial court properly allowed the state to amend the information after the state had finished presenting evidence, but had not yet formally rested before the jury?

B. STATEMENT OF THE CASE

The statement of the case is set forth in Petitioner’s Petitioner for Review.

C. SUPPLEMENTAL ARGUMENT

1. The trial court should not have permitted the state to amend the information because the amendment was sought after the state had admittedly completed its case in chief, thereby prejudicing Mr. Gehrke.

The gravamen of the question before this Court is whether, under *Pelkey*¹ and its progeny, the formality of resting before the jury has any substantive meaning where the State makes plain that it does not intend to call any further witnesses, and that it would formally rest its case whatever the trial court’s decision as to the amendment request. Verbatim Report of Proceedings (VRP) at 543. As argued in Petitioner’s Petition for review, as

¹ *State v. Pelkey*, 109 Wn.2d 484, 745 P.2d 854 (1987).

a matter of policy consistent with *Pelkey*, prejudice should be found when the state completes the presentation of its evidence, regardless of whether the technical formality of resting before the jury has taken place. After all, this Court has always avoided technical rules in favor of tailing its jurisprudence to ensure that the substantive evils sought to be avoided by article I, section 22 are avoided. *State v. Schaffer*, 120 Wn.2d 616, 620, 845 P.2d 281 (1993).

Critically, such a construction does not conflict run afoul of those cases decided after *Pelkey*, all of which maintained this bright line rule, though without discussing either the precise moment of application, or a case as procedurally near to the implementation of the *Pelkey* rule as is presented by the case at bar.

This Court first revisited its *Pelkey* decision in *Schaffer*. In that case, the sole issue before the court was the constitutional validity of an amendment to a charging document *during* the State's case, as the Petitioner sought to extend the *Pelkey* rule to apply to mid-trial amendments. *Id.* at 619-20. The *Schaffer* court declined to extend the *Pelkey* rule to mid-trial amendments prior to the state resting, noting that former CrR 2.1(e) (now CrR 2.1(d), appropriately covered such situations, and had been cited with approval by the *Pelkey* court. *Id.* at 621.

In *State v. Markle*, this Court struck down mid-trial amendments which were made after the state had closed its case. 118 Wn.2d 424, 823 P.2d 1101 (1992). Citing *Pelkey*, this Court reiterated that mid-trial amendments which take place after the close of the state's case in chief are not permitted and violated a defendant's constitutional rights. Notably, this Court did not consider the pre-trial notice provided to defense counsel to be sufficient to overcome the bright-line rule established by *Pelkey*.

Finally, in *State v. Vangerpen* this Court adhered to the rule established in *Pelkey* and held that the trial court erred in amending the information where it was neither a lesser-degree nor a less-included of the crime charged. 125 Wn.2d 782, 888 P.2d 1177 (1995).

In sum, this case presents this Court with an opportunity to both clarify and illustrate the spectrum of prejudice which occurs during those procedural markers referred to by this Court in *Pelkey*.² That is because this case is as nearly identical procedurally to the situation in *Pelkey* as may be possible without a formal resting of the state's case in chief, thereby demonstrating the extreme upper end of prejudice just prior to reaching prejudice *per se*.

² To wit, the investigatory period between arrest and trial, pretrial motions, *voir dire*, opening argument, questioning and cross-examination of witnesses, and so forth. *Id.* at 490.

D. CONCLUSION

Mr. Gehrke was deprived of his constitutional rights when the trial court permitted the information to be amended after the State had finished its case-in-chief despite not having technically rested before the jury. That error merits a vacation of Mr. Gehrke's conviction with prejudice, owing to the mandatory joinder rule.

Respectfully submitted this 6th day of July, 2018 by:

s/ John C. Julian

WSBA #43214
John C. Julian, Attorney at Law, PLLC
5 W. Alder St., Ste. 238
Walla Walla, WA 99362
Telephone: (509) 529-2830
Fax: (509) 529-2504
E-mail: john@jcjulian.com

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that I personally caused this SUPPLEMENTAL BRIEF OF PETITIONER to be delivered to the following individual(s) addressed as follows:

Brian Clayton O'Brien
Spokane Co. Pros. Atty.
1100 W. Mallon
Spokane, WA 99201
scpaappeals@spokanecounty.org

[X] Electronic

Gretchen E. Verhoef
Spokane Co. Pros. Atty.
1100 W. Mallon
Spokane, WA 99201
scpaappeals@spokanecounty.org

[X] Electronic

Michael Gehrke
DOC # 880398
Washington Corrections Center
P.O. Box 900
Shelton, WA 98584

[X] U.S. Mail, Postage Prepaid

DATED this 6th day of July, 2018 in Walla Walla, Washington by:

s/ John C. Julian

WSBA #43214
John C. Julian, Attorney at Law, PLLC
5 W. Alder St., Ste. 238
Walla Walla, WA 99362
Telephone: (509) 529-2830
Fax: (509) 529-2504
E-mail: john@jcjulian.com

JOHN C. JULIAN, ATTORNEY AT LAW, PLLC

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Address:
5 W ALDER ST STE 238
WALLA WALLA, WA, 99362-2863
Phone: 509-529-2830

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