

NO. 40310-2-II

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

STATE OF WASHINGTON, RESPONDENT

v.

TROY FITZGERALD WILLIAMS, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Rosanne Buckner

No. 98-1-02549-4

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**BRIEF OF RESPONDENT**

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether the court could clarify its judgment on defendant's assault sentence when the record from the initial sentencing shows that any error was "clerical" rather than "judicial."
2. Whether the prosecutor acted in conformity with his duty to promote the plea bargain the parties had reached when, during a subsequent hearing to clarify the sentencing paperwork, he directed the court's attention to the findings and conclusions it had entered nine years previously to refresh the court's memory about the case and the sentence it had previously imposed.
3. Whether defendant has failed to meet his burden to show that counsel was ineffective when he has shown neither that counsel's representation was deficient nor that any prejudice resulted from his representation.

B. STATEMENT OF THE CASE.

On June 8, 1998, the Pierce County Prosecutor's Office filed cause number 98-1-02549-4 which charged appellant Troy Fitzgerald Williams, hereinafter "defendant," with murder in the second degree on or about

May 30, 1998, and in count 2, mutilating human remains on or about June 4, 1998. CP 37-39. An amended information was filed on June 18, 1998, which increased the charge in count 1 to murder in the first degree, and left count 2 as charged. CP 96-100. Defendant was detained in custody pending trial. 1 RP 24.

While the murder case was pending, defendant committed an assault on another inmate who was a State's witness against him in the murder case. 1 RP 24. The prosecutor filed a new case, cause number, 98-1-03656-9, on August 24, 1998, charging defendant with intimidating a witness in counts 1 and 2, and assault in the second degree in count 3. CP 1-4. On November 12, 1998, defendant entered a *Newton* plea before the Honorable Rosanne Buckner to an amended information alleging one count of assault in the second degree on cause number 98-1-03656-9. CP 103, 8-13, 1 RP 4-7, 20. Section 6(f) of defendant's plea statement indicates:

The prosecuting attorney will make the following recommendation to the judge:

The parties stipulate to the top of the standard range for count I, 57 months. To run concurrent with charges from cause # 98-1-02549-4.

On the same date, defendant entered a plea to murder in the first degree and mutilation of human remains before Judge Buckner in cause number 98-1-02549-4. CP 43-48, 1 RP 3-4, 20. Section 6(f) of his plea

statement indicates: “The prosecuting attorney will make the following recommendation to the judge:

The parties stipulate to the top of the range for count 1 – 450 months; top of the range for count 2 – 12 months, both counts concurrent; 24 months consecutive for deadly weapon enhancement, 24 months community placement; DNA test, no contact with victim’s family, Franklin Morris or any state’s witness; \$500 CVPA, \$110 court costs, restitution.

CP 43-48CP 8-13. Sentencing for both cases was set for December 17, 1998,

At sentencing the Court sentenced defendant first on the assault case, 98-1-03656 -9. 2 RP 7. The Court imposed the high end of the standard range, and ordered no credit for time served as he was already in custody pending trial on the murder and mutilation case. CP 14-24, 2 RP 7-8. Section 4.2(a) of the sentencing paperwork inquires whether the sentence is to run concurrently or consecutively to a sentence in another case. The assault paperwork shows that “consecutively” had been checked but was crossed out; the word “concurrent” was checked. At this time in the proceedings, defendant had no other sentence imposed in any other case.

The Court the proceeded to sentencing on the murder/mutilation case. The Court imposed an exceptional sentence of 600 months on the murder and mutilation charges, to run consecutive to an enhancement of 24 months for the use of a deadly weapon. 3 RP 1, 19-20, CP 49-60.

Section 4.2(a) of the sentence orders the sentence on the murder and mutilation case to run consecutive to the sentence in the assault case, 98-1-03656-9. CP 49-60, page 56.

On February 11, 1999, the court entered findings of fact and conclusions of law in the murder case. The conclusions specified that the sentences in the two cause numbers were to run consecutively, and gave several grounds to support the exceptional sentence of 600 months . CP 87-92. Defendant did not object to the findings and conclusions.

Defendant appealed his exceptional sentence. The sentence was affirmed by the Court of Appeals; the mandate issued on March 20, 2001. CP 106-116.

Nine years later, the Department of Corrections sent a letter to the court on August 24, 2009, asking for clarification of whether the sentences in the two cases were to run concurrently or consecutively. CP 1106-108. On January 8, 2010, the court held hearing regarding the request for clarification. At this hearing, the prosecutor noted that the court was clear in its findings and conclusions that the sentence in the murder and mutilation of human remains case was to run consecutively to the sentence in the assault case. 5 RP 2-3, CP 87-92. Judge Buckner signed an order correcting section 4.2(a) on the assault sentence to reflect that the sentences in the two cases were to run consecutively. CP 27-28.

Defendant timely filed an appeal of the order correcting the judgment and sentence.

C. ARGUMENT.

1. THE COURT PROPERLY CLARIFIED ITS INTENT THAT THE SENTENCES IN THE TWO CAUSE NUMBERS SHOULD RUN CONSECUTIVELY.

CrR 7.8 allows that clerical mistakes in judgments, orders or other parts of the record may be corrected by the court at any time of its own initiative or on the motion of any party. The test used to determine whether an error is “clerical” or “judicial” in civil cases is used in criminal cases. *State v. Snapp*, 119 Wn. App. 614, 626, 82 P. 3d 252 (2004).

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. If the answer to that question is yes, it logically follows that the error is clerical in that the amended judgment merely corrects language that did not correctly convey the intention of the court, or supplies language that was inadvertently omitted from the original judgment. If the answer to that question is no, however, the error is not clerical, and, therefore, must be judicial. Thus, even though a trial court has the power to enter a judgment that differs from its oral ruling, once it enters a written judgment, it cannot, under CR 60(a), go back, rethink the case, and enter an amended judgment that does not find support in the trial court record.

*Presidential Estates Apartment Associates v. Barrett*, 129 Wn.2d, 320, 326, 917 P.2d 100 (1996) (citations omitted).

A review of the record from the original sentencing hearing clearly shows the sentencing court’s intention as to whether it was ordering consecutive or concurrent sentences. When the Court sentenced defendant

on the murder case, its paperwork indicated that the murder sentence was to run consecutive to the assault sentence. CP 49-60, page 56. The prosecutor asked the Court to verify whether the sentence was concurrent or consecutive to the assault sentence. The Court responded that it was “consecutive.” 3 RP 20. Based on the oral and written representations by the Court, it is evident that it intended the sentences in the two cases run consecutively.

The findings of fact and conclusions of law to support the exceptional sentence on the murder and mutilation case were entered on February 11, 1999. CP 87-92. A review of the Court’s findings and conclusions makes it clear that the Court intended was the sentences on the two cases run consecutively. CP 87-92. The third conclusion of law states:

That the defendant, (sic) should be incarcerated in the Washington State Department of Corrections for a period of 600 months for the crime of Murder in the First Degree, and 12 months for the crime of Mutilation of Human Remains. Those sentences shall run concurrently with each other, but consecutive to the sentence received for the Assault in the Second Degree conviction under Cause Number 98-1-03656-9.

CP 87-92, page 92. The findings and conclusions coupled with the Court’s statements at the sentencing leave no doubt that the sentences in the two cases were to run consecutive to each other.

The only clerical error that may have been committed in this case was for the Court to enter a determination on the assault sentencing

paperwork as to whether that sentence was to run consecutive or concurrent to any other sentence. Since the assault case was sentenced first there was no case for the assault sentence to run concurrent or consecutive to. That section could have been left blank. Had it not been completed, the Court's intent would have been clear. The Court's indication that the assault conviction was to run concurrently is inconsistent with every other verbal ruling and written ruling made at the original sentencing. Thus, at most, the "concurrent" notation on the assault judgment is a scrivener's error as it is contrary to the Court's express intent.

The assault judgment as amended clarifies accurately reflects the Court's decision to run that sentence consecutive to the sentence imposed on the murder case. CP 27-28. Applying the test set forth in *Presidential*, 129 Wn.2d. at 326, the correction from a "concurrent" to a "consecutive" sentence embodies the trial court's intent as expressed at the time of sentencing. As the order correcting the assault sentence does reflect the Court's intent as gleaned from the sentencing record, the only conclusion is that the error on the sentencing form was "clerical."

Defendant makes two arguments that the sentences in these cases should be concurrent. First, he argues that the Court's correction to the sentence in 2010, constitutes a "re-sentencing" rather than a correction to

the sentence. Second, he asserts that the judge's presumed intent at the time of the first sentencing, the assault case, should govern the outcome of the second sentencing, for murder.

Defendant argues that the judge's act of imposing a concurrent sentence in the first case was an intentional "judicial" act, which may not be corrected. In reviewing the *Presidential* test, it is clear that the motion and order correcting the sentence results in a sentence which is in accord with the trial court's stated intent at the murder sentencing.

Defendant is not persuasive in his insistence that the Court's intent at the first sentencing, assault, must control the final outcome in the second, murder, sentencing. Defendant cites *State v. Rooth*, 129 Wn. App 761, 770, 121 P. 3d 755 (2005) to support his argument that the inconsistency in sections 4.2(a) of the sentences is a "judicial" error. *Rooth* deals with jury instructions which transposed the caliber of two handguns in two "to convict" jury instructions. The sentencing court found that the jury had made an error and sentenced Rooth in accordance with his interpretation of what the correct verdict would have been. *Rooth*, 129 Wn. App. at 770. The Court of Appeals determined that the error was not "clerical" and therefore it was judicial error for the court to have interpreted the verdict and altered it to comport with his understanding of the evidence. *Rooth*, 129 Wn. App. at 770. The *Rooth*

Court's decision to "reinterpret a jury's verdict bears no relevance to the facts of this case and does not clarify the issue before this court. It does, though, give a clear example of the difference between a "clerical" and a "judicial" error.

Defense next claims that because the error was "judicial" rather than "clerical," a complete re-sentencing was necessary. Defendant relies on *State v. Smissaert* in his argument that the "judicial" error results in an increased sentence and so a re-sentencing rather than an order correcting judgment was required in this case. *State v. Smissaert*, 103 Wn.2d. 636, 694 P.2d 654 (1985).

Defendant prevails on this argument only if this court determines that the sentence on the assault case was not a clerical error. A review of the cases discussed in *Smissaert* shows that they all deal with judicial errors in which invalid sentences were entered. That is not the situation in this case. The sentence here was valid, and so a full re-sentencing is not required. Defense also cites *In Re Chatman*, 59 Wn. App. 258, 796, P.2d 755 (1990) in which the sentencing court imposed a sentence which was outside its authority. These two cases are examples of "judicial" errors, and only serve to clarify the distinction between a "clerical" and "judicial" error. As defendant has not alleged that the sentences imposed in these

cases are invalid, he is left with the conclusion that the sentences are merely at odds. His argument that the error is “judicial” is not persuasive.

In looking at defendant’s second argument regarding the judge’s intent at the time of the assault sentencing, we must look to the record of that event. The assault case was sentenced before the murder case, and in that sense, it was sentenced alone.<sup>1</sup> The judge indicated in section 4.2(a) of the sentence that it was to run “consecutive.” CP 14-24, page 21. That notation was crossed out and changed to “concurrent.” It is unknown at what point in the sentencing hearing this change was made.

During the assault sentencing, the prosecutor asked about credit for time served on the assault case:

Mr. Lane (Prosecutor):       Actually, in terms of credit for time served, I would ask that the defendant receive no credit for time served as he’s been in custody on the other referral [murder] since his arrest on that charge.

The Court:     Mr. Wickens?

Mr. Wickens (Defense):       Frankly your honor, the time—if the court’s ruling that the time is running concurrent, I don’t see that really being an issue.

The Court:     Is that required by law that it be concurrent?

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<sup>1</sup> The reason for the separate sentencing was that the defendant had a different attorney on each case, due to an earlier conflict. 1 RP 3.

Mr. Lane: I'm sorry?<sup>2</sup>

The Court: Is that required by law that it be concurrent?

Mr. Lane: That's correct unless the court finds an exceptional sentence.

The Court: I've filled that in.

2 RP 7-8.

Defendant argues that a discussion between the parties about credit for time the defendant served was actually a discussion about whether the assault sentence was to be consecutive or concurrent to the murder sentence. A review of the transcript of the sentencing shows that the conversation about concurrent or consecutive time arose in the context of "credit for time served." Apparently the Court's question to the prosecutor was whether the credit for time served in both cases had to be concurrent.

When reviewing the sentence completed by the judge in the assault case, it is evident that she gave defendant no credit for time served, because he had been in custody on the murder case while he was pending

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<sup>2</sup> The transcript is unclear whether the conversation between the court and the parties pertained to credit for time served or to whether the sentences were to run concurrent or consecutive. It also contains misstatements as to the law: Mr. Wickens' statement that it is irrelevant whether the credit for time served is ordered on only one case or both; Mr. Lane's statement that the court can not run the sentences consecutively unless she imposes an exceptional sentence.

trial on the assault. CP 14-24, page 21. It is unclear whether the change to section 4.2(a) was because the assault case was sentenced alone and before the murder case, or because she believed the section dealt with concurrency of the credit for time served rather than concurrency of the sentence. The determination of this issue is unnecessary as the judge made abundantly clear during the sentence on the murder case and in the findings and conclusions, that the two sentences were to be consecutive.

A final rationale for the discrepancy between the “concurrent” sentence in the assault case, and “consecutive” sentence in the murder case may be that court changed its mind during the murder sentencing. As the Court heard the statements presented by the victim’s family, by the assault victim Franklin Morris, the exchange between Mr. Morris and the defendant, and the defendant’s allocution, this information may well have changed the Court’s mind as to whether the sentences should be concurrent or consecutive. 3 RP 13-14. It is abundantly clear that she found the facts of the murder case to involve acts of deliberate and extreme cruelty to the victim. 3 RP 19. The Court also noted that the defendant’s statements indicate that he believes that the victim deserved this fate. 3 RP 19. These facts coupled with the defendant’s attitude may certainly have convinced the Court that consecutive sentences were justified in this case.

Regardless of the conflicting directions in section 4.2(a) of the two judgments, the Court's intent as stated on the record and memorialized in the findings and conclusions was clearly expressed: the two sentences were to run consecutively. Given this stated intent, the discrepancies in sections 4.2(a) of the judgments amount to a scrivener's error which the Court could correct at any time pursuant to CrR 7.8. The order correcting the sentence clearly gave effect to the Court's original intent and so was properly entered. Reversal is not required in this case.

As to defendant's contention that the assault case needs to be remanded to clarify the sentencing court's intent, that is not necessary as this case was sentenced under RCW 9.94A.400. As noted above, in 1998 the Court could impose a consecutive sentence without finding grounds for an exceptional sentence, and without entering findings and conclusions. Even though it might have been better to leave the choice between "concurrent" and "consecutive" sentences blank, as the assault judgment entered on January 8, 2010, does correctly convey to the Department of Corrections the Court's intent that the sentences on the two cases run consecutively. If not left blank, the order correcting should also have indicated that the exceptional sentence was imposed in the other cause number. The Court did not have to impose an exceptional sentence on the assault to achieve consecutive sentenced as this could be accomplished with the exceptional sentence imposed on the murder cause number. The assault sentence, as corrected on January 8, 2010, more

clearly reflects the Court's original intent and it does result in the proper sentence which the Court ordered. Because it does clearly represent the sentence which the Court intended, the order correcting the sentence need not be remanded for correction.

2. THE PROSECUTOR ACTED ETHICALLY AND IN CONFORMITY WITH HIS PLEA AGREEMENT AT A HEARING TO CORRECT THE JUDGMENT AND SENTENCE WHEN HE RELIED ON DOCUMENTS PREVIOUSLY ENTERED WHICH REFLECTED THE COURT'S SENTENCE.

Plea agreements in Washington are governed under RCW 9.94A.080.100. These statutes provide the prosecutor with authority to amend charges against a defendant, and also permit the prosecutor to recommend a particular sentence as part of a plea arrangement. *State v. Wakefiled*, 130 Wn.2d 464, 471, 925 P.2d 183 (1996). It is well settled that a plea agreement is a contractual agreement between the State and defendant. *State v. Sledge*, 133 Wn.2d 828, 838 39, 947 P.2d 1199 (1998). A prosecutor is obliged to fulfill the State's duty under the plea agreement by making the promised sentencing recommendation. *State v. Talley*, 134 Wn.2d 176, 362, 949 P.2d 358 (1998); *State v. Coppin*, 57 Wn. App. 866, 874, 791 P.2d 228, *review denied*, 115 Wn.2d 1011, 797 P.2d 512 (1990). A prosecutor fulfills her duty with regard to a promise to make a recommendation with respect to sentence by making the promised recommendation. *United States v. Benchimol*, 471 U.S. 453, 456, 105 S.

Ct. 2103, 85 L. Ed. 2d 462 (1985); *State v. Crider*, 78 Wn. App. 849, 853 54, 899 P.2d 24 (1995); *Coppin*, 57 Wn. App. at 873. The recommendation need not be made “enthusiastically.” *State v. Coppin*, 57 Wn. App. at 874.

The prosecutor, as an officer of the court, is obliged to participate in the sentencing proceedings, candidly answering the court’s questions in accordance with RPC 3.3, and holding back no relevant information regarding the plea agreement. *See* RCW 9.94A.460 (State may not agree to withhold relevant information from court regarding plea agreement). A prosecutor is entitled to present all relevant facts, whether or not they fully support his recommendation. *State v. Gutierrez*, 58 Wn. App. 70, 76, 791 P.2d 275 (1990); *State v. Davis*, 43 Wn. App. 832, 837, 720 P.2d 454, *review denied*, 106 Wn.2d 1017 (1986).

Certain acts by the State have been found not to constitute a breach. *State v. Arko*, 52 Wn. App. 130, 758 P.2d 522 (1988) (State’s advocacy for exceptional sentence on appeal after standard range recommendation in plea agreement was not a breach); *State v. Talley*, 134 Wn.2d 176, 949 P.2d 358 (1998) (prosecutor’s participation in a court ordered evidentiary hearing, by itself, does not undercut agreed recommendation); *State v. Davis*, 43 Wn. App. 832, 720 P.2d 454 (1986) (prosecutor did not breach agreement by advising court of two witnesses who wished to testify in favor of a prison term rather than probation). An appellate court applies an objective standard to determine whether the

State has breached the plea bargain, “irrespective of prosecutorial motivations or justifications for the failure in performance.” *State v. Jerde*, 93 Wn. App. 774, 780, 970 P.2d 781 (1999).

It is uncontested that the prosecutor in this case acted in conformity with agreed plea bargain when the defendant was sentenced. The focus of this inquiry is whether the prosecutor’s comments to the court at a later hearing to clarify the sentence imposed were in conformity with his duty to advocate for the sentence defendant had bargained to obtain. The facts of the *Arko* case are particularly instructive on this issue. *State v. Arko*, 52 Wn. App. 130, 758 P.2d 522 (1988).

The *Arko* prosecutor bargained to make a standard range sentence recommendation in exchange for defendant’s plea. After Arko failed to appear twice for his sentencing, the prosecutor asked for a sentence within the standard range. The court imposed an exceptional sentence. *Arko*, 52 Wn. App. at 131. When Arko appealed, the prosecutor filed a brief in support of the court’s exceptional sentence. Arko moved to strike the State’s brief, contending that it violates the plea agreement. *Arko*, 52 Wn. App. at 132.

The *Arko* Court believed that the plea agreement bound the prosecutor at sentencing, but that it did not prohibit the State from later participating in an appeal which involved the sentence the court had imposed. *Arko*, 52 Wn. App. at 133. The *Arko* court stated:

After sentencing the State's obligation is to become an advocate for the court's position and thus to argue in favor of the sentence imposed to the extent that such arguments are supportable. This court then has the benefit of full briefing on the issue which is necessary to provide effective review.

*Arko*, 52 Wn. App. at 134. The December 11, 2009, and January 8, 2010, hearings to clarify the sentencing court's intent occurred after the sentencing hearings were completed.

*Arko* is directly analogous to the case at bar. The prosecutor's sentencing recommendation was in conformance with the plea bargain. When defendant appealed the court's sentence the prosecutor's obligation was to become an advocate for the sentence which the court ordered. When the clarity of the sentence was called into question nine years later, the prosecutor continued his obligation to act as an advocate for the trial court's position, and to argue in favor of the exceptional sentence it had imposed. The prosecutor fully complied with his obligations during the sentencing hearings, during the appeal process and at the hearing to clarify the court's sentence.

Similarly, in *Talley*, the prosecutor made the agreed upon recommendation but because the defendant entered an *Alford* plea, the court ordered an evidentiary hearing. *Talley*, 134 Wn. 2d at 182. After the sentencing court entered an exceptional sentence Tally appealed, arguing that the prosecutor had violated their plea bargain by participating in the evidentiary hearing. The *Talley* court held that the prosecutor had

an obligation as an officer of the court to participate in the hearing and present evidence that will help the court make its decision. *Talley*, 134 P.2d at 186. The Washington Supreme Court concluded that the *Talley* prosecutor had not violated the terms of the plea bargain.

As in *Talley*, this prosecutor had an obligation as an officer of the court to be candid in his representations to the tribunal. RPC 3.3(a)(1). He did not make any misrepresentations to about the sentence the court had ordered nine years earlier. He was candid in his statements about his lack of memory regarding his recommendation, and he informed the Court that he was relying on the findings and conclusions she had entered in the case, which were very clear. 5 RP 5.

During the December 11, 2009, hearing to clarify the sentence, the prosecutor reiterated the basic facts of this case, without reminding the court of the grisly details such as that the victim's body had been sawed into pieces for disposal. 1 RP 24. The prosecutor correctly reminded the Court that it had ordered, verbally and in writing, that the murder sentence run consecutively with the assault sentence. 3 RP 20, CP 87-92, page 91-92; 49-60, page 56. The prosecutor agreed to set the hearing over so that defense could be prepared. The prosecutor also offered to provide copies of the documents from the sentencings to defense so that he could review the prior proceedings. 1 RP 25. In short, the prosecutor evinced none of the bad faith conduct that defense ascribes to him. To the contrary, the prosecutor correctly stated that the defendant had previously been

sentenced and that the purpose of the hearing was simply to provide clarification for the Department of Corrections of the court's intended sentence.

When the hearing reconvened on January 8, 2010, the prosecutor again laid the issue before the Court and indicated his belief that the findings and conclusions clearly set out that the two sentences were to be consecutive. 5 RP 3, 6. After reviewing the documents of this case, the Court stated it was clear to that its intent was for the assault and murder sentences to run consecutively. 5 RP 7. She also indicated that section 4.2(a) of the assault sentence was incorrect, but this was a scrivener's error. 5 RP 7. The corrected that error by entering an order correcting judgment and sentence. CP 27-28.

Defendant's assertion that the prosecutor argued repeatedly for defendant to be re-sentenced to an exceptional sentence is simply without merit.

3. DEFENDANT HAS NOT MET HIS BURDEN TO SHOW THAT HIS COUNSEL WAS EFFECTIVE IN THIS CASE AS HIS OVERALL PERFORMANCE FELL WITHIN THE STANDARD OF A REASONABLY COMPETENT PROFESSIONAL AND NO ERROR ACCRUED TO DEFENDANT AS A RESULT OF HIS REPRESENTATION.

The right to effective assistance of counsel is found in the Sixth Amendment to the United States Constitution and in Article 1, Sec. 22 of the Constitution of the State of Washington. The U.S. Supreme Court has

stated that “the essence of an ineffective-assistance claim is that counsel’s unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect.” *Kimmelman v. Morrison*, 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L. Ed. 2d 305 (1986). In determining whether defense counsel was ineffective, the judicial scrutiny of counsel’s performance must be highly deferential. *Strickland v. Washington*, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

The test to determine when a defendant’s conviction must be overturned for ineffective assistance of counsel was set forth in *Strickland v. Washington*, and adopted by the Washington Supreme Court in *State v. Jeffries*, 105 Wn.2d 398, 418, 717 P.2d 722, *cert. denied*, 497 U.S. 922 (1986). The *Strickland* test has two prongs, both of which must be met by defendant. The first prong is:

First, the defendant must show that the counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as “counsel” as guaranteed to the defendant by the Sixth Amendment.

The Washington State Supreme Court gave further clarification to the application of the first prong of the *Strickland* test. The Supreme Court in *State v. Lord* stated:

There is a strong presumption that counsel have rendered adequate assistance and made all significant decisions in the exercise of reasonably professional judgment such that their conduct falls within the wide range of reasonable professional assistance. The reasonableness of counsel's challenged conduct must be viewed in light of all of the circumstances, on the facts of the particular case, as of the time of counsel's conduct.

*State v. Lord*, 117 Wn.2d 829, 883, 822 P.2d 177 (1991).

The second prong of the *Strickland* test is:

Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.

*State v. Lord*, 117 Wn.2d at 883.

Under the second prong, “[t]he defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Lord*, 117 Wn.2d at 883-884. Because the defendant must prove both prongs of *Strickland*, it may be found that he did not meet his burden based upon a lack of prejudice, without determining if counsel’s performance was deficient. *Id.*

Defendant challenges the effectiveness of his counsel on two issues. First that counsel failed to object to the correction of the “clerical error” on the assault sentencing paperwork, and second that he asked for a

continuance of the hearing and then asked another attorney to represent him when that hearing reconvened.<sup>3</sup>

At the first hearing, defendant's counsel did not lodge an opinion on the characterization of the "error" in the assault sentence as "clerical" or "judicial." This was reasonable as he did not have his file and so was not in a position to give the court an informed rationale for either position.

At the second hearing, the substitute counsel conceded that the issue was a scrivener's error, but in light of the above argument which defines a "clerical" error, this was reasonable. Counsel continued to argue, despite defendant's acquiescence that the sentences should run consecutively,<sup>4</sup> that the murder and mutilation sentence should be corrected to reflect that the sentences on the two cause numbers run concurrently. 5 RP 4. He argued that this would fulfill the Court's apparent intent to enter an exceptional sentence in the murder case, yet still fulfill the apparent intent in the assault sentencing paperwork that the two run concurrently. 5 RP 5.

Defendant has not shown the first prong of *Strickland*, that either attorney was deficient for not objecting that the error was "judicial" rather

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<sup>3</sup> Defendant's counsel on the murder case was Don Lundhal. Counsel on the assault case was Sean Wickens at the sentencing and first hearing to correct the sentence. James Oliver appeared for the second hearing to correct the sentence.

<sup>4</sup> Defendant's apparent position was that he did not care to argue the issue, but simply wanted to return to the Department of Corrections forthwith, and argue about whether the sentences were concurrent or consecutive on appeal. The State does not treat this of a waiver of his right to object as the substitute counsel objected on his behalf.

than “clerical.” Both counsel represented defendant at these hearing by making significant arguments in the exercise of reasonably professional judgment. Neither conceded that the prosecutor was correct in his analysis of the cases and each advocated for defendant, thereby affording him his right to an attorney. Defendant has not met his burden to show that counsel’s failure to object to the characterization of the error as “clerical” was deficient. Because he has not met the first prong of *Strickland*, he cannot show that he was effectively denied counsel as a showing that both prongs have been met necessary to prevail on his argument.

As for the second argument defendant makes that his counsel was ineffective, he has not shown that counsel’s performance was deficient when he asked for a continuance of the first hearing or when he sent substitute counsel to represent defendant at the second hearing.

It is not so unexpected that counsel was not prepared for the initial hearing as the scheduling orders which set the hearing carries no indication of what the re-sentencing issue would be. CP 7. It was certainly more effective for his attorney to seek a clarification from the prosecutor on the purpose of a hearing and to retrieve his file from an archive rather than proceed when he was uninformed and unprepared.<sup>5</sup> 1 RP 26. Had counsel proceeded without informing and preparing himself,

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<sup>5</sup> The documents originally entered in this case in 1998 were not scanned into LINX, so were not easily available to counsel. 1 RP 26.

it is highly likely that his representation would have been inadequate and ineffective. In light of the facts and circumstances of this case, counsel was highly reasonable in his professional assistance of defendant when he asked that the hearing be continued so that he and the court<sup>6</sup> could be fully prepared. 1 RP 27. Defendant has not shown that counsel's request for a continuance of the hearing was unreasonable to the extent that he "was not functioning as counsel." Defendant has articulated no reason to believe that his attorney's request for a continuance should be considered as ineffective.

Nor has defendant shown that his counsel was ineffective when he secured a substitute counsel to appear for the re-scheduled hearing. Defendant's counsel was in another court but it is clear that he arranged to have this hearing covered in his absence. 5 RP 3. The substitute counsel had apparently been briefed on the nature of the proceeding, and he asked that the court enter a correction that the sentences should run concurrently rather than consecutively. 5 RP 4. Further, the prosecutor objected to any argument that the sentences should be run concurrently as this hearing was simply to correct a "clerical" error and not to reargue the sentence. 5 RP 5.

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<sup>6</sup> The judge also noted that she did not have both of her files and so she would have been unable to make an informed decision as to the procedures and facts of both the cases. 1 RP 27.

As noted above, the sentencing court's intention to enter the sentences consecutively was abundantly clear in her findings and conclusions, and it was obvious that the error in the assault paperwork was "clerical." Defendant's decision not to reargue this issue falls within the wide range of reasonable professional assistance. Defendant has not met the first prong of the *Strickland* test on this issue. Having failed to meet the first prong, he cannot meet both prongs and so cannot prevail on his argument that his 6<sup>th</sup> Amendment right to counsel was violated.

Defendant has not shown that he was prejudiced by his counsel's performance in this case. As stated above, the fact that the court ordered the sentences in these cases to run consecutively was clear from the findings and conclusions she entered. He would surely have failed in both his objection to the characterization of the error as "judicial" and in any re-argument of the sentence because the conclusions entered were so evident..

In fact, defendant's counsel in this case was very active in his defense. He bargained for and received a favorable plea bargain in this case, given the fact that the court could have imposed a life sentence. CP 49-60, page 52. The prosecutor agreed to recommend that the two cases should be standard range sentences and concurrent. At sentencing, defense counsel presented witnesses to defendant's good character, discussed whether defendant had landed the killing blow in the victim, whether every bond in

the victim's body was actually broken, clarified that his client dismembered the victim only after he had been dead for a number of days, and argued that he had no prior history of violence. 3 RP 5, 6, 8, 9, and 12.

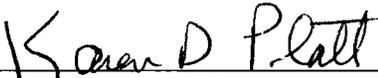
When viewed in light of all the circumstances, defendant has not met his burden to show that his counsel was less than reasonably professional in her trial tactics and strategies. Nor has defendant shown that prejudice resulted or that it affected the outcome of his trial. He has not overcome the presumption that he had reasonably competent counsel in this case.

D. CONCLUSION.

For the reasons stated above, the State respectfully asks that the court affirm the sentence ordered in this case.

DATED: March 7, 2011

MARK LINDQUIST  
Pierce County  
Prosecuting Attorney

  
KAREN D. PLATT  
Deputy Prosecuting Attorney  
WSB # 17290

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his 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.

3/9/11 \_\_\_\_\_  
Date Signature

U.S. MAIL  
MARCH 9 PM 3:00  
STATE OF WASHINGTON  
BY Ka  
UNIT 11