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I. **SUMMARY OF THE CASE**

Vernon was convicted on two counts of voyeurism after a jury trial. CP 5-7. The offenses allegedly occurred June 14, 2009, when Rebecca (Becky) Schoelkopf and Kassandra Schoelkopf accused Vernon of watching them through a hole in the wall of a port-a-potty. RP 69.

Vernon denied any wrong-doing. RP 57-59, 77.

At trial, the court admitted a previous voyeurism conviction to which Vernon pleaded guilty in 2003. The court initially ruled it was relevant and admissible under ER 404(b) to prove intent and to impeach Vernon if he testified and claimed accident or mistake. MRP 6-7, 15-16. Vernon did not testify, his defense was general denial, and the court ruled out mistake as a physical impossibility. MRP 1,12; RP 119, 130. Nevertheless, the State introduced the 2003 conviction in its case in chief. MRP 17; RP 73. The State presented a live witness, Ruth Aetzel, who testified that Vernon had used a mirror to look up her skirt. RP 114-16.

The jury convicted Vernon on both counts. CP 89, 90. The standard sentencing range for each offense was 43-57 months. CP 95. The court imposed indeterminate sex offender sentencing under RCW 9.94A.535. But the court also imposed minimum sentences of 60 months with a statutory maximum of five years and ordering the two sentences to be served consecutively. CP 93, 97. The court imposed community

restrictions on alcohol use and association with minors and imposed \$4,429 in costs.

## II ARGUMENTS IN REPLY

### 1. *The Evidentiary Facts From 2003 Were Neither Admitted*

*Nor Proved.* As a foundation for admitting the prior conviction, the State merely alleged the existence of some sort of guilty plea which it did not document. Based solely on this, the court permitted Aetzel to testify about the prior allegations. CP 23-24. This was error. A certified copy of the plea statement and a transcript of the plea hearing was necessary to show whether Vernon entered a standard guilty plea or an *Alford*<sup>1</sup> plea. Without seeing the Plea Statement or a transcript of the Hearing, the court did not know whether any facts were admitted or proved. Instead, to satisfy the preponderance standard required by ER 404(b), the court allowed testimony as to the previously alleged facts.

The State claims that Vernon did not provide authority for the proposition that an *Alford* plea is not proof of facts. RB at 7. This is false. As argued in the opening brief, an *Alford* plea standing alone is not evidence of any facts. *Clark v. Baines*, 150 Wn.2d 905, 912-14, 84 P.3d 245 (2004); *See also In re Pers. Restraint of Spencer*, 152 Wn. App. 698,

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<sup>1</sup> *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

715, 218 P.3d 924 (2009); *In re Detention of Stout*, 159 Wn.2d 357, 365, 150 P.3d 86 (2007). Defense counsel argued this below and vigorously opposed the ER 404(b) motion. MRP 9; RP 41. ER 404(b) requires more than an undocumented guilty plea after a hung jury trial failed to establish any facts. CP 23; MRP 7. The 2003 conviction was admitted in error.

The State's "flip/flop" argument is amusing but false. RB 6, 9, etc. Vernon contends merely that certified copies of the prior plea proceedings and judgment would be the only admissible evidence of facts admitted or proved — not that they would have been better evidence from the State's point of view. RB at 6. If the admissible evidence does not establish facts the State wishes to prove, that does not open the door to inadmissible evidence. Aetzel's testimony was inadmissible. The State calls this "damned if they do and damned if they don't." RB at 9. This is correct: If the State proved the prior conviction by producing the guilty plea, it was restricted to the facts admitted or proved therein. Having elected not to produce the plea, no other evidence is admissible to prove the prior facts.

**2. *Aetzel's Testimony Was Collaterally Estopped by the Doctrine of Res Judicata.*** The State presented Aetzel's testimony to prove facts allegedly underlying the prosecution of Vernon in 2003. But that prosecution resulted in a valid final judgment, and the State could have

established these facts in 2003. Instead, the State elected to pursue a guilty plea. It is now estopped from litigating those facts in this case.

Res judicata refers to “the preclusive effect of judgments, including the relitigation of claims and issues that were litigated, or might have been litigated, in a prior action.” *Loveridge v. Fred Meyer, Inc.*, 125 Wn.2d 759, 763, 887 P.2d 898 (1995), quoting Philip A. Trautman, CLAIM AND ISSUE PRECLUSION IN CIVIL LITIGATION IN WASHINGTON, 60 Wash. L. Rev. 805, 805 (1985). The doctrine applies where: (1) both proceedings arise out of the same facts, (2) the proceedings involve substantially the same evidence, and (3) the rights and interests established in the first proceeding would be impaired or destroyed by permitting relitigation. *Kelly-Hansen v. Kelly-Hansen*, 87 Wn. App. 320, 330, 941 P.2d 1108 (1997). It is closely related to the doctrine of collateral estoppel, which prevents relitigation of an issue after the party estopped has had a full and fair opportunity to present its case. *Hanson v. City of Snohomish*, 121 Wn.2d 552, 561, 852 P.2d 295 (1993). This issue of constitutional magnitude and can be raised for the first time on appeal. *Ashe v. Swenson*, 397 U.S. 436, 445 (1970), 90 S. Ct. 1189, 25 L. Ed. 2d. 469 (1970).

As applied to these facts, a guilty plea constitutes the factual basis for conviction and punishment. *See, Haring v. Prosise*, 462 U.S. 306, 321, 103 S. Ct. 2368, 76 L. Ed. 2d 595 (1983). Claims based on potential trial

evidence that was never presented because the defendant pleaded guilty are precluded by the plea. *See State v. Carrier*, 36 Wn. App. 755, 757, 677 P.2d 768 (1984); *see also State v. Davis*, 29 Wn. App. 691, 695-96, 630 P.2d 938 (1981).

The State was a party to the prior prosecution and had every opportunity to present its case. It served the State's purposes in 2003 to make a plea offer to Vernon and to accept the benefits of his guilty plea, thus avoiding the trouble and expense of presenting testimony or proving anything (after one jury had hung). The State was irrevocably bound by that choice, just as Vernon was. The State cannot now be heard to change its mind and decide to put on witnesses to prove facts to a jury, any more than Vernon can withdraw his plea and demand those proofs.

This is consistent with the general rule that our Supreme Court disfavors mini-trials-within-trials such the one that happened here, and interprets the trial rules accordingly. *See, e.g., State v. Kilgore*, 147 Wn.2d 288, 293, 53 P.3d 974, 977 (2002). To that end, collateral estoppel precludes relitigation of facts. *State v. Dupard*, 93 Wn.2d 268, 272, 609 P.2d 961, 963 (1980). “[W]hen an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.” *State v. Tili*, 148

Wn.2d 350, 360, 60 P.3d 1192, 1197 (2003), quoting *Ashe*, 397 U.S. at 443.

The legal principles underlying this hornbook law are res judicata and collateral estoppel. Vernon cites authority that res judicata in criminal cases spring from Fifth Amendment double jeopardy principles. AB 11-12, citing *State v. Eggleston*, 164 Wn.2d 61, 71 (2008). Vernon is not saying the Aetzel testimony was barred by double jeopardy per se. Simply that Aetzel was barred by res judicata and collateral estoppel, which are off-shoots of double jeopardy in the context of a criminal prosecution. The State offers no contrary authority because none exists. There is no *res* more *judicata* than a criminal judgment following a voluntary guilty plea. It cannot be reopened. The State is collaterally estopped from resuscitating a would-have-been witness from 2003 instead of producing a certified copy of the plea statement or hearing.

The State claims it is not precluded from alleging new facts so long as the current prosecution is not for the same offense as that underlying the prior guilty plea. This confuses claim preclusion and issue preclusion.

If the State had dropped the charge after the hung jury in 2003, Aetzel's testimony here would not be objectionable. As the State correctly says, collateral estoppel does not exclude from a current trial on a new charge evidence relating to an alleged offense for which the defendant

was acquitted. *Dowling v. United States*, 493 U.S. 342, 348, 110 S. Ct. 668, 107 L. Ed. 2d 708 (1990). But Vernon was not acquitted.

The State is correct that diligent search by appellate counsel turned up no Washington case that affirms the preclusive effect of a guilty plea over a belated attempt by the State to produce witnesses to establish facts the State elected not to prove in the course of the prior prosecution. RB at 7. The cases cannot be found because they do not exist, because the principles are so fundamental.

The State says: “It is not like the State was simply ‘making up’ this evidence.” RB 4. But that is precisely what the State was doing. The State cites to no rule or decision that would relieve the government of its obligation to prove the old conviction with certified copies of the plea statement and hearing and the judgment. Neither does the State explain why it was not limited to proving the existence of the old guilty plea and barred from relitigating the facts with testimony it elected to forego back when its purposes were best served by accepting a plea. The only element of collateral estoppel the State challenges is prejudice. The State claims it would be prejudiced by enforcing the doctrine. As the State reminds the Court, however, the concern is not about prejudice, but unfair prejudice. ER 403. Every adverse ruling is prejudicial.

The State glosses over the differences between civil and criminal applications of the doctrine. A guilty plea generally does not collaterally estop a criminal defendant from litigating the issue of guilt in future civil litigation. *Stout*, 159 Wn.2d at 365; *Baines*, 150 Wn.2d at 912-14. But even a civil plaintiff may not invoke a prior Alford plea to establish intent. *N.Y. Underwriters Ins. Co. v. Doty*, 58 Wn. App. 546, 550-51, 794 P.2d 521 (1990).

In the criminal context, this Court has held that the State could introduce a prior Alford statement on plea of guilty to prove the fact of that conviction, where ER 404(b) permitted the prior conviction to be admitted for a particular purpose. *State v. Price*, 126 Wn. App. 617, 636, 109 P.3d 27 (2005). But there is a big difference between the fact of conviction and the facts underlying the conviction. *Stout*, 159 Wn.2d at 367. Vernon's case is thus distinguished from *Price*, where the prosecutor did not attempt to prove an undocumented guilty plea. Nor did the State in *Price* reach back in history to retrieve hypothetical testimony it would have presented if a trial had been held to prove facts underlying the plea.

The factual basis must have been established in 2003 when the court accepted the guilty plea. *State v. Amos*, 147 Wn. App. 217, 228, 195 P.3d 564 (2008). That factual basis has to be in the record of the plea. *State v. Osborne*, 102 Wn.2d 87, 95, 684 P.2d 683 (1984). Therefore,

once the court accepted Vernon's plea, the State was precluded from relitigating the facts six years later with testimony the prosecutor previously elected to forego in exchange for a plea. Only Vernon's admissions in the guilty plea statement, not Aetzel's unproven allegations should ever have reached the ears of the jurors.

The error completely poisoned any chance for a fair trial, and this Court should reverse the conviction.

3. *Aetzel's Testimony Was Inadmissible Under ER 404(b)*. After the court established by a preponderance that prior misconduct occurred, and that the State proposes to prove it with evidence that is not barred by the Fifth Amendment, then the court would determine whether the prior conviction has any logical relevance to prove an element of the offense or negate a defense. ER 404(b) evidence is prohibited if its sole relevance is to show propensity. *State v. Lane*, 125 Wn.2d 825, 831-32, 889 P.2d 929 (1995); *State v. Powell*, 126 Wn.2d 244, 259, 893 P.2d 615 (1995).

The State claims Aetzel's testimony was admissible to prove "motive, intent, knowledge, preparation, plan and absence of mistake." RB at 2, 3, citing CP 23-25; 1RP 11. This is wrong.

First, a court may not simply recite the laundry list from ER 404(b) and hope that one of the legitimate purposes applies. *State v. Fitzgerald*, 39 Wn. App. 652, 663, 694 P.2d 1117 (1985). The court must specify

why the evidence is relevant, so this Court can review whether ER 404(b) was properly applied. *State v. Jackson*, 102 Wn. 2d 689, 694, 689 P.2d 76 (1984).<sup>2</sup>

Here, the State offered the prior conviction evidence solely to show intent. RB at 2; 8/5 RP 6, 7. The court correctly rejected this as not logically relevant, because if the jurors believed Vernon cut a hole in the wall of a port-a-potty and looked through it at females occupying the neighboring stall, they necessarily found that he intended to observe females using the toilet. One does not cut and peer through a hole in a potty wall by accident, or misunderstanding. 1 RP 12. But then the court admitted Aetzel's testimony, reasoning *sua sponte* that the facts of the 2003 offense were similar to those here. RB at 3; 8/5 RP 16-17; CP 23-25. The court thought Aetzel's testimony was relevant because both incidents involved some sort of "preparation." 1RP 11. This was wrong.

The Aetzel testimony was not relevant to prove anything other than propensity. To be admissible, 404(b) evidence must be both logically relevant and necessary to prove an essential element of the current charge. *State v. Robtoy*, 98 Wn. 2d 30, 42, 653 P.2d at 284 (1982), quoting *State v.*

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<sup>2</sup> Eric D. Lansverk, Comment: ADMISSION OF EVIDENCE OF OTHER MISCONDUCT IN WASHINGTON TO PROVE INTENT OR ABSENCE OF MISTAKE OR ACCIDENT: THE LOGICAL INCONSISTENCIES OF ER 404(b), 61 Wash. L. Rev. 1213, 1213 (July, 1986).

*Goebel*, 40 Wn. 2d 18, 21, 240 P.2d 251 (1952).<sup>3</sup> And the relevance cannot be merely inferred propensity. *Id.* The following are recognized exceptions to the ER 404(b) ban on prior bad acts evidence.

(a) *Motive*. There can be no motive for cutting a hole and peeping through it other than to see the other side.

(b) *Intent, or Absence of Accident or Mistake*. Where the charged act itself characterizes the offense, proving the act proves intent. *State v. Saltarelli*, 98 Wn. 2d 358, 366, 655 P.2d 697 (1982); *State v. Smith*, 103 Wash. 267, 268, 174 P. 9 (1918). Here, intent is inherent in the act and was not, therefore, at issue. *See*, 61 Wash. L. Rev. at 1236, citing II J. Wigmore, EVIDENCE § 357 (Chadbourn rev. 1979). The State's sole premise for the relevance of intent was mere speculation that Vernon might claim mistake or accident as a defense. 8/5RP 15. He did not.

(c) *Common scheme or plan*. This may be what the trial court had in mind. But this exception applies solely when either the occurrence of the crime or the identity of the perpetrator is at issue. *State v. Foxhoven*, 161 Wn.2d 168, 179, 163 P.3d 786 (2007); *State v. Lough*, 125 Wn.2d 847, 853, 889 P.2d 487 (1995). Common scheme or plan for ER 404(b) purposes is relevant solely to show the charged crime happened.

*Foxhoven*, 161 Wn.2d at 179, citing *Lough*, 125 Wn.2d at 861-62. Two

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<sup>3</sup> 61 Wash. L. Rev. at 1236.

witnesses testified to the alleged crime here. Therefore, the prior incident was unnecessary.

Moreover, to prove design or plan, the acts must share “such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations.” Mere similarity of result does not create relevance. *Lough*, 125 Wn.2d at 856. Here, both incidents arguably involved “preparation,” but the circumstances are entirely different.

(d) *Identity*. Identity was not at issue here. 8/5 RP 12.

Accordingly, Aetzel’s recollections from six years before had no logical relevance.

Unless the evidence is logically relevant, balancing its probative value versus its potential for unfair prejudice is pointless. *Saltarelli*, 98 Wn. 2d at 366; 61 Wash. L. Rev. at 1236, n.40. Specifically, evidence of prior convictions “is not relevant to the question of guilt yet [is] very prejudicial, as it may lead the jury to believe the defendant has a propensity to commit crimes.” *State v. Oster*, 147 Wn.2d 141, 147-48, 52 P.3d 26 (2002), quoting *State v. Hardy*, 133 Wn.2d 701, 706, 946 P.2d 1175 (1997) and citing Karl B. Tegland, WASHINGTON PRACTICE: EVIDENCE § 114, at 383 (3d ed.1989). The propensity potential of prior convictions is inevitably prejudicial. *State v. Roswell*, 162 Wn.2d 186,

196-97, 196 P.3d 705 (2008). Prejudice could not be greater than for a prior conviction on the same charge. “[I]f an element of the crime is a prior conviction of the very same type of crime, there is a particular danger that a jury may believe that the defendant has some propensity to commit that type of crime. We and other courts have recognized how highly prejudicial such evidence may be.” *Roswell*, 162 Wn.2d at 198. And, since probative value is zero if the evidence is not necessary, the Aetzel testimony fails on both prongs. Accordingly, trial courts should “exercise their sound discretion to reduce unnecessary prejudice where practical.” *Roswell*, 162 Wn.2d at 198. Here, that meant excluding the evidence.

The test is whether the other offense is both relevant and necessary to prove an essential ingredient of the crime charged. *Goebel*, 40 Wn.2d at 21. Here, the court acknowledged that the prior act evidence was not necessary to prove the State’s case. CP 24; 8/5 RP 16. But the court nevertheless ruled that “the probative value outweighs the prejudice[.]” 8/5 RP 17. CP 23-25. These rulings are inherently contradictory and mutually exclusive.

The State argues that any evidence tending to prove guilt will have some prejudicial impact on a defendant. RB at . The unedited version of this chestnut says that “evidence that tends to prove any element of a

crime will have some prejudicial impact on the defendant.” *Roswell*, 162 Wn.2d at 198 (emphasis added.) The point being that, if the existence of the prior conviction is an element of the current charge, it is not possible to keep it from the jury and the prejudice cannot be avoided. In *Roswell*, the prior conviction was an essential element of the current felony charge. *Roswell*, 162 Wn.2d at 188.

That is not the case here. The evidentiary value of Vernon’s prior voyeurism conviction was solely to alert the jury that they were looking at a proven voyeur. That is propensity plain and simple.

“There is no more insidious and dangerous testimony than that which attempts to convict a defendant by producing evidence of crimes other than the one for which he is on trial, and such testimony should only be admitted when clearly necessary to establish the essential elements of the charge which is being prosecuted.” *State v. Smith*, 103 Wash. 267, 174 P. 9 (1918). This is especially true where a propensity for sexual deviancy is alleged. *Saltarelli*, 98 Wn.2d at 363.

*Saltarelli* is directly on point. There, the court admitted evidence of an assault years earlier, supposedly for the purpose of showing motive and intent. In reversing, the Supreme Court identified three implicit conclusions in the erroneous admission of the evidence: (1) that the defendant’s motive and intent were facts of consequence to the outcome of

the current case; (2) that evidence of the old assault was probative of present motive and intent; and (3) that the probative value of using old offense to establish present motive and intent outweighed its prejudicial effect. 98 Wn.2d at 363.

Here, as in *Saltarelli*, the trial court's only justification for admitting the evidence was the perceived similarity of the two events. In neither case could the court explain either why motive or intent was of consequence to the outcome of present case or how the similarity of the two events bore on the relevance of the first offense to the defendant's motive or intent years later. Evidence of unconnected prior alleged sexual misconduct is not admissible under ER 404(b) to prove intent where, as here, intent is not at issue. *State v. Harris*, 36 Wn. App. 746, 751, 677 P.2d 202, 205 (1984). Otherwise, the intent exception would swallow the rule. *Powell*, 126 Wn.2d at 262.

A prejudicial evidentiary error requires reversal if, within reasonable probabilities, the evidence materially affected the outcome of the trial. *State v. Tharp*, 96 Wn.2d 591, 599, 637 P.2d 961 (1981). Prejudice resulting from inherently prejudicial evidence is likely to impress itself upon the minds of the jurors and cannot be removed by instruction. *State v. Miles*, 73 Wn.2d 67, 71, 436 P.2d 198 (1968).

This error clearly affected the outcome of the trial. As defense counsel argued, once the jurors knew about the prior conviction for voyeurism, they would simply tune out, wait for everybody to stop talking, and write “guilty” on the verdict forms. RP 10-11.

4. *The Admissible Evidence Was Insufficient.* The State claims Vernon cannot follow up an attack on the State’s core evidence by asking this Court to decide whether the remaining evidence is sufficient to support the conviction. RB 11. But Vernon’s sufficiency argument is no more than a simple “harmless error” analysis that is an integral part of any assignment of error. Without the tainted evidence, the State does not have a case.

Here, without the inadmissible propensity evidence, the case against Vernon falls short of proof beyond a reasonable doubt. Vernon correctly argues that, without the impermissible inference of guilt derived from the erroneously-admitted proclivity evidence, reasonable doubt would have forestalled these convictions. Vernon does not, as the State sneeringly suggests, offer evidence for the first time on appeal. RB at 12. He simply points out the weaknesses in the State’s evidence, and argues that, if the Court agrees that the prior voyeurism evidence was not properly before the jury, the remaining evidence is insufficient to support the verdict and reversal is required. Vernon’s point is that the prior

conviction evidence is necessary to overcome the improbability of Ms. Schoelkopf's story and the inconsistencies between her testimony and her husbands'.

Since retrial following reversal for insufficient evidence is prohibited, the Court should dismiss with prejudice. *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998).

5. ***Vernon Did Not Receive the Unbiased Tribunal Guaranteed by art. 1 § 22 and the Sixth Amendment.*** Contrary to the State's argument, Vernon clearly overcame the presumption that every judge is unbiased in every situation. *Chamberlin*, 161 Wn.2d at 38, citing *Withrow v. Larkin*, 421 U.S. 35, 47, 95 S. Ct. 1456, 43 L. Ed. 2d 712 (1975). Judges are susceptible to human limitations. *Offutt v. United States*, 348 U.S. 11, 14, 75 S. Ct. 11, 99 L. Ed. 11 (1954); *Tumey v. State of Ohio*, 273 U.S. 510, 532, 47 S. Ct. 437, 444, 71 L. Ed. 749 (1927).

The State appears to concede that Vernon's challenge is not unfounded. RB 15-22. If there is any doubt whatsoever, this is a fundamental error that can be raised for the first time on appeal and for which reversal is required. *State v. Weber*, 159 Wn.2d 252, 285, 149 P.3d 646, 663 (2006); *State v. Jackman*, 125 Wn. App. 552, 560, 104 P.3d 686 (2004); *Tumey*, 273 U.S. at 444. Moreover, the State concedes that Vernon assigned error to his counsel's failure to seek a change of venue

because of the County's dearth of judges. RB 22-26. The Court should reverse on this ground alone.

6. *The Jury Was Tainted.* The State falsely claims that, unless the jury sees a defendant in shackles, he cannot show prejudice. RP 28. This underestimates the intelligence of jurors. RB 26.

Upon hearing that a law enforcement officer is familiar with the defendant because he saw his name on the jail roster, they have the same ability as judges to make the logical inference that the defendant's name appeared on the roster and that, bingo! the defendant was in jail.

Likewise, uniformed officers stationed immediately behind the defense table would alert even the dimmest juror that the defendant was not only in custody but also deemed a public menace. The Court should hold that the trial court abused its discretion in not, at minimum, inquiring whether the potential for tainting the jury was overcome by some showing of necessity. Nothing in this record suggests Vernon presented a security risk. The court simply did not bother to inquire.

7. *The Sentence Is Wrong.* The State claims this Court's first question is whether the trial court's reasons for imposing an exceptional sentence are sufficient. RB 31. This is wrong. First, the Court must determine whether the SRA authorizes an exceptional sentence, because a

sentence in excess of the court's statutory authority violates Const. art. 1, § 22 and the Sixth Amendment.

Where — as here — the current offense is a sex offense and the defendant has a prior conviction for a designated offense, the court **must** impose an indeterminate sex offender sentence. RCW 9.94A.535. The State offers no contrary authority. An indeterminate sentence by definition is one where the court does not get to impose a fixed amount of extra time. That would be, by definition, a determinate sentence.

The State is nonplussed by so-called creative arguments by defense counsel. The trial court's hybrid sentence here is a creative application of the law that is prohibited by the plain language of the SRA at RCW 9.94A.535. The legislature clearly intended to assume control over the sentencing of sex offenders and divest sentencing judges of discretion. The SRA's sex offender sentencing scheme cannot, by any stretch of the imagination, be characterized as giving repeat offenders "free" crimes.

The court also got the offender score wrong. Vernon stipulated to four prior felonies, including failure to register as a sex offender. CP 91. His failure to register violation, however, was not a felony. RCW 9.94A.130; PSI, CP at 133. This miscalculation resulted in the prosecutor erroneously telling the court Vernon's sex offense offender score was 15.

RP 185. This did not change the sentence, but Vernon asks the Court to clarify that he had three prior felonies, not four.

The Court should remand for resentencing in compliance with the SRA.

8. *The Community Custody Provisions Require Remand.* Finally, the State defends the excessive community custody provisions and costs.

RB 39.

This Court reviews de novo whether the statutory scheme authorizes a prohibition against using alcohol. *State v. Williams*, 158 Wn.2d 904, 908, 148 P.3d 993 (2006). An alcohol prohibition is not lawful unless alcohol contributed to the crime. *State v. Jones*, 118 Wn. App. 199, 205-06, 76 P.3d 258 (2003). Here, it did not. Also, there is no evidence that any minor was involved in the charged offenses or that Mr. Vernon has ever exhibited any inclination to bother children.

Where the trial court lacks authority to impose a specific community custody condition, the appropriate remedy is remand. *State v. O’Cain*, 144 Wn. App. 772, 775, 184 P.3d 1262 (2008).

The court also imposed excessive costs. Costs assessed against an indigent defendant under RCW 10.01.160(2) “cannot include expenses inherent in providing a constitutionally guaranteed jury trial or expenditures in connection with the maintenance and operation of

government agencies that must be made by the public irrespective of specific violations of law.” Constitutionally-guaranteed trial expenses include counsel for indigent defendants. *Fuller v. Oregon*, 417 U.S. 40, 52, 94 S. Ct. 2116, 40 L. Ed. 2d 642 (1974) (interpreting Oregon’s identical statute. 417 U.S. at 43, n.5.)

Washington courts may impose nominal trial costs on an indigent defendant. *See, e.g., State v. Curry*, 118 Wn.2d 911, 915, n.2, 829 P.2d 166, 167 (1992). In the collected cases in *Curry*, the costs were in the range of a couple of hundred dollars. *Id.* at 913. Likewise, in *State v. Baldwin*, 63 Wn. App. 303, 818 P.2d 1116 (1991), and the cases cited therein, Division I upheld challenged costs in the \$100 range. *Baldwin*, 63 Wn. App. at 308-309.

Vernon asks this Court to intercede and vacate the excessive and punitive costs assessment of \$4,429.00.

### III. CONCLUSION

For the reasons stated, the Court should vacate the judgment and sentence. Respectfully submitted this August 6, 2010.



Jordan B. McCabe, WSBA No. 27211  
Counsel for David J. Vernon

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COURT OF APPEALS

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STATE OF WASHINGTON

BY  \_\_\_\_\_  
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**DECLARATION OF SERVICE**

I certify that I mailed this day, postage prepaid,  
a copy of the foregoing Appellant's Brief to:

Lori I. Smith  
Lewis County Prosecuting Attorney's Office  
345 West Main Street, 2<sup>nd</sup> Floor  
Chehalis, WA 98532

David J. Vernon  
DOC No. 964997  
A.H.C.C. (L, B-58)  
Post Office Box 2049  
Airway Heights, WA 99081-2019

 date August 6, 2010  
Jordan B. McCabe, WSBA No. 27211, Bellevue, Washington