No. 99383-1
COA No. 53262-0-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

WARREN MATTHEW HELZER,

Petitioner

On Appeal from Pierce County Superior Court
The Hon. Gretchen Leanderson, Presiding
The Hon. Thomas Felnagle, Presiding

PETITION FOR REVIEW

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A. INTRODUCTION

Over thirty years ago, Washington adopted strict time limits for post-conviction challenges,[1] deciding that the interests of finality of judgments is more important than allowing for belated-collateral attack petitions.[2] Accordingly, this Court has denied collateral relief to prisoners where their claims were raised after the one-year time limit of RCW 10.73.090, even though it would have granted relief had the claims been raised in a timely fashion.[3]

This case involves a parallel situation where the State filed a collateral attack petition nearly a decade after judgment, a petition filed on the eve of Warren Helzer's release from prison and a petition which sought to increase his sentence from a fixed term of 130 months to an indeterminate life sentence. In this regard, this case presents a challenge – are the interests in the finality of judgments only for the benefit of the State or do such interests also extend to protect vulnerable prisoners? This Court should accept review

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[1] RCW 10.73.090 (Laws of 1989, ch. 395 § 1).

[2] *See In re Pers. Restraint Meippen*, 193 Wn.2d 310, 315, 440 P.3d 978 (2019).

[3] *See, e.g., In re Pers. Restraint of Haghighi*, 178 Wn.2d 435, 445-49, 309 P.3d 459 (2013) (court denies PRP, despite meritorious suppression issue, because ineffectiveness claim was not timely raised by *pro se* prisoner before the one-year time limit passed, but rather was raised later, after the assignment of counsel).

and hold restore Mr. Helzer's 130-month determinate sentence, a sentence that was imposed in February 2010.

B. IDENTITY OF PETITIONER

Warren Helzer, the appellant below, asks this Court to accept review of the Court of Appeals' decision terminating review set out in Part C, *infra*.

C. COURT OF APPEALS' DECISION

Mr. Helzer seeks review of the decision in *State of Washington v. Warren Matthew Helzer*, No. 53262-0-II, an unpublished opinion issued on December 8, 2020. A copy is attached in Appendix A.

D. ISSUES PRESENTED FOR REVIEW

1. In 2010, (now retired) Pierce County Superior Court Judge Thomas Felnagle sentenced Mr. Helzer to serve a fixed term of 130-months in prison for intrafamilial sex offenses. CP 20-32, 69-71. Was there a "clerical" error in the original judgment and in the order revoking the suspended sentence justifying the State's collateral attack petition filed in 2019 that increased the sentence from 130 months to an indeterminate life sentence?

2. Did the increase in sentence violate Mr. Helzer's constitutional rights to due process of law and to be free from double jeopardy?

3. Was the State's collateral attack petition time-barred?

4. Did the State breach its plea agreement?

5. Are various sentencing conditions unconstitutional or not valid crime-related prohibitions?

6. Where the trial court in 2019 retroactively changed the judgment, must Mr. Helzer be given a remedy to challenge illegal and unconstitutional conditions of community custody imposed in 2010?

E. STATEMENT OF THE CASE

In 2009, in a Pierce County Superior Court case, Mr. Helzer gave up his trial rights and pled guilty to three counts of child molestation for alleged acts that took place earlier that decade (now almost twenty years ago). CP 6-17. The State agreed to recommend a suspended determinate sentence -- "SSOSA, 130 months incarceration with 124 months suspended." CP 10.[4]

While the plea form did have sections regarding indeterminate sentencing, it set out two different SSOSA sentence structures, one for the

[4] "SSOSA" is a special sex offender sentencing alternative under RCW 9.94A.670.

determinate sentence recommended by the State and one for indeterminate sentences:

> The judge may suspend execution of the standard range term of confinement or the minimum term of confinement under the special sex offender sentencing alternative (SSOSA) if I qualify under RCW 9.94A.670.

CP 12 (¶ 6, § q).

During the plea colloquy between Judge Thomas Felnagle and Mr. Helzer, there was no discussion of an indeterminate sentence, only a suspended standard range sentence of 98 to 130 months:

> The maximum penalty is life in prison and a $50,000 fine. The standard sentencing range is 98 to 130 months, and then you could be on community custody for a life term as well. . . .
>
> . . .
>
> The recommendation from the State is that, if you qualify, they would recommend a SSOSA or suspended sentence with 124 months suspended, and six months would have to be served in custody.

RP (12/16/09) 5-6 (CP 102-03).

When Mr. Helzer was sentenced on February 5, 2010, the State requested a determinate sentence that was to be suspended: "We are asking the Court to impose 130 months. We are asking the Court to suspend 124 months, ordering the defendant to serve six months immediately. . . . We are

asking the Court to order the defendant to a period of lifetime supervision under the Department of Corrections." RP (2/5/10) 4 (CP 110). Consistent with its promise in the plea statement, the State did not recommend that the court impose a life sentence, with a minimum term of 130 months (that would then be suspended for the SSOSA program).

Judge Felnagle went along with the prosecutor's recommendation. RP (2/5/10) 26-27 (CP 132-33). The transcript of the sentencing hearing makes no mention of an indeterminate life sentence, with a minimum term of 130 months, suspended on condition of compliance with the SSOSA. The final judgment reflected exactly what the State recommended:

> (a) CONFINEMENT. RCW 9.94A.400. Defendant is sentenced to the following term of *total confinement* in the custody of the county jail or Department of Corrections (DOC):
>
> 130 months on Count II
> 130 months on Count III
> 130 months on Count IV
>
> *Actual number of months of total confinement* ordered is: 130 Months

CP 25 (emphasis added). Thus, the judgment imposed not an indeterminate life sentence but a determinate 130-month sentence. The final judgment also contained a series of conditions for community custody ("App. H"). CP 37-

39. Neither Mr. Helzer nor the State filed a notice of appeal, and thus the February 5, 2010, judgment became final in early 2010.

On August 31, 2010, the Department of Corrections ("DOC") claimed that Mr. Helzer violated the SSOSA sentence. The Community Corrections Officer's ("CCO's") violation report described Helzer as having an additional 124 months to serve (even listing a termination date for the sentences of 6/5/20). There was no mention of an indeterminate sentence. CP 293-95.

Judge Felnagle revoked the suspended sentence on October 22, 2010. RP (10/22/10) 21-24. He committed Mr. Helzer to DOC to serve the remainder of the determinate standard range sentence previously suspended:

> IT IS HEREBY ORDERED, ADJUDGED and DECREED that the *suspended standard range sentence* be revoked pursuant to RCW 9.94A.670 and 9.94A.505, and the defendant *committed to the Department of Corrections for a period of* __*130*__ *months*.

CP 69 (emphasis added). Judge Felnagle also ordered lifetime DOC supervision (as had been initially recommended by the State), with a number of conditions. CP 69-70. Again, in terms of whether the final order somehow misrepresented what the judge actually ruled, the transcript of the revocation hearing contains no discussion of indeterminate life sentences with a minimums term, and release by the Indeterminate Sentence Review Board

("ISRB"). RP (10/22/10) 3-25. However, the transcript does show that the prosecutor prepared the final order. RP (10/22/10) 24-25.

When Mr. Helzer arrived at prison in October 2010, DOC staff read the judgment and order revoking the SSOSA and quickly realized that the judge had imposed a determinate sentence. DOC staff emailed the prosecutor in this case, stating:

> When they are sentenced under this RCW they should have a minimum term, a maximum term (equal to the statutory maximum for the offense, in this case Life) and also supervision for any time released prior to the statutory maximum sentence. He was sentenced to 130 months and community placement of Life but there is no reference to a minimum and maximum term.

CP 328. In response, the prosecutor incorrectly told DOC staff Helzer had been given a life sentence with a minimum term of 130 months. *Id*. DOC did not file a post-sentence review petition under RCW 9.94A.585(7) and RAP 16.18(b).

Mr. Helzer appealed the revocation of the SSOSA. The State did not cross-appeal the commitment to DOC for a fixed 130-month sentence. Rather, in its appellate brief, the State described Mr. Helzer's sentence in the following manner:

> The conditions of defendant's suspended sentence began on February 5, 2010, when he was sentenced to 130 months in

> custody with 124 months suspended pursuant to the Special Sex Offender Sentencing Alternative ("SSOSA").

CP 331. On April 24, 2012, when affirming the revocation, Division Two repeated this language as it described the case's history:

> On February 5, 2010, the trial court imposed a SSOSA, suspending Helzer's 130-month sentence.

CP 86.

After losing his appeal, Mr. Helzer did not petition for review to this Court, and the mandate issued on June 4, 2012. CP 84-85. Mr. Helzer did not file a Personal Restraint Petition, a petition for a writ of *certiorari* to the U.S. Supreme Court, or a petition in federal court under 28 U.S.C. § 2254. Instead, Mr. Helzer served out the 130-month determinate sentence imposed by Judge Felnagle.

Mr. Helzer's earned early release ("ERD") was set for May 19, 2019. CP 206. In late 2018 and early 2019, the ISRB scheduled a Community Custody Board ("CCB") hearing to determine whether Mr. Helzer should be released. Mr. Helzer filed two civil actions (a petition for a writ of prohibition in Thurston County and a petition for a writ of habeas corpus in Snohomish County) contesting the ISRB's assertion of jurisdiction. CP 347, 349-55. While the habeas writ in Snohomish County was pending, at DOC's

behest,[5] the State filed a motion in the superior court in this case to "correct" the judgment. The State alleged a scrivener's or clerical error, and argued that the proper sentence structure was an indeterminate life sentence, with a minimum term and ISRB jurisdiction. CP 136-200. Mr. Helzer opposed the motion, raising issues related to due process, double jeopardy, time-bar, and breach of the plea agreement. CP 201-220.

On April 12, 2019, Judge Gretchen Leanderson (the successor judge to Judge Felnagle) granted the State's motion, finding that there was a scrivener's or clerical error in the original judgments. RP (4/12/09) 46-51. She entered an order amending the original judgment and the order revoking the suspended sentence, *nunc pro tunc*, to increase the sentence from 130 months to an indeterminate life sentence, with a minimum 130-month term on each count. CP 374-75.

Mr. Helzer appealed. CP 378-400. He challenged the finding that there was a "clerical" error; he raised a double jeopardy/due process challenge to the change of the sentence on the eve of his release from prison; he argued the State's petition was time-barred; he argued the State breached

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[5] *See* CP 144 (State notes that the "Department of Corrections has requested" the order).

the plea agreement; and he raised challenges to clearly illegal community custody conditions (such as no internet access).

On December 8, 2020, Division Two affirmed. App. A. Mr. Helzer now seeks review in this Court.

F. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. *The Court of Appeals Failed to Apply the Established Test to Determine Whether There Was a Clerical or a Judicial Error*

The Court of Appeals concluded that Judge Felnagle made a clerical error, not a judicial error, when he imposed a 130-month standard range sentence rather than imposing an indeterminate life sentence with a minimum term of 130 months. The court relied on the mandatory nature of the sentence structure and the trial court's discretion within that structure as the basis for its conclusion:

> Certain aspects of a sentence like statutory maximums and supervision by the ISRB are set by the legislature and are not changeable by the sentencing court. The original sentencing court's discretion in this case included selecting a sentence within the standard range and the decision whether to impose a SSOSA. The sentencing court's discretion did not include altering the maximum penalty or disallowing supervision of the sentence by the ISRB. As the State notes, "the maximum term applies by operation of law" and is not alterable by the exercise of discretion. Br. of Resp't at 14. The minimum sentence of 130 months and the decision whether

> to grant the SSOSA were the matters over which the trial court had discretion.

Slip Op. at 8-9. In other words, because the law required an indeterminate life sentence and the judge's discretion was only to set a minimum term within a standard range, the trial judge here must have made a clerical mistake when not setting such a sentence.[6]

Division Two's conclusion is wrong and conflicts with a long line of cases from both this Court and the Court of Appeals. "'In deciding whether an error is 'judicial' or 'clerical,' a reviewing court must ask itself whether the judgment, as amended, embodies the trial court's intention, *as expressed in the record at trial*.'" *State v. Hendrickson*, 165 Wn.2d 474, 479, 198 P.3d 1029 (2009) (quoting *Presidential Estates Apartment Assocs. v. Barrett*, 129 Wn.2d 320, 326, 917 P.2d 100 (1996)) (emphasis added). "A judicial error involves an issue of substance; whereas, a clerical error involves a mere

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[6] The fact that the plea form contained language about indeterminate sentencing is not significant, *see* Slip Op. at 8, since the form also contained language about standard range sentences and SSOSAs. CP 12 (¶ 6, § q). The fact that the judge said 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," CP 102, supports Mr. Helzer since there was no mention of indeterminate sentencing. In fact, the judge said "you *could* be" on community custody for life as opposed to stating "It is mandatory that I sentence you to life in prison and that you will only be allowed out of prison if the ISRB decides to let you out after you serve a minimum term of imprisonment and then it is mandatory that you be on community custody for life, subject to being sent back to prison for life if your community custody is revoked."

mechanical mistake." *Marchel v. Bunger*, 13 Wn. App. 81, 84, 533 P.2d 406 (1975).

In this case, the proper inquiry is not whether the judge was wrong about the sentence actually imposed, but rather whether there is any evidence *in the record* that the judge intended to impose an indeterminate life sentence with a minimum term and that there was simply a drafting error such that the judge's intended sentence did not make its way into the final judgment. In this case, there is no evidence in the record of the sentencing hearing or the revocation hearing that Judge Felnagle intended to impose an indeterminate life sentence with a minimum term – nothing the judge said on the record ever indicated that this was his intent and that the judgment and revocation order simply contained mechanical drafting errors.

The Court of Appeals' contrary conclusion conflicts with decisions of this Court and decisions of the Court of Appeals. Review is warranted under RAP 13.4(b)(1) & (2).

2. *Increasing a Sentence After Someone Served it Violates Double Jeopardy and Due Process of Law*

Mr. Helzer had served just about the entire determinate sentence of 130 months when the State hauled him back to court to increase the sentence to life with a minimum term of 130 months, under the life-time jurisdiction

of the ISRB. This process violated Mr. Helzer's rights to due process of law and to be free from double jeopardy protected by the Fifth and Fourteenth Amendments to the United States Constitution and article I, sections 3 and 9, of the Washington Constitution.

In *State v. Hardesty*, 129 Wn.2d 303, 915 P.2d 1080 (1996), this Court held that, even where a sentence was illegal, if the defendant had fully or substantially served it, double jeopardy precluded changing the sentence unless the erroneous sentence was a product of the defendant's fraud. *Id*. at 312 (relying on *United States v. DiFrancesco*, 449 U.S. 117, 101 S. Ct. 426, 66 L. Ed. 2d 328 (1980) and subsequent federal cases). Similarly, in *State v. Hall*, 162 Wn.2d 901, 177 P.3d 680 (2008), this Court prohibited vacating a judgment over a defendant's objections even where he was convicted of *a non-existent crime*:[7]

> Hall's individual right to be free from continuing jeopardy imposed by the government weighs heavily in his favor.
>
> The circumstances in this case are very unique; almost all other defendants who were held or tried at the time [*In re Pers. Restraint of Andress*, 147 Wn.2d 602, 56 P.3d 981 (2002)] was decided voluntarily moved to vacate their convictions. Fairness and justice dictate that an individual

[7] Mr. Hall was convicted of second degree felony murder based on a second degree assault as the predicate felony. *See In re Pers. Restraint of Andress*, 147 Wn.2d 602, 56 P.3d 981 (2002).

> who has served his sentence, and is not seeking any relief other than that imposed in the original action, should not be retried by the State for the same offense.

Hall, 162 Wn.2d at 911.

The Court of Appeals never even mentioned this Court's decisions in *Hall* and *Hardesty*. Instead, the court avoided the subject by stating, erroneously,

> the court's order corrected a clerical error and did not change Helzer's sentence. Helzer's sentence has always been indeterminate with a maximum of life. The trial court merely corrected the written order to accurately reflect the sentence; it did not amend the sentence. Helzer has not suffered multiple punishments. Rather, Helzer is serving the sentence that was originally imposed.

Slip Op. at 10.

This conclusion is not based on the record since the trial court never imposed an indeterminate life sentence with a minimum term of confinement of 130 months. And even if there was some sort of clerical error, that does not satisfy the double jeopardy concerns of changing a judgment to increase the terms of a sentence nearly a decade after it became final after the defendant served or substantially served the sentence. The Court of Appeals' conclusion to the contrary conflicts with this Court's decisions in *Hardesty* and *Hall*, and violates federal and state constitutional provisions regarding

due process[8] and double jeopardy. U.S. Const. amends. V & XIV; Const. art. I, §§ 3 & 9. Review should be granted under RAP 13.4(b)(1) and (3).

3. *The State's Petition Was Time-Barred*

RCW 10.73.090 sets out a strict one-year time limit for filing a petition for collateral attack, which encompasses the State's motion, filed almost a decade after it became final. While the Court of Appeals held that a motion to correct a judgment under CrR 7.8(a) was not a "collateral attack" motion, Slip Op. at 11, CrR 7.8 is entitled "Relief From Judgment or Order" which fits under the category of "any form of postconviction relief other than a direct appeal." RCW 10.73.090.

The Legislature and this Court have expressed its clear intent that errors in sentencing be correct promptly – within 90 days of DOC learning of the terms of a judgment. *See* RCW 9.94A.585(7); RAP 16.18(b). Notably, in 1989, in the same term, the Legislature adopted both RCW 10.73.090 (Laws of 1989, ch. 395) and RCW 9.94A.585(7) (Laws of 1989, ch. 214),

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[8] The Court of Appeals chided Mr. Helzer for not briefing the due process issue. Slip Op. at 9 n.2. As Mr. Helzer noted in his opening brief at p. 26, n.17, it was this Court in *State v. Hardesty*, *supra*, that stated, "Other cases find a similar barrier to increasing a served sentence if the defendant is innocent of wrongdoing in obtaining the sentence, *based upon the due process clause of the Fourteenth Amendment to the U.S. Constitution.*" *Hardesty*, 129 Wn.2d at 313 (emphasis added). Following this Court's lead, Mr. Helzer relies on both the federal and state Due Process Clauses as well as the federal and state Double Jeopardy Clauses.

which evidences a continuity of purpose between the two statutes, designed promote finality of judgments.

As noted above, Washington courts have refused to consider meritorious arguments by prisoners serving lengthy sentences in the Department of Corrections because they have missed the one-year time limit in RCW 10.73.090. Thus, it is a matter of public interest under RAP 13.4(b)(4) that these time limits be applied with an even hand, to the State as well as to *pro se* prisoners, many with mental health and literacy problems. The Court should accept review and reverse the Court of Appeals.

4. *The State Breached Its Plea Agreement*

Basic principles of due process of law under the Fourteenth Amendment and article I, section 3, "require[] a prosecutor to adhere to the terms of the plea agreement." *State v. Sanchez*, 146 Wn.2d 339, 367, 46 P.3d 774 (2002) (Madsen, J., opinion) (citing *Santobello v. New York*, 404 U.S. 257, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971)). The Court of Appeals recognized that "[i]n its recommendation the State did write 'SSOSA, 130 months incarceration with 124 months suspended.'" Slip Op. at 12 (citing CP at 10). Nearly ten years later, in 2019, the State went to court and advocated for an indeterminate life sentence with a minimum term of 130 months. The

State's actions in 2019 breached the plea agreement from 2009 and therefore violated federal and state due process of law.

The Court of Appeals concluded that there was not a breach of the plea agreement because the indeterminate sentence was non-discretionary and "[t]he plea agreement here covered only those matters over which the trial court had discretion, to wit: the minimum term within the standard range." Slip Op. at 12. Yet, the court cited to no part of the record where the State explained its recommendation in this manner. The State's recommendation was clear and unambiguous and by seeking to change the sentence structure after Mr. Helzer had served almost the entire sentence, the State clearly breached its obligations and violated due process of law under the Fourteenth Amendment and article I, section 3, when it brought Mr. Helzer back to court nearly a decade later and changed its recommendation.

This Court should accept review under RAP 13.4(b)(1) and (3) and reverse.

5. *The Illegal Sentence Conditions Were Appealable When the Court Changed the Sentence*

When Judge Felnagle sentenced Mr. Helzer in 2010, he imposed a series of community custody conditions that were improper "crime related prohibitions" under former RCW 9.94A.030(12) (eff. 9/1/01), were

unconstitutionally vague, or were violations of free speech and the right to travel, in violation of the First, Eighth and Fourteenth Amendments and article I, sections 3, 4, 5 and 14. These conditions include:

Condition 3 -- consumption of alcohol

Condition 9/I – geographic restrictions

Condition 10 – urinalysis and breathalyzer testing

Condition 15 – possessing or "perusing" pornographic materials

Condition 18 – notification of CCO of " any romantic relationships

Condition 19 – polygraph and plethysmograph testing

Condition 21 -- avoiding places where children congregate

Condition 25 – ban on access to the Internet

Condition 28 — not frequenting adult entertainment establishments

CP 38-39, 70.

The Court of Appeals refused to consider the challenges to these sentence conditions, many of which are completely illegal (i.e. like the ban on access to the Internet[9]) because Mr. Helzer did not appeal the judgment in

[9] *See State v. Johnson*, 180 Wn. App. 318, 325 & 330, 327 P.3d 704 (2014).

2010. Slip Op. at 13. This lopsided holding – that the State can seek to increase Helzer's sentence nearly a decade after the judgment became final, but Mr. Helzer is time-barred for not seeking review of facially invalid sentence conditions in 2010 – calls out for review under RAP 13.4(b)(4). Again, the public interest is that time-limits are even-handedly applied and are not used simply against the powerless for the benefit of the powerful.

The Court of Appeals' decision also conflicts directly with *State v. Smissaert*, 103 Wn.2d 636, 694 P.2d 654 (1985). In *Smissaert*, this Court upheld the tardy modification of a criminal judgment, imposed after a jury trial, which changed the maximum term of imprisonment from 20 years to life. Even though the defendant had not appealed the original judgment, he appealed the judgment after the modification. This Court upheld the modification, but also recognized that the defendant's right to appeal, protected under article I, section 22, required restoration of the defendant's appeal of the judgment:

> Petitioner argues that his reliance on the original 20-year sentence influenced his waiver of appeal. [Footnote omitted] Resentencing him to an increased number of years after the running of the time for taking an appeal thus deprives him of his constitutional right to appeal. This position is well taken. . . . When, as here, a defendant waives his right to appeal based on a judicial error in sentencing,

> correction of the sentence should reopen the opportunity to appeal the original judgment.

Smissaert, 103 Wn.2d at 642-43.

Here, if the State was allowed to go back in time and change the 2010 judgment, Mr. Helzer should now be able to appeal that same judgment. The Court of Appeals' decision completely ignores *Smissaert* and article I, section 22. Review should be granted under RAP 13.4(b)(1) & (3). This Court should review the conditions that are not crime-related or which violate Mr. Helzer's rights under the First, Eighth and Fourteenth Amendments and article I, sections 3, 4, 5 and 14.

G. CONCLUSION

The Court should accept review and reverse, holding that Mr. Helzer was sentenced only to a 130-month determinate sentence to be followed by life on community placement, but not under the authority of the ISRB.

DATED this 31st day of December 2020.

Respectfully submitted,

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Attorney for Petitioner

APPENDIX A

Filed
Washington State
Court of Appeals
Division Two

December 8, 2020

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. WARREN MATTHEW HELZER, Appellant.	No. 53262-0-II UNPUBLISHED OPINION

CRUSER, J. — Warren Helzer appeals the "Order Correcting Judgment and Sentence & Correcting Order Revoking Suspended Sentence," and he appeals the community custody conditions in his original 2010 judgment and sentence. He argues that (1) the trial court erred by determining the judgment and sentence had a clerical error, (2) the trial court's order changed his determinate sentence to an indeterminate sentence, (3) the order violated double jeopardy and due process, (4) the trial court erred by allowing the State's motion which was time barred, (5) the State breached its plea agreement, and (6) the previous trial court erred in imposing various community custody conditions.

We hold the error in the original judgment and sentence and Order Revoking Sentence was a clerical error and that the trial court did not change Helzer's sentence, the order did not violate double jeopardy and due process, the State's motion was not time barred, the State did not breach the plea agreement, and the various community custody conditions are not appealable.

We affirm.

FACTS

I. 2009 AND 2010 PROCEEDINGS

Helzer pleaded guilty to three counts of first degree child molestation that occurred between November 2001 and June 2005. In exchange, the State agreed to recommend a "[special sex offender sentencing alternative (SSOSA)], 130 months incarceration with 124 months suspended." Clerk's Papers (CP) at 10.

His plea agreement stated, "I Understand That: (a) Each crime with which I am charged carries a maximum sentence, a fine, and a **Standard Sentence Range**." *Id.* at 7. It went on to give a standard range of actual confinement as 98 to 130 months and a maximum term of life for each count.

The plea agreement stated that sex offenses committed on or after September 2001 would be sentenced under former RCW 9.94A.712 (2001) and "[i]f this offense is for any of the offenses listed in subsections (aa) . . . 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." *Id.* at 8-9. First degree child molestation is listed as an offense in subsection (aa). It went on that the "minimum term of confinement that is imposed may be increased by the Indeterminate Sentence Review Board [(ISRB)] if the Board determines by a preponderance of the evidence that it is more likely than not that I will commit sex offenses if released from custody." *Id.* at 9.

At the end of the agreement it stated that "[m]y lawyer has explained to me, and we have fully discussed, all of the above paragraphs . . . I understand them all." *Id.* at 14. The trial court found "[t]he defendant's lawyer had previously read to him or her the entire statement above and that the defendant understood it in full." *Id.*

In December 2009, the trial court held a hearing on the guilty pleas. Helzer stated that he had enough time to review the paperwork and that he had no questions. The court explained 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 was aware of the penalties. The court noted the State recommended "a SSOSA or suspended sentence with 124 months suspended." *Id.* The court accepted Helzer's guilty pleas.

Additionally, the court ordered the Department of Corrections (DOC) to perform a presentence investigation (PSI). The PSI noted the standard range for first degree child molestation with Helzer's offender score would be life and that the minimum would be set between 98 and 130 months with ISRB determining his actual release date.

In February 2010, the court held the sentencing hearing. At the hearing, the State asked the court "to impose a SSOSA . . . 130 months . . . [and] to suspend 124 months." *Id.* at 110. The court stated that it was "going to adopt the SSOSA on the conditions listed." *Id.* at 133. The court did not say at the hearing that it was imposing an indeterminate sentence with a minimum term of 130 months subject to ISRB review and a maximum of life.

However, the judgment and sentence in section 2.3 explains that the standard range for all three counts was 98 to 130 months and the maximum term is life. It also reflects that Helzer was sentenced to 130 months on each count. It states the "[a]ctual number of months of total confinement ordered is: 130 Months." *Id.* at 25. Under section 4.4 "Appendix 'G' and 'H'" are hand written. *Id.* at 24. Appendix H states that "[d]efendant additionally is sentenced on convictions herein, for the offenses under [former] RCW 9.94A.712." *Id.* at 37.

In October 2010, the court held a revocation hearing. At the hearing the trial court revoked Helzer's SSOSA. The trial court did not say anything about the minimum sentence, maximum sentence, or the ISRB at the hearing. The court ordered that "the suspended standard range sentence be revoked . . . and the defendant [be] committed to the [DOC] for a period of 130 months." *Id.* at 69. The order stated Helzer "is additionally sentenced to a term of life year(s)[sic] community placement." *Id.* Helzer appealed the revocation. This court affirmed. *State v. Helzer*, noted at 167 Wn. App 1048 (2012).

After the revocation hearing, Helzer was transported to the Washington Corrections Center (WCC). On October 29, 2010, WCC sent an e-mail to the prosecutor asking if Helzer was sentenced under RCW 9.94A.507. It noted Helzer "was sentenced to 130 months and community placement of Life but there is no reference to a minimum and maximum term." CP at 328. The prosecutor confirmed Helzer was sentenced under RCW 9.94A.507 with a minimum of 130 months and a maximum of life.[1]

II. 2019 PROCEEDINGS

In February 2019, Helzer petitioned the superior court in Snohomish County to be released. Helzer argued that the ISRB did not have jurisdiction over him and that he was to be released in May "without regard to an orders [sic] of the ISRB." *Id.* at 349-50. He stated he was serving a determinate sentence of 130 months.

[1] Helzer was sentenced in 2010, but his crimes were committed between November 2001 and June 2005. Therefore, he was properly sentenced under former RCW 9.94A.712 as referenced in the record. However, in 2008, former RCW 9.94A.712 was recodified to RCW 9.94A.507. LAWS OF 2008, ch. 231, § 56. Thus, WCC and the prosecutor erroneously referenced RCW 9.94A.507 rather than former RCW 9.94A.712. However, this error and the recodification are irrelevant to our analysis of Helzer's appeal as there were no changes to the statute that bear upon his claims.

Following Helzer's petition, the State moved to correct the judgment and sentence as well as the order revoking the suspended SSOSA sentence "to make it clear that the defendant's sentence is indeterminate." *Id.* at 144. In response, Helzer again asserted that he was serving a determinate sentence of 130 months, which is what he contended the trial court originally imposed.

At the hearing, the trial court found that "based on . . . the totality of the circumstances, when reviewing the record" there was a clerical error. Verbatim Report of Proceedings (VRP) at 46. The court explained that clerical errors include omissions of language. The trial court went on to note that the plea had been reviewed by Helzer, the attorneys, and the court. The court noted that the plea form clearly referenced the statute that applied. The trial court observed that the paragraphs that did not apply to Helzer's case were crossed out and that Helzer had initialed next to those paragraphs, suggesting that this eliminated any confusion and that Helzer "knew what did not apply." *Id.* at 47.

The PSI, the trial court further noted, stated that the ISRB will determine Helzer's actual release date. The PSI also stated that "the standard sentence was . . . a minimum set between 98 and 130 months." *Id.* at 48. The trial court believed "Helzer knew, . . . the attorneys knew, . . . [and] the Court knew" that Helzer's sentence was indeterminate. *Id.* The trial court explained that the "Court is presumed to follow the law" and that it "had before it the PSI as well as the plea form." *Id.*

The trial court stated it was unfortunate that the "additional language of 'to life' was not included" in the judgment and sentence or the order revoking the SSOSA. *Id.* However, the trial court observed that the statute provided for an indeterminate sentence up to the maximum of life, and the maximum sentence was noted in the PSI and in the plea form. Additionally, there "needed

to be a minimum that was set . . . with then the [ISRB] having oversight in terms of when his actual release would be . . . [a]nd that is what was apparent—was available to him." *Id.* at 50. The trial court also noted that the "information . . . in the PSI, . . . [was] consistent with the statute . . . that applied at this time." *Id.*

The court went on to say that "it had been intended that [Helzer] be sentenced—to a minimum of 130 months and the maximum life, as had been detailed both in the PSI as well as the plea and sentence." *Id.* The court explained that it was "a Scrivener's error that the 130 was left without the 'to life' because it was apparent from the get-go that that is what [Helzer] would be required to serve if he did not successfully complete the SSOSA." *Id.* at 50-51.

The court granted the motion and ordered the judgment and sentence as well as the order revoking the SSOSA to be corrected to indicate the sentence is 130 months to life subject to the ISRB.

Helzer appeals the corrected judgment and sentence.

DISCUSSION

I. CLERICAL ERROR

Helzer argues the trial court erred by concluding that there was a clerical error in the original judgment and sentence. Helzer contends that if there was an error, it was a judicial error because the trial court imposed a set number of months to be served and there was nothing to indicate in the record that this was unintentional. Stated another way, Helzer argues that the trial intended to impose an illegal sentence. And if the error was a judicial error, Helzer argues that it cannot be corrected by a CrR 7.8 motion.

We disagree.

A. LEGAL PRINCIPLES

Clerical mistakes in judgments or orders may be corrected at any time. CrR 7.8(a). A clerical error is an error "by a clerk or other judicial or ministerial officer in writing or keeping records." *State v. Hendrickson*, 165 Wn.2d 474, 479, 198 P.3d 1029 (2009). They are errors "that do not embody the trial court's intention as expressed in the trial record." *State v. Morales*, 196 Wn. App. 106, 117, 383 P.3d 539 (2016). Courts may amend "to correct language that did not correctly convey the court's intention" or add language that was unintentionally left out of the original judgment. *Id.* at 117 (quoting *Presidential Estates Apartment Assocs. v. Barrett*, 129 Wn.2d 320, 326, 917 P.2d 100 (1996)).

"To determine whether an error is clerical or judicial, we look to 'whether the judgment, as amended, embodies the trial court's intention, as expressed in the record at trial.'" *State v. Snapp*, 119 Wn. App. 614, 627, 82 P.3d 252 (2004) (quoting *Presidential*, 129 Wn.2d at 326). If a judgment contains a clerical error, the judgment should be corrected so that the language correctly reflects the court's intention. *Presidential*, 129 Wn.2d at 326. This can include adding the language the court inadvertently omitted. *Id.*

If the amended language does not convey the intention of the trial court, then it is a judicial error and the court is not allowed to make the amendment. *Id.*; *State v. Davis*, 160 Wn. App. 471, 478, 248 P.3d 121 (2011).

Former RCW 9.94A.712, under which Helzer was sentenced, prescribed the penalties applicable to certain sex offenses. For offenders sentenced under this statute, the trial court was required to sentence the offender to a minimum term and a maximum term, with the maximum term consisting of the maximum sentence for the offense. Former RCW 9.94A.712(3). With

certain exceptions, the trial court was required to set the minimum term within the standard range for the offense. Former RCW 9.94A.712(3).

B. ANALYSIS

Here, the trial court found that the original sentencing court had "intended that [Helzer] be sentenced—to a minimum of 130 months and the maximum life, as had been detailed both in the PSI as well as the plea and sentence." VRP at 50. The trial court noted it was unfortunate that the "additional language of 'to life' was not included." *Id.* at 48. But the trial court believed, based on its review of the sentencing record, that "Helzer knew, . . . the attorneys knew, . . . [and] the Court knew." *Id.* The court further explained that it was "it was apparent from the get-go that that is what [Helzer] would be required to serve if he did not successfully complete the SSOSA." *Id.* 50-51. 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.

Certain aspects of a sentence like statutory maximums and supervision by the ISRB are set by the legislature and are not changeable by the sentencing court. The original sentencing court's discretion in this case included selecting a sentence within the standard range and the decision whether to impose a SSOSA. The sentencing court's discretion did not include altering the

maximum penalty or disallowing supervision of the sentence by the ISRB. As the State notes, "the maximum term applies by operation of law" and is not alterable by the exercise of discretion. Br. of Resp't at 14. The minimum sentence of 130 months and the decision whether to grant the SSOSA were the matters over which the trial court had discretion.

We hold the error in question was a clerical error, and thus affirm the Order Correcting Judgment and Sentence & Correcting Order Revoking Suspended Sentence.

II. DOUBLE JEOPARDY[2]

Based on his claim that the correction of the judgment and sentence was a judicial error rather than a clerical error, a claim with which we disagree, Helzer argues that altering his sentence after it had been finalized for a decade violated his right to be free from double jeopardy. We disagree.

Both the federal and state double jeopardy clauses protect against multiple punishments for the same offense. U.S. CONST. amend. V; WASH. CONST. art. I, § 9; *State v. Hart*, 188 Wn. App. 453, 457, 353 P.3d 253 (2015). "The prohibition on double jeopardy generally means that a person cannot be prosecuted for the same offense after being acquitted, be prosecuted for the same offense after being convicted, or receive multiple punishments for the same offense." *State v. Villanueva-Gonzalez*, 180 Wn.2d 975, 980, 329 P.3d 78 (2014). "The prohibition against double jeopardy applies when (1) jeopardy previously attached, (2) jeopardy was terminated, and (3) the defendant

[2] Helzer purports to raise a due process claim, but a review of his brief shows that he makes no argument related to due process. He merely notes, once in the first paragraph and once in the final sentence of this section of his brief that the same state and federal constitutional provisions which bar double jeopardy also guarantee due process of law. Under RAP 10.3(a)(6) we do not review issues not argued, briefed, or supported with citation to authority. *Christian v. Tohmeh*, 191 Wn. App. 709, 728, 366 P.3d 16 (2015). "Passing treatment of an issue or lack of reasoned argument is insufficient to merit appellate review." *Id.*

is again prosecuted for the same offense." *State v. George*, 160 Wn.2d 727, 741, 158 P.3d 1169 (2007). The Supreme Court has held that "resentencing to correct an erroneously imposed lenient sentence does not violate the protection against double jeopardy." *State v. Freitag*, 127 Wn.2d 141, 145, 896 P.2d 1254, 905 P.2d 355 (1995). We review alleged violations of double jeopardy de novo. *Villanueva-Gonzalez*, 180 Wn.2d at 979-80.

Here, as noted above, the court's order corrected a clerical error and did not change Helzer's sentence. Helzer's sentence has always been indeterminate with a maximum of life. The trial court merely corrected the written order to accurately reflect the sentence; it did not amend the sentence. Helzer has not suffered multiple punishments. Rather, Helzer is serving the sentence that was originally imposed.

We hold that Helzer's right to be free from double jeopardy has not been violated.

III. TIME BARRED

Helzer contends that the State's motion to correct his judgment and sentence and order revoking the SSOSA is not timely. Helzer acknowledges that CrR7.8(a) allows for a clerical mistake to be corrected at any time. However, he argues the "provisions must be read in conjunction with the procedures and time limits set up . . . to address changes to final criminal judgments." Br. of Appellant at 26. He argues that the State's motion falls under the one year time limit in RCW 10.73.090 for filing a petition for collateral attack. Additionally, he contends that because the DOC could have sought correction of the judgment and sentence, the State was effectively barred from bringing this CrR 7.8 motion.

But Helzer cites no authority for his contention that RCW 10.73.090 modifies the portion of CrR 7.8(a) that allows for a clerical mistake to be corrected at any time. Helzer argues that

because RCW 10.73.090 governs collateral attacks on judgments, it controls this case. But 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.

Helzer additionally contends that because the DOC could have sought correction of the judgment and sentence pursuant to RCW 9.94A.585(7), the State was effectively barred from bringing this CrR 7.8 motion. But Helzer again cites no authority for this claim. "Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none." *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962). The State's motion was timely brought under CrR 7.8(a), which allows for a clerical mistake to be corrected at any time.

We hold the State's motion was not time barred.

IV. BREACH OF THE PLEA AGREEMENT

Helzer argues that the State breached its plea agreement with Helzer because, he claims, the State originally agreed to recommend a *determinate* 130 month sentence despite the fact that the Sentencing Reform Act of 1981 (SRA), chapter 9.94A RCW, requires sentences for first degree child molestation committed after September 1, 2001 to be indeterminate. He contends that by bringing the motion to correct the judgment and sentence, the State undermined the plea agreement.

The State responds that the plea offer merely addressed those aspects of the sentence over which the trial court had discretion, which would not have included altering the maximum sentence for the crime. The State further points to the presentence report, which clearly stated the agreed

recommendation of the parties was "life with a minimum set at 130 months," and that Helzer did not challenge the DOC's interpretation of the plea agreement at the sentencing hearing. Br. of Resp't at 20 (internal quotation marks omitted). We agree with the State.

The plea agreement showed that the standard sentencing range was 98 to 130 months with a maximum of life. The agreement clearly stated Helzer was being sentenced under former RCW 9.94A.712. The agreement explained because of that statute "the judge will impose a maximum term of confinement consisting of the statutory maximum sentence of the offense and a minimum term of confinement . . . within the standard range for the offense." CP at 8-9. It went on that the "minimum term of confinement that is imposed may be increased by the [ISRB]." *Id.* at 9.

In its recommendation the State did write "SSOSA, 130 months incarceration with 124 months suspended." *Id.* at 10. However, as the State points out, the sentencing court cannot, either based on an agreement by the parties or of its own accord, alter the maximum penalty for an offense. The maximum penalty is set by the legislature and cannot be altered as part of a plea agreement. The plea agreement here covered only those matters over which the trial court had discretion, to wit: the minimum term within the standard range.

We hold that the State did not breach the plea agreement.

V. COMMUNITY CUSTODY CONDITIONS

Helzer challenges several community custody conditions that were imposed as part of his 2010 judgment and sentence. Helzer acknowledges that he did not appeal any community custody condition when the judgment and sentence was entered. However, he argues community custody conditions can be argued for the first time on appeal "if they impact constitutional rights or are

illegal or erroneous as a matter of law." Br. of Appellant at 33. Additionally, he argues that because the trial court modified his original sentence that he now has the right to appeal.

A notice of appeal must be filed in the trial court within 30 days after the trial court has entered the decision to be reviewed. RAP 5.2(a), (e). This 30 day time limit can be extended due to some specific and narrowly defined circumstances. *Schaefco, Inc. v. Columbia River Gorge Comm'n*, 121 Wn.2d 366, 367, 849 P.2d 1225 (1993). Filing of certain post-trial motions, including motions for reconsideration, may extend this deadline. *Id.* at 367; RAP 5.2(e). Motions to vacate judgment are not among the list of motions that extend the deadline to appeal. RAP 5.2(e).

It is well settled that the correction of an erroneous portion of a judgment and sentence "does not affect the finality of that portion of the judgment and sentence that was correct and valid when imposed." *In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 877, 50 P.3d 618 (2002). Here, community custody conditions were imposed in 2010. The time to challenge those conditions has expired. Helzer had an opportunity to appeal these conditions and he failed to seek timely review of the conditions. The correction to the judgment and sentence did not affect the community custody conditions and therefore did not open that portion of the 2010 judgment and sentence to appeal. *Id.* at 877.

We decline to consider Helzer's challenge to his community custody conditions.

CONCLUSION

We hold that the correction to Helzer's judgment and sentence and order revoking his suspended sentence involved a clerical error. We further hold that Helzer's right to be free from double jeopardy was not violated when the trial court corrected his judgment and sentence, that

the State's motion was not time barred, and that the State did not breach the plea agreement. Finally, we decline to reach Helzer's challenge to his community custody conditions because the challenge is not timely. Accordingly, we affirm the Order Correcting Judgment and Sentence & Correcting Order Revoking Suspended Sentence.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

CRUSER, J.

We concur:

WORSWICK, P.J.

MELNICK, J.

STATUTORY APPENDIX

CrR 7.8 provides:

> (a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. Such mistakes may be so corrected before review is accepted by an appellate court, and thereafter may be corrected pursuant to RAP 7.2(e).
>
> (b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc. On motion and upon such terms as are just, the court may relieve a party from a final judgment, order, or proceeding for the following reasons:
>
> (1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order;
>
> (2) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 7.5;
>
> (3) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
>
> (4) The judgment is void; or
>
> (5) Any other reason justifying relief from the operation of the judgment.
>
> The motion shall be made within a reasonable time and for reasons (1) and (2) not more than 1 year after the judgment, order, or proceeding was entered or taken, and is further subject to RCW 10.73.090, .100, .130, and .140. A

motion under section (b) does not affect the finality of the judgment or suspend its operation.

(c) Procedure on Vacation of Judgment.

(1) Motion. Application shall be made by motion stating the grounds upon which relief is asked, and supported by affidavits setting forth a concise statement of the facts or errors upon which the motion is based.

(2) Transfer to Court of Appeals. The court shall transfer a motion filed by a defendant to the Court of Appeals for consideration as a personal restraint petition unless the court determines that the motion is not barred by RCW 10.73.090 and either (i) the defendant has made a substantial showing that he or she is entitled to relief or (ii) resolution of the motion will require a factual hearing.

(3) Order to Show Cause. If the court does not transfer the motion to the Court of Appeals, it shall enter an order fixing a time and place for hearing and directing the adverse party to appear and show cause why the relief asked for should not be granted.

RAP 13.4(b) provides:

A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 16.18 provides:

> (a) Generally. The Department of Corrections may petition the Court of Appeals for review of a sentence committing an offender to the custody or jurisdiction of the Department of Corrections. The review shall be limited to errors of law.
>
> (b) Filing. The petition should be filed no later than 90 days after the Department of Corrections has received the documents containing the terms of the sentence. The petition should be filed in the division that includes the superior court entering the decision under review.
>
> (c) Parties. When the Department files the petition, it should serve copies on the prosecuting attorney and on the offender whose sentence is in question. The appellate court clerk will serve the offender with a statement of the right to counsel and the right to proceed at public expense if indigent. If the offender was found indigent at trial and has been incarcerated since trial, continued indigency is presumed. In other cases where the offender claims indigency, the Court of Appeals may make a determination of indigency or may remand to the sentencing court for such a determination. The Court of Appeals may appoint counsel for indigent offenders and waive costs as provided in RAP 16.15(g) or may remand to the sentencing court for such appointment. All parties should file a written response to the petition within 45 days after the appellate court clerk notifies the offender of the right to counsel and the right to proceed at public expense. The Department has 20 days after service of the last response to file a reply.
>
> (d) Petition. The petition should contain:
>
> (1) The county and superior court cause number below;

(2) The crime for which the offender was convicted;

(3) The date the Department of Corrections received the documents containing the terms of the sentence;

(4) The address of the offender;

(5) The error of law at issue;

(6) A statement by the Department of Corrections of all efforts that have been made to resolve the dispute at the superior court level, and the results thereof;

(7) Argument;

(8) The relief requested;

(9) A conclusion; and

(10) An appendix. The appendix should contain a copy of the judgment and sentence, the warrant of commitment, and any response of the superior court regarding the Departments administrative efforts to resolve the issue.

(e) Consideration of Petition.

(1) Generally. The Chief Judge will consider the petition promptly after the time has expired for filing of the Departments reply. The Chief Judge determines at the initial consideration if the petition will be retained by the appellate court for determination on the merits.

(2) Determination by Appellate Court. The Chief Judge determines at the initial consideration of the petition the steps necessary to properly decide on the merits the issues raised by the petition. If the issues presented are

frivolous, the Chief Judge will dismiss the petition. If the petition is not frivolous, the Chief Judge will refer the petition to a panel of judges for a determination on the merits. The Chief Judge may enter other orders necessary to obtain a prompt determination of the petition on the merits.

(3) Oral Argument. Decisions of the Chief Judge will be made without oral argument. If a petition is to be decided on the merits by a panel of judges, the appellate court clerk will set the petition for consideration by the panel of judges, with or without oral argument. If oral argument is directed, the clerk will notify the parties of the date set for oral argument.

(f) Disposition. The Court of Appeals will dispose of the matter in such manner as the ends of justice require.

(g) Review of Court of Appeals Decision. If the petition is dismissed by the Chief Judge or decided by the Court of Appeals on the merits, the decision is subject to review by the Supreme Court by a motion for discretionary review on the terms and in the manner provided in rule 13.5A.

Former RCW 9.94A.030 (eff. 9/1/01) provided in part:

(12) "Crime-related prohibition" means an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted, and shall not be construed to mean orders directing an offender affirmatively to participate in rehabilitative programs or to otherwise perform affirmative conduct. However, affirmative acts necessary to monitor compliance with the order of a court may be required by the department.

Former RCW 9.94A.505 (eff. 9/1/01) provided in part:

> (8) As a part of any sentence, the court may impose and enforce crime-related prohibitions and affirmative conditions as provided in this chapter.

RCW 9.94A.585 provides in part:

> (7) The department may petition for a review of a sentence committing an offender to the custody or jurisdiction of the department. The review shall be limited to errors of law. Such petition shall be filed with the court of appeals no later than ninety days after the department has actual knowledge of terms of the sentence. The petition shall include a certification by the department that all reasonable efforts to resolve the dispute at the superior court level have been exhausted.

RCW 9.94A.670 provides in part:

> (2) An offender is eligible for the special sex offender sentencing alternative if:
>
> (a) The offender has been convicted of a sex offense other than a violation of RCW 9A.44.050 or a sex offense that is also a serious violent offense. If the conviction results from a guilty plea, the offender must, as part of his or her plea of guilty, voluntarily and affirmatively admit he or she committed all of the elements of the crime to which the offender is pleading guilty. This alternative is not available to offenders who plead guilty to the offense charged under *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970) and *State v. Newton*, 87 Wash.2d 363, 552 P.2d 682 (1976);
>
> (b) The offender has no prior convictions for a sex offense as defined in RCW 9.94A.030 or any other felony sex offenses in this or any other state;

(c) The offender has no prior adult convictions for a violent offense that was committed within five years of the date the current offense was committed;

(d) The offense did not result in substantial bodily harm to the victim;

(e) The offender had an established relationship with, or connection to, the victim such that the sole connection with the victim was not the commission of the crime; and

(f) The offender's standard sentence range for the offense includes the possibility of confinement for less than eleven years.

(3) If the court finds the offender is eligible for this alternative, the court, on its own motion or the motion of the state or the offender, may order an examination to determine whether the offender is amenable to treatment. . . .

. . .

(4) After receipt of the reports, the court shall consider whether the offender and the community will benefit from use of this alternative, consider whether the alternative is too lenient in light of the extent and circumstances of the offense, consider whether the offender has victims in addition to the victim of the offense, consider whether the offender is amenable to treatment, consider the risk the offender would present to the community, to the victim, or to persons of similar age and circumstances as the victim, and consider the victim's opinion whether the offender should receive a treatment disposition under this section. The court shall give great weight to the victim's opinion whether the offender should receive a treatment disposition under this section. If the

sentence imposed is contrary to the victim's opinion, the court shall enter written findings stating its reasons for imposing the treatment disposition. The fact that the offender admits to his or her offense does not, by itself, constitute amenability to treatment. If the court determines that this alternative is appropriate, the court shall then impose a sentence or, pursuant to RCW 9.94A.507, a minimum term of sentence, within the standard sentence range. If the sentence imposed is less than eleven years of confinement, the court may suspend the execution of the sentence as provided in this section.

(5) As conditions of the suspended sentence, the court must impose the following:

(a) A term of confinement of up to twelve months or the maximum term within the standard range, whichever is less. The court may order the offender to serve a term of confinement greater than twelve months or the maximum term within the standard range based on the presence of an aggravating circumstance listed in RCW 9.94A.535(3). In no case shall the term of confinement exceed the statutory maximum sentence for the offense. The court may order the offender to serve all or part of his or her term of confinement in partial confinement. An offender sentenced to a term of confinement under this subsection is not eligible for earned release under RCW 9.92.151 or 9.94A.728.

(b) A term of community custody equal to the length of the suspended sentence, the length of the maximum term imposed pursuant to RCW 9.94A.507, or three years, whichever is greater, and require the offender to comply with any conditions imposed by the department under RCW 9.94A.703.

(c) Treatment for any period up to five years in duration. The court, in its discretion, shall order outpatient

> sex offender treatment or inpatient sex offender treatment, if available. A community mental health center may not be used for such treatment unless it has an appropriate program designed for sex offender treatment. The offender shall not change sex offender treatment providers or treatment conditions without first notifying the prosecutor, the community corrections officer, and the court. If any party or the court objects to a proposed change, the offender shall not change providers or conditions without court approval after a hearing. . . .

RCW 10.73.090 provides:

> (1) No petition or motion for collateral attack on a judgment and sentence in a criminal case may be filed more than one year after the judgment becomes final if the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction.
>
> (2) For the purposes of this section, "collateral attack" means any form of postconviction relief other than a direct appeal. "Collateral attack" includes, but is not limited to, a personal restraint petition, a habeas corpus petition, a motion to vacate judgment, a motion to withdraw guilty plea, a motion for a new trial, and a motion to arrest judgment.
>
> (3) For the purposes of this section, a judgment becomes final on the last of the following dates:
>
> (a) The date it is filed with the clerk of the trial court;
>
> (b) The date that an appellate court issues its mandate disposing of a timely direct appeal from the conviction; or

(c) The date that the United States Supreme Court denies a timely petition for certiorari to review a decision affirming the conviction on direct appeal. The filing of a motion to reconsider denial of certiorari does not prevent a judgment from becoming final.

U.S. Const. amend. I provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

U.S. Const. amend. V provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. VIII provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Const. amend. XIV, § 1 provides in part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Wash. Const. art. I, § 3 provides:

> No person shall be deprived of life, liberty, or property, without due process of law.

Wash. Const. art. I, § 4 provides:

> The right of petition and of the people peaceably to assemble for the common good shall never be abridged.

Wash. Const. art. I, § 5 provides:

> Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right.

Wash. Const. art. I, § 9 provides:

> No person shall be compelled in any criminal case to give evidence against himself, or be twice put in jeopardy for the same offense.

Wash. Const. art. I, § 14 provides:

> Excessive bail shall not be required, excessive fines imposed, nor cruel punishment inflicted.

Wash. Const. art. 1, § 22 (Amendment 10) provides in part:

> 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 . . . .

CERTIFICATE OF SERVICE

I, Alex Fast, certify and declare as follows:

On December 31, 2020, I served a copy of this PETITION FOR REVIEW on counsel for the Respondent by filing this pleading through the Portal.

I certify or declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 31st day of December 2020 at Seattle, Washington.

s/ Alex Fast
Legal Assistant

LAW OFFICE OF NEIL FOX PLLC

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Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	53262-0
Appellate Court Case Title:	State of Washington, Respondent v. Warren M. Helzer, Appellant
Superior Court Case Number:	09-1-00111-3

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