90670-0

NO. 45306-1-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

WILLIAM CALETTI, III,

Petitioner.

PETITION FOR REVIEW

John A. Hays, No. 16654
Attorney for Appellant

1402 Broadway
Suite 103
Longview, WA 98632
(360) 423-3084

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Constitutional Provisions

Court Rules

A. *IDENTITY OF PETITIONER*

William Caietti, III, asks this court to accept review of the decision designated in Part B of this motion.

B. *DECISION*

Petitioner seeks review of each and every part of the decision of the Court of Appeals denying petitioner's motion to modify a decision of the Court of Appeals Commissioner Affirming the trial court's order modifying the defendant's sentence. A copy of the Court of Appeals Order and the Commissioner's decision are attached.

C. *ISSUES PRESENTED FOR REVIEW*

> Does a trial court's order amending a sentence after the defendant fully serves it violate that defendant's right to be free from double jeopardy under Washington Constitution, Article 1, § 9, and United States Constitution, Fifth Amendment when the state neither alleges nor proves that the defendant procured the original sentence through fraud?

D. *STATEMENT OF THE CASE*

By information filed July 6, 1998, the Clallam County Prosecutor charged the defendant William Caietti, III, with second degree assault against a prison guard under RCW 9A.36.021. CP 104. At the time of the alleged offense the defendant was a prisoner at the Clallam Bay Correctional Facility serving a lengthy sentence out of Spokane County. CP 70-79, 80. The case later went to trial and on November 12, 1998, a jury found the defendant guilty as charged. CP 103. On December 23, 1998, Clallam County Superior

Court Judge Terry McCluskey sentenced the defendant to 74 months in prison which was about the midpoint of the standard rage of 63 to 84 months with no credit noted for any time served. CP 94-102. Paragraph 4.6(a) of the judgement and sentence includes the following language which is standard and printed on the form. CP 98. Neither the trial court nor the prosecutor added the number of the defendant's Spokane cause number:

> The sentence herein shall run consecutively with the sentence in cause numbers(s) _____
>
> _____
>
> but concurrently to any other felony cause not referred to in this Judgment. RCW 9.94A.400.

CP 98.

The Warrant of Commitment the court signed along with the judgment and sentence did not mention the existence of the Spokane conviction and did not note any credit for time served. CP 106. Neither the defendant, nor the Clallam County Prosecutor, nor the Department of Corrections appealed from any portion of this judgment and sentence. CP 7-104. Given the language in the Judgment and Sentence that the 72 months run "concurrently to any other felony cause not referred to in this Judgment," the latest the defendant completed his sentence on February 23 , 2005, which was exactly 72 months after the court signed the judgment and sentence. *Id.* In fact, if the December 23, 1998, sentencing date is taken as the first day the defendant commenced his sentence, the 10 year statutory maximum for the defendant's class B

felony conviction ran out on December 23, 2008. *Id.*

On June 6, 2012, over 13 years after the court sentenced the defendant on the second degree assault charge and over seven and one-half years after the defendant completed his sentence, Washington State Department of Corrections (DOC) Records Supervisor Patty Jordan sent the defendant a letter stating that DOC was unilaterally changing his Clallam County sentence to run consecutive to his Spokane County sentence. CP 48. The first two paragraphs of this letter stated:

> This letter is to inform you of a change in your release date. A recent audit of your sentence structure has uncovered that your sentence for the Assault 2nd had not been entered correctly. Cause 98-1-00191-6 should have been ran consecutive to all other causes per RCW 9.94A.589 which states under section (2)(a); Except as provided in (b) of this subsection, whenever a person while under sentence for conviction of a felony commits another felony and is sentenced to another term of confinement, the latter term shall not begin until expiration of all prior terms. I am enclosing a copy of the RCW for your review.
>
> You were sentenced to 74 months on your Clallam cause 98-1-00191-6. This time has now been entered to run consecutive to the longest count on your Spokane 95-1-00365-7 cause. Your earned Release date (ERD) changed due to this update, from January 11, 2023, to September 22, 2028.

CP 48.

Apparently DOC later became aware of the decision in *State v. Dress*, 168 Wn.App. 319, 279 P.3d 875 (2012), which prohibits DOC from unilaterally modifying a defendant's judgment and sentence. CP 81. As a result, on October 26, 2012, Ms Jordan sent an e-mail to the Clallam County

Prosecutor noting that (1) the Clallam County Superior Court had erroneously ordered that the defendant's sentence run concurrent to his Spokane County Sentence, (2) that the *Dress* decision prohibited DOC from unilaterally changing the sentence to run it consecutively, and (3) that the Clallam County Prosecutor should bring an action seeking to modify the defendant's sentence because "[a]t this time the Clallam cause is being run concurrent to his other cause." CP 81. The exact language of this e-mail is as follows:

> Caietti was received at the Clallam Bay Corrections Center on 12-11-1998 from Clallam County on CSE#98-1-00191-6. Per RCW 9.94A.589(2)(a), this cause should run consecutively with the prior sentences, the longest running one being Spokane CSE#95-1-00365-7. This Judgment and Sentence contains boilerplate language that has been determined by the Court to run the sentences concurrently per the recent Dress Decision 66262-7 filed on 05-14-12. Please review and if you agree provide this office with a certified order amending the original Judgment and Sentence stating this cause is to be served consecutively to the DOC sanction and/or DOSA revocation. If you do not agree, we would appreciate a written response for our files.
>
> This was an added cause in which the offender was convicted of assaulting a staff member in prison. Since he was serving another felony cause (Spokane 95-1-00365-7) when he committed this offense, it appears per RCW 9.94A.589(3)(a) that the Clallam cause should be consecutive to his prior offenses, however J&S states "this sentence shall run consecutively with the sentence in cause number(s) *blank* but **concurrently to any other felony cause not referred to in this Judgment".** Please let me know if you need anything further from me. Appreciate any clarification you can provide
>
> At this time the Clallam cause is being run concurrent to his other cause.

CP 81 (bold, underlining and italics in original).

About two months after receiving this e-mail, the Clallam County

Prosecutor filed a "Motion to Correct Judgment and Sentence" in this case, arguing that (1) the trial court had intended to run the defendant's Clallam County sentence consecutive to his Spokane sentence, (2) that the failure to add the Spokane County cause number to paragraph 4.6(a) of the judgment and sentence was a "clerical error" under CrR 7.8(a) and (3) that under CrR 7.8(a), the court had authority at any time to remedy that error by modifying the judgment and sentence to conform with the trial court's intent. CP 49-57, 67-91. In support of this motion the state presented the minute sheet from the sentencing hearing along with the affirmation of the sentencing judge. CP 82. The former states in relevant part: "Court sentenced def. to 74 mo. in prison. Consecutive to charge he is now serving." CP 82. In the latter affidavit former Judge McCluskey included the following claim:

> I recall and I am positive that it was my intent, at the time of sentencing, to sentence Mr. Caiette [sic] to a prison term which would be served consecutively to the term he was already serving from Spokane.

CP 32.

The defense responded to the state's motion by arguing that (1) the trial court had not intended to run the defendant's sentence consecutively, (2) that any error if it existed was a judicial error that could only be remedied under CrR 7.8(b), (3) that the state's motion under CrR 7.8(b) was untimely, and (4) that given the fact that the defendant had completed his sentence prior to the state filing its motion, any application of a remedy under CrR 7.8(a) would

violate the defendant's right under Washington Constitution, Article 1, § 9, and United States Constitution, Fifth Amendment to be free from double jeopardy. CP 42-48. In support of his factual argument the defendant gave an affirmation stating that the judge had ordered that his Clallam County sentence run concurrently with his Spokane County sentence. Exhibit 4. In addition, the defense attempted to get a transcription of the original sentencing hearing but eventually determined that the court reporter had destroyed her notes. CP 58, 61; RP 10-12, 13-20.[1]

Following a number of hearings on the matter the court granted the state's motion, amended the judgment and sentence to run it consecutive to the defendant's Spokane cause number and later entered the following findings of fact and conclusions of law in support of its ruling:

> THIS MATTER came before the court on May 16, 2013, for the State's motion to correct the judgment and sentence, the plaintiff appearing by and through Clallam County Deputy Prosecuting Attorney, Jesse Espinoza, the Defendant appearing in person by and through his attorney, Harry D. Gasnick, the Court having reviewed the briefings and having heard the testimony and arguments by the parties, and deeming itself fully apprised in the premises, and having filed a Memorandum Opinion (incorporated herein along with all exhibits admitted), the court makes the following "Background, Issues, Findings of Fact, Conclusions of Law and Order."

I. BACKGROUND

---

[1]The record on appeal includes one volume of continuously numbered verbatim reports of the hearings held 1/11/13, 1/31/13, 2/21/13, 3/21/13, 5/16/13, 5/24/13 and 8/7/13. They are referred to herein as "RP [page #]."

On Dec. 10, 2012, the Clallam County Prosecutor, through her deputy, Jesse Espinoza, (hereinafter "State") filed a motion to correct the Judgment and Sentence entered on Dec. 23, 1998 under Clallam County cause no. 98-1-00191-6 (hereinafter "1998 Clallam cause"). The State sought to add language to make the prison term ordered under the 1998 Clallam cause run "consecutive" to the sentence entered on Sept. 5, 1995 under Spokane County cause no. 95-1-00365-7 (hereinafter "1995 Spokane cause").

On Sept. 5, 1995, the defendant was sentenced to 236 months under the 1995 Spokane cause. On July 6, 1998, while serving his sentence under the 1995 Spokane cause, the defendant was charged under the 1998 Clallam cause with Assault in the Second Degree for assaulting a correctional officer at the Clallam Bay Corrections Center on Aug. 7, 1997. On Nov. 12, 1998 a jury found the defendant guilty of Assault in the Second Degree as charged. On Dec. 23, 1998, the defendant was sentenced to 74 months.

Paragraph 4.6 of the judgment and sentence under the 1998 Clallam cause states the following:

> The sentence herein shall run consecutively with the sentence in cause number(s) _____but concurrently to any other felony cause not referred to in this judgment. RCW 9.94A.400.

It is the State's position that the court should have ordered the 74 months to be served consecutively to the 1995 Spokane cause and that "Spokane County cause no. 95-1-00365-7" was inadvertently omitted from paragraph 4.6 in the 1998 Clallam judgment and sentence. The defendant argues that there was no mistake and that the Court intended the sentence to run concurrently with the 1995 Spokane cause.

The State offered the affidavit of the sentencing to the Judge, Terry McClusky, dated June 7, 2013, which states as follows:

> This is my declaration regarding the matter of the sentencing of William Caietti under Clallam County Superior court Cause no. 98-1-00191-6. I was the sentencing Judge on this matter and remember it very well. I also remember the details of his case from Spokane County. It is my recollection that Mr. Caietti was in prison in Clallam Bay due to his Spokane county charges, one of which was for Kidnaping. Mr. Caietti was serving a sentence of approximately 31

years when he committed the crime for Assault in the Second Degree. I recall and I am positive that it was my intent, at the time of sentencing, to sentence Mr. Caietti to a prison term which would be served consecutively to the term he was already serving from Spokane. The alternative would be a sentence with no punishment.

Tammy Wooldridge was the courtroom clerk during the sentencing hearing on Dec. 23, 1998. The court reporter notes from the sentencing hearing for the 1998 Clallam cause could not be located but the minutes for the hearing were available. At the hearing, Ms. Wooldridge testified that she had served in the capacity of a courtroom clerk for 28 years, beginning in 1978. Ms Wooldridge identified Sate's Exhibit no. 1 as the minutes she prepared at the sentencing hearing for the 1998 Clallam cause on Dec. 23, 1998.

Ms. Wooldridge's minutes read in part as follows:

> Sentencing. Counsel gave recommendations. Court sentences defendant to 74 months in prison. Consecutive to charge he is now serving.

Ms. Wooldridge testified that her duties as a courtroom clerk entail the recording of the judge's ruling by putting into the minutes "what I hear." Ms Wooldridge further stated that there were no corrections made to State's Exhibit No. 1, although she also admitted that she is human and can make mistakes.

The defendant's certified declaration states as follows:

> My memory of these proceedings is that the judge said my sentence was to be served concurrently with my sentence from Spokane."

II. ISSUES

1. Whether the omission of a term from the 1998 Clallam judgment and sentence in paragraph 4.6 requiring the defendant's sentence to be served consecutively with the sentence under the 1995 Spokane cause, was a mistake, oversight or omission or whether it was an error of law?

2. Whether CrR 7.8 or RCW 9.94A.585(7) applies to the facts of this case?

3. Whether the defendant would suffer prejudice from the correction of the sentence under the 1998 Clallam cause by requiring that it be served consecutively to the sentence under the 1995 Spokane cause?

II. FINDINGS OF FACTS

1. The sentence under the 1998 Clallam cause was mandated by law to run consecutively to the sentence under the 1995 Spokane cause pursuant to RCW 9.94A.400(2) which was in effect in 1998.

2. In order for the 1998 Clallam cause to run concurrently with the 1995 Spokane cause, the sentencing Court in the 1998 Clallam cause would have had to impose an exceptional sentence, which was not done.

3. For this Court to find that the sentencing Judge, under the 1998 Clallam cause, intended the sentences to run concurrently, several assumptions would have to be made:

a. That Judge McClusky's memory is inaccurate and that both he and the prosecuting attorney were either ignorant of the law or chose to outright ignore the law; and at the same time,

b. That a courtroom clerk, with 20 years experience, misheard the judge and wrote "consecutive" rather than "concurrent". This is not language that would appear routinely in the clerk's minutes unless there was some discussion on the record.

4. It is the Court's finding that the likelihood of both the above assumptions occurring at the same time is highly problematic and it is extremely unlikely that the judge, prosecutor, and courtroom clerk would all have a lapse in judgment at the same moment.

5. There is evidence that the Dept. Of Corrections (DOC) was aware of the omission of the 1995 Spokane cause No. in paragraph 4.6 of the 1998 Clallam County judgment and sentence and failed to act within a 90 day window as set forth in RCW 9.94A.585(7).

6. The defendant was present at his own sentencing under the 1998 Clallam cause and was aware of the consecutive nature of his sentence.

7. The defendant asserted that DOC made prior representations that

his 1998 Clallam County sentence had concluded in 2005. The defendant would have been aware that such representations by DOC were erroneous.

II. CONCLUSIONS OF LAW

1. The failure to specify, in paragraph 4.6 of the judgment and sentence under the 1998 Clallam cause, that the sentence shall be served consecutively to the sentence under the 1995 Spokane cause was a mistake, oversight or omission pursuant to CrR 7.8(a) rather than an error of law.

2. RCW 9.94A.585(7) applies to petitions filed by DOC directly to the Court of appeals, not by the county prosecutor and is limited to "errors of law" and therefore, it does not apply to the facts and issues in dispute in the present case.

3. RCW 9.94A.585(7) and CrR 7.8(a) cover two different scenarios and are therefore not in conflict.

4. The decision in *Dress v. Washington State Dept. Of Corrections,* 168 Wn. App. 319, 279 P.3d 875 (Ct. App. 2012), does not control in the present case. The *Dress* Court found that the sentencing court intentionally made the sentence concurrent rather than consecutive and therefore *Dress* was not a case dealing with a "mistake, oversight or omission."

5. Since the defendant was present at sentencing and was aware of the consecutive nature of the sentence, the defendant is not prejudiced by the correction of the sentence under the 1998 Clallam cause which makes the 74 month term of confinement consecutive to the sentence under the 1995 Spokane cause.

IV. ORDER

Based upon the Findings of Fact and Conclusions of Law, it is hereby ordered that paragraph 4.6 of the defendant's judgment and sentence under Clallam County cause no. 98-1-00191-6 shall be corrected by specifying that the 74 month prison sentence shall be served consecutive to the sentence under Spokane County cause no. 95-1-00365-7.

CP10-15.

Following entry of this order the defendant filed timely notice of appeal. CP 7. On June 24, 2014, a Commissioner of the Court of Appeals entered a Ruling Affirming Order Correcting Judgment and Sentence. *See* Ruling. The defendant responded with a timely Motion to Modify. By order entered August 15, 2014, a panel of judges of Division II entered an Order Denying the Motion to Modify.

E. *ARGUMENT WHY REVIEW SHOULD BE ACCEPTED*

Under RAP 13.4(b) this court has set out four bases for granting review of a final decision of the Court of Appeals. They are:

> (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 another 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.

In the case at bar Petitioner argues that review should be granted under parts (1) and (3) of this rule. Specifically, petitioner argues that the decision in this case conflicts with this court's decisions in *State v. Michielli*, 132 Wn.2d 229, 937 P.2d 587 (1997), and *State v. Hardesty*, 129 Wn.2d 303, 311, 915 P.2d 1080 (1996) and that the Court of Appeals' decision violates the defendant's right to be free from double jeopardy under Washington

Constitution, Article 1, § 9, and United States Constitution, Fifth Amendment. The following sets out these arguments.

(1) Conflict with State v. Michielli, Supra. In this case the commissioner relied upon the following conclusions when granting the ruling on the merits: (1) that the trial court's oral statements at sentencing controlled over the court's ultimate written order, and (2) that since the trial court had orally indicated that it intended to order consecutive sentences the defendant had no legitimate expectation sufficient to claim that the court's modification of the sentence well after it was served violated his right to be free from double jeopardy under either the federal or state constitutions.

As to the first conclusion, the settled law of this state is that when there is a conflict between a court's oral statements and the court's ultimate written ruling, the written ruling controls. *See i.e. State v. Michielli*, 132 Wn.2d at 242 ("Even a trial court's oral decision has no binding or final effect unless it is formally incorporated into findings of fact, conclusions of law, and judgment.") To put the matter another way, our settled case law is clear: A court's oral rulings are always tentative and never control over the court's written orders. In this case the trial court signed a judgment and sentence that operated by law to run the defendant's sentences concurrently. The written order was the binding decision. Thus, the Commissioner erred on this point because settled case law supports appellant's position, not the state's.

(2) Conflict with State v. Hardesty, supra, and Conflict with Washington Constitution, Article 1, § 9, and United States Constitution, Fifth Amendment.

There are three instances in which the constitutional double jeopardy provision prohibits a court from increasing a previously imposed sentence. First, the double jeopardy clause prevents the state from attempting to increase a correct sentence after it is imposed. *United States v. DiFrancesco*, 449 U.S. 117, 138-139, 101 S.Ct. 426, 438-439, 66 L.Ed.2d 328 (1980). Second, the double jeopardy clause prevents resentencing if the original sentencing proceeding was more like a trial than an ordinary sentencing proceeding. *DiFrancesco*, 449 U.S. at 136-37, 101 S.Ct. at 437. Third, the double jeopardy clause prevents the state from seeking to modify an erroneous sentence after a defendant has obtained "a legitimate expectation of finality in the sentence." *State v. Hardesty*, 129 Wn.2d at 311.

Whether or not a defendant has obtained "a legitimate expectation of finality" in an erroneous sentence depends upon a number of factors "such as the completion of the sentence, the passage of time, the pendency of an appeal or review of the sentencing determination, or the defendant's misconduct in obtaining the sentence." *State v. Hardesty*, 129 Wn.2d at 311. Although the recitation of this laundry list of pertinent factors in this analysis appears to leave the ultimate decision up to the unfettered discretion of the trial court, the fact is that there are some factors which automatically require

the application of the double jeopardy prohibition while others automatically preclude its application. *Id.* In *Hardesty* this Court noted the following on this issue:

> The case law following *DiFrancesco* indicates the defendant acquires a legitimate expectation of finality in a sentence, substantially or fully served, unless the defendant was on notice the sentence might be modified, due to either a pending appeal or the defendant's own fraud in obtaining the erroneous sentence. In *United States v. Jones*, 722 F.2d 632, 638 (11th Cir.1983), the court stated a defendant has an expectation of finality in the sentence once she or he begins to serve it, unless a review process is employed or the defendant "intentionally deceive[d] the sentencing authority or thwart [ed] the sentencing process." . . . A defendant who creates the error through fraud should not be heard to claim an expectation of finality in the sentence the defendant knows is erroneous.

State v. Hardesty, 129 Wn.2d at 312-313 (most citations omitted).

In this case the Commissioner attempted to distinguish this court's decision *Hardesty* by arguing that since the trial court orally stated that the sentences would run consecutively, the defendant had no legitimate expectation of finality in the written sentence the court signed. This finding simply ignores the ruling in *Hardesty* and eliminates the protections against double jeopardy that *Hardesty* and the cited federal cases recognize for a defendant who has fully served the sentence that the trial court did impose instead of the sentence the trial court intended to impose. Consequently, the decision in this case directly conflicts with the decision in *Hardesty* and violates both Washington Constitution, Article 1, § 9, and United States Constitution, Fifth Amendment. As a result, this court should accept review

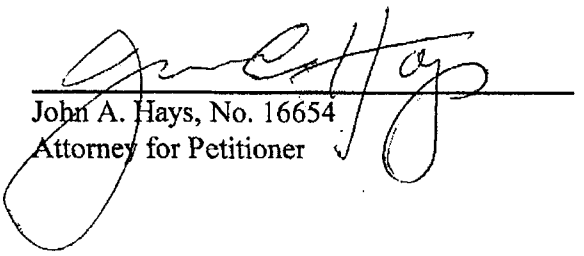
and reverse the decision of the Court of Appeals.

F. *CONCLUSION*

For the reasons set out in this motion, this court should accept review of this case and reverse the decision of the Court of Appeal.

Dated this 25th day of August, 2014.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Petitioner

COURT OF APPEALS OF WASHINGTON, DIVISION II

STATE OF WASHINGTON, **Respondent,** **vs.** **WILLIAM CAIETTI, III,** **Appellant.**	**NO. 45306-1-II** **AFFIRMATION OF OF SERVICE**

The under signed states the following under penalty of perjury under the laws of Washington State. On this, I personally e-filed and/or placed in the United States Mail the Brief of Appellant with this Affirmation of Service Attached with postage paid to the indicated parties:

1. Mr. Lewis Schrawyer
   Clallam County Prosecuting Attorney
   223 East 4th Street, Suite 11
   Port Angeles, WA 98362
   lschrawyer@co.clallam.wa.us

2. William Caietti, III,, No. 1082842
   Lovelock Correctional Center
   1200 Prison Road
   Lovelock, NV 89410

Dated this 25th day of August, 2014 at Longview, Washington.

John A. Hays, No. 16654
Attorney at Law

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. WILLIAM CAIETTI, III, Appellant.	No. 45306-1-II ORDER DENYING MOTION TO MODIFY

APPELLANT filed a motion to modify a Commissioner's ruling dated June 24, 2014, in the above-entitled matter. Following consideration, the court denies the motion. Accordingly, it is

SO ORDERED.

DATED this 15th day of August, 2014.

PANEL: Jj. Bjorgen, Worswick, Maxa

FOR THE COURT:

Bjorgen, A.C.J.

ACTING CHIEF JUDGE

John A. Hays
Attorney at Law
1402 Broadway St
Longview, WA 98632-3714

Lewis M. Schrawyer
Attorney at Law
223 E 4th St Ste 11
Port Angeles, WA 98362-3000

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. WILLIAM CAIETTI, III, Appellant.	No. 45306-1-II RULING AFFIRMING ORDER CORRECTING JUDGMENT AND SENTENCE

William Caietti, III, appeals from the order correcting the judgment and sentence imposed following his conviction of second degree assault. He argues that the order violated his right against double jeopardy. This court considered his appeal as a motion on the merits to affirm under RAP 18.14. Finding that his appeal is clearly without merit, this court affirms the order correcting Caietti's judgment and sentence.

On September 5, 1995, the Spokane County Superior Court sentenced Caietti to 395 months of confinement following his pleas of guilty to two counts of first degree

robbery, one count of first degree assault, one count of attempted first degree kidnapping, one count of first degree kidnapping, and one count of taking a motor vehicle without permission. On August 7, 1997, while Caietti was confined at Clallam Bay Correctional Center, he allegedly assaulted a correctional officer. The State charged him in Clallam County Superior Court with second degree assault. A jury found him guilty. On December 23, 1998, the Clallam County Superior Court sentenced him to 74 months of confinement. Paragraph 4.6(a) of his judgment and sentence provided:

> The sentence herein shall run consecutively with the sentence in cause number(s) _____
> but concurrently to any other felony cause not referred to in this Judgment. RCW 9.94A.400.

Clerk's Papers (CP) at 98.

In 2012, the Department of Corrections sent the State an e-mail noting that the section of Caietti's judgment and sentence regarding consecutive sentences was blank and asked the State to have the judgment and sentence amended to specify that his Clallam County sentence was to run consecutively to his Spokane County sentences, because RCW 9.94A.589(2)(a) required that the sentences run consecutively.[1] That statute, formerly RCW 9.94A.400(2)(a) (1998), provides:

> Except as provided in (b) of this subsection, whenever a person while under sentence for conviction of a felony commits another felony and is sentenced to another term of confinement, the latter term shall not begin until expiration of all prior terms.

[1] The Department had earlier informed Caietti that it was unilaterally making his Clallam County sentence consecutive to his Spokane County sentences. But after this court held in *Dress v. Department of Corr.*, 168 Wn. App. 319, 279 P.3d 875 (2012), that the Department did not have that authority, it sent the e-mail asking that the judgment and sentence be amended.

The State filed a motion to correct the judgment and sentence to state that Caietti's Clallam County sentence was to run consecutively to his Spokane County sentences. It brought its motion under CrR 7.8(a), which provides:

> 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.

The State supported its motion with a Criminal Minute Sheet prepared by a deputy clerk during Caietti's Clallam County sentencing. That sheet stated:

> Sentencing. Counsel gave recommendations. Court sentenced def. to 74 mo. in prison. Consecutive to charge he is now serving.

CP at 82.

It also supported its motion with a declaration from Judge Terry McCluskey, who sentenced Caietti in Clallam County Superior Court. Judge McCluskey declared:

> I was the sentencing Judge on this matter and remember it very well. I also remember the details of his case from Spokane County. It is my recollection that Mr. Caiette [sic] was in prison in Clallam Bay due to his Spokane County charges, one of which was for Kidnapping. Mr. Caiette [sic] was serving a sentence of approximately 31 years when he committed the crime of Assault in the Second Degree. I recall and I am positive that it was my intent, at the time of sentencing, to sentence Mr. Caiette [sic] to a prison term which would be served consecutively to the term he was already serving from Spokane. The alternative would be a sentence with no punishment.

CP at 32.

Caietti opposed the State's motion, stating that he had already served the 92-month Clallam County sentence, so amending it to now make it consecutive to his

Spokane County sentences would violate his right against double jeopardy, as set forth in *State v. Hardesty*, 129 Wn.2d 303, 311, 915 P.2d 1080 (1996).

The court granted the State's motion, making the following findings of fact:

> 1. The sentence under the 1998 Clallam cause was mandated by law to run consecutively to the sentence under the 1995 Spokane cause pursuant to RCW 9.94A.400 (2) which was in effect in 1998.
> 2. In order for the 1998 Clallam cause to run concurrently with the 1995 Spokane cause, the sentencing Court in the 1998 Clallam cause would have had to impose an exceptional sentence, which was not done.
> 3. For this Court to find that the sentencing Judge, under the 1998 Clallam cause, intended the sentences to run concurrently, several assumptions would have to be made:
> a. That Judge McClusky's memory is inaccurate and that both he and the prosecuting attorney were either ignorant of the law or chose to outright ignore the law;
> and at the same time,
> b. That a courtroom clerk, with 20 years experience, misheard the judge and wrote "consecutive" rather than "concurrent ". This is not language that would appear routinely in the clerk's minutes unless there was some discussion on the record.
> 4. It is the Court's finding that the likelihood of both the above assumptions occurring at the same time is highly problematic and it is extremely unlikely that the judge, prosecutor, and courtroom clerk would all have a lapse in judgment at the same moment.
> 5. There is evidence that the Dept. of Corrections (DOC) was aware of the omission of the 1995 Spokane cause no. in paragraph 4.6 of the 1998 Clallam County judgment and sentence and failed to act within a 90 day window as set forth in RCW 9.94A.585(7).
> 6. The defendant was present at his own sentencing under the 1998 Clallam cause and was aware of the consecutive nature of his sentence.
> 7. The defendant asserted that DOC made prior representations that his 1998 Clallam County sentence had concluded in 2005. The defendant would have been aware that such representations by DOC were erroneous.

CP at 13.[2]

[2] In his statement of additional grounds, Caietti denies that he was aware of the consecutive nature of his sentence during his Clallam County sentencing.

The court concluded the failure to specify that the Clallam County sentence was to be served consecutively to the Spokane County sentences "was a mistake, oversight or omission pursuant to CrR 7.8(a) rather than an error of law." CP at 14 It corrected paragraph 4.6(a) of the Clallam County sentence to state that "[t]he sentence herein shall run consecutively to the sentence in Spokane County cause number 95-1-00365-7." CP at 8.

Caletti renews his argument that the order correcting his judgment and sentence violates his right against double jeopardy because he had obtained "a legitimate expectation of finality in the sentence." *Hardesty*, 129 Wn.2d at 311. In general, a trial court may correct a clerical error in a judgment and sentence at any time under CrR 7.8(a). *State v. Snapp*, 119 Wn. App. 614, 626, 82 P.3d 252, *review denied*, 152 Wn.2d 1028 (2004). A clerical error is one in which "the judgment, as amended, embodies the trial court's intention, as expressed in the record at trial." *Snapp*, 119 Wn. App. at 627 (quoting *Presidential Estates Apartment Assoc. v. Barrett*, 129 Wn.2d 320, 326, 917 P.2d 100 (1996)). If an error is clerical, the amended judgment and sentence should correct its language to reflect the court's intention or add the language that the court inadvertently omitted. *Snapp*, 119 Wn. App. at 627. In *Snapp*, this court concluded that the omission of a treatment program condition from a judgment and sentence was a clerical error because the clerk's minutes reflected that the court had intended to impose that condition. *Snapp*, 119 Wn. App. at 627. Similarly, the clerk's Criminal Minute Sheet reflected that the trial court had intended that Caletti serve his Clallam

County sentence consecutively to his Spokane County sentences.[3] Thus, the omission of an explicit order in Caietti's judgment and sentence, that the Clallam County sentence be served consecutively to his Spokane County sentences, was a clerical error that the trial court had the power to correct under CrR 7.8(a).

However, double jeopardy may prohibit a correction of a judgment and sentence under CrR 7.8(a) when that correction increases the punishment imposed. *Hardesty*, 129 Wn.2d at 310-11. Double jeopardy prohibits increasing a correct sentence but does not necessarily prohibit increasing an incorrect sentence. *Hardesty*, 129 Wn.2d at 310; *United States v. DiFrancesco*, 449 U.S. 117, 138-39, 101 S. Ct. 426, 66 L. Ed. 2d 328 (1980). Caietti's judgment and sentence was incorrect because former RCW 9.94A.400(2)(a) required that the Clallam County sentence be served consecutively to the Spokane County sentences he was serving at the time he was sentenced.

Double jeopardy may prohibit the correction of an incorrect judgment and sentence if the defendant had a "legitimate expectation of finality in the sentence." *Hardesty*, 129 Wn.2d at 311. The legitimacy of such an expectation of finality is "influenced by many factors such as the completion of the sentence, the passage of time, the pendency of an appeal or review of the sentencing determination, or the defendant's misconduct in obtaining the sentence." *Hardesty*, 129 Wn.2d at 311. In *Hardesty*, the Washington State Supreme Court held that the defendant had a legitimate expectation of finality in a sentence in which his offender score had been

[3] A verbatim report of the sentencing hearing is not available because the court reporter destroyed the notes of that hearing.

calculated incorrectly because he had already served the sentence and been released. *Hardesty*, 129 Wn.2d at 314. But Caietti does not have a legitimate expectation of finality in his incorrect judgment and sentence in which the Clallam County sentence was not run consecutively to his Spokane County sentences. Former RCW 9.94A.400(2)(a) required that the sentences be run consecutively. According to the clerk's Criminal Minute Sheet, the Clallam County judge stated on the record that the Clallam County sentence was to be run consecutively to Caietti's Spokane County sentences. While he now denies it, Caietti was put on notice that his sentences were to be consecutive, so any expectation in the finality of a concurrent sentence is not a legitimate expectation. Further, to conclude that such an expectation of finality in a concurrent sentence was legitimate would be to say that Caietti would receive no punishment for an assault he committed while serving his Spokane County sentences. Such an absence of punishment demonstrates that Caietti did not have a legitimate expectation of finality in a concurrent sentence, so the trial court did not violate Caietti's right against double jeopardy when it corrected his judgment and sentence to reflect the sentencing judge's intention that the Clallam County sentence be run consecutively to Caietti's Spokane County sentences.

An appeal is clearly without merit when the issue on review is clearly controlled by settled law. RAP 18.14(e)(1)(a). Because his claim of double jeopardy is clearly controlled by settled law, Caietti's appeal is clearly without merit. Accordingly, it is hereby

ORDERED that the motion on the merits to affirm is granted and the order correcting Caietti's judgment and sentence is affirmed. He is hereby notified that failure to move to modify this ruling terminates appellate review. *State v. Rolax*, 104 Wn.2d 129, 135-36, 702 P.2d 1185 (1985).

DATED this 24th day of June, 2014.

Eric B Schmidt

Eric B. Schmidt
Court Commissioner

cc: John A. Hays
Lewis M. Schrawyer
Hon. George L. Wood
William Caietti, III

COURT OF APPEALS OF WASHINGTON, DIVISION II

STATE OF WASHINGTON, **Respondent,**	**NO. 45306-1-II**
vs.	**AFFIRMATION OF OF SERVICE**
WILLIAM CAIETTI, III, **Appellant.**	

The under signed states the following under penalty of perjury under the laws of Washington State. On this, I personally e-filed and/or placed in the United States Mail the Brief of Appellant with this Affirmation of Service Attached with postage paid to the indicated parties:

1. Mr. Lewis Schrawyer
   Clallam County Prosecuting Attorney
   223 East 4th Street, Suite 11
   Port Angeles, WA 98362
   lschrawyer@co.clallam.wa.us

2. William Caietti, III,, No. 1082842
   Lovelock Correctional Center
   1200 Prison Road
   Lovelock, NV 89410

Dated this 25th day of August, 2014 at Longview, Washington.

John A. Hays, No. 16654
Attorney at Law

HAYS LAW OFFICE

August 25, 2014 - 10:30 AM

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