NO. 99383-1

**SUPREME COURT OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

WARREN MATTHEW HELZER,

Petitioner.

Petition for Review

# STATE'S ANSWER

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## I. INTRODUCTION

The Legislature has determined that the Defendant Warren Helzer's serious sexual offenses shall be punished with indeterminate sentences with a maximum term of life. The sentencing court imposes a minimum term within the standard range; and the Indeterminate Sentence Review Board determines the Defendant's actual release date.

The original sentencing forms did not provide a space for the court to input the maximum term. This would be clarified after the court determined the omission to be clerical in nature. Helzer argues the error was not clerical and that Judge Felnagle, who expressed so little patience for the Defendant, actually intended to bestow an illegally lenient fixed or determinate sentence upon him. This is not the record. The Defendant was repeatedly advised of the indeterminate term in filings and by the court. The court imposed a lifetime term of community custody, consistent with an indeterminate sentence and inconsistent with a determinate sentence.

The trial court's interpretation of its own record is not manifestly unreasonable and does not present a RAP 13.4 consideration for review.

## II. RESTATEMENT OF THE ISSUES

A. Is the challenge to the term of incarceration moot where the Defendant has been released from prison?

B. Where the unpublished opinion makes a thorough review of the record in support of the trial judge's finding as to the sentencer's intent, is there any basis for the Defendant's claim that the court of appeals failed to consider the record?

C. Where the sentence was only clarified as to the judge's original intent, is there any authority which would hold such clarification to violate double jeopardy?

D. Where there is no time restriction for corrections of clerical error made under CrR 7.8(a), is there any basis to review the unsupported claim of a time bar?

E. Where the court reasonably interpreted the facts to find no agreement of the parties to recommend an illegal sentence, is there any legal question presented?

F. Where the clarification of the court's original intent does not "alter" or "increase" the sentence, is the Defendant's 2019 appeal of community custody conditions imposed in 2010 untimely?

## III. STATEMENT OF THE CASE

In 2010, the Defendant Warren Helzer pled guilty to three counts of first-degree child molestation, one for each of his three children. CP 4-17, 100-05. The evidence against him included the statements of his victims and his own confession to his wife and to police. CP 1-3, 41, 45-46, 114-16, 118.

A sentence for first degree child molestation is indeterminate in nature; the law mandates a maximum term of life; and the sentencing judge chooses a minimum term from within the standard sentence range. RCW 9.94A.507(1)(a)(i) and (3); RCW 9A.20.021(1)(a); RCW 9A.44.083(2). *See also* Laws of 2008, c. 231, § 33. An exceptional sentence is permitted

as to the minimum term only and would require written findings and conclusions. RCW 9.94A.507(3)(c)(i); RCW 9.94A.535. The court did not impose an exceptional sentence in this case.

The parties agreed to recommend a treatment alternative sentence or SSOSA. CP 10. In such a sentence, the court imposes "a sentence or, pursuant to RCW 9.94A.507, a minimum term of sentence, within the standard sentence range" and then suspends the execution of that sentence for treatment. RCW 9.94A.670(4).

The plea statement advised "the judge will impose a maximum term of confinement consisting of the statutory maximum sentence of the offense and a minimum term . . . within the standard range." CP 8-9; *see also* Unpublished Opinion at 2. The parties' agreed recommendation as to the minimum term[1] was for 130 months, with 124 months suspended for SSOSA. CP 10.

The presentence report noted that, "According to the Plea of Guilty, the agreed recommendation is Life with a minimum set at 130 months, six months confinement and 124 months suspended for SSOSA, Community Custody for Life …" CP 49. Four times the Department noted that the standard range for Child Molestation in the First Degree with an offender

[1] The Defendant repeatedly mischaracterizes the recommendation as to a minimum term to be an agreement to an illegal determinate sentence such as would render the judgment invalid on its face. Petition for Review at 3-4.

score of six would be "Life with the minimum set between 98 and 130 months." CP 42, 49. The Department explained in two places in its report that:

> The Indeterminate Sentence Review Board will determine his actual release date. Following incarceration he will be required to spend Life on Community Custody under the supervision of the Department of Corrections and the authority of the Indeterminate Sentence Review Board for any period of time the person is released from total confinement before the expiration of the maximum sentence.

CP 49-50.

The Defendant's treatment provider Maureen Saylor found him to be only a marginal candidate for SSOSA. CP 60-61, 124. And the Department of Corrections opined that a SSOSA was inappropriate in this case, recommending a standard sentence instead. CP 49-50 (noting the Defendant is a self-reported sex addict who "crosses all barriers to include exhibitionism, voyeurism, bondage, cross-dressing, ur[o]philia, and copraphilia, and zoophilia").

The Defendant blamed his wife for reporting him to the police, repeatedly threatened to kill her resulting in her forced displacement on five occasions, repeatedly threatened suicide, and was institutionalized five times. CP 45, 47, 63, 119. His acting out was a means of manipulating and controlling his itinerant, home-schooled family. CP 116-20. He told the SSOSA evaluator that the law criminalizing child molestation is cultural

repression and persecution and that his criminal charges are "ridiculous." CP 45-46. Even after hearing the victim impact statements read into the record (CP 112-22), the Defendant insisted that he had been a good father. CP 130-31. He labeled himself a rapist and murderer above the power of the law and in God's hands. CP 120. The SSOSA evaluation described a wide variety of deviant sexual behavior including coprophilia and bestiality, high sexual drive, sexual preoccupation, the use of sex to cope with stressors, as well as sexual identity confusion, depression, and narcissistic and histrionic personality traits. CP 47-48.

The Honorable Judge Felnagle was concerned that a SSOSA was "a recipe for disaster." CP 81, 95, 321-22, 341. However, he followed the parties' recommendation in the hope that treatment would keep the community safe. CP 132-33. The judge imposed 130 months, suspending all but six months. CP 20, 25.

Two months after his release from incarceration, the Defendant fully rejected treatment. CP 60-65, 76-77, 295. Judge Felnagle revoked the SSOSA, and the Defendant was imprisoned. CP 54-71. Revocation imposes the suspended sentence. RCW 9.94A.670(11). The revocation order imposed lifetime community custody, a term that is only justified under the indeterminate sentencing provision of RCW 9.94A.507(5). CP 69. The revocation was affirmed on appeal. CP 84-97.

When the Defendant arrived at prison, the Department of Corrections asked the prosecutor whether the sentence imposed was a .507 sentence. CP 328. The prosecutor responded that it was. "The court set the minimum term at 130 months imprisonment, with a maximum term of life imprisonment." CP 328.

In 2019, the State filed a motion to clarify the judgment and sentence and subsequent order revoking SSOSA. CP 136-200; RP[2] 3. The orders included blanks for the court to write the minimum term of 130 months, but the forms failed to include reference to or space for the maximum term of life. CP 20, 69. The State asked that the court make "explicitly clear" that the sentence was under RCW 9.94A.507. CP 144.

The State characterized the omission as clerical and correctable at any time under CrR 7.8(a). CP 137; RP 3. The Defendant took the position that Judge Felnagle had intentionally imposed an illegal, determinate sentence. CP 202. The prosecutor noted that, even in the unlikely event the omission had been negligent or intentional, the judgment would be invalid and correctable under CrR 7.8(b)(5). CP 364-65; RP 4-5.

The Honorable Judge Leanderson reviewed the 200+ pages of briefing and heard argument. CP 136-369; 370-73; RP (4/12/19). She

[2] All RP references herein are to the April 12, 2019 hearings, where the transcripts to other hearings have been made part of the Clerk's Papers. CP 98-135, 237-75, 301-26.

agreed with the State that the omission was clerical and entered a two-page order correcting clerical errors in the judgment and sentence and in the revocation order. CP 374-75; RP 46-51. At no time in the 2019 hearing was the topic of community custody conditions raised or reviewed. CP 136-44, 201-19, 359-73.

Although the Defendant has not advised the Court of his change of address, the State has confirmed with Mr. Helzer's community corrections office that he is no longer incarcerated. He has been released from Monroe and is living in Snohomish, serving the lifetime community custody term. CP 69. In this appeal, he does not challenge the term of community custody, but only his completed incarceration term and the conditions which were imposed in 2010.

## IV. ARGUMENT

### A. The Defendant's challenge to the clerical correction of his sentence is moot.

The Defendant is no longer incarcerated. He is only serving his community custody, a term which was entered in 2010 and never challenged. His release renders the first four of his five arguments moot.

The Defendant complains that he should not be held beyond the minimum term. But he is not being held. As a general rule, the Court will not consider cases that are moot or present only abstract questions. *State v. Beaver*, 184 Wn.2d 321, 330, 358 P.3d 385, 390 (2015) (citing *State v.*

*Hunley*, 175 Wn.2d 901, 907, 287 P.3d 584 (2012), and *Sorenson v. City of Bellingham*, 80 Wn.2d 547, 558, 496 P.2d 512 (1972)) (finding Beaver's case was moot where he had been discharged).

Mootness is a jurisdictional concern. *Beaver*, 184 Wn.2d at 330 (citing *State v. Deskins*, 180 Wn.2d 68, 80, 322 P.3d 780 (2014)).

> "[I]f a court can no longer provide effective relief," then the case is basically moot. *State v. Hunley,* 175 Wash.2d 901, 907, 287 P.3d 584 (2012) (citing *State v. Gentry,* 125 Wash.2d 570, 616, 888 P.2d 1105 (1995)). The general rule is that moot cases should be dismissed. *Sorenson v. City of Bellingham,* 80 Wash.2d 547, 558, 496 P.2d 512 (1972).

*State v. Cruz*, 189 Wn.2d 588, 597, 404 P.3d 70, 75 (2017).

A question of continuing and substantial interest is one that is likely to recur. *Beaver*, 184 Wn.2d at 330. The error here was a result of flawed court forms which have been corrected. The error is not likely to recur. The first four claims in the petition must be dismissed as moot.

**B. The court of appeals applied the correct test: finding the superior court did not abuse its discretion in interpreting the sentencing judge's intention.**

The Defendant claims that the court of appeals' decision conflicts with other cases in that it applied the wrong test on review. The argument is lacking in candor. It is readily apparent that the court of appeals applied the proper legal standards. The parties do not disagree on those standards.

First, the test for determining whether a clerical error exists under CrR 7.8 is whether the judgment embodies the trial court's *intention*. *See*

Petition (for Review) at 12 ("proper inquiry" considers what "the judge intended").

> Clerical errors are those that do not embody the trial court's intention as expressed in the trial record. These errors allow for amended judgments to correct language that did not correctly convey the court's intention or "supply language that was inadvertently omitted from the original judgment."

*State v. Morales*, 196 Wn. App. 106, 117, 383 P.3d 539, 544 (2016); *State v. Rooth*, 129 Wn. App. 761, 770, 121 P.3d 755, 760 (2005).

Second, the standard of review is abuse of discretion. *State v. Hardesty*, 129 Wn.2d 303, 317, 915 P.2d 1080 (1996). This is because the superior court has jurisdiction under the court rule to correct its own erroneous sentence where justice requires. *Hardesty*, 129 Wn.2d at 315-16. *See also State v. Smissaert*, 103 Wn.2d 636, 639, 694 P.2d 654 (1985) (recognizing that it is the trial court's power and duty to correct an erroneous sentence, even when that means imposition of a more onerous judgment). The trial court is in the best position to recognize its own procedures, routines, and habits in order to interpret its own intent.

The Defendant argues that the court of appeals failed to consider the record illuminating Judge Felnagle's intention, focusing only on the legality of the sentence. Petition at 10-11. This is a blatant misrepresentation of the Unpublished Opinion. The court of appeals (and trial court) explicitly considered the record of the sentencing judge's intention.

> The trial court highlighted several points in the record across multiple documents that indicated the mindset of the parties, and specifically the judge.
>
> The plea agreement explained there is a standard range for the minimum sentence and the law required a maximum of life. The plea agreement also advised Helzer that the "minimum term of confinement that is imposed may be increased by the [(ISRB)]." CP at 9. The trial judge also explained at the plea hearing the "maximum penalty is life in prison . . . [t]he standard sentencing range is 98 to 130 months, and then you could be on community custody for a life term as well." *Id.* at 102. Helzer stated he understood.

Unpub. Op. at 8. *See also* Unpub. Op. at 2-6 (fleshing out the facts which support the analysis in greater detail).

Judge Leanderson reviewed the entire record (not just the sentencing hearing) and considered the totality of the circumstances. RP 46. That record reasonably includes the change of plea and revocation hearing – all of which occurred before the same judge and within mere months of sentencing.

Judge Leanderson noted extensive discussion of the mandatory life term in the presentence report. RP 47-48. CP 42, 49-50. She noted that the plea form included markings, demonstrating a conversation between counsel and client about the maximum life term. CP 9; RP 47. All signators to the guilty plea (Defendant, judge, and attorneys) understood that the only lawful sentence was an indeterminate one. CP 7-9 ("the judge will impose a maximum term of confinement consisting of the statutory maximum

sentence of the offense and a minimum term of confinement either within the standard range for the offense or outside the standard range if an exceptional sentence is appropriate"); CP 8 (community custody is also for life, i.e. "for any period of time I am released from total confinement before the expiration of the maximum sentence"), 69; *see also* Unpub. Op. at 2.

Judge Felnagle is presumed to follow the law. RP 48. If the experienced judge was not already quite familiar with the indeterminate sentence required for a child molestation in the first degree, he was well apprised by the presentencing report. *See also* CP 128, l. 13 (judge informing the Defendant what was in the report); CP 132, l. 10 ("I've read the file."). Based on the PSI and plea statement, Judge Leanderson found that all parties understood that the only lawful sentence was an indeterminate one. RP 48, ll. 9-11.

If Judge Felnagle had intended to depart from what the law requires, perhaps under a belief that he had authority to impose a determinate sentence as some kind of exceptional sentence, he would have entered written findings and conclusions or, at the very least, commented on this departure from practice. RP 8-9. He did not.

Not only is there no record to suggest an intent to impose an unlawful sentence, but it is risible to believe Judge Felnagle would have done so for this particular Defendant. Judge Felnagle berated Helzer for

calling himself a good father. CP 131. He noted that the Defendant was a poor candidate for SSOSA; "everybody who's listening to this has concerns." CP 132. He warned the Defendant he would not be given any second chances. CP 133 ("You are on the shortest of short leashes."). Then, standing by his promise, the judge revoked the SSOSA only two months after the Defendant's release from custody. Such a record does not support an intent to impose an unlawfully lenient sentence.

The lifetime term of community custody which Judge Felnagle imposed (CP 69) further demonstrates the court's intent to impose an indeterminate sentence under RCW 9.94A.507. Such a term is only available under the indeterminate sentencing statute at RCW 9.94A.507(5). If he had imposed a determinate sentence, he would have imposed a community custody term of 36 months. RCW 9.94A.701(1)(a).

Soon after the Defendant's sentence, the prosecutor communicated with the Department of Corrections his understanding, as the party who drafted the orders, that the sentence was for an indeterminate term with a maximum of life. CP 328. The prosecutor's understanding reflects on the judge's intention.

The Defendant argues that the plea form set out two different SSOSA structures – one for determinate sentences and one for indeterminate sentences. Petition at 3-4. This is false. The structure is the

same. The court imposes the lawful sentence, whether determinate or indeterminate, and then suspends it. RCW 9.94A.670. The plea form accurately represents the law.

It is the offense which determines whether RCW 9.94A.507 (indeterminate sentencing) applies and how long the term of community custody may be. Child molestation 1º results in a .507 sentence. RCW 9.94A.507(1)(a)(i). The sentencing court "shall impose a sentence to a maximum term and a minimum term." RCW 9.94A.507(3)(a). The maximum term for child molestation 1º is life. RCW 9.94A.507(3)(b); RCW 9A.44.083(2); RCW 9A.20.021(1)(a). And the community custody term for child molestation 1º is for "any period of time the person is released from total confinement before the expiration of the maximum sentence." RCW 9.94A.507(5). Thus, in 2010, Judge Felnagle imposed community custody for life (CP 69), part and parcel of a .507 indeterminate sentence.

The error was in the forms. Today, the standard SSOSA judgment and sentence form includes language reflecting details for both indeterminate and determinate sentences. WPF CR 84.0400 SOSA (06/2020)[3] at 4. However, the form the court was provided in 2010 did not allow for a space to indicate the mandatory legislative maximum of life. CP

[3] http://www.courts.wa.gov/forms/documents/CR84.0400_FJSform_SSOSA_2020%2006.pdf

25. Similarly, the form order which revoked the SSOSA provides a blank for the court to indicate the minimum term only, not the maximum which is determined by statute. CP 69. This was an oversight resulting from flawed forms.

Judge Leanderson disagreed that Judge Felnagle intended to enter a determinate sentence. RP 48. The record supports this finding together with her conclusion that the error was clerical. The orders did not convey correctly Judge Felnagle's actual intention.

### C. A clerical correction made to reflect the judge's original and true intention does not implicate double jeopardy.

The Defendant argues that the correction of a clerical error was a resentencing in violation of double jeopardy. Petition at 13. But neither case he relies upon supports the Defendant's claim.

In one case, the court determined that a defendant who commits fraud in sentencing has no reasonable expectation of finality in that sentence. *State v. Hardesty*, 129 Wn.2d 303, 3, 915 P.2d16 1080 (1996). The case is not material to Helzer's situation. The State did not allege fraud, a claim under CrR 7.8(b)(3) which is subject to the one-year time bar in RCW 10.73.090. It alleged clerical error under CrR 7.8(a) which has no time bar. The State here was not seeking a resentencing at all, but only a clarification of the actual, original sentence.

In the other case, the state requested a whole new trial. *State v. Hall*, 162 Wn.2d 901, 177 P.3d 680 (2008). This was four years after the defendant's conviction was rendered invalid by *In re Pers. Restraint of Andress*, 147 Wn.2d 602, 56 P.3d 981 (2002) and after the defendant had completed his sentence. *Hall*, 162 Wn.2d at 904-05 The court balanced the society's interest, i.e. "whether there is manifest necessity to retry Hall" with the defendant's interests. *Id*. at 911. Because Hall had already completed his sentence, the balance weighed in his favor. *Id.*

In our own case, there is no request to retry the Defendant, but only to conform the orders to the court's original intent. The law mandates an indeterminate sentence for the safety of the public. Consistent with the law, the court intended a life sentence. The Defendant has not served a life sentence. The equities are not in his favor. Moreover, Judge Leanderson specifically found that the Defendant had no reasonable expectation in a determinate sentence, which everyone understood to be contrary to law. RP 48, ll. 9-11 ("I believe that Mr. Helzer knew, I believe that the attorneys knew, both the State as well as the defense counsel, and I do believe that the Court knew.").

Correction of a clerical error "merely corrects the language to reflect the court's intention or adds the language the court inadvertently omitted." *Rooth*, 129 Wn. App. at 770. "Resentencing to correct an

erroneous sentence does not violate a defendant's right against double jeopardy." *State v. Mutch,* 171 Wn.2d 646, 665, 254 P.3d 803 (2011). This is so even when the correction results in a greater sentence. *State v. Freitag*, 127 Wn.2d 141, 145, 896 P.2d 1254 (1995); *State v. Pascal*, 108 Wn.2d 125, 133-134, 736 P.2d 1065 (1987). "The Constitution does not require that sentencing should be a game in which a wrong move by the judge means immunity for the prisoner." *United States v. DiLorenzo*, 429 F.2d 216, 221 (2d Cir. 1970). There is no consideration permitting review.

**D. The clerical correction was not time barred.**

The State's motion was made under CrR 7.8(a). CP 136-37. This rule clearly lays out that such motion may be brought "at any time" by "any party." There is no time bar. The Defendant asserts that the one-year time bar in RCW 10.73.090 applies, although the motion was not a collateral attack. Petition at 16. He has not supported this claim with any authority. Unpub. Op. at 10. RCW 10.73.090 applies to motions brought under CrR 7.8(b), but not to motions brought under CrR 7.8(a). The statute does not apply.

The Defendant claims he had an interest in the finality of the judgment. But the State brought the motion to clarify the judgment, not to change it.

> The State's motion to correct this clerical error was not a collateral attack on the judgment because it did not ask the

> trial court to *change* its judgment. On the contrary, it merely asked the trial court to more clearly memorialize its judgment.

Unpub. Op. at 11. As the prosecutor noted, the maximum term applies by operation of law and not judicial discretion. CP 140; RP 13-14. As with the loss of civil rights upon felony conviction, an omission in the judgment does not prevent the law from taking effect. *State v. Radan*, 143 Wn.2d 323, 337-38, 21 P.3d 255 (2001) ("any felony conviction automatically results in the loss of the right to bear arms, whether or not the judgment so states"). *Accord State v. Garcia*, 191 Wn.2d 96, 105, 420 P.3d 1077 (2018). Because the law is the law regardless, the Defendant does not have a legitimate interest in subverting the law by misrepresenting the judge's intent.

He argues this claim raises a matter of substantial public interest, because criminal defendants are held to high standard, i.e. the one-year time bar. Petition at 16. This is false. A motion brought by "any party" under CrR 7.8(a) is not subject to any time limits. The parties' rights are the same in this regard.

If the error had not been clerical, but intentional, a finding no court has made, then the State could have requested review of a different nature – under CrR 7.8(b). Such a motion would still not be subject to the one-year time bar. A judgment which purports to impose a determinate sentence

on a .507 offense is invalid on its face. *Matter of Flippo*, 187 Wn.2d 106, 110, 385 P.3d 128, 131 (2016) (a facially invalid judgment demonstrating exercise in excess of the court's authority is not subject to the one-year time bar). And an error which renders the judgment facially invalid is correctable at any time. RCW 10.73.090. Again, this is true regardless of which party brings the motion. There is no consideration permitting review.

**E. The clerical correction did not breach the plea agreement**

The Defendant fails to demonstrate any conflict of laws related to his claim of breach. The claim is entirely factual in nature, not legal. It is not reviewable under RAP 13.4(b).

The Defendant has not provided a "fair statement of the facts." Petition at 3-4 (claiming the parties agreed to recommend an illegal sentence); RAP 10.3(a)(5). The court of appeals has interpreted the record in the only reasonable way. "The plea agreement here covered only those matters over which the trial court had discretion, to wit: the minimum term within the standard range." Unpub. Op. at 12.

The agreed recommendation did not comment on every provision of the sentence. It did not, for example, address mandatory provisions like the loss of gun rights or voting rights. It only addressed those aspects of the sentence over which the court had discretion, e.g. the minimum term of confinement. CP 10. The maximum term was beyond the parties' or court's

control. Therefore, it was not referenced as a term that required agreement. It is not reasonable to interpret that in failing to comment on mandatory provisions, the parties agreed to subvert them.

The record reflects that the parties understood that the maximum term was mandatory. The court of appeals' interpretation of the factual record does not conflict with any case.

**F. The Defendant did not timely appeal from the 2010 judgment imposing community custody conditions.**

The Defendant appealed from his revocation in 2010, but did not then challenge his community custody conditions. CP 72-83. He argues that an order, which clarified the court's intention but did not alter it, offers him an opportunity to appeal from the 2010 order in 2019. He argues that this is an equitable claim and therefore necessarily of substantial public interest. Petition at 19. He does this by mischaracterizing what occurred. *Id*. (citing *State v. Smissaert*, 103 Wn.2d 636, 694 P.2d 654 (1985) (where a sentence was increased after discovery of a legal error and incorrectly labeled *nunc pro tunc*)). In 2019, the court only clarified an original order. It did not resentence or increase the original sentence. Because his premise is false, so is his conclusion. There was no alteration to his sentence and certainly no alteration to his community custody conditions. His appeal of those conditions is untimely.

## V. CONCLUSION

Because no consideration under RAP 13.4(b) is present, this Court must deny review.

RESPECTFULLY SUBMITTED this 21st day of May, 2021.

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*5-21-21* *s/Therese Kahn*
Date Signature

# PIERCE COUNTY PROSECUTING ATTORNEY

## May 21, 2021 - 12:52 PM

## Transmittal Information

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