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**COURT OF APPEALS, DIVISION II**
**STATE OF WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

WARREN M. HELZER,

Appellant.

Appeal from the Superior Court of Pierce County
The Honorable Gretchen Leanderson

No. 09-1-00111-3

# BRIEF OF RESPONDENT

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## TABLE OF CONTENTS

I. INTRODUCTION ..... 1

II. RESTATEMENT OF THE ISSUES ..... 2

1. The trial court reviewed over 200 pages of briefing and took argument at length before determining that the error in the sentencing orders had been clerical. Was this finding a manifestly unreasonable exercise of the court's discretion? ..... 2

2. Does the Defendant have a legitimate expectation of finality in a clerical error which is inconsistent with the law, the court's intention, and the Defendant's expectation? ..... 2

3. Is there any legal authority for the Defendant's claim that a clerical correction rectifying an otherwise invalid judgment is subject to any time restriction? ..... 2

4. Where the prosecutor's recommendation was not for an illegal determinate sentence, but addressed only those aspects of the sentence over which the court had discretion, is the request to correct clerical error a breach of the plea agreement? ..... 2

5. When appealing from the 2019 correction of a clerical error, may the Defendant challenge community custody conditions imposed in 2010 and not revisited in 2019, contrary to RAP 5.2(a) and *In re Coats*, 173 Wn.2d 123, 134, 170, 267 P.3d 324, 330 (2011)? ..... 2

III. STATEMENT OF THE CASE ..... 2

IV. ARGUMENT ..... 7

A. The court did not abuse its discretion in correcting the judgment and order to reference the statutory maximum ..... 7

1. The court did not abuse its discretion in finding the omission was was a clerical error. ..... 8

2. Correcting a clerical error in an invalid sentence does not violate double jeopardy. ..... 14

3. The court has jurisdiction to correct an invalid sentence at any time. ..... 17

4. The parties did not agree to an illegal sentence. ..... 19

B. The challenge to community custody conditions is untimely and not the proper subject of this appeal. ..... 20

V. CONCLUSION ..... 24

## TABLE OF AUTHORITIES

State Cases

*In re Coats*, 173 Wn.2d 123,
170, 267 P.3d 324, 330 (2011) ..... 2, 21, 22

*In re Pers. Restraint of Andress*, 147 Wn.2d 602, 56 P.3d 981 (2002) .... 15

*McNutt v. Delmore*, 47 Wn.2d 563, 288 P.2d 848 (1955) ..... 17

*Ohnemus v. State*, 195 Wn. App. 135, 379 P.3d 142, 144 (2016) ..... 14

*State v. Freitag*, 127 Wn.2d 141, 896 P.2d 1254 (1995) ..... 17

*State v. Garcia*, 191 Wn.2d 96, 420 P.3d 1077 (2018) ..... 14

*State v. Gore*, 101 Wn.2d 481, 681 P.2d 227 (1984) ..... 17

*State v. Hall*, 162 Wn.2d 901, 177 P.3d 680 (2008) ..... 14-15

*State v. Hardesty*, 129 Wn.2d 303, 915 P.2d 1080 (1996) ..... 7, 15, 16

*State v. Morales*, 196 Wn. App. 106, 383 P.3d 539, 544 (2016) ..... 8

*State v. Mutch*, 171 Wn.2d 646, 254 P.3d 803 (2011) ..... 16

*State v. Pascal*, 108 Wn.2d 125, 736 P.2d 1065 (1987) ..... 17

*State v. Pringle*, 83 Wn.2d 188, 517 P.2d 192 (1973) ..... 17, 18

*State v. Quismundo*, 164 Wn.2d 499, 192 P.3d 342 (2008) ..... 8

*State v. Radan*, 143 Wn.2d 323, 21 P.3d 255 (2001) ..... 14

*State v. Rooth*, 129 Wn. App. 761, 121 P.3d 755, 760 (2005) ..... 8, 16

*State v. Smissaert*, 103 Wn.2d 636, 694 P.2d 654 (1985) ..... 7, 17, 22

*Tamosaitis v. Bechtel Nat., Inc.*, 182 Wn. App. 241, 327 P.3d 1309 (2014) ..... 23

Federal and Other Jurisdiction

*United States v. DiLorenzo*, 429 F.2d 216, 221 (2d Cir. 1970) ..... 17

*Vincent v. United States*, 337 F.2d 891, 894 (8th Cir. 1964) ..... 18

Statutes

Former RCW 9.94A.712 ..... 6, 13

RCW 10.73.090 ..... 17, 18

RCW 10.73.090(1) ..... 18

RCW 9.94A.507 ..... 6, 10, 18

RCW 9.94A.507(1)(a)(i) ..... 10, 18

RCW 9.94A.507(2) ..... 10, 18

RCW 9.94A.507(3)(a) ..... 11

RCW 9.94A.507(3)(b) ..... 11

RCW 9.94A.507(3)(c)(i) ..... 11

RCW 9A.20.021(1)(a) ..... 11

RCW 9A.44.083(2) ..... 11

WAC 437-20-010 ..... 13

Rules and Regulations

CrR 7.8 ..... 7, 8

CrR 7.8(a) ..... 6, 15, 17, 19

CrR 7.8(b) ..... 15, 17

CrR 7.8(b)(5) ..... 6

GR 9 ..... 18

RAP 10.3(a)(5) ..... 9, 11

RAP 10.4(b) ..... 24

RAP 5.2(a) ..... 2, 20, 22

RPC 3.3(a)(3) ..... 22

## I. INTRODUCTION

The Legislature has determined that the Defendant's serious sexual offenses shall be punished with indeterminate sentences with a maximum term of life. The trial court imposes a minimum term within the standard range; and the Indeterminate Sentence Review Board determines the Defendant's actual release date. Both the Defendant's plea statement and the Department of Corrections' presentencing report explain the sentence. The presentencing reports notes that the parties agreed in the plea statement to "life with a minimum set at 130 months … suspended for SSOSA."

At sentencing, the forms prompted the court to address the minimum term, but did not provide any language addressing the maximum term, which occurs by operation of law and not discretion of the court. The court imposed a lifetime of community custody, a term only available for indeterminate sentences.

Some years later, the State asked the court to include language referencing the maximum term – noting that its omission was a clerical error. The Defendant contended that the omission was intentional and that the judge had intended to impose illegal, determinate sentences. The trial court agreed with the State, finding that the omission in the forms was an unintended, clerical error. Such finding is not manifestly unreasonable.

## II. RESTATEMENT OF THE ISSUES

1. The trial court reviewed over 200 pages of briefing and took argument at length before determining that the error in the sentencing orders had been clerical. Was this finding a manifestly unreasonable exercise of the court's discretion?

2. Does the Defendant have a legitimate expectation of finality in a clerical error which is inconsistent with the law, the court's intention, and the Defendant's expectation?

3. Is there any legal authority for the Defendant's claim that a clerical correction rectifying an otherwise invalid judgment is subject to any time restriction?

4. Where the prosecutor's recommendation was not for an illegal determinate sentence, but addressed only those aspects of the sentence over which the court had discretion, is the request to correct clerical error a breach of the plea agreement?

5. When appealing from the 2019 correction of a clerical error, may the Defendant challenge community custody conditions imposed in 2010 and not revisited in 2019, contrary to RAP 5.2(a) and *In re Coats*, 173 Wn.2d 123, 134, 170, 267 P.3d 324, 330 (2011)?

## III. STATEMENT OF THE CASE

The Defendant Warren Helzer disclosed to his wife that he had a sex addiction and had been sexually abusing their three children. CP 3, 41, 45-46, 118. When his wife reported the crimes, the Defendant repeated his confession to a police officer. CP 41, 118. The two older children confirmed the abuse, and the Defendant was charged with raping and molesting his daughter and molesting one of his sons. CP 1-3, 41, 114-16. He eventually pled guilty to three counts of first-degree child molestation, one for each of his three children. CP 4-17, 100-05.

Prior to pleading guilty and on the recommendation of the SSOSA evaluator Robert Wheeler, the Defendant entered treatment with Maureen Saylor for her to determine whether he was treatable. CP 60-61, 124. She found him to be a marginal candidate for SSOSA. CP 61 ("I came very close to saying I would not treat him because of his attitude."). The Defendant himself had concerns about complying with terms of community supervision. CP 48.

The Defendant blamed his wife for reporting his abuse of his children, repeatedly threatened to kill her resulting in her forced displacement on five occasions, repeatedly threatened suicide, and was institutionalized five times. CP 45, 47, 63, 119. His acting out was a means of manipulating and controlling his itinerant, home-schooled family. CP 116-20. He told the SSOSA evaluator that the law criminalizing child molestation is cultural repression and persecution and that his criminal charges are "ridiculous." CP 45-46. Even after hearing the victim impact statements read into the record (CP 112-22), the Defendant insisted that he had been a good father. CP 130-31. He labeled himself a rapist and murder who is above the power of the law and in God's hands. CP 120. The evaluation described a wide variety of deviant sexual behavior, high sexual drive, sexual preoccupation, the use of sex to cope with stressors, as well as

sexual identity confusion, depression, and narcissistic and histrionic personality traits. CP 47-48.

The Department of Corrections noted that, "According to the Plea of Guilty, the agreed recommendation is Life with a minimum set at 130 months, six months confinement and 124 months suspended for SSOSA, Community Custody for Life ..." CP 49. The Department did not agree that a SSOSA was appropriate in this case, recommending a standard sentence instead. CP 49-50 (noting the Defendant is a self-reported sex addict who "crosses all barriers to include exhibitionism, voyeurism, bondage, cross-dressing, uriphilia, and copraphilia, and zoophilia"). Four times the Department noted that the standard range for Child Molestation in the First Degree with an offender score of six would be "Life with the minimum set between 98 and 130 months." CP 42, 49. The Department explained in two places in its report that:

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

CP 49-50.

The Honorable Judge Felnagle was concerned that the Defendant would demand his "own set of rules" and that the SSOSA was "a recipe for

disaster." CP 81. However, he granted the SSOSA in the hope that treatment would keep the community safe. CP 132-33. The judge advised the Defendant that he would not tolerate the kind of mistakes which normally are forgiven in treatment. CP 81, 133. "You are on the shortest of short leashes." CP 133. "If I see anything that suggests that the concerns that have been raised by everybody are valid ones and you are not completely toeing the mark, that's it." CP 133. The court imposed 130 months, suspending all but six months. CP 20, 25.

Two months after his release from incarceration, the Defendant rejected treatment. CP 60-65. He refused to abide by his counselor's conditions that he not engage in sexual relations with persons 20% older or younger than himself, that he not contact his wife and children through third parties, that he see a psychiatrist and take medication as prescribed, that he refrain from cross dressing, and that he wear clothing that is modest and does not support exposing. CP 62-63, 76-77. The Defendant rejected this treatment and believed he could find a different counselor who would permit him to continue in these behaviors. CP 64, 295. Judge Felnagle revoked the SSOSA, and the Defendant was imprisoned. CP 54-71.

In 2019, the State filed a motion to correct the judgment and sentence and subsequent order revoking SSOSA. CP 136-200; RP[1] 3. The orders indicated the minimum term of 130 months, but failed to mention the maximum term of life which is mandated by RCW 9.94A.507 (formerly RCW 9.94A.712). CP 20, 69.

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

The Honorable Judge Leanderson reviewed the 200+ pages of briefing and heard argument. CP 136-369; 370-73; RP (4/12/19). The court agreed with the State that the omission was clerical. CP 374-75; RP 46-51.

In 2019, the topic of community custody conditions was not raised. CP 136-44, 201-19, 359-73. Then the court entered a two-page order correcting clerical errors in the judgment and sentence and in the revocation order. CP 374-75. And the court corrected the no-contact order to properly

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

reflect the birthdate of one of the victims. CP 376-77. This latter order was corrected *nunc pro tunc* with the Defendant's agreement. RP 55.

When the Defendant filed his notice of appeal, this Court's Clerk requested a memorandum on appealability. The State explained that the Defendant should have an opportunity to challenge the correction of the clerical error, but that this correction was "the only change" made in 2019. State's Response to Court Order at 1. "Every other event in this case" is "unappealable." *Id.* at 1-2.

After reviewing the parties' responses, Commissioner Bearse's ruling "agrees with the parties."

## IV. ARGUMENT

### A. The court did not abuse its discretion in correcting the judgment and order to reference the statutory maximum.

Citing public records cases discussing summary judgment motions, the Defendant urges this Court to review the order on the CrR 7.8 motion *de novo*. Opening Brief of Appellant (BOA) at 12 n.4. The correct standard of review is abuse of discretion. *State v. Hardesty*, 129 Wn.2d 303, 317, 915 P.2d 1080 (1996). This is because the superior court has jurisdiction under the court rule to correct *its own* erroneous sentence where justice requires. *Hardesty*, 129 Wn.2d at 315-16. *See also State v. Smissaert*, 103 Wn.2d 636, 639, 694 P.2d 654 (1985) (recognizing that it is the trial court's power and duty to correct an erroneous sentence, even when that means

imposition of a more onerous judgment). The trial court is in the best position to recognize its own procedures, routines, and habits in order to interpret its own intent.

A trial court abuses its discretion when it exercises its discretion in a manner that is manifestly unreasonable or based on untenable grounds. *State v. Quismundo,* 164 Wn.2d 499, 504, 192 P.3d 342 (2008).

**1. The court did not abuse its discretion in finding the omission was was a clerical error.**

Judge Leanderson concluded that the omission in the orders was a clerical error. The Defendant challenges this.

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

*State v. Morales*, 196 Wn. App. 106, 117, 383 P.3d 539, 544 (2016); *State v. Rooth*, 129 Wn. App. 761, 770, 121 P.3d 755, 760 (2005) (the test for determining whether a clerical error exists under CrR 7.8 is whether the judgment embodies the trial court's intention).

In concluding that this was a clerical error, Judge Leanderson reviewed the entire record and considered the totality of the circumstances. RP 46. She noted the presentence investigation repeatedly and at some length discussed the mandatory life term. RP 47-48. [The presentencing report thrice repeats that the Defendant would be sentenced to "life with a

minimum set between 98 and 130 months." CP 42, 49, 50. "The Indeterminate Sentence Review Board will determine his actual release date." CP 50. The report twice indicates that the *community custody* term is "for Life." CP 49-50 ("Following incarceration he will be required to spend Life on Community Custody under the supervision of the Department of Correction and the authority of the Indeterminate Sentence Review Board for any period of time the person is released from total confinement before the expiration of the maximum sentence.").] Judge Leanderson found that Judge Felnagle knew the law and is presumed to follow the law. RP 48. And she noted that the plea form would have been prepared by defense counsel and included markings demonstrating a conversation with the client about the maximum life term. RP 47.

In the Defendant's Statement of the Case, he improperly argues anybody could have made those markings. BOA at 5; RAP 10.3(a)(5) (the statement of the case should be made "without argument"). The judge's finding is more reasonable.

Judge Leanderson is familiar with taking guilty pleas. She has been working with special assault cases exclusively. RP 4. She would know that defense attorneys prepare the plea papers and review them, paragraph by paragraph, with clients in advance of the change of plea. Indeed, the document is drafted with this expectation. CP 14 (defendant signs under

language indicating that he or she has discussed "all of the above paragraphs and the 'Offender Registration' Attachment;" the defense attorney signs under language repeating the same; and the judge signs at the end). During that discussion, counsel crosses out inapplicable paragraphs, and the defendant initials the strike marks. One of the marks on the document is an arrow indicating that the offense is listed in subsection (aa). CP 9. For (aa) offenses, the judge will impose a maximum term of life and a minimum term within the standard range. CP 7-9. Because no one else would be explaining this to the defendant, it is reasonable for the court to find that the Defendant's attorney Robert Rhodes drew the arrow. It is also reasonable, because the Defendant has not asked to withdraw his plea as involuntary. BOA at 32.

The Defendant notes that there is a presumption of regularity in a court's orders. BOA at 14. Here, however, it was not only highly irregular for the judgment to omit the reference to the life sentence, but a determinate sentence would be an invalid sentence.

An offender convicted of child molestation in the first degree is sentenced under RCW 9.94A.507. RCW 9.94A.507(1)(a)(i). This statute requires that the court "shall[2] impose a sentence to a maximum term and a

[2] There is an exception for juvenile offenders. RCW 9.94A.507(2).

minimum term." RCW 9.94A.507(3)(a). The minimum term "shall" be within the standard sentence range for the offense, unless an exceptional sentence is imposed. RCW 9.94A.507(3)(c)(i). The maximum term is life. RCW 9.94A.507(3)(b); RCW 9A.44.083(2); RCW 9A.20.021(1)(a).

The Defendant argues that the parties invited the court to impose a determinate sentence. BOA at 15-16. This is not a reasonable interpretation of the record.

The defense attorney prepared the Defendant's statement on plea of guilty, which informs that the sentence for these offenses is indeterminate with the maximum term being life. CP 7-9 ("the judge will impose a maximum term of confinement consisting of the statutory maximum sentence of the offense and a minimum term of confinement either within the standard range for the offense or outside the standard range if an exceptional sentence is appropriate"). The period of community custody is also life. CP 8 ("for any period of time I am released from total confinement before the expiration of the maximum sentence").

The Defendant's Statement of the Case improperly argues that, in failing to comment on the mandatory indeterminate sentence in its recommendation, the prosecutor in effect "promise[d]" an illegal, determinate sentence. BOA at 7; RAP 10.3(a)(5) (the statement of the case should be a "fair statement of the facts" made "without argument"). The

State did not comment on every provision of the sentence. It did not, for example, address mandatory provisions like the loss of gun rights or voting rights. It only addressed those aspects of the sentence over which the court had discretion, e.g. the minimum term of confinement. CP 10. It is not reasonable to interpret that in failing to comment on mandatory provisions, the prosecutor agreed to violate the law.

The Department certainly did not interpret the recommendation in that way. Two community corrections professionals signed a report which indicates that the agreed recommendation "[a]ccording to the Plea of Guilty" is "life with a minimum set at 130 months." CP 49-50. Neither attorney challenged this interpretation at sentencing.

No party invited an illegal sentence. RP 48, ll. 9-11.

The Defendant claims that the absence of this language was not an error "arising from oversight or omission," but an intentional act by the judge. BOA at 14.

It is risible to suggest that the Judge Felnagle would have entered an illegal sentence to reduce the penalty for this particular Defendant. Judge Felnagle berated the Defendant for calling himself a good father and noted he was not a great candidate for a SSOSA. CP 131, 132. "[E]verybody who's listening to this has concerns." CP 132. He told the Defendant he

would not be given any second chances. CP 133. And he revoked the SSOSA only two months after the Defendant's release from custody.

Judge Leanderson disagreed that Judge Felnagle intended to enter a determinate sentence. RP 48. The record supports her finding.

If the experienced Judge Felnagle was not already quite familiar with the indeterminate sentence required for a child molestation in the first degree, he was well apprised by the presentencing report. *See also* CP 128, l. 13 (judge informing the Defendant what was in the report); CP 132, l. 10 ("I've read the file."). If he had intended to depart from what the law requires, he would have commented on it. RP 8-9. He did not.

Also, Judge Felnagle signed an order indicating that community custody would be for life, the term linked with an indeterminate sentence. CP 69. This term is only imposed together with indeterminate sentences. Former RCW 9.94A.712. If the judge had intended a determinate sentence, he would have imposed 36-48 months of community custody. WAC 437-20-010.

The error was in the forms. Although the sentencing form used by the court indicates that it is appropriate for use in Special Sexual Offender Sentencing Alternatives, it failed to provide a section addressing the maximum term. CP 20. Similarly, the form order which revoked the SSOSA provides a blank for the court to indicate the minimum term only,

not the maximum which is determined by statute. CP 69. The judge "did not simply inadvertently fail to check the correct boxes." BOA at 16. No boxes existed. There was no space set aside for such a provision. This was an oversight resulting from flawed forms.

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

The record supports Judge Leanderson's conclusion then the error was clerical, not intentional. The orders did not convey Judge Felnagle's intention.

In a footnote, the Defendant urges this Court to ignore other reasons to affirm. BOA at 18, n. 9. This Court may always affirm on any theory. *Ohnemus v. State*, 195 Wn. App. 135, 139, 379 P.3d 142, 144 (2016). However, the trial court's rationale is justified in the record.

**2. Correcting a clerical error in an invalid sentence does not violate double jeopardy.**

The Defendant claims a double jeopardy violation. He relies upon cases that are eminently distinguishable. BOA at 23 (citing *State v. Hall*,

162 Wn.2d 901, 177 P.3d 680 (2008) and *State v. Hardesty*, 129 Wn.2d 303, 915 P.2d 1080 (1996)). These caes discuss legal error under CrR 7.8(b), not clerical error under CrR 7.8(a). As the Defendant acknowledges, double jeopardy is not violated if the correction was timely made. BOA at 20. Any correction made under subsection (a) will be timely. CrR 7.8(a), (clerical errors may be corrected at any time).

In *Hall*, the defendant's felony murder conviction became invalid after the decision in *In re Pers. Restraint of Andress*, 147 Wn.2d 602, 56 P.3d 981 (2002). *Hall*, 162 Wn.2d at 904. Within two years, the Department of Corrections had identified all inmates affected by the decision. *Id.* Nevertheless, the state did not act for four years. *Id.* at 905. When it did, the state made a motion to vacate the sentence under CrR 7.8(b) and to amend the information in order to retry Hall. *Id.* The Washington Supreme Court held that the "determination of whether there is manifest necessity to retry Hall ... should control," balancing society's interest with the defendant's interests. *Id.* at 911. Because the defendant had already served the sentence that he would receive if convicted on retrial, the balance weighed in his favor. *Id.*

In our own case, there is no request to retry the Defendant, but only to conform the orders to the court's original intent. The law requires an indeterminate sentence for the safety of the public. The court intended a

life sentence. The Defendant has not served that sentence. The equities are not in his favor.

In *Hardesty*, after the defendant was released from incarceration, the state discovered additional criminal history. The court considered Hardesty's legitimate expectation of finality, noting that the defendant's knowledge of error undermined that expectation. *Hardesty*, 129 Wn.2d at 311-12.

The Defendant claims that, because he was close to the serving the minimum term, he had an expectation of finality. BOA at 21-22. But Judge Leanderson interpreted that, based on the plea statement and presentencing report, the Defendant expected that he was serving an indeterminate sentence. RP 48, ll. 9-11 ("I believe that Mr. Helzer knew, I believe that the attorneys knew, both the State as well as the defense counsel, and I do believe that the Court knew."). Based on this record, he does not have a legitimate expectation of a determinate sentence resulting from clerical error.

Correction of a clerical error "merely corrects the language to reflect the court's intention or adds the language the court inadvertently omitted." *Rooth*, 129 Wn. App. at 770. "Resentencing to correct an erroneous sentence does not violate a defendant's right against double jeopardy." *State v. Mutch,* 171 Wn.2d 646, 665, 254 P.3d 803 (2011). This

is so even when the correction results in a greater sentence. *State v. Freitag*, 127 Wn.2d 141, 145, 896 P.2d 1254 (1995); *State v. Pascal*, 108 Wn.2d 125, 133-134, 736 P.2d 1065 (1987). "The Constitution does not require that sentencing should be a game in which a wrong move by the judge means immunity for the prisoner." *United States v. DiLorenzo*, 429 F.2d 216, 221 (2d Cir. 1970).

The correction of a clerical error does not violate double jeopardy.

**3. The court has jurisdiction to correct an invalid sentence at any time.**

The Defendant acknowledges that both the court rule and the case law permits, and even requires, the court to correct clerical sentencing erros at any time. BOA at 26 (citing *State v. Smissaert*, 103 Wn.2d 636, 639, 694 P.2d 654 (1985); *State v. Pringle*, 83 Wn.2d 188, 193, 517 P.2d 192 (1973); and *McNutt v. Delmore*, 47 Wn.2d 563, 565, 288 P.2d 848 (1955)). He argues those authorities should be set aside. This Court is required to follow Washington Supreme Court precedent. *State v. Gore*, 101 Wn.2d 481, 487, 681 P.2d 227 (1984). It cannot ignore those authorities.

He argues that this Court should revise the court rule in order to treat clerical error under CrR 7.8(a) like errors under CrR 7.8(b). BOA at 26-28. Under the court rule, clerical errors may be corrected "at any time of its own initiative or on the motion of any party." CrR 7.8(a). Other claims of error are subject to the time bar in RCW 10.73.090. CrR 7.8(b). This Court lacks

authority to revise court rules, which are adopted under a laborious process involving all stakeholders. GR 9.

Moreover, the application of RCW 10.73.090 would not have restricted the trial court's review. "When a sentence has been imposed for which there is no authority in law, the trial court has the power and duty to correct the erroneous sentence, when the error is discovered." *State v. Pringle*, 83 Wn.2d 188, 193, 517 P.2d 192 (1973). *Accord Vincent v. United States*, 337 F.2d 891, 894 (8th Cir. 1964) (Fed. R. Crim. P. 35 provides that the court may correct an illegal sentence at any time). And, therefore, the one-year time limit only applies to facially valid judgments. RCW 10.73.090(1).

The judgment indicates that the Defendant, born 05/29/1962, committed crimes of first-degree child molestation between 2001 and 2005. CP 18. In other words, he was not a juvenile offender. Therefore, he had to be sentenced under RCW 9.94A.507 and receive an indeterminate sentence with a maximum term of life. RCW 9.94A.507(1)(a)(i) and (2). Any other sentence would be invalid on its face.

The Defendant compares his interest in finality with the State's. BOA at 29. It is a false comparison. Over time, evidence degrades, witnesses move away or pass away, memories degrade, and witnesses' motivation, desire for accountability, and outrage recedes. The passage of

time is especially prejudicial and oppressive to the State because, if a late-raised claim of error results in a retrial, ***the State bears the burden of proof***.

The Defendant argues that he deserves "repose." *Id.* Because the correction only conveys the court's original intent, nothing has been changed or disturbed -- only corrected to conform with the court's intent and the parties' expectations and understanding of the law.

The Defendant's claim that the CrR 7.8(a) motion should be considered time-barred is unsupported by any law.

**4. The parties did not agree to an illegal sentence.**

The Defendant argues that the prosecutor breached a plea agreement to recommend an illegal, determinate sentence. BOA at 6-7, 16, 29-30. When this claim was raised to the trial court, the prosecutor found it hard to see how the claim could be made "with a straight face." RP 20. Judge Leanderson found that the Defendant, attorneys, and court all understood the sentence was indeterminate with a maximum of life. RP 48, ll. 9-11.

The plea agreement was for the prosecutor to amend the information dismissing the child rape and to recommend SSOSA. RP 20. Where the Defendant had confessed to a police officer and the children had made recorded statements, this was "a pretty sweet deal" for the Defendant. RP 49-50.

The prosecutor's recommendation addressed those aspects of the sentence over which the court had discretion, e.g. the minimum term of confinement. CP 10. The prosecutor was not confused about the law. In 2010, he had advised the DOC that this is an ISRB sentence with a maximum term of life imprisonment. CP 328.

The Department understood the recommendation, writing in the presentence report that "life with a minimum set at 130 months" is the agreed recommendation "[a]ccording to the Plea of Guilty." CP 49. The Defendant made no challenge to this interpretation at his sentencing hearing.

In finding that the court's error was clerical, the trial court essentially found that the error was not judicial. The court had not been misled by any recommendation for a determinate sentence. This is because there had been no such recommendation and no such agreement.

**B. The challenge to community custody conditions is untimely and not the proper subject of this appeal.**

Based on recent changes in law, for the first time in this appeal, the Defendant seeks review of community custody conditions. BOA at 32-33 Those orders were entered without objection in 2010. CP 37-39, 70. The community custody conditions were not revisited in 2019. They are not the proper subject of this appeal. RAP 5.2(a) (a notice of appeal must be filed within 30 days of the entry of the decision to be reviewed).

The time to appeal from these conditions was in 2010. However, the Defendant did not challenge them in the appeal. CP 86. And they became final with the mandate which issued on June 2, 2012. CP 84. They have long been final. *See In re Coats*, 173 Wn.2d 123, 134, 170, 267 P.3d 324, 330 (2011) (one claim of error is not a gateway to allow a criminal defendant to bring a different, otherwise untimely challenge) (the remedy for an error in the face of the judgment "is correction of that error," but it "does not open the gateway to consideration of other time-barred claims").

When the Defendant filed his notice of appeal, this Court's Clerk requested a memorandum on appealability. The State explained that the Defendant should have an opportunity to challenge the correction of the clerical error, but that this correction was "the only change" made in 2019. State's Response to Court Order at 1. In 2019, the court entered a two-page order correcting clerical errors in the judgment and sentence and in the revocation order. CP 374-75. [And the court corrected the no-contact order to properly reflect the birthdate of one of the victims. CP 376-77. This latter order was corrected *nunc pro tunc* with the Defendant's agreement. RP 55.] "Every other event in this case" is "unappealable." *Id.* at 1-2.

Commissioner Bearse's ruling "agrees with the parties." In other words, this Court permitted review as to that issue which the parties agreed

was appealable. The State only agreed that the order at CP 374-75 was appealable, not orders entered in and undisturbed since 2010.

The Defendant argues that, because the trial court corrected a clerical error to reflect the court's original intention, he should be allowed to appeal from the entire judgment (entered in 2010) rather that the action which took place in 2019. BOA at 33-34. He cites *State v. Smissaert*, 103 Wn.2d 636, 694 P.2d 654 (1985) in support of his attempt to crowbar this challenge into this appeal. BOA at 34-35. If the Defendant had shepardized the case, he would understand that this is not the law. RPC 3.3(a)(3). *Smissaert* "was a timely challenge to a trial court's judgment and sentence." *Coats*, 173 Wn.2d at 137. "It does not stand for the proposition that any error on the face of the judgment and sentence opens the door to an otherwise time barred challenge." *Id.* "[T]here is no notion of a claim serving as a gateway for consideration of other claims that do not fit within one of the enumerated exceptions." *Coats*, 173 Wn.2d at 169.

The court rule (RAP 5.2(a)) and the time bar are determinative of the community custody challenges.

In a footnote, the Defendant argues that it is convenient to address the hypothetical application of these conditions now, rather than if and when they ever become ripe. BOA at 33 n.24. It is not convenient to litigate a matter nine years after the court's decision and seven years after the date of

finality as to conditions that may never go into effect. It is possible that the Defendant may never be released to community custody. If he is released, it is possible that he will never violate the challenged community custody conditions. And it is highly unlikely that the State will enforce conditions which are in conflict with new case law. If it does, then the Defendant will have a remedy at his hearing.

In attempting to shoehorn the community custody challenge into an appeal from correction of a clerical error, the Defendant filed a 50-page brief, which only meets the page limit through an injudicious use of 37 footnotes.

> RAP 10.4(b) limits a respondent's brief to no more than 50 pages. Although the respondents' initial brief contains exactly 50 full pages, its excessive use of footnotes, 47 in all, is clearly intended to circumvent the page limits set by RAP 10.4(b). Many of these footnotes take up a third of a page or more, and contain core facts and substantive argument intended to directly support the respondents' argument for affirming summary judgment. Had the respondents put these items in the body of their brief, the brief would have greatly exceeded the 50 page limit.
>
> We have repeatedly told parties to make their argument in the body of their brief, not their footnotes. *State v. Harris,* 164 Wash.App. 377, 389 n. 7, 263 P.3d 1276 (2011); *State v. N.E.,* 70 Wash.App. 602, 606 n. 3, 854 P.2d 672 (1993); *State v. Johnson,* 69 Wash.App. 189, 194 n. 4, 847 P.2d 960 (1993).

*Tamosaitis v. Bechtel Nat., Inc.*, 182 Wn. App. 241, 248 n.2, 327 P.3d 1309 (2014). When the complicated nature of a case justifies the need for over-

length briefing, "we have rules for seeking permission to file an over-length brief." *Id.* (citing RAP 10.4(b)).

If the Defendant had made such a motion in this case based on an intent to challenge orders that were not entered in 2019, the State would have objected, consistent with its appealability memorandum.

Community custody conditions are long final. They are not the proper subject of this appeal.

## V. CONCLUSION

For the above stated reasons, the State requests this Court affirm the Order Correcting Judgment and Sentence and Correcting Order Revoking Suspended Sentence.

RESPECTFULLY SUBMITTED this 25th day of November, 2019.

MARY E. ROBNETT
Pierce County Prosecuting Attorney

Teresa Chen WSB# 31762
Deputy Prosecuting Attorney

Certificate of Service:
The undersigned certifies that on this day she delivered by E-file or U.S. mail to the attorney of record for the appellant / petitioner and appellant / petitioner c/o his/her attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington on the date below. 11/25/19

Date / Signature

## PIERCE COUNTY PROSECUTING ATTORNEY

## November 25, 2019 - 10:46 AM

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| **Superior Court Case Number:** | 09-1-00111-3 |

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