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#### A. ASSIGNMENTS OF ERROR

1. The trial court erred by admitting evidence Mr. Butler had failed to register as a sex offender on four prior occasions.

2. Mr. Butler did not receive effective assistance of counsel when his attorney failed to request an instruction informing the jury of the limited purpose for which it could use evidence of Mr. Butler's prior convictions for failure to register as a sex offender.

3. The trial court lacked statutory authority to order Mr. Butler to pay restitution to the Clallam County Jail for the costs of medical treatment received during incarceration pending trial and sentencing.

#### B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Evidence of a testifying defendant's prior criminal convictions may be admitted only if they are relevant to the defendant's veracity. ER 609(a). The State has the burden of proving prior convictions are relevant for impeachment purposes, and the trial court must weigh numerous factors in making its decision. The trial court admitted Mr. Butler's four prior convictions for failing to register as a sex offender to rebut his necessity defense without weighing the appropriate factors. Where (1) the prior convictions were highly prejudicial propensity evidence, (2) the

convictions were not relevant to the jury's determination of Mr. Butler's truthfulness, and (3) the jury was not given a limiting instruction, is there a reasonable possibility the jury would not have returned a guilty verdict if the evidence had not been admitted?

(Assignment of Error 1)

2. Evidence of a criminal defendant's other misconduct is not admissible to show bad character and is only admissible if it helps prove an essential ingredient of the charged offense. ER 404(b). The trial court permitted the State to elicit testimony that Mr. Butler failed to report as required during four separate time periods prior to the current offense. Where (1) the prior misconduct was highly prejudicial propensity evidence, (2) it was not relevant to prove an essential element of the charged offense, (3) Mr. Butler did not deny committing the charged offense but presented a necessity defense, and (4) the jury was not given a limiting instruction, is there is a reasonable possibility the jury would not have returned a guilty verdict if the evidence had not been admitted? (Assignment of Error 1)

3. A criminal defendant may be impeached with other misconduct if he testifies as to his own good character. Mr. Butler testified he was a homeless sex offender who was trying to get his

life together and had been reporting to the local sheriff until a gang of men threatened to kill him if he did not leave the community. Did Mr. Butler place his good character into evidence such that the State was permitted to elicit testimony that Mr. Butler had failed to report as a sex offender during four separate time periods before the charged offense? (Assignment of Error 1)

4. When evidence of a defendant's prior criminal convictions or prior misconduct is admitted under ER 609 or ER 404(b), the defendant is entitled to an instruction informing the jury of the limited purpose for which it may utilize the evidence. Given the prejudicial nature of such evidence, Mr. Butler's attorney was ineffective for failing to request such a limiting instruction. Where the jury was free to use the prior misconduct evidence to conclude Mr. Butler was the type of person who would fail to register as a sex offender, was Mr. Butler prejudiced by his attorney's deficient performance? (Assignment of Error 2)

5. The superior court's authority to impose restitution is determined by statute, and the SRA only permits the court to order a defendant to pay restitution for injury or loss or damage to property caused by the defendant's crime. RCW 9.94A.753. Where Mr. Butler's crime of failing to register as a sex offender did

not cause any damage or loss to the Clallam County Jail, must the order requiring Mr. Butler to pay restitution of \$832.65 to the jail for his medical expenses be vacated? (Assignment of Error 3)

C. STATEMENT OF THE CASE

The Clallam County Prosecutor charged Richard Wayne Butler with failing to report to the county sheriff as a sex offender during a 15-day period in October 2006. RCW 44.130(1)(a), (6)(b). CP 40-41.

At a jury trial before the Honorable George L. Wood, the State's witnesses explained that a sex offender is required to register with the county sheriff where he resides and provide his current address. RP 19-21.<sup>1</sup> An offender who is homeless must come into the sheriff's office on a weekly basis and report where he has been living. RP 22, 29-31. In Clallam County, sex offenders report on Tuesdays to the sheriff's officer in the Clallam County courthouse. RP 19-22.

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<sup>1</sup> The verbatim report of proceedings contains two volumes. The volume dated April 14, 2008, is referred to as RP. The other volume contains proceedings for April 9, 15, and 22, 2008, and is referred to by the date of the hearing.

Mr. Butler had a 1997 conviction for rape of a child in the third degree.<sup>2</sup> RP 26, 42-43; Ex. 1. On June 10, 2005, Mr. Butler signed a form explaining the registration requirements. RP 53-54; Ex. 2. Mr. Butler re-registered when he returned to Clallam County from a treatment program in another county on September 10, 2006; at that time he was homeless. RP 47-49, 54-55; Ex. 3, 5.

Mr. Butler checked in with the Clallam County Sheriff's Office as required on August 1, 8, 15, 22, 2006, and on September 1, 5, 12, 16, 2006. RP 23-24, 33-34, 47-49; Ex. 4-5. He continued to report he was homeless and living on the beach. RP 30; Ex. 4-5. Mr. Butler did not check into the sheriff's department, however, on October 3, 10, or 17, 2006. RP 24, 32-33; Ex. 4.

Mr. Butler asserted a necessity defense and did not contest that he was required to register as a sex offender or that he knowingly failed to register during the charging period. CP 37, 44-47; RP 60, 82-84. Mr. Butler testified that he went to a flagging class offered on a Saturday in October at Peninsula Community College, and after class he was approached by two men outside the classroom. RP 61-64. The men directed him to the back of a building at the end of the campus whether four additional men were

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<sup>2</sup> Mr. Butler pled guilty to sexual contact with a girl who was one week shy of her sixteenth birthday. Ex. 1 at 1, 5.

waiting. RP 64. The men asked if he was Richard Butler the sex offender who lived on the beach. RP 64.

When Mr. Butler admitted his identity, the men told him he would be killed if he did not leave their community. RP 65. One of the men kicked Mr. Butler in the back, knocking him down, and later Mr. Butler was knocked unconscious by a blow to the head. RP 65-66. Mr. Butler awoke to find he had a split lip, sore ribs, and a bruised back. RP 66.

Mr. Butler went to the beach where he found his tent slashed and his belongings scattered. RP 66-67, 69-70. Grabbing what he could, Mr. Butler left the beach but was met at the top of the hill by two of the men; the other four were in the back of a nearby pickup truck. RP 67-68, 70-71. The men again said they would kill Mr. Butler if he did not leave the area, and one man pointed a gun at him. RP 71-72. Mr. Butler was so afraid that he jumped off the bluff to the beach, and he heard the gun fire as he escaped. RP 72.

The men watched Mr. Butler flee down the beach and followed him up Lower Elwha Road where he hid in the woods. RP 73-74, 90. Eventually Mr. Butler arrived at Neah Bay where he remained in hiding for several months. RP 74-77, 90-92. Mr.

Butler explained he did not go to the sheriff's office in Port Angeles to register because he was afraid he would be killed if the men learned his location. RP 77-78, 80-81. Mr. Butler did not report the threats to the local police, as he did not think the police would believe a sex offender. RP 81, 92.

Although Mr. Butler admitted he had not always complied with the registration requirements, the State was permitted to cross-examine him about four prior occasions – in 2001, 2002, 2004, and 2005 – when Mr. Butler did not report as required. RP 92-98.

The jury convicted Mr. Butler as charged, and he was sentenced to a 50-month prison term. CP 13, 22. The sentencing court ordered Mr. Butler to pay restitution of \$832.65 to the Clallam County Jail “for pre- and post-conviction medical costs incurred while incarcerated in County Jail.” CP 10. This appeal follows. CP 5.

#### D. ARGUMENT

##### 1. MR. BUTLER'S CONVICTION FOR FAILING TO REGISTER AS A SEX OFFENDER MUST BE REVERSED BECAUSE THE TRIAL COURT IMPROPERLY ADMITTED IRRELEVANT AND HIGHLY PREJUDICIAL EVIDENCE OF FOUR PRIOR CONVICTIONS FOR THE SAME OFFENSE

Mr. Butler asserted a necessity defense and did not contest that he failed to register weekly as required of a homeless sex offender. The trial court permitted the State to impeach Mr. Butler with evidence that he had failed to report on four separate prior occasions without identifying the rule under which the evidence was admissible. Thus, the court did not weigh the factors required by ER 609(1)(a), identify a purpose for which the evidence would be admissible under ER 404(b), or find Mr. Butler had put his good character into evidence. The highly prejudicial propensity evidence was not relevant, and this Court cannot be convinced the jury verdict would not have been different without the prior conviction evidence. Mr. Butler's conviction must therefore be reversed.

a. The admission of a defendant's prior convictions for purposes of impeachment is governed by ER 609. A defendant's prior felony convictions are generally inadmissible against him because prior convictions are highly prejudicial and not relevant to

guilt or innocence. State v. Hardy, 133 Wn.2d 701, 706, 946 P.2d 1175 (1997). ER 609 permits the use of prior convictions to impeach the credibility of a witness, including a testifying defendant, thus creating a narrow exception to this rule. Hardy, 133 Wn.2d at 706. Crimes of dishonesty or false statement are per se admissible under ER 609, as they are relevant to the jury's determination of a witness's truthfulness. ER 609(a)(2); State v. Jones, 101 Wn.2d 113, 117-18, 677 P.2d 131 (1984), overruled on other grounds, State v. Brown, 111 Wn.2d 124, 157, 761 P.2d 588 (1988), adhered to on rehearing, 113 Wn.2d 520, 554, 782 P.2d 1013, 787 P.2d 906 (1989).

When the defendant's prior conviction is not a crime of dishonesty or false statement, the court may permit the opposing party to use the conviction only if it is relevant to the witness's truthfulness. Hardy, 133 Wn.2d at 707-08; Jones, 101 Wn.2d at 18-19. ER 609(a)(1) permits the introduction of felony convictions that are less than 10 years old if the probative value of admitting the conviction outweighs the prejudice to the party offering the witness. ER 609(a)(1). The rule provides:

For the purpose of attacking the credibility of a witness in a criminal or civil case, evidence that the witness has been convicted of a crime shall be

admitted if elicited from the witness or established by public record during examination of the witness but only if the crime (1) was punishable by death or imprisonment in excess of 1 year under the law under which the witness was convicted, and the court determines that the probative value of admitting this evidence outweighs the prejudice to the party against whom the evidence is offered, or (2) involved dishonesty or false statement, regardless of the punishment.

ER 609(a).

When the State seeks to impeach a witness under ER 609(a)(1), it bears the difficult burden of demonstrating the probative value of the evidence outweighs its prejudicial effect. State v. Calegar, 133 Wn.2d 718, 722, 947 P.3d 235 (1997); Jones, 101 Wn.2d at 120. In deciding the issues, the trial court must weigh the importance that the jury hears the defendant's side and whether the defendant is the only one who can testify in his defense. Normally, the court should err on the side of excluding a challenged conviction. Jones, 101 Wn.2d at 121. Other factors to be weighed include (1) the length of the defendant's criminal record; (2) the remoteness of the prior conviction; (3) the nature of the prior crime; (4) the age and circumstances of the defendant; (5) the centrality of the credibility issue; and (6) the impeachment value of the prior conviction. Calegar, 133 Wn.2d at 722; State v. Alexis,

95 Wn.2d 15, 19, 621 P.2d 1269 (1980). In addition, the court should consider whether the defendant testified at the trial for the prior conviction; the conviction has less bearing on veracity if the defendant did not testify. Jones, 101 Wn.2d at 121.

In making this determination, the trial court “must bear in mind at all times that the sole purpose of impeachment evidence is to enlighten the jury with respect to the defendant’s credibility as a witness.” Calegar, 133 Wn.2d at 723 (quoting Jones, 101 Wn.2d at 118). The prior conviction must be relevant to the defendant’s ability to testify truthfully; the fact a defendant has a prior conviction does not mean he will lie when testifying. Jones, 101 Wn.2d at 119-20.

b. The trial court did not utilize the *Alexis* and *Jones* factors in admitting Mr. Butler’s prior convictions. In deciding if the State may utilize a defendant’s prior convictions to impeach his credibility, the trial court must weigh the factors set forth in Jones and Alexis and state, on the record, which factors favor admission and exclusion of the evidence. Jones, 101 Wn.2d at 122. In Mr. Butler’s case, the trial court did not weigh any of the factors, however, looking only at the State’s desire to impeach his testimony. RP 11-14.

The State sought to admit Mr. Butler's prior convictions for failing to register as a sex offender. CP 21; SuppCP \_\_ (Plaintiff's Motions in Limine, sub. no. 55, filed April 8, 2008) (hereafter Plaintiff's Motions in Limine); 4/9/08RP 19-20; RP 19. The State first asserted the evidence was admissible to rebut Mr. Butler's anticipated testimony that he had registered prior to the threats on his life, which the State asserted was evidence of his own good character. Plaintiff's Motions in Limine at pages 2-3. Later, the State claimed the evidence was admissible to rebut Mr. Butler's necessity defense. CP 21; RP 19. The State did not refer to ER 609 in its pleadings, but did cite cases addressing the rule. CP 21.

The court determined Mr. Butler's credibility was an important issue and the State should be permitted to rebut his testimony concerning his necessity defense with the prior convictions for failing to register as a sex offender. RP 11.

[I]f Mr. Butler gets up and testifies that he was threatened in some way by individuals that are not going to testify, all we're going to have is Mr. Butler's testimony, then I think his credibility with regard to that is highly important and I think the State has – could have an opportunity to rebutt [sic] that testimony.

And I think it is relevant that he was not – he had 4 prior convictions for not registering.

RP 11. The court did not mention ER 609 or discuss any of the other Jones and Alexis factors. RP 11-14.

The court then restricted the evidence to the fact that Mr. Butler did not register with the sheriff as required during certain time periods without mentioning he was convicted of a crime, unless Mr. Butler denied failing to register on the prior occasions. RP 12-14. The court felt this limitation was necessary to diminish the prejudicial effect of the evidence so that it did not outweigh its probative value. RP 12, 14.

In cross-examination of Mr. Butler, the State elicited testimony that he moved in October 2001 and in July 2002 without notifying the sheriff and referred to the criminal judgment and sentence when Mr. Butler did not remember the second occasion. RP 92-97. The State also elicited testimony that Mr. Butler did not check in weekly as required when homeless for three months in 2004 and between July and October 2005. RP 97-98.

c. The trial court erred by admitting Mr. Butler's prior convictions for failing to register as a sex offender to "rebut" his necessity defense. The decision to admit a prior conviction under ER 609(a)(1) is reviewed for an abuse of discretion. State v. Wilson, 83 Wn.App. 546, 549, 922 P.2d 188 (1996), rev. denied,

130 Wn.2d 1024 (1997). In announcing its decision, the trial court “must” state the factors which favor admission or exclusion of prior conviction evidence for the record. Jones, 101 Wn.2d at 122. Failure to do so is an abuse of discretion. Wilson, 83 Wn.App. at 550. “[T]he court must consider whether the State has demonstrated that the specific nature of the felony has probative value.” Id.

The trial court failed to undergo the analysis required to determine if a defendant’s prior criminal convictions are so relevant to his veracity that they should be presented to the jury. Jones, 101 Wn.2d at 19. Instead, the only factor considered by the court was the State’s need to cross-examine Mr. Butler and the importance of his veracity to the jury’s evaluation of the testimony. RP 11-14. The trial court did not mention other critical factors, such as the type of crime, remoteness of the prior convictions, the age and circumstances of the defendant at the time, or the length of Mr. Butler’s prior record. Jones, 101 Wn.2d at 121-22. And the court did not consider if convictions for failure to register as a sex offender were in fact relevant to Mr. Butler’s veracity, the key factor in deciding the issue. Calegar, 133 Wn.2d at 723; Jones, 101 Wn.2d at 118-19.

Instead of engaging in the necessary balancing test, the trial court believed it could allay the prejudice by permitting the State to elicit testimony that Mr. Butler failed to register during four periods of time without mentioning each incident resulted in a criminal conviction. This is analogous to the decision to admit unnamed prior convictions addressed by this Court in Wilson, supra. In Wilson the defendant was on trial for delivery of a controlled substance, and the trial court accepted the prosecutor's suggestion that the defendant's prior convictions for two violations of the Uniform Controlled Substances Act be admitted but referred to as unnamed felonies. Wilson, 83 Wn.App. at 548-49. The defendant also had a prior theft conviction that was admissible under ER 609(a)(2). Id. at 548. The trial court reasoned the defendant's prior record created an incentive to fabricate, and held the prejudice of admitting the prior convictions outweighed the obvious prejudice because of the critical importance of the defendant's credibility. Id. at 548-49.

This Court pointed out that failure to balance the Alexis and Jones factors on the record was an abuse of discretion, as was the admission of unnamed felonies to circumvent the balancing process. Wilson, 83 Wn.App. at 550; accord, Hardy, 133 Wn.2d at

712 (“it is anomalous to unname the felony as it is generally the nature of the prior felony which renders it probative of veracity”). While the trial court considered the importance of the defendant’s testimony, this Court noted that factor favors both admission and exclusion of prior convictions. Id. at 551. The defendant was the only witness and his testimony was thus crucial to the defense, but that fact also made it crucial that the jury not be misled as to the defendant’s credibility. Id. For that reason, the trial court should normally err on the side of exclusion of the prior conviction, “with a warning to the defendant that any misrepresentation of his background on the stand will lead to the admission of the conviction for impeachment purposes.” Id. (quoting Jones, 101 Wn.2d at 121).

As in Wilson, the trial court in Mr. Butler’s case based its decision upon the importance of the defendant’s testimony, a neutral factor which should have led to the trial court giving a warning to the defendant rather than admitting four prior identical offenses. RP 11-13; Wilson, 83 Wn.App. at 551. Also, as in Wilson, the trial court did not analyze any other factors, but instead tried to mitigate the prejudice by admitting Mr. Butler’s conduct but not his convictions. RP 14 (admitting conduct but not fact of

conviction); Wilson, 83 Wn.App. at 551-52 (admitting prior convictions as unnamed felonies). The trial court therefore erred in admitting Mr. Butler's four prior convictions for failing to register as a sex offender without determining they were relevant to his ability to testify truthfully.

Mr. Butler asserted a necessity defense, and the court correctly determined his credibility was crucial because he was the sole witness for the defense. The State, however, had other weapons to impeach Mr. Butler's credibility, such as his failure to report the threat on his life to the police or to produce any witnesses to corroborate his testimony. RP 85-86, 92. Additionally, the jury was well aware that Mr. Butler was a sex offender and had a conviction for rape of a child in the third degree. RP 20, 23, 26, 47-52, 60; Ex. 1-3.

The trial court erred by permitting the State to impeach Mr. Butler with the fact that he had committed the same crime on four prior occasions. The court did not identify how the prior convictions were relevant to Mr. Butler's ability to tell the truth on the witness stand. Instead, the evidence simply showed Mr. Butler's propensity to commit the charged crime.

d. The error in admitting Mr. Butler's prior convictions was not harmless. This Court must reverse a conviction where "within reasonable probabilities" the erroneous introduction of a defendant's prior convictions may have materially affected the jury verdict. Calegar, 133 Wn.2d at 727; Hardy, 133 Wn.2d at 712. The appellate court looks to the evidence at trial, the importance of the defendant's credibility, and the effect prior convictions may have on the jury. Id.

Washington courts have noted the admission of a defendant's prior criminal conviction is inherently prejudicial. Hardy, 133 Wn.2d at 710; Jones, 101 Wn.2d at 120. Several studies have shown that juries are more likely to convict when they learn the defendant has a prior record. Hardy, 133 Wn.2d at 710-11 (citing Alan D. Hornstein, Between Rock and a Hard Place: The Right to Testify and Impeachment by Prior Convictions, 42 Vill. L. Rev. 1 (1997); Edith Greene & Mary Dodge, The Influence of Prior Record Evidence on Juror Decision Making, 19 Law & Hum. Behav. 67, 76 (1995); Harry Kalven, Jr. & Hans Zeisel, The American Jury 161 (1966)). "It is difficult for the jury to erase the notion that a person who has once committed a crime is more likely to do so again. The prejudice is even greater when the prior conviction is

similar to the crime for which the defendant is being tried.” Jones, 101 Wn.2d at 120.

Mr. Butler did not contest that he failed to register during the charging period, asserting a necessity defense. The State presented no evidence to counter that defense, relying instead upon its cross-examination of Mr. Butler. Much of this cross-examination centered on Mr. Butler’s four prior failures to register in 2001, 2002, 2004, and 2005 – the same crime for which he was on trial. RP 92-98. The jury was not given a limiting instruction explaining it could not use the prior convictions to find he had a propensity to commit the crime. This Court cannot conclude that the jury was not impacted by the evidence of Mr. Butler’s prior failures to report, and his conviction must therefore be reversed and remanded for a new trial. Calegar, 133 Wn.2d at 728-29; Hardy, 133 Wn.2d at 713.

e. Mr. Butler’s prior convictions for failing to register as a sex offender were not admissible under ER 404(b). In admitting evidence that Mr. Butler had failed to register a sex offender in the past, the trial court did not reference ER 609 or ER 404. Because the court admitted Mr. Butler’s omissions but not the fact that he had four prior convictions for the crime of failing to register as a sex

offender, this Court may find the admission of the evidence properly analyzed under ER 404(b).

A defendant's other misconduct is not admissible to prove the defendant's character or show that he acted in conformity with that character. ER 404; State v. Everybodytalksabout, 145 Wn.2d 456, 464, 39 P.3d 294 (2002); State v. Smith, 106 Wn.2d 772, 775, 725 P.2d 951 (1986). Prior misconduct may not be used to demonstrate the defendant is a criminal person or the type of person who would commit the charged offense.

Everybodytalksabout, 145 Wn.2d at 466; State v. Lough, 125 Wn.2d 847, 859, 889 P.2d 487 (1995). The rule, however, permits evidence of other misconduct when relevant to prove an ingredient of the offense charged. The rule reads:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of the person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

ER 404(b).

In determining if evidence of prior misconduct is admissible under ER 404(b), the trial court must, on the record,

(1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purposes for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, (4) weigh the probative value against the prejudicial effect.

State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002). In doubtful cases, the evidence should be excluded. Id. (citing Smith, 106 Wn.2d at 776). If the evidence is admitted, the court must provide the jury with a limiting instruction. Lough, 125 Wn.2d at 864. This Court reviews admission of evidence under ER 404(b) for an abuse of discretion. Thang, 145 Wn.2d at 642. A prior conviction may be admissible under ER 404(b) as well as ER 609, but admission under one rule does not make the conviction automatically admissible under the other. State v. Brown, 113 Wn.2d 520, 529-30, 782 P.2d 1013 (1989).

Here, the fact that Mr. Butler had failed to register as a sex offender four times in the past did not establish an essential element of the crime charged. While the evidence was relevant as to Mr. Butler's knowledge of the registration requirements, this element was not in dispute. RP 60, 80, 83. In fact, none of the elements of the crime were in issue because Mr. Butler asserted a necessity defense which necessarily admits commission of the

offense. CP 37; State v. Gallegos, 73 Wn.App. 644, 650-51, 871 P.2d 621 (1994) (necessity is a common law defense that excuses otherwise criminal conduct when it is necessary to avoid a greater harm).

Instead, Mr. Butler's prior convictions implied a propensity to commit the crime in question, the purpose specifically prohibited by ER 404(b). This Court's opinion in State v. Pogue, 104 Wn.App. 981, 986-87, 17 P.3d 1272 (2001), is instructive. There, the defendant was charged with possession of cocaine based upon drugs found in his sister's car when he was driving, and the defendant asserted an unwitting possession defense. Pogue, 104 Wn.App. at 982-83. The State sought to admit the defendant's prior conviction for delivery of cocaine under ER 404(b) to rebut the defendant's implied assertion that the drugs were planted by the police. Id. at 984. The trial court agreed the prior conviction was relevant, but attempted to limit the prejudice by only permitting the prosecutor to ask the defendant if he had prior experience with cocaine. Id. On appeal, the State conceded that the admission of the evidence was reversible error. Id.

This Court rejected the trial court's reasoning that the defendant's prior possession of cocaine was relevant to show his

knowledge that the substance was cocaine; the conviction was not relevant because the defendant asserted unwitting possession, not that he was unaware the substance was cocaine. Pogue, 104 Wn.App. at 985. The Pogue Court also rejected the trial court's reasoning that the evidence was relevant to "level the playing field," finding the evidence did not rebut the claim the evidence was planted and the defendant's testimony did not put his good character in issue. Id. at 986-87. This Court found the defendant's prior possession of cocaine was irrelevant. "The only logical relevance of his prior possession is through a propensity argument: because he knowingly possessed cocaine in the past, it is more likely that he knowingly possessed it on the day of the charged incident." Id.

Similarly, Mr. Butler did not assert he lacked knowledge of the reporting requirement or challenge any of the elements of the crime. As in Pogue, Mr. Butler's prior crimes did not rebut his necessity defense. Thus, the only possible relevance of the prior failures to register as a sex offender was to show his propensity to commit that crime. ER 404(b) prohibits the introduction of other misconduct to show the defendant's character or prove he acted in conformity with that character trait. Everybodytalksabout, 145

Wn.2d at 466. Mr. Butler's prior failures to report were inadmissible and highly prejudicial, inviting the jury to convict Mr. Butler because he acted in conformity with his character.

As with ER 609, evidence improperly admitted under ER 404(b) requires reversal if there is a reasonable probability that the error materially affected the jury verdict. Pogue, 104 Wn.App. at 988. As argued above, it is within reasonable possibilities that the jury would not have convicted Mr. Butler in the absence of this invitation to use his prior convictions as propensity evidence. There was no limiting instruction informing the jury to do otherwise. Mr. Butler's conviction must be reversed and remanded for a new trial. Id.

f. Mr. Butler did not place his good character in issue. The State may argue this Court should uphold the trial court's ruling on the alternative ground that the prior convictions were admissible to impeach Mr. Butler's testimony of his good character. See Plaintiff's Motions in Limine at 3. This argument should be rejected, however, because Mr. Butler did not bring his good character into issue.

Mr. Butler did not disguise the fact he was a homeless sex offender and required to register with the sheriff's department on a

weekly basis. RP 60, 66. He explained he did not report the threats on his life because no one would believe him due to his prior conviction for rape of a child. RP 81, 102. While Mr. Butler testified he had been complying with the registration requirements prior to October, this had already been established by the State's witnesses. RP 30-31, 33-34, 60-61; Ex. 3-5. He explained he was trying to comply "because I was trying to get my life together." RP 104. When asked by the prosecutor, however, Mr. Butler admitted he had not always complied with the registration requirements. RP 92-93.

When a defendant voluntarily puts his good character into evidence, the State may "complete the tapestry" with less favorable evidence. State v. Renneberg, 83 Wn.2d 735, 736-38, 522 P.2d 835 (1974) (defendant's drug addiction admissible after defendant testified as to prior work experience, college attendance and participation in Miss Yakima pageant, glee club, pep club, drill team and science club to show good character). Mr. Butler's simple testimony that he went to a flagging class at the community college, worked as a laborer, and lived in a tent on the beach was not the type of sweeping evidence of good character that permits the State to bring in his prior convictions. See State v. Avendano-Lopez, 79

Wn.App. 706, 904 P.2d 324 (1995) (testimony where defendant born and raised did not open door to cross-examination as to whether defendant illegal immigrant), rev. denied, 129 Wn.2d 1007 (1996); Pogue, 104 Wn.App. at 986-87 (defendant's testimony implying police planted evidence was not evidence of good character; prior conviction for possession of a controlled substance was improperly admitted). This Court should not uphold the trial court on this alternative theory.

g. Mr. Butler's conviction must be reversed and remanded for a new trial. In 1980, the Washington Supreme Court explained:

A prosecutor should expect to prevail on the strength of the evidence in the particular case being tried. That does not always follow when prior convictions are admitted, even when a cautionary instruction of the court restricts the use of the evidence to impeachment of credibility.

Alexis, 95 Wn.2d at. Here, the trial court permitted the State to elicit testimony that Mr. Butler had failed to register as a sex offender during four different time periods before the charged offense. The trial court did not announce under which rule the evidence was being admitted. The trial court did not engage on the record in the required analyses under either ER 609 or ER 404(b). Moreover, the evidence is not admissible under either court rule,

nor was Mr. Butler's character relevant because he did declare his own good character. Thus, the propensity evidence was inadmissible.

The jury was not given any limiting instructions concerning Mr. Butler's prior convictions, and thus was free to find him guilty because he had committed the offense on these prior occasions. Given Mr. Butler's necessity defense, this Court cannot be convinced the outcome of the trial would not have been materially different if the propensity evidence had been properly excluded. Mr. Butler's conviction should be reversed and remanded for a new trial.

2. MR. BUTLER DID NOT RECEIVE THE EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY THE FEDERAL AND STATE CONSTITUTIONS

a. Mr. Butler had the right to effective assistance of counsel.

A criminal defendant has the constitutional right to the assistance of counsel. U.S. Const. amends. 6, 14; Wash. Const. art. 1, §§ 3, 22. Counsel's critical role in the adversarial system protects the defendant's fundamental right to a fair trial. Strickland v. Washington, 466 U.S. 668, 684-85, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); United States v. Cronin, 466 U.S. 648, 656, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). "[T]he very premise of our adversary

system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free.” Herring v. New York, 422 U.S. 853, 862, 95 S.Ct. 2550, 45 L.Ed.2d 593 (1975). The right to counsel therefore necessarily includes the right to effective assistance of counsel. Kimmelman v. Morris, 477 U.S. 365, 377, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986).

When reviewing a claim that trial counsel was not effective, appellate courts utilize the two-part test announced in Strickland. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Under Strickland, the appellate court must determine (1) was the attorney’s performance below objective standards of reasonable representation, and, if so, (2) did counsel’s deficient performance prejudice the defendant. Strickland, 466 U.S. at 687-88; Thomas, 109 Wn.2d at 226. Ineffective assistance of counsel is a mixed question of law and fact reviewed de novo. Strickland, 466 U.S. at 698; In re Personal Restraint of Brett, 142 Wn.2d 868, 873, 16 P.3d 601 (2001).

A lawyer’s strategic choices made after thorough investigation of the law and the facts rarely constitute deficient performance. Strickland, 466 U.S. at 690. In reviewing the first

prong of the Strickland test, the appellate courts presume that defense counsel was not deficient, but this presumption is rebutted if there is no possible tactical explanation for counsel's performance. Strickland, 466 U.S. at 689-90; State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). The appellate court will find prejudice under the second prong if the defendant demonstrates "counsel's errors were so serious as to deprive the defendant of a fair trial." Strickland, 466 U.S. at 687.

Mr. Butler asserts his attorney was ineffective because he did not propose a limiting instruction when the court admitted evidence that Mr. Butler failed to register as a sex offender during four prior time periods. To determine if defense counsel's failure to propose an appropriate jury instruction constitutes ineffective assistance of counsel, appellate courts necessarily reviews three questions: (1) was the defendant entitled to the instruction; (2) was the failure to request the instruction tactical; and (3) did the failure to offer the instruction prejudice the defendant. State v. Kruger, 116 Wn.App. 685, 690-91, 67 P.3d 1147, rev. denied, 150 Wn.2d 1024 (2003).

b. Mr. Butler's attorney did not provide effective assistance of counsel because he did not request an instruction limiting the

jury's consideration of propensity evidence. A party may always request a limiting instruction when evidence is admitted for a restricted purpose. ER 105. The rule reads:

When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.

Id. (Emphasis added). When prior convictions or evidence of a defendant's other misconduct are admitted as evidence, the defendant is entitled to have the jury instructed as to the limited purpose for which it is to consider the evidence. Brown, 113 Wn.2d at 529-30. "Due to the potentially prejudicial nature of prior conviction evidence, these limiting instructions are of critical importance." Id. at 529. Thus, limiting instructions would no doubt have been given if requested by defense counsel.

There is no reason to conclude defense counsel's failure to request limiting instructions was tactical. It is well settled that a limiting instruction must be given upon the defendant's request when ER 609 or ER 404(b) evidence is admitted. Lough, 125 Wn.2d at 864 (ER 404(a)); Brown, 113 Wn.2d at 529-30 (both); State v. Newton, 109 Wn.2d 69, 74, 743 P.2d 254 (1987) (ER 609); ER 105. Washington courts have pointed out the grave danger that

such evidence will permit the jury to convict the defendant because he is a criminal rather than upon the evidence or lack of evidence that he committed the crime at issue. Hardy, 133 Wn.2d at 710; Newton, 109 Wn.2d at 73-74; Jones, 101 Wn.2d at 120.

Competent defense counsel would be aware of these dangers and request an instruction to inform the jury as to the limited purpose for which the evidence was admitted.

This Court has found counsel to be ineffective for failing to object to the admission of his client's prior criminal record, including prior escape and drug convictions, in a prosecution for drug offenses . State v. Shaver, 116 Wn.App. 375, 384-85, 65 P.3d 688 (2003). Similarly, Mr. Butler's attorney was ineffective for failing to request a limiting instruction once this damaging propensity evidence was admitted.

c. Mr. Butler was prejudiced by the failure of his attorney to request a limiting instruction. Mr. Butler was entitled to an instruction limiting the jury's consideration of his prior failures to register as a sex offender. Because his attorney did not propose such an instruction, however, the jury was free to consider his four offenses for any purpose it saw fit, such as his propensity to fail to register or his character traits of criminality or forgetfulness. Mr.

Butler therefore did not receive a fair trial. This Court should reverse his conviction and remand for a new trial. Thomas, 109 Wn.2d at 229, 232; Shaver, 116 Wn.App. at 385.

3. THE COURT LACKED STATUTORY AUTHORITY TO ORDER MR. BUTLER TO PAY RESTITUTION TO THE CLALLAM COUNTY JAIL

The superior court's power to order restitution is solely statutory. State v. Tobin, 161 Wn.2d 517, 523, 166 P.3d 1167 (2007). The Sentencing Reform Act (SRA) governs restitution for felony offenses such as failure to register as a sex offender, and the sentencing court is required to impose restitution if appropriate. RCW 9.94A.505(7); RCW 9.94A.753(1). The SRA gives broad powers to the courts to impose restitution to require the defendant to face the consequences of his criminal conduct. Tobin, 161 Wn.2d at 524.

The court must order a defendant to pay restitution when his offense results in injury to a person or damage or loss of property. RCW 9.94A.753(5). The statute provides:

Restitution shall be ordered whenever the offender is convicted of an offense which results in injury to any person or damage to or loss of property or as provided in subsection (6) of this section unless extraordinary circumstances exist which make restitution inappropriate in the court's judgment and the court sets forth such circumstances in the record.

In addition, restitution shall be ordered to pay for an injury, loss, or damage if the offender pleads guilty to a lesser offense or fewer offenses and agrees with the prosecutor's recommendation that the offender be required to pay restitution to a victim of an offense or offenses which are not prosecuted pursuant to a plea agreement.

Id.<sup>3</sup> Restitution must be based upon "easily ascertainable" damages for injury, or loss of or damage to property, and the defendant may be ordered to pay up to twice the victim's loss.

RCW 9.94A.753(3).

Except as provided in subsection (6) of this section, restitution ordered by a court pursuant to a criminal conviction shall be based on easily ascertainable damages for injury to or loss of property, actual expenses incurred for treatment for injury to persons, and lost wages resulting from injury. Restitution shall not include reimbursement for damages for mental anguish, pain and suffering, or other intangible losses, but may include the costs of counseling reasonably related to the offense. The amount of restitution shall not exceed double the amount of the offender's gain or the victim's loss from the commission of the offense.

Id. Restitution is not a substitute for and does not deprive a victim of civil remedies. RCW 9.94A.753(8); State v. Martinez, 78 Wn.App. 870, 881, 899 P.2d 1302 (1995), rev. denied, 128 Wn.2d 1017 (1996).

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<sup>3</sup> Subsection (6) applies only to the offense of rape of a child where the victim becomes pregnant.

Restitution is designed to compensate the victim of the offender's crime. "Victim" is defined as "any person who has sustained emotional, psychological, physical, or financial injury to person or property as a direct result of the crime charged." RCW 9.94A.030(49). A government agency may be a crime victim. See Tobin, supra (state and Indian tribes entitled to restitution for illegal harvest of crab and geoduck). A government agency that reimburses a victim for loss may also be entitled to restitution. State v. Davison, 116 Wn.2d 917, 920-21, 809 P.2d 1374 (1991) (upholding restitution to city that had paid wages to assault victim). The Clallam County Jail, however, was not injured and did not suffer financial loss because Mr. Butler failed to register as a sex offender. The jail also did not reimburse the immediate victim of this crime. Thus, the jail is not a victim entitled to restitution.

In addition, a defendant may only be ordered to pay restitution for loss or damage causally connected to his offense. State v. Enstone, 137 Wn.2d 675, 682, 974 P.2d 828 (1999). The burden is on the State to prove restitution amounts and the causal connection. State v. Dedonado, 99 Wn.App. 251, 257, 991 P.2d 1216 (2000). Restitution is limited to loss resulting from the precise offense charged. State v. Dauenhauer, 103 Wn.App. 373, 379-80,

12 P.3d 661 (2000) (overturning restitution order for damage to vehicle unrelated to burglaries of which he was convicted), rev. denied, 143 Wn.2d 1011 (2001); State v. Dennis, 101 Wn.App. 223, 227-28, 6 P.3d 1125 (2000) (error to require defendant to pay for medical expenses incurred by police officer in absence of connection between injuries and defendant's assault); State v. Miszak, 69 Wn.App. 426, 428, 848 P.2d 1329 (1993) (error to order defendant convicted of attempted theft to pay for items the State could not prove were taken on date of offense). "A causal connection is not established simply because a victim or insurance company submits proof of expenditures for replacing property stolen or damaged by the person convicted." Dedonado, 95 Wn.App. at 257. The jail's expenditure of funds for Mr. Butler's medical problems was not causally connected to his failure to report as a sex offender. If anything, it was causally connected to the indigent defendant's inability to post bail.

This Court's duty in interpreting the restitution statutes is to discern and implement the intent of the legislature. State. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003). The starting point is the "plain language of the statute," which includes the wording of the statute and related statutes. Id. Here, the restitution statutes

clearly show the legislature's intent that offenders be required to reimburse those harmed by their crimes by injury or the loss or damage to property. RCW 9.94A.753. Restitution is not designed to reimburse the county government for pretrial detention of an offender, even when the offender requires medical attention.

In the present case, Mr. Butler was ordered to pay restitution to the Clallam County Jail for the costs of his medical treatment when he was incarcerated pending trial. The Clallam County Jail was not the victim of Mr. Butler's crime, and it did not suffer any loss as a result of his crime. Mr. Butler's medical expenses were not causally connected to his offense. Thus, the sentencing court exceeded its statutory authority in ordering Mr. Butler to \$832.65 in restitution to the Clallam County Jail.

#### E. CONCLUSION

The trial court improperly admitted evidence that he failed to register on four prior occasions without identifying the grounds upon which the propensity evidence was admissible. In addition, Mr. Butler's attorney did not request a limiting instruction explaining to the jury the limited purpose for which it could use the evidence. Mr. Butler's conviction for failing to register as a sex offender must be reversed and remanded for a new trial.

In addition, the court exceeded its statutory authority by requiring Mr. Butler to pay restitution to the Clallam County Jail. The restitution order must be vacated because the jail did not suffer loss or damage as a result of Mr. Butler's offense.

DATED this 16<sup>th</sup> day of October 2008.

Respectfully submitted,



Elaine L. Winters – WSBA #7780  
Washington Appellate Project  
Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO**

STATE OF WASHINGTON, )  
 )  
 Respondent, )  
 )  
 v. )  
 )  
 RICHARD BUTLER, )  
 )  
 Appellant. )

NO. 37653-9-II

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DIVISION II  
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DEPUTY

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 16<sup>TH</sup> DAY OF OCTOBER, 2008, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION TWO** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] ANN M. LUNDWALL  
ATTORNEY AT LAW  
CLALLAM COUNTY PROSECUTOR'S OFFICE  
223 E 4<sup>TH</sup> ST., STE 11  
PORT ANGELES, WA 98362

(X) U.S. MAIL  
( ) HAND DELIVERY  
( ) \_\_\_\_\_

[X] RICHARD BUTLER  
975379  
AIRWAY HEIGHTS CORRECTIONS CENTER  
PO BOX 1899  
AIRWAY HEIGHTS, WA 99001

(X) U.S. MAIL  
( ) HAND DELIVERY  
( ) \_\_\_\_\_

**SIGNED** IN SEATTLE, WASHINGTON THIS 16<sup>TH</sup> DAY OF OCTOBER 2008.

X \_\_\_\_\_ 

**Washington Appellate Project**  
701 Melbourne Tower  
1511 Third Avenue  
Seattle, Washington 98101  
☎(206) 587-2711