

TABLE OF CONTENTS

| | <u>Page</u> |
|--|-------------|
| A. SUMMARY OF APPEAL..... | 1 |
| B. ASSIGNMENTS OF ERROR | 3 |
| C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR | 4 |
| D. STATEMENT OF THE CASE..... | 7 |
| 1. Procedural history | 7 |
| 2. Factual history..... | 11 |
| E. ARGUMENT | 16 |
| 1. <u>THE TRIAL COURT DENIED HARRISON HIS RIGHT TO SPEEDY TRIAL UNDER CrR 3.3. WHEN IT GRANTED DEFENSE COUNSEL’S MOTION TO CONTINUE THE TRIAL DATE OVER APPELLANT’S OBJECTION</u> | 16 |
| 2. <u>THE FOUR PRIOR ALLGED ACTS BY HARRISON, IN WHICH HE ALLEGEDLY ASSAULTED KRISTEN CROTS, WERE NOT ADMISSIBLE UNDER ER 404(b) AND PREJUDICED THE OUTCOME OF HARRRISON’S TRIAL</u> | 19 |
| a. The States ER 404(b) offer of proof | 19 |
| b. The trial court’s ruling..... | 19 |
| c. Propensity evidence is inadmissible | 21 |
| d. The evidence of prior assaults only portrayed Harrison as violent and had no relevance to a material, non-propensity issue | 22 |

| | | |
|------|---|----|
| e. | Even if relevant to a non-propensity issue, any minimal probative value of the evidence did not outweigh its unfair prejudice | 22 |
| f. | The error was not harmless | 24 |
| 3. | <u>DEFENSE COUNSEL’S UNPROFESSIONAL ERRORS DENIED HARRISON CONSTITUTIONALLY EFFECTIVE COUNSEL</u> | 25 |
| a. | Counsel Was Ineffective In Allowing The Jury To Consider Improper Propensity Evidence. | 26 |
| i. | The Jury Heard Evidence Implying That Harrison seduced Crots into prostitution. | 27 |
| ii. | The Jury Must Not Convict On The Basis Of A Defendant’s Propensity To Commit Crime | 28 |
| iii. | Counsel Was Ineffective In Failing To Request A Limiting Instruction For ER 404(b) Evidence that Harrison allegedly assaulted Crots in the past. | 28 |
| b. | Counsel Was Ineffective In Failing to preserve speedy trial violation. | 34 |
| 4. | <u>REVERSAL IS REQUIRED BECAUSE THERE IS A REASONABLE PROBABILITY THAT THE COMBINED EFFECT OF MULTIPLE ERRORS AFFECTED THE VERDICT</u> | 35 |
| 5. | <u>THE TRIAL COURT ERRED BY COUNTING AS A QUALIFYING OFFENSE A PRIOR OREGON</u> | |

| | | |
|----|---|----|
| | <u>FIRST DEGREE SODOMY CONVICTION WHERE THE STATE FAILED TO PROVE THE CRIME WAS COMPARABLE TO A CRIME IN WASHINGTON AND WHERE OREGON DOES NOT REQUIRE A UNANIMOUS JURY VERDICT.</u> | 36 |
| a. | The Prior Oregon Sodomy Was Not Comparable to a Crime in Washington. | 37 |
| b. | Harrison’s Persistent Offender Sentence Must Be Reversed | 40 |
| c. | The Persistent Offender Sentence Must Be Reversed Because the Oregon Constitution Does Not Require a Unanimous Jury Verdict | 41 |
| 6. | <u>HARRISON’S LIFE SENTENCE VIOLATES HIS CONSTITUTIONAL RIGHT AGAINST CRUEL AND UNUSUAL PUNISHMENT UNDER THE UNITED STATES AND WASHINGTON CONSTITUTIONS</u> | 42 |
| a. | The Washington and United States Constitutions bar Punishments Which are Cruel and Unusual | 42 |
| b. | Application of a Proportionality Review Compels the Conclusion the Life Sentence is Unconstitutionally Cruel | 43 |
| 7. | <u>THE TRIAL COURT’S DETERMINATION BY A PREPONDERANCE OF THE EVIDENCE THAT HARRISON HAD SUFFERED TWO QUALIFYING PRIOR CONVICTIONS AND WAS THUS A PERSISTENT OFFENDER VIOLATED HIS CONSTITUTIONALLY PROTECTED RIGHT TO A JURY TRIAL</u> | 45 |

| | | |
|----|---|-----------|
| a. | A Defendant has a constitutionally protected right to a jury determination of every element of the charged crime | 45 |
| b. | Whether Harrison had prior convictions they constituted qualifying or “strike” crimes was required to be determined by the jury beyond a reasonable doubt..... | 46 |
| c. | Harrison's sentence as a persistent offender must be reversed and remanded for Resentencing within the standard range | 49 |
| E. | CONCLUSION..... | 50 |

TABLE OF AUTHORITIES

| <u>WASHINGTON CASES</u> | <u>Page</u> |
|--|-------------|
| <i>State v. Alexander</i> , 64 Wn. App. 147, 822 P.2d 1250 (1992)..... | 35 |
| <i>State v. Bacotgarcia</i> , 59 Wn. App. 815, 822, P.2d 993 (1990). | 28, 29, 32 |
| <i>State v. Barragan</i> , 102 Wn. App. 754, 9 P.3d 942 (2000)..... | 31 |
| <i>State v. Boyd</i> , 160 Wn.2d 424, 158 P.3d 54 (2007)..... | 35 |
| <i>State v. Braun</i> , 82 Wn.2d 157, 509 P.2d 742 (1973)..... | 35 |
| <i>State v. Berry</i> , 141 Wn.2d 121, 5 P.3d 658 (2000)..... | 37, 42 |
| <i>State v. Breedlove</i> , 79 Wn.App. 101, 900 P.2d 586 (1995)..... | 17 |
| <i>State v. Brown</i> , 132 Wn.2d 529, 940 P.2d 546 (1997)..... | 23 |
| <i>State v. Cameron</i> , 80 Wn. App. 374, 909 P.2d 309 (1996)..... | 37 |
| <i>State v. Cabrera</i> , 73 Wn. App. 165, 868 P.2d 179 (1994)..... | 37 |
| <i>State v. Campbell</i> , 103 Wn.2d 1, 691 P.2d 929 (1984)..... | 16 |
| <i>State v. Carson</i> , 128 Wn.2d 805, 912 P.2d 1016 (1996)..... | 16 |
| <i>State v. Condon</i> , 72 Wn. App. 638, 865 P.2d 521 (1993)..... | 28 |
| <i>State v. DeVincentis</i> , 150 Wn.2d 11, 23 n.3, 74 P.3d 119 (2003)..... | 30 |
| <i>State v. Donald</i> , 68 Wn. App. 543, 844 P.2d 447 (1993)..... | 29 |
| <i>State v. Ermert</i> , 94 Wn.2d 839, 621 P.2d 121 (1980)..... | 36 |
| <i>State v. Fain</i> , 94 Wn.2d 387, 617 P.2d 720 (1980)..... | 43, 44, 45 |
| <i>State v. Ford</i> , 137 Wn.2d 472, 973 P.2d 452 (1999)..... | 37, 41 |
| <i>State v. Foxhoven</i> , 161 Wn.2d 168, 163 P.3d 786 (2007)..... | 30 |
| <i>State v. Gimarelli</i> , 105 Wn. App. 370, 20 P.3d 430 (2001), <i>review denied</i> , 144 Wn.2d 1014 (2001)..... | 41, 42 |
| <i>State v. Goebel</i> , 40 Wn.2d 18, 240 P.2d 251 (1952)..... | 22 |
| <i>State v. Greiff</i> , 141 Wn.2d 910, 10 P.3d 390 (2000)..... | 35 |
| <i>State v. Kingen</i> , 39 Wn.App. 124, 692 P.2d 215 (1984)..... | 16 |

| | |
|--|------------|
| <i>State v. Hernandez</i> , 99 Wn. App. 312, 997 P.2d 923 (1999), <i>review denied</i> , 140 Wn.2d 1015 (2000)..... | 21, 23 |
| <i>State v. Holmes</i> , 43 Wn. App. 397, 717 P.2d 766 (1986)..... | 29 |
| <i>State v. Jackson</i> , 102 Wn.2d 689, 689 P.2d 76 (1984). | 21, 23, 25 |
| <i>State v. Johnson</i> , 90 Wn. App. 54, 950 P.2d 981 (1998)..... | 35 |
| <i>State v. Lopez</i> , 147 Wn.2d 515, 55 P.3d 609 (2002)..... | 41 |
| <i>State v. Lough</i> , 125 Wn.2d 847, 889 P.2d 487 (1995)..... | 21, 28 |
| <i>State v. McFarland</i> , 127 Wn.2d 322, 899 P.2d 1251 (1995)..... | 26 |
| <i>State v. Michielli</i> , 132 Wn.2d 229, 937 P.2d 587 (1997)..... | 17 |
| <i>State v. Morley</i> , 134 Wn.2d 588, 952 P.2d 167 (1998)..... | 37, 40 |
| <i>State v. Myers</i> , 133 Wn.2d 26, 941 P.2d 1102 (1997) | 32 |
| <i>State v. Newbern</i> , 95 Wn. App. 277, 975 P.2d 1041 (1999)..... | 30 |
| <i>State v. Nichols</i> , 161 Wn.2d 1, 162 P.3d 1122 (2007)..... | 30 |
| <i>State v. Rivers</i> , 129 Wn.2d 697, 921 P.2d 495 (1996)..... | 44 |
| <i>State v. Robtoy</i> , 98 Wn.2d 30, 653 P.2d 284 (1982)..... | 22 |
| <i>State v. Sardinia</i> , 42 Wn. App. 533, 713 P.2d 122, <i>review denied</i> , 105 Wn.2d 1013 (1986)..... | 26 |
| <i>State v. S.M.</i> , 100 Wn. App. 401, 996 P.2d 1111 (2000)..... | 26 |
| <i>State v. Smith</i> , 106 Wn.2d 772, 725 P.2d 951 (1986)..... | 24 |
| <i>State v. Thomas</i> , 109 Wn.2d 222, 743 P.2d 816 | 26 |
| <i>State v. Thorne</i> , 129 Wn.2d 736, 776 921 P.2d 514 (1996)..... | 43 |
| <i>State v. Saltarelli</i> , 98 Wn.2d 358, 655 P.2d 697 (1982) | 21, 29 |
| <i>State v. Wade</i> , 98 Wn. App. 328, 989 P.2d 576 (1999) | 27 |
| <i>State v. Williams</i> , 104 Wn.App. 516, 17 P.3d 648 (2001)..... | 17 |

| <u>UNITED STATES CASES</u> | <u>Page</u> |
|--|--------------------|
| <i>Almendarez-Torrez v. United States</i> , 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998)..... | 48, 49 |
| <i>Apprendi v. New Jersey</i> , 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000)..... | 45, 46, 48, 49, 50 |
| <i>Blakely v. Washington</i> , 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 556 (2002)..... | 45, 46, 50 |
| <i>Old Chief v. United States</i> , 519 U.S. 172, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997)..... | 32 |
| <i>Strickland v. Washington</i> , 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)..... | 26 |
| <i>Washington v. Recuenco</i> , 548 U.S. 212, 126 S. Ct. 2546, 2552, 165 L.Ed.2d 466 (2006) | 46 |

| <u>FEDERAL CASES</u> | <u>Page</u> |
|---|--------------------|
| <i>United States v. Preston</i> , 608 F.2d 626, <i>United States v. Preston</i> , 608 F.2d 626, 639 n. 16 (5 th Cir. 1979)..... | 23 |

| <u>COURT RULES</u> | <u>Page</u> |
|---------------------------|--------------------|
| CrR 3.3 | 2, 3, 4, 5, 8, 16 |
| CrR 3.3(c)(1)..... | 34 |
| CrR 3.3 (b)(1)(i)..... | 16, 34 |
| CrR 3.3 (b)(5)..... | 34 |
| CrR 3.3(h) | 16, 19, 35 |
| CrR 3.5 | 9, 18 |
| CrR 3.5(d)(3)..... | 34 |
| CrR 3.6..... | 9 |

| <u>CONSTITUTIONAL PROVISIONS</u> | <u>Page</u> |
|---|--------------------|
| Wash. Const. Art. 1, §. 3..... | 35 |
| Wash. Const. Art. 1, §. 14..... | 43 |
| U.S. Const. Amend. V | 35 |
| U.S. Const. Amend. VI..... | 4, 6 |
| U.S. Const. Amend. VIII..... | 41 |
| U.S. Const. Amend XIV | 4, 6, 35 |

| <u>REVISED CODE OF WASHINGTON</u> | <u>Page</u> |
|--|--------------------|
| RCW 9.94A.515 | 44, 45 |
| RCW 9A.44.010(4)..... | 39 |
| RCW 9A.44.050 (1989)..... | 39 |
| RCW 9.94A.030(29)..... | 49 |
| RCW 9.94A.030(31)..... | 49 |
| RCW 9.94A.030(41)(a) | 49 |
| RCW 9A.36.021 | 47 |
| RCW 9A.36.021(a) | 7 |
| RCW 9.94A.570 | 47 |
| RCW 9A.44.050 | 38 |
| RCW 9.94A.525(3)..... | 39 |
| RCW 9.94.555(2)..... | 44 |
| RCW 10.95.020 | 45 |

| <u>EVIDENCE RULE</u> | <u>Page</u> |
|-----------------------------|--|
| ER 105 | 30 |
| ER 404(b)..... | 20, 21, 22, 23, 24, 26, 28, 29, 31, 36 |

| | |
|---------------------------------------|--------------------|
| <u>OREGON REVISED STATUTES</u> | <u>Page</u> |
| ORS 163.365..... | 38 |
| ORS 163.305(3)..... | 38, 39 |

| | |
|-----------------------------------|--------------------|
| <u>OREGON CONSTITUTION</u> | <u>Page</u> |
| Oregon Const. art. 1 § 11 | 41 |
| Oregon Const. art. 1 § 21 | 41 |

| | |
|---|--------------------|
| <u>OTHER AUTHORITIES</u> | <u>Page</u> |
| Stone, <i>The Rule of Exclusion of Similar Fact Evidence: England</i> , 46 Harv.L.Rev. 954, 983 (1933)..... | 23 |
| 22 Wright & Graham, <i>Federal Practice and Procedure: Evidence</i> ‘ ‘ 5224, at 323-24 & n. 9) | 23 |

A. SUMMARY OF APPEAL

Kristen Crots alleged that appellant Tim Harrison assaulted her, seriously injuring her, on May 22, 2007, in Vancouver, Washington. 1Report of Proceedings [RP] at 89-92, 94-102.¹ Crots alleged that Harrison hit her repeatedly; injuring her left eye, right side of her face, forehead, and teeth. She said that he drove her to a hospital but did not let her get out, and that he drove her to a second hospital where she went in and received medical care. 1RP at 104-08.

Prior to trial Crots wrote a letter stating that she had been angry with Harrison, that he did not force her into the car and that she had lied to police about the incident. 1RP at 113.

Harrison was subsequently charged with first degree kidnapping, first degree robbery, and second degree assault. Harrison was convicted of one count of second degree assault. Clerk's Papers [CP] at 67. The jury deadlocked on the charge of first degree kidnapping and acquitted Harrison of first degree robbery. CP at 66.

Over defense objection, the court permitted testimony by Crots

¹ The record consists of six volumes.
1RP March 10, 2008, jury trial,
2RP A March 11, 2008, jury trial,
2RP B March 11, 2008, jury trial,
3RP March 12, 2008, jury trial,
4RP April 24, 2008, sentencing hearing,
5-7RP pre-trial hearings.

regarding four prior incidents between 2006 and 2007 in which Harrison allegedly assaulted her. 1RP at 47-50, 55.

The State alleged at sentencing that Harrison had two prior strike offenses that qualified him to be sentenced to life without the possibility of parole under the Persistent Offender Accountability Act [POAA]. The court found that an Oregon conviction for first degree sodomy was comparable to Washington's statute for second degree rape, and that Oregon convictions for attempted murder and first degree assault was comparable to Washington's second degree assault. 5RP at 382-83, 396.

Harrison submits that he received ineffective assistance of counsel due to counsel's failure to move to exclude testimony pursuant to ER 404(b) that Crots was not involved in prostitution until she met Harrison and that counsel failed to request a limiting instruction regarding four alleged previous assaults against Crots by Harrison. Harrison also argues that the court improperly admitted propensity evidence that he had previously assaulted Crots. In addition, Harrison argues that the trial court denied his right to speedy trial, that his counsel was ineffective by waiving speedy trial over his objection on January 10, 2008, and that counsel was ineffective by failing to file an objection to the new trial date within 10 days of the waiver as required by CrR 3.3.

Harrison also submits that the Oregon offense of first degree sodomy

is not comparable to Washington's statute defining second degree rape, and that the Oregon conviction cannot count as a "strike" offense under the POAA.

Harrison also submits the court's finding that he is a persistent offender, as opposed to a jury finding beyond a reasonable doubt, violated his rights under the United States and Washington Constitution, and that sentencing him as a persistent offender violates state and federal constitutional protections against cruel and unusual punishment.

B. ASSIGNMENTS OF ERROR

1. The trial court denied appellant of his right to speedy trial under CrR 3.3 when it granted defense counsel's motion to continue the trial date over Harrison's objection.

2. The trial court erred in admitting evidence of four prior alleged assaults against the complainant by the appellant.

3. Ineffective assistance of counsel deprived appellant of his right to a fair trial.

4. Cumulative error denied appellant of his due process right to a fair trial.

5. The trial court erred in ruling Harrison was a persistent offender.

6. The trial court erred in entering Finding of Fact 2.2 in the

Judgment and Sentence that prior offenses in Oregon for first degree sodomy and attempted murder and first degree assault require that Harrison be sentenced as a persistent offender. CP at 80.

7. The trial court erred in including in appellant's offender score for purposes of determining him to be a persistent offender for an Oregon first degree sodomy conviction where the elements of the Oregon offense were not comparable to the crime of second degree rape in Washington.

8. The trial court's imposition of a sentence of life imprisonment without the possibility of parole violated state and federal constitutional prohibitions against cruel and unusual punishment.

9. The court violated appellant's Sixth Amendment right to a jury trial and Fourteenth Amendment right to due process when it found he had suffered two qualifying prior convictions and sentenced him to life without the possibility of the parole as a persistent offender.

10. The court erred imposing a sentence of life imprisonment without the possibility of parole in the absence of a jury verdict finding the two qualifying prior convictions beyond a reasonable doubt.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Does a trial court deny an appellant the right to speedy trial under CrR 3.3 when it grants defense counsel's motion to continue the trial date over the appellant's objection? Assignment of Error No. 1.

2. Whether the trial court erred in admitting evidence of four prior alleged assaults of the complainant by the appellant, where the incidents were not relevant for any non-propensity purpose, particularly regarding the charges of first degree robbery and second degree assault, and where, even if it had been relevant, the unfair prejudice of the alleged assaults outweighed its probative value, and where the court failed to engage in even a cursory ER 403 balancing test regarding the charges of robbery and second degree assault, and where the court limited its evaluation of the testimony only to the charge of kidnapping? Assignment of Error No. 2.

3. Whether the error in admitting ER 404(b) evidence, within reasonable probabilities, prejudiced the outcome of the trial. Assignment of Error No. 2.

4. Whether reversal is required because counsel was ineffective in failing to (1) object to improper admission of ER 404(b) evidence that appellant induced the complainant to become a prostitute; (2) request a limiting instruction for ER 404(b) evidence that appellant previously assaulted the complainant, thus allowing the jury to infer appellant committed the offense because he had a propensity to commit assault; (3) waiving appellant's right to speedy trial over appellant's objection; and (4) failing to file an objection to the court setting the trial date beyond the timeline provided in CrR 3.3? Assignment of Error No. 3.

5. Did cumulative error in the form of errors by the trial court and ineffective assistance deny appellant his right to a fair trial? Assignment of Error No. 4.

6. Where the State alleges an out-of-state conviction is a qualifying offense for purposes of the POAA, the State must prove the existence and comparability of the out-of-state offense to a “strike” offense in Washington. Where the elements of the foreign offense differ from or are broader than the Washington crime, the prior offense cannot be counted as a qualifying offense. Where the elements of Oregon’s first degree sodomy statute differ from Washington's second degree rape statute, did the trial court err in concluding the Oregon sodomy conviction was comparable to second degree rape in Washington? Assignments of Error No. 5, 6, and 7.

7. Cruel and unusual punishment is prohibited by both the federal and state constitutions. Did the imposition of a life sentence without the possibility of parole violate prohibitions against cruel and unusual punishment? Assignments of Error No. 5, 6, and 8.

8. A defendant possesses a Sixth Amendment right to a jury trial and a Fourteenth Amendment right to proof beyond a reasonable doubt on every fact that increases the sentence beyond that authorized by the facts as found by the jury. A finding that the defendant is a persistent offender, which increases the sentence from a standard range term to life

imprisonment without the possibility of parole, is made by the trial court at sentencing by a preponderance of the evidence. Did the trial court violate appellant's right to a jury trial when it found him to be a persistent offender, in the absence of a jury finding beyond a reasonable doubt that he had suffered two prior convictions that qualified as predicate offenses for a finding he was a persistent offender? Assignment of Error No. 5, 6, and 9.

D. STATEMENT OF THE CASE

1. Procedural history:

Tim Harrison was charged by information filed in Clark County Superior Court with first degree kidnapping, first degree robbery (domestic violence), and second degree assault (domestic violence), contrary to RCW 9A.36.021(1)(a). Clerk's Papers [CP] at 1. Harrison was arraigned in Clark County Superior Court on November 21, 2007. Supp. CP at _____. Sub Num. 7. 2RP A at 139. A readiness hearing was set for January 10, and the matter was set for jury trial on January 14, 2008. Supp. CP at _____. Sub Num. 7. 2RP A at 139. The court calculated that the trial date was set to occur 54 days into his speedy trial timeline of 60 days. 2RP A at 139.

On January 10, 2008, the fiftieth day after the commencement date, counsel Jason Bailes of the Vancouver public defender's office filed a motion to continue the trial date. Supp. CP at _____. Sub Num. 15. 2RP A at 139, 140. The request for continuance was made over Harrison's objection.

2RP A at 140. Harrison did not execute a waiver of speedy trial. RP (Feb. 6, 2008) at 448. The court granted the motion and entered a new Scheduling Order, resetting the trial date for February 11, 2008. 2RP A at 140. Supp. CP at _____. Sub. Num. 16. Both counsel signed the Scheduling Order. Supp. CP at _____. Sub Num. 16. The word "Refused" is written above the space designated for the defendant's signature. Supp. CP at _____. Sub Num. 16.

The matter came on for hearing on February 6, 2008, pursuant to the State's request for a continuance of the trial date of February 11, citing witness unavailability. RP (Feb. 6, 2008) at 444. New defense counsel Jeffrey Barrar objected to the State's request for continuance, noting that the matter had been continued one time previously at defense request over Harrison's objection. RP (Feb. 6, 2008) at 445. Defense counsel stated on February 6 that he had previously requested a continuance because the case "came in as a regular case and it became a third-strike case late in the game." RP (Feb. 6, 2008) at 445. The court granted the State's motion and noted that January 10 was the CrR 3.3 commencement date. The court did not have an available trial date until March. The court noted that on January 10 Judge Bennett set the trial date for February 11, and that the judge noted at that time that 50 days had elapsed since arraignment. The order was signed by both counsel. RP (Feb. 6, 2008) at 449. The State noted that a defendant has ten days from the date of the order continuing a trial date to file a written

objection and that no objection to the new court date had been filed. RP (Feb. 6, 2008) at 449. A Scheduling Order was entered February 6, signed by Harrison. Supp. CP at _____. Sub. Num. 8. Harrison was represented by Jeffery Barrar at the hearing, and the words “Jason Bailes ill” were written over Harrison’s signature on the Scheduling Order. Supp CP at _____. Sub Num. 8. Jeffrey Barrar noted that he could not do the trial on March 10 and stated that he would have to withdraw because he was the only person in his office qualified to do a POAA case, and that he already had a trial set to take place on March 10. RP (Feb. 6, 2008) at 450, 451. Judge Wulle found that January 10 was the commencement date, and set the trial date for March 10 despite counsel’s objection. RP (Feb. 6, 2008) at 450.

No motions were filed nor heard regarding either a CrR 3.5 or CrR 3.6 hearing. Defense counsel waived a CrR 3.5 motion the second day of trial. 2RP A at 248. Harrison was tried by a jury starting March 10, 2008, the Honorable Roger A. Bennett presiding.

The court heard the State’s pre-trial ER 404(b) motion on March 10. 1RP at 45-55. The State moved to introduce testimony regarding four alleged previous assaults by Harrison against Crots between 2006 and 2007. 1RP at 44. Crots testified in an offer of proof that she was strangled by Harrison until she was unconscious following an argument in the fall of 2006; that in the spring of 2007 he injured her pelvic bone by punching her; that prior to that incident he injured her lip; and that in the winter of 2007 he

injured her ribs by punching her. 1RP at 47-51. The State argued that the four incidents were admissible to show that Crots got into Harrison's car on May 22, 2007 because she was afraid for her life. 1RP at 52. Judge Bennett permitted the testimony and stated:

ER [404(b)] permits the use of prior so-called bad acts not to show propensity but rather for other relevant purposes, one of which could be to show the effect on the alleged victim here as to her state of mind.

Her state of mind is significant in a kidnapping case to show whether or not she, in fact, was in fear of the defendant. There—this is a classic situation of the State having to prove legitimate fear on her part, and the best way to do that is to show prior injuries.

The probative value is extremely high. The prejudice, the danger of undue prejudice, that is, being used for improper purposes such as propensity, does not greatly outweigh the probative value.

1RP at 55.

Judge Bennett stated that he would give a limiting instruction regarding the alleged prior assaults, if requested. 1RP at 55. The defense did not request a limiting instruction when Crots testified regarding the alleged incidents, however, and the instructions provided to the jury contained no limiting instruction. 1RP at 92; CP at 40-63.

On March 11, 2008, the second day of trial, Harrison asked that charges be dismissed for violation of speedy trial. 2RP A at 138-39. Judge Bennett reviewed the history of the case, noting that an objection to the new trial date had to have been filed within 10 days of when the matter was set

on February 6, and that no motion to that effect was filed, and that Harrison had therefore waived any objection. 2RP A at 141.

The jury found Harrison guilty of second degree assault (domestic violence) against Crots as charged in Count 3. CP at 67. The jury was unable to reach a verdict in Count 1 and acquitted Harrison of Count 2. CP at 65, 66. By special verdict, the jury found that Harrison and Crots were members of the same family or household. CP at 68.

At sentencing on April, 2008, the State alleged Harrison had two prior qualifying convictions that subjected him to life without the possibility of parole under the Persistent Offender Accountability Act [POAA], specifically: first degree sodomy in Multnomah County, Oregon, which the court found was comparable to Washington's statute for second degree rape; and attempted murder and first degree assault, which court found was comparable to second degree assault. The court found that these two latter Oregon counts merged. 4RP at 398; CP at 80.

The court sentenced Harrison to life without the possibility of parole under the POAA. 4RP at 425.

Timely notice of appeal was filed on April 24, 2008. CP at 93. This appeal follows.

2. Factual history:

Kristen Crots dated Tim Harrison for approximately one year. 1RP at 84. In May, 2007 she lived in an apartment in Vancouver, Washington

with Susan Carter, who is the mother of Harrison's daughter. 1RP at 84, 86. Crots stated that she worked as an "escort." 1RP at 85. At 3:00 a.m. on May 22, 2007, she received a telephone call at the apartment for her to perform an act of prostitution. 1RP at 88, 94. She did not meet with the person and did not perform the requested act of prostitution, because "[i]t was late," and she did not "want to." 1RP at 88. Harrison wanted them to drive back to Portland, Oregon, but she did not want to go and told him so. 1RP at 88. Crots said that Harrison was upset by this. 1RP at 89. She stated that Harrison grabbed her arm and pulled her down the stairs to the apartment parking lot. 1RP at 89, 91. She said that he hit her on the head, and then kicked her when she was on the ground. 1RP at 90. After that she got into the driver's seat of his car in order to drive to Portland with Harrison. 1RP at 94-95. She said that he hit her in the face after she got into the car, knocking off her glasses. 1RP at 95. She then tried to put the car in park and open the door to get out. 1RP at 95. She said that he got out of the car and then grabbed her neck with his arm and tried to pull her toward him. 1RP at 97. She got out of the car, and Harrison hit her. 1RP at 97, 98. She tried to get away and he chased after her and caught her. 1RP at 98. He then told her to get back into the car. 1RP at 98. She said that Harrison threw her around and pushed her against other cars, the building, and on the pavement. 1RP at 98. She got back into the car because he "stabbed me though my eyeball with his finger." 1RP at 100. She said that he went into

her pockets and took her cell phone, identification, \$81.00, and money she had in her purse. 1RP at 101, 102. She said that she was “head-butted” twice, injuring her forehead. 1RP at 112.

While in the car, she asked him to take her to the hospital but that he “didn’t want to.” 1RP at 103. She stated that she was “in and out of consciousness” and did not know what happened in “that hour after it happened.” 1RP at 104-05. She testified that she woke up in the car at Irvington School in Portland and told him to take her to hospital. 1RP at 105. She said that they “talked for a minute” and that he then drove her to Emanuel Hospital, but did not allow her to go inside. 1RP at 105, 106. He then drove her to Providence Portland Medical Center. 1RP at 106. She stated that she had previously been to both hospitals as a result of injuries from Harrison. 1RP at 106. She went into the Providence Medical Center. 1RP at 106, 107. Harrison did not go into the hospital. 1RP at 107.

Crots was admitted to Providence Medical Center at 6:13 a.m. 1RP at 67. At the hospital, medical personnel testified that Crots initially said that she had been in an altercation with another girl. 1RP at 67. Crots testified that she did not remember precisely what she told hospital staff, and that she told them that “somebody” assaulted her. 2RP A at 152, 153. She initially did not make a police report. 1RP at 108. She later made a statement to hospital staff naming Harrison as the person who assaulted her. 1RP at 69, 109.

Crots said that her left eye hurt and that four of her teeth almost went through her lip. 1RP at 109. She said that almost all of her front teeth and teeth on the side of her mouth are cracked, causing her pain. 1RP at 109-110. She stated that she was still receiving medical treatment for her eye and that she still suffers pain in the eye from the incident. 1RP at 111. She said that it took about three weeks until she was able to use her left eye sufficiently. 1RP at 110. She said her glasses were broken during the incident and she had to obtain a new pair. 1RP at 111.

Crots wrote a letter and gave it to Harrison's mother—Elease Harrison—saying that she got into an argument with Harrison and was angry with him, and that she lied to police about being forced into a car by Harrison, and that she “willingly and on [her] own accord got into the car with Timothy.” 1RP at 114, 2RP A at 156-57. She said that Harrison asked her to write the letter a couple weeks after the alleged incident. 1RP at 114, 115. Exhibit 46. She said that Harrison was incarcerated in Multnomah County [Oregon] Jail at the time she wrote the letter. 1RP at 115.

Crots stated that she had been assaulted on four previous occasions by Harrison. 1RP at 93-94.

After she was admitted to the hospital, Dr. Brian Trueworthy saw her for a follow up evaluation four days later; she said that she had continuing pain on the right side of her face, and dental pain. 1RP at 64. Jane Erickson, a social worker at Providence Hospital, testified that Crots told her

that the person who brought her to the emergency room had beaten her up because she refused to work in the “industry,” which Erickson took to mean that she refused to work as a prostitute. 1RP at 75. Crots testified that she worked as an escort, and that she did not work as a prostitute before she met Harrison. 2RP A at 186.

While Crots was in the hospital, Harrison called her room and she arranged for him to come to her hospital room. 2RP A at 196. She told him that she could not be released because of her medical condition, that she had to be released to an adult and that the person would have to come to the hospital and accept her release. 2RP A at 196, 2 RP B at 259. Police were in her room at the time of the conversation. 2RP A at 196, 245. Harrison arrived at the hospital and was taken into custody by police. 2RP A at 246. Vancouver police officer Brock Sorenson testified that after being given his warnings, Harrison said that he did not know how Crots was injured and that she got in a fight with some girls or that some girls jumped on her. 2RP B at 260. He said that Harrison stated that he did not know how Crots got to the hospital earlier that morning. 2RP B at 261.

Elise Harrison testified that she told Crots not to let anyone get her into prostitution. 2RP B at 263.

The defense rested without calling witnesses. 2RP B at 314, 324.

In closing, the prosecution said that “[b]ut one of the things that you can clearly look at here is that this isn’t something that she did

before. She'd never done this before until she started this relationship with this loving man, the man that even his mother went—had to go speak with his—with her to let her know, don't get into prostitution.” 2RP B at 328, 354.

E. ARGUMENT

1. THE TRIAL COURT DENIED HARRISON HIS RIGHT TO SPEEDY TRIAL UNDER CrR 3.3 WHEN IT GRANTED DEFENSE COUNSEL'S MOTION TO CONTINUE THE TRIAL DATE OVER APPELLANT'S OBJECTION.

A defendant who is detained in jail pending trial is entitled to be brought to trial within 60 days from arraignment. CrR 3.3 (b)(1)(i). Under CrR 3.3(h), “[a] criminal charge not brought to trial within the time period provided by this rule shall be dismissed with prejudice.” CrR 3.3(h). The purpose of CrR 3.3 is to prevent undue and oppressive incarceration prior to trial. *State v. Kingen*, 39 Wn.App. 124, 692 P.2d 215 (1984). While the trial court bears the responsibility for assuring a defendant's right to speedy trial under this rule, the decision whether or not to grant a continuance beyond the time required under CrR 3.3 lies within the sound discretion of the trial court and will only be overruled upon an abuse of that discretion. *State v. Carson*, 128 Wn.2d 805, 912 P.2d 1016 (1996).

Normally, allowing counsel time to prepare for trial is a valid basis for continuance. *State v. Campbell*, 103 Wn.2d 1, 691 P.2d 929 (1984); *State v.*

Williams, 104 Wn.App. 516, 523, 17 P.3d 648 (2001). However, both the statutory right to speedy trial and the constitutional right to effective assistance of counsel belong to the defendant, who has the right to waive either or both. See e.g., *State v. Michielli*, 132 Wn.2d 229, 937 P.2d 587 (1997) (state's mismanagement of case cannot force the defendant to choose between the "right" to speedy trial and the "right" to effective representation). While Washington cases don't normally speak in terms of a defendant "waiving" the right to effective assistance of counsel, this is precisely what a defendant does when he or she proceeds pro se in a criminal case. *State v. Breedlove*, 79 Wn.App. 101, 106, 900 P.2d 586 (1995). Therefore, the trial court's authority to grant a defense counsel's request for a continuance in contravention of the defendant's statutory right to speedy trial is only justified if the continuance is necessary to preserve the defendant's right to effective assistance.

Here, defense counsel Jeffrey Barrar stated that he asked for a continuance after he learned that the state alleged that Harrison should be sentenced as a persistent offender and receive life in prison. RP (Feb. 6, 2008 at 448-49. Despite this request, it is doubtful what substantive difference, if any, this made in the defense's preparation of the case. The defense did not utilize an investigator and called no witnesses. The defense made no pre-trial motion to suppress evidence and waived an opportunity for

a CrR 3.5 motion on the second day of trial. 2RP A at 248. The only unusual aspect of the case was the sentencing as a persistent offender and the resulting comparability of crimes evaluation conducted following Harrison's conviction. During that phase of the proceeding, Harrison was represented by yet another attorney, Gregg Schile. 4RP at 375.

The trial court erred in granting Harrison's counsel's motion for continuance on January 10 and erred by not ensuring that Harrison was brought to trial within 60 days of arraignment. Harrison was arraigned on the information on November 21, 2007, but not tried until March 10, 2008. During the three and one half months between arraignment and trial, the case was continued two times. The first was at the request of defense counsel, and made over the objection of Harrison. The court granted the continuance and set the case for trial on February 11. On February 6, 2008 the State requested a continuance over defense objection. Again the court granted the continuance, and reset the trial for March 10. The trial court abused its discretion by granting defense counsel's motion to continue the trial over his client's objection. The case, although involving a tremendous penalty if Harrison was convicted of any of the three counts, did not necessitate that the defense engage in more investigation or preparation than a non-POAA case. In fact, the preparation of the case should not have been significantly different than a case involving the possibly of a standard range sentence.

The only substantive difference for a POAA case arises at sentencing, and counsel would have additional time after the verdict in which to prepare for sentencing in the event that Harrison was convicted of a strike offense. Although the stakes for a POAA case are considerably higher than for a defendant facing a standard range sentence, the preparation for trial should not be different than a non-three strikes case.

The court abused its discretion because the continuance was not necessary to preserve Harrison's right to effective assistance of counsel. As a result, under CrR 3.3(h), this Court should dismiss the conviction with prejudice and find that the State is precluded from retrying Harrison on Count 1. CP at 65.

2. **THE FOUR PRIOR ALLEGED ACTS BY HARRISON, IN WHICH HE ALLEGEDLY ASSAULTED KRISTEN CROTS, WERE NOT ADMISSIBLE UNDER ER 404(b) AND PREJUDICED THE OUTCOME OF HARRISON'S TRIAL.**

Evidence of four alleged prior assaults by Harrison against Crots unfairly and inaccurately portrayed Harrison as a person with a propensity to commit assault against her. In a case where the jury had to decide between competing accounts by Crots, her prior statement to hospital staff, and her notarized letter stating that Harrison was not guilty of forcing her into the car and that she had lied to police, the testimony regarding the alleged assaults

was unfairly prejudicial and more probably than not affected the verdict.

a. The State's ER 404(b) offer of proof.

In a pre-trial ER 404(b) motion, Crots testified to four past incidents in which she alleged Harrison had assaulted her. She stated that he strangled her until she was unconscious in the fall of 2006; that he punched her, fracturing three of her ribs in the spring of 2007; that he split her lip; and that he punched her, injuring her pelvic bone in the spring of 2007. RP at 47-51. The trial court based its ER 404(b) ruling on this pre-trial proffer. RP at 55.

b. The trial court's ruling.

The trial court ruled that the incidents were admissible as relevant to Crots' state of mind to show whether or not she was in fear of Harrison. The court's ruling specifically applied to the kidnapping charge. 1RP at 55. Judge Bennett stated that Crots' "state of mind is significant to the kidnapping case to show whether or not she, in fact, was in fear of the defendant." 1RP at 55. The court also stated that the evidence was "extremely" highly probative. 1RP at 55.

With regard to the question of prejudice, the judge merely stated that the balance of unfair prejudice allowed admission of the evidence. 1RP at 55.

c. Propensity evidence is inadmissible.

Under ER 404(b), evidence of a defendant's prior crimes or prior bad acts will not be admissible if its ultimate effect is to merely encourage the jury to conclude that the defendant's past conduct shows a bad character or propensity to commit acts such as the crime charged. ER 404(b); *State v. Saltarelli*, 98 Wn.2d 358, 362, 655 P.2d 697 (1982). But such evidence may be admissible if it is offered, and is relevant and material, to prove other matters, including motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. ER 404(b).

In order to admit prior bad act evidence under ER 404(b), the trial court must identify the proper *non-propensity* purpose for which the evidence is offered, and determine if the evidence is relevant to prove an essential element of the crime. *State v. Lough*, 125 Wn.2d 847, 853, 889 P.2d 487 (1995). To avoid error, the trial court must identify the purpose and relevance of the evidence on the record. *State v. Jackson*, 102 Wn.2d 689, 693-94, 689 P.2d 76 (1984).

The trial court must then balance the probative value of the evidence against the prejudicial effect, also on the record. *State v. Lough*, 125 Wn.2d at 853. In order to be admissible, even if it is relevant to a non-propensity issue, the evidence must carry probative value that outweighs its prejudicial effect. *State v. Hernandez*, 99 Wn. App. 312, 321-22, 997 P.2d 923 (1999), *review denied*, 140 Wn.2d 1015 (2000).

- d. The evidence of prior assaults only portrayed Harrison as violent and had no relevance to a material, non-propensity issue.**

Before any evidence of prior crimes, wrongs, or acts can be admitted at a criminal trial, the evidence must be shown to be “logically relevant to a material issue before the jury.” *State v. Robtoy*, 98 Wn.2d 30, 42, 653 P.2d 284 (1982); *State v. Goebel*, 40 Wn.2d 18, 21, 240 P.2d 251 (1952).

In *State v. Satarelli*, the Washington Supreme Court reaffirmed that the material issue in question must not be one grounded in propensity reasoning. The *Salterelli* Court stated:

In no case, however, regardless of its relevance or probativeness, may the evidence be admitted to prove the character of the accused in order to show that he acted in conformity therewith.

Salterelli, at 362.

In the present case, the State failed to identify, in conjunction with Counts 2 and 3, how the prior assaults were “logically relevant to a material issue before the jury.” *State v. Robtoy*, 98 Wn.2d at 42. Without such relevance, the evidence only suggested to the jurors that Harrison had a propensity to commit violent acts against Crots, which makes the evidence inadmissible as ER 404(b) character evidence. *Salterelli*, at 362.

- e. Even if relevant to a non-propensity issue, any minimal probative value of the**

evidence did not outweigh its unfair prejudice.

In order to be admissible, even if it is relevant to a non-propensity issue, the probative value of prior bad act evidence must outweigh its prejudicial effect. *State v. Hernandez*, 99 Wn. App. at 321-22. Therefore, where admission of evidence of prior bad acts is unduly prejudicial, the minute peg of relevancy is said to be obscured by the dirty linen hung upon it. See Stone, *The Rule of Exclusion of Similar Fact Evidence: England*, 46 Harv.L.Rev. 954, 983 (1933).

The precise test is that, when balanced, the probative value of prior bad act evidence must substantially outweigh its inherently prejudicial propensity effect. *State v. Brown*, 132 Wn.2d 529, 570, 940 P.2d 546 (1997) (The trial court properly weighed the probative value of the testimony against its prejudicial effect and concluded its probative value substantially outweighs its prejudicial effect.). In addition, the trial court must conduct the probability-prejudice balancing test on the record. *State v. Jackson*, 102 Wn.2d at 693-94.

The ER 404(b) rule, requiring exclusion if probative value does not outweigh prejudice, is mandatory. *United States v. Preston*, 608 F.2d 626, *United States v. Preston*, 608 F.2d 626, 639 n. 16 (5th Cir. 1979) (citing 22 Wright & Graham, *Federal Practice and Procedure: Evidence* ‘ ‘ 5224, at 323-24 & n. 9), *cert. denied*, 446 U.S. 940, 100 S. Ct. 2162, 64 L.Ed.2d 794

(1980). In marginal cases of ER 404(b) admissibility, the prior bad act evidence should be excluded. *State v. Smith*, 106 Wn.2d 772, 776, 725 P.2d 951 (1986).

Here, the trial court abused its discretion by failing to carefully specify exactly how the prior act evidence was relevant to the charges of second degree assault (Count 3) and first degree robbery (Count 2); how it carried substantial probative value to show material issues; and also by failing to correctly weigh any probative value against the unfair prejudice regarding Counts 2 and 3. The court engaged in short, cursory weighing of the probative value, but only in the context of the kidnapping charge. 1RP at 55. The court utterly failed to address the prejudicial affect of the testimony regarding the other two counts. The danger of prejudice is undeniable regarding the assault charge—where it is clearly inadmissible propensity testimony. Despite this, the court did not weigh the prejudicial affect of the evidence as it pertained to that charge.

For all of these reasons, the evidence of the prior assaults was unduly prejudicial under the balancing portion of the ER 404(b) test. Even merely doubtful cases of prejudicial ER 404(b) evidence should be resolved in favor of the defendant. *State v. Smith*, 106 Wn.2d at 776.

f. The error was not harmless.

Evidentiary errors under ER 404(b) are reversible if, within reasonable probabilities the outcome of the trial would have differed had the

error not occurred. *State v. Jackson*, 102 Wn.2d at 695.

Here, the evidence of an assault, robbery, and kidnapping by Harrison was sharply disputed. Crots acknowledged that she told hospital staff that she had been assaulted by “somebody” but initially did not alleged that Harrison assaulted her. She testified that she wrote a notarized statement that she lied and that Harrison did not force her to get into the car.

1RP at 113. The jury clearly was not overly impressed with Crots’ testimony; Harrison was acquitted of robbery and the jury was unable to reach a verdict on the charge of kidnapping. The only count the jury found that Harrison committed was second degree assault—the charge to which the propensity evidence was most closely connected.² Based on the foregoing, this Court should reverse the assault conviction.

3. **DEFENSE COUNSEL’S UNPROFESSIONAL
ERRORS DENIED HARRISON
CONSTITUTIONALLY EFFECTIVE
COUNSEL.**

The Washington State and United States Constitutions guarantee a criminal defendant the right to effective assistance of counsel Const. Art. 1, Sec. 22; U.S. Const. Amend. VI. The test for ineffective assistance of counsel has two parts. One, it must be shown that the defense counsel’s conduct was deficient, i.e., that it fell below an objective standard of

² The court’s error was compounded by defense counsel’s failure to request an instruction to limit the consideration of the testimony to the kidnapping charge only, discussed *infra*.

reasonableness. Legitimate strategic or tactical reasons of trial counsel do not support ineffective assistance claims. *State v. McFarland*, 127 Wn.2d 322, 334-38, 899 P.2d 1251 (1995). Two, it must be shown that such conduct prejudiced the defendant, i.e., that there is a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have been different. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (adopting rest from *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). Ineffective assistance of counsel claims are reviewed de novo. *State v. S.M.*, 100 Wn. App. 401, 409, 996 P.2d 1111 (2000). There is a presumption that counsel's assistance was effective. *State v. Sardinia*, 42 Wn. App. 533, 539, 713 P.2d 122, *review denied*, 105 Wn.2d 1013 (1986).

Here, trial counsel was ineffective in three ways. First, Jeffrey Barrar failed to object to the prejudicial impact of ER 404(b) evidence, specifically, the testimony implying that Harrison was a pimp and that he induced Crots to become a prostitute. Second, counsel failed to request a limiting instruction when the court admitted Crots' testimony about four alleged prior assaults by Harrison against her. Third, counsel failed to preserve Harrison's right to speedy trial. Reversal is required because there is a reasonable probability these errors affected the verdict.

a. Counsel Was Ineffective In Allowing The Jury To Consider Improper Propensity Evidence.

i. The Jury Heard Evidence Implying That Harrison seduced Crots into prostitution.

On direct examination, Crots stated that she was not engaged in prostitution until she met Harrison. 2RP A at 186. Harrison’s mother testified that she told Crots not to get involved in prostitution. 2RP B at 263.

In closing, the prosecutor argued:

Defense counsel wanted to really focus on the fact that, you know, something like this could possibly happen to her, because look at her, she’s a prostitute. She’s just a hooker.

Well, we talked about that already. And we’re not in heaven, so none of the witnesses are gonna be angels. But one of the things that you can clearly look at here is that this isn’t something that she did before. She’d never done this before until she started this relationship with this loving man, the man that even his mother went—had to go speak with his—with her to let her know, Don’t get into prostitution.

2RP B at 328.

ii. The Jury Must Not Convict On The Basis Of A Defendant’s Propensity To Commit Crime.

“The purpose of the rules of evidence is to secure fairness and to ensure that truth is justly determined.” *State v. Wade*, 98 Wn. App. 328,

333, 989 P.2d 576 (1999). To that end, ER 404(b) prohibits the admission of evidence designed simply to prove bad character. *State v. Lough*, 125 Wn.2d 847, 859, 889 P.2d 487 (1995). “ER 404(b) forbids such inference because it depends on the defendant’s propensity to commit a certain crime.” *State v. Bacotgarcia*, 59 Wn. App. 815, 822, 801, P.2d 993 (1990). Evidence of a crime that is similar or identical to the one charged can be extremely prejudicial because it is likely jurors will conclude the defendant had a propensity for committing that type of crime. *State v. Condon*, 72 Wn. App. 638, 649, 865 P.2d 521 (1993). Here, the State clearly implied that Harrison was a pimp and that he induced Crots into prostitution.

iii. Counsel Was Ineffective In Failing To Request A Limiting Instruction For ER 404(b) Evidence that Harrison allegedly assaulted Crots in the past.

The state introduced evidence that Harrison allegedly assaulted Crots four times since 2006. The court ruled that the ER 404(b) evidence of the alleged assaults was admissible for the purpose of showing state of mind, but limited his analysis to the kidnapping charge. 1RP at 55. The court did not evaluate whether the evidence may have been admissible for a permissible purpose as to the other two counts, particularly the second degree assault charge. The jury was unrestrained to use the evidence of the

alleged assaults as Harrison's propensity to commit assaults against Crots. No legitimate tactic justified defense counsel's failure to request a limiting instruction for this evidence.

Evidence that Harrison assaulted Crots may have been admissible to show her state of mind on the day in question, but regardless of admissibility, in no case may evidence of other bad acts "be admitted to prove the character of the accused in order to show that he acted in conformity therewith." *Saltarelli*, 98 Wn.2d at 362; see *State v. Holmes*, 43 Wn. App. 397, 400, 717 P.2d 766 (1986) ("once a thief always a thief" is not a valid basis to admit evidence). "A juror's natural inclination is to reason that having previously committed a crime, the accused is likely to have reoffended." *Bacotgarcia*, 59 Wn. App. at 822.

For this reason, when ER 404(b) evidence is admitted, an explanation should be made to the jury of the purpose for which it is admitted, and the court should give a cautionary instruction that it is to be considered for no other purpose. *Saltarelli*, 98 Wn.2d at 362. A defendant has the right to have a limiting instruction to minimize the damaging effect of properly admitted evidence by explaining the limited purpose of that evidence to the jury. *State v. Donald*, 68 Wn. App. 543, 547, 844 P.2d 447 (1993). Indeed, our Supreme Court reiterated last year, "a limiting

instruction *must* be given to the jury” if evidence of other crimes, wrongs, or acts is admitted. *State v. Foxhoven*, 161 Wn.2d 168, 175, 163 P.3d 786 (2007) (emphasis added); *see also* ER 105 (“the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly”).

Counsel must nevertheless request the instruction and the failure to do so generally waives the error. *State v. DeVincentis*, 150 Wn.2d 11, 23 n.3, 74 P.3d 119 (2003); *State v. Newbern*, 95 Wn. App. 277, 295-96, 975 P.2d 1041 (1999). In the present case, counsel did not request an instruction, but his failure to do so may still be raised on appeal as a constitutional ineffective assistance claim. *See State v. Nichols*, 161 Wn.2d 1, 9, 162 P.3d 1122 (2007) (“A claim of ineffective assistance of counsel may be considered for the first time on appeal as an issue of constitutional magnitude.”).

Counsel should have requested a limiting instruction that informed the jury it could only consider Harrison’s prior alleged assaults against Crots for the purpose of assessing Crots’ state of mind, and only pertaining to the kidnapping charge. Counsel was deficient for failing to propose a limiting instruction that would have prevented the jury from considering the alleged bad acts as evidence of his propensity to commit another crime in assaulting Crots.

There was no legitimate reason not to propose a limiting instruction given the highly prejudicial nature of this evidence. Harrison was charged, *inter alia*, with assault against Crots. Crots' testimony was that Harrison had assaulted her on four previous occasions as recently as the spring of 2007. The jury was not swayed by her testimony that Harrison committed robbery, and was unable to reach a decision regarding the kidnapping charge, but the jurors were certainly persuaded that he assaulted her. Allowing the jury to convict Harrison on the basis of these assaults—and to conclude that he had a propensity to assault Crots—sealed his fate and almost guaranteed a conviction for assault in a case where the jury otherwise found Crots' testimony less than compelling by dint of the acquittal and hung jury.

Under certain circumstances, courts have held lack of request for a limiting instruction may be legitimate trial strategy because such an instruction would have reemphasized damaging evidence to the jury. *See e.g., State v. Barragan*, 102 Wn. App. 754, 762, 9 P.3d 942 (2000) (failure to propose a limiting instruction for the proper use of ER 404(b) evidence of prior fights in prison dorms was a tactical decision not to reemphasize damaging evidence).

The “reemphasis” rationale is inapplicable here. Evidence that

Harrison assaulted Crots was not of a fleeting nature; the prosecutor hammered the point home in direct examination of Crots. Such testimony must have resonated with jurors as they attempted to understand the dynamics of the relationship between Harrison and Crots. This is not a case where a limiting instruction raised the specter of “reminding” the jury of unimportant and briefly referenced evidence. This was evidence that he repeatedly assaulted her; it was coupled with testimony that he induced her into prostitution. There was no legitimate reason not to request a limiting instruction given the highly prejudicial nature of this character evidence.

The dispositive question is whether the jury used this evidence for an improper purpose in the absence of a limiting instruction. There is no reason to believe the jury did not consider Harrison’s prior bad acts as evidence of his propensity to commit assault against Crots. The jury is naturally inclined to treat evidence of other bad acts in this manner. *Bacotgarcia*, 59 Wn. App. at 822. “[A]bsent a request for a limiting instruction, evidence admitted as relevant for one purpose is deemed relevant for others.” *State v. Myers*, 133 Wn.2d 26, 36, 941 P.2d 1102 (1997). Although propensity evidence is relevant, the risk that a jury uncertain of guilt will convict anyway because a bad person deserves punishment “creates a prejudicial effect that outweighs ordinary relevance.” *Old Chief v. United States*, 519 U.S. 172, 181, 117 S.

Ct. 644, 136 L. Ed. 2d 574 (1997) (citation omitted).

In *Cook*, evidence of prior violence against the victim in an assault case required reversal because the limiting instruction was inadequate. *Cook*, 131 Wn. App. at 854. The defective instruction informed the jury that it could consider the prior abuse to assess the victim's credibility but failed to eliminate the possibility that the jury would consider the evidence for improper propensity purposes. *Id.*, at 847. In the absence of proper limiting instruction, the jury was free to focus on the defendant's prior abuse and assume "because he did it before, he did it now." *Id.*, at 853.

Precisely the same danger presents itself here. Defense counsel was deficient for failing to ensure the trial court gave a proper limiting instruction that would have prevented the jury from considering Harrison's bad acts as evidence of his propensity to commit crime.

The outcome of this case depended upon the credibility of the parties because Harrison's defense was that he did not assault Crots. In the absence of a limiting instruction, there is a reasonable probability ER 404(b) evidence materially affected the outcome by confirming Harrison was the type of person who would assault Crots. Counsel's failing was of major significance and undermines confidence in the outcome of this case. Reversal of the conviction verdict is required.

b. Counsel Was Ineffective In Failing to preserve speedy trial violation.

As noted in Section 1, *supra*, a defendant detained in jail shall presumptively be brought to trial within 60 days unless there is an allowable excluded period. CrR 3.3 (b)(1)(i) & (b)(5). The 60-day window commences with arraignment. CrR 3.3(c)(1). Harrison was arraigned in custody on the information on November 21, 2007, giving the court until January 20 for trial. The court set a January 14 trial date. On January 10, defense counsel moved to have the trial date continued because the case was a three strikes case. The court continued the date over Harrison's objection to February 11.

On February 6 the State moved to have the trial date continued due to the unavailability of a doctor who treated Crots whom the State intended to call as a witness. 5RP (Feb. 6, 2008) at 444. Over defense counsel's objection, the court reset the trial to March 10. The record is devoid of any need to continue the trial to any date outside of the original 60-day January 20 window. Objections to the resetting of a trial date must be made within 10 days of receiving notice of the new date or the right to challenge the new date is lost. CrR 3.5(d)(3). Defense counsel should have respected Harrison's request to be tried within 60 days and filed an objection to the February 11 trial date within the 10 days required by the rule. Had defense

counsel done so, Harrison's right to object to the trial date would have been preserved and he would likely have been successful on challenging his delayed trial date, as discussed *supra*, and won a dismissal with prejudice. CrR 3.3(h). Defense counsel's failure to do so fell below the standard required by effective counsel.

4. **REVERSAL IS REQUIRED BECAUSE THERE IS A REASONABLE PROBABILITY THAT THE COMBINED EFFECT OF MULTIPLE ERRORS AFFECTED THE VERDICT.**

Every criminal defendant has the constitutional due process right to a fair trial under Article 1, § 3 of the Washington Constitution and the Fifth and Fourteenth Amendment to the United States Constitution. *State v. Boyd*, 160 Wn.2d 424, 434, 158 P.3d 54 (2007); *State v. Braun*, 82 Wn.2d 157, 166, 509 P.2d 742 (1973). Under the cumulative error doctrine, a defendant is entitled to a new trial when it is reasonably probable that errors, even though individually not reversible errors, cumulatively produce an unfair trial by affecting the outcome. *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000); *State v. Johnson*, 90 Wn. App. 54, 74, 950 P.2d 981 (1998). Even where some errors are not properly preserved for appeal, the court retains the discretion to examine them if their cumulative effect denies the defendant a fair trial. *State v. Alexander*, 64 Wn. App. 147, 150-51, 822 P.2d 1250

P.2d 1250 (1992). In addition, the failure to preserve errors can constitute ineffective assistance of counsel and should be taken into account in determining whether the defendant received an unfair trial. *State v. Ermert*, 94 Wn.2d 839, 848, 621 P.2d 121 (1980).

As discussed above, an accumulation of errors affected the outcome of Harrison's trial including but not limited to defense counsel's ineffectiveness in failing to prevent admission of ER 404(b) evidence and in failing request a limiting instruction for ER 404(b) evidence. The combined effect of these errors requires reversal of the conviction.

5. **THE TRIAL COURT ERRED BY COUNTING AS A QUALIFYING OFFENSE A PRIOR OREGON FIRST DEGREE SODOMY CONVICTION WHERE THE STATE FAILED TO PROVE THE CRIME WAS COMPARABLE TO A CRIME IN WASHINGTON AND WHERE OREGON DOES NOT REQUIRE A UNANIMOUS JURY VERDICT.**

Where the State alleges a defendant's criminal history contains out-of-state felony convictions, the State bears the burden of proving the existence and comparability of those convictions. RCW 9.94A.525(3);³ *State v. Ford*, 137 Wn.2d 472, 480, 973 P.2d 452 (1999). To determine whether a foreign conviction is comparable to a Washington offense, the

³ That section provides in relevant part, "Out-of-state convictions for offenses shall be

court must compare the elements of the out-of-state offense with the elements of potentially comparable Washington crimes. *Ford*, 137 Wn.2d at 479 (citing *State v. Morley*, 134 Wn.2d 588, 606, 952 P.2d 167 (1998)). A prior out-of-state conviction may not be used to increase an offender score unless the State proves the conviction would be a felony under Washington law. *State v. Cabrera*, 73 Wn. App. 165, 168, 868 P.2d 179 (1994). The goal under the SRA is to match the out-of-state crime to the comparable Washington crime and “to treat a person convicted outside the state as if he or she had been convicted in Washington.” *State v. Berry*, 141 Wn.2d 121, 130-31, 5 P.3d 658 (2000) (citing *State v. Cameron*, 80 Wn. App. 374, 378, 909 P.2d 309 (1996)).

a. The Prior Oregon Sodomy Conviction Was Not Comparable to a Crime in Washington.

Here, the State alleged that Harrison’s prior conviction for first degree sodomy in Oregon was comparable to Washington’s second degree rape statute. Second degree rape is defined in Washington as follows:

- (1) A person is guilty of rape in the second degree when, under circumstances not constituting rape in the first degree, the person engages in sexual intercourse with another person:
 - (a) By forcible compulsion;

classified according to the comparable offense definitions and sentences provided by Washington law.”

- (b) When the victim is incapable of consent by reason of being physically helpless or mentally incapacitated; or
- (c) When the victim is developmentally disabled and the perpetrator is a person who is not married to the victim and who has supervisory authority over the victim.

RCW 9A.44.050.

In contrast, the Oregon Revised Code defines sodomy in the first degree as follows:

(1) A person who engages in deviate sexual intercourse with another person or causes another to engage in deviate sexual intercourse commits the crime of sodomy in the first degree if:

(a) The victim is subjected to forcible compulsion by the actor;

(b) The victim is under 12 years of age;

(c) The victim is under 16 years of age and is the actor's brother or sister, of the whole or half blood, the son or daughter of the actor or the son or daughter of the actor's spouse; or

(d) The victim is incapable of consent by reason of mental defect, mental incapacitation or physical helplessness.

(2) Sodomy in the first degree is a Class A felony.

ORS 163.365.

Mentally defective was defined as “a mental disease or defect that renders the person incapable of appraising the nature of the conduct of the person.” ORS 163.305(3).

Washington defines “mental incapacity” as “that condition existing at the time of the offense which *prevents a person from understanding the nature or the consequences of the act of sexual intercourse...*” RCW 9A.44.010(4) (emphasis added).

Oregon’s definition is thus different from, and broader than, Washington’s definition. Under Washington’s statutory formulation, if the victim understands the nature and consequences of sexual intercourse, even if she is incapable of appraising her own conduct, the defendant would not be guilty. RCW 9A.44.050 (1989). Under the Oregon law, the converse is true: one of the ways that the offense can be committed is if the victim understood the nature and consequences of sexual intercourse, but engaged in conduct that she was incapable of appraising, the defendant would be guilty. ORS 163.305(3).

Division __ of this Court recently explained that emphasizing statutory formulations in conducting a comparability analysis safeguards a criminal defendant’s right to have each essential element of liability proven beyond a reasonable doubt. *State v. Bunting*, 115 Wn. App. 135, 140, 61 P.3d 375 (2003). The Court reasoned,

If the statutory formulation of the out-of-state crime did not contain one or more of the elements of the Washington crime on the date of the offense, it means that the out-of-state court

or jury did not have to find each fact that must be found to convict the defendant of the essential elements of liability under the Washington counterpart crime.

115 Wn. App. at 140-41. Thus,

[w]hile it may be necessary to look into the record of a foreign conviction to determine its comparability to a Washington offense, *the elements of the charged crime must remain in the cornerstone of the comparison.* Facts or allegations contained in the record, if not directly related to the elements of the charged crime, may not have been sufficiently proven in the trial.

Id., at 141 (citing *State v. Morley*, 134 Wn.2d at 606 (emphasis added)).

The *Morley* Court explained, “*if the elements of a foreign crime are broader than a comparable Washington crime, this court can rely on other court documents underlying the foreign conviction to determine whether the defendant’s conduct would have violated a Washington statute.*” 134 Wn.2d at 610-11 (emphasis added). The Oregon statute fails to address whether Harrison’s conduct would have satisfied Washington’s statute.

b. Harrison’s Persistent Offender Sentence Must Be Reversed.

Because the Oregon first degree sodomy conviction is not comparable to second-degree rape in Washington, Harrison is entitled to reversal of his persistent offender sentence. At the resentencing hearing, the

State will be estopped from raising any new arguments in support of its comparability analysis:

Where the defendant raises a specific objection and “the disputed issues have been fully argued to the sentencing court, we ... hold the State to the existing record, excise the unlawful portion of the sentence, and remand for resentencing without allowing further evidence to be adduced.”

State v. Lopez, 147 Wn.2d 515, 520-21, 55 P.3d 609 (2002) (citing *Ford*, 137 Wn.2d at 485). Because the three strikes sentence is incorrect, Harrison’s criminal history must be recalculated on remand.

c. The Persistent Offender Sentence Must Be Reversed Because the Oregon Constitution Does Not Require a Unanimous Jury Verdict.

Washington’s constitution requires a unanimous 12-person verdict in a criminal case, directing that the right “shall remain inviolate...” Const. art. 1, § 21. Oregon’s constitution, on the other hand, permits criminal convictions where only 10 out of 12 jurors agree the defendant is guilty. Oregon Const. art. 1 § 11. Under Washington’s constitution, therefore, the Oregon conviction is invalid.

In *State v. Gimarelli*, this Court rejected the identical argument advanced here. 105 Wn. App. 370, 377-79, 20 P.3d 430 (2001), *review denied*, 144 Wn.2d 1014 (2001). This Court held that under the Full Faith

and Credit Clause of the federal constitution the conviction was valid because Washington is required to give full faith and credit to a judgment from another state unless the foreign court lacked jurisdiction or the conviction is constitutionally invalid. *Id.*, at 377-78.

The *Gimarelli* decision is incorrect. The issue presented here is not the validity of the *judgment* but whether, under Washington's constitution, the prior conviction can be considered a qualifying offense for purposes of POAA. This conclusion is borne out by the Washington Supreme Court's reasoning in *Berry*, 141 Wn.2d at 128 (rejecting challenge to inclusion of stayed out-of-state conviction and reasoning, "[t]here is no claim... that the California court did not have jurisdiction or committed constitutional error.") Here, in contrast, there is "constitutional error", because Oregon's constitution does not require the right to a 12-person verdict remain "inviolate." Harrison's persistent offender sentence must be reversed.

6. HARRISON'S LIFE SENTENCE VIOLATES HIS CONSTITUTIONAL RIGHT AGAINST CRUEL AND UNUSUAL PUNISHMENT UNDER THE UNITED STATES AND WASHINGTON CONSTITUTIONS.

a. The Washington and United States Constitutions bar Punishments Which are Cruel and Unusual.

The Eight Amendment to the United States Constitution bars cruel and

unusual punishments. Similarly, article 1, § 14 of the Washington Constitution prohibits cruel punishment.⁴ The state constitution provision, moreover, provides greater protection than its federal counterpart regarding cruel punishment. *State v. Fain*, 94 Wn.2d 387, 392, 617 P.2d 720 (1980).

**b. Application of a Proportionality Review
Compels the Conclusion the Life Sentence
is Unconstitutionally Cruel.**

In *State v. Thorne*, the Washington Supreme Court upheld the POAA under an Eighth Amendment and article 1, § 14 challenge. *Thorne*, 129 Wn.2d 736, 776 921 P.2d 514 (1996). But the Court recognized that its decision in *Thorne* did not end the inquiry. *Thorne*, 129 Wn. 2d at 773 n.11. The *Thorne* Court affirmed the sentence of life imprisonment without the possibility of parole under the POAA, finding it not grossly disproportionate. *Id.*, at 776. In so doing, the Court applied the four factors enunciated in *Fain, supra*. In Harrison’s case, application of the *Fain* factors results in a finding the sentence is unconstitutionally cruel.

The four factors adopted in *Fain* for analyzing a claim of *disproportionate* sentences as cruel punishment are: “(1) the nature of the offense; (2) the legislative purpose behind the habitual criminal statute; (3) the punishment defendant would have received in other jurisdictions for the

⁴ In contrast to the Eight Amendment, which prohibits “cruel and unusual punishment,” Article 1, § 14 provides, “[e]xcessive bail shall not be required, excessive fines imposed,

same offense; and (4) the punishment meted out for other offenses in the same jurisdiction.” *Fain*, 94 Wn.2d at 397.

The second *Fain* factor requires the Court to examine the Act’s legislative purposes. These include deterring future offenses, segregating dangerous individuals from the community, and restoring public trust in the criminal justice system. RCW 9.94.555(2); *State v. Rivers*, 129 Wn.2d 697, 712-13, 921 P.2d 495 (1996). None of these purposes is advanced by sentencing Harrison to life imprisonment in a penal institution.

It is clear that considering the nature of the current offense, a sentence of life without the possibility of release is cruel and unusual punishment for conviction of second degree assault. Because assault in the second degree is a Class B felony, the highest possible sentence for conviction is 120 months, with up to 40 months good time credit. The 120-month statutory maximum sentence reflects a legislative finding that no second degree assault, in and of itself, should be punished by more than 10 years in prison. Moreover, second degree assault has a seriousness level of IV. RCW 9.94A.515. The highest standard range sentence that could be imposed, with an offender score of 9, is 63 to 84 months. This represents a further legislative finding that no more than 84 months should be imposed for a conviction of second degree assault, absent an exceptional sentence.

nor cruel punishment inflicted...”

Even as a third strike offense, a sentence of life is cruel and unusual punishment. No matter how a second degree assault is aggravated by the fact that it is repetitive criminal conduct, a life sentence is cruel punishment.

The final *Fain* factor is the punishment imposed for other offenses in this jurisdiction. Other than the POAA, in Washington, only one offense guarantees life without the possibility of parole: aggravated first-degree murder. RCW 10.95.020; RCW 9.94A.515. This factor as well supports a finding of cruel punishment.

7. THE TRIAL COURT’S DETERMINATION BY A PREPONDERANCE OF THE EVIDENCE THAT HARRISON HAD SUFFERED TWO QUALIFYING PRIOR CONVICTIONS AND WAS THUS A PERSISTENT OFFENDER VIOLATED HIS CONSTITUTIONALLY PROTECTED RIGHT TO A JURY TRIAL.

- a. A defendant has a constitutionally protected right to a jury determination of every element of the charged crime.**

The Sixth Amendment guarantees a criminal defendant the right to a trial by jury. *Blakely v. Washington*, 542 U.S. 296, 302, 124 S.Ct. 2531, 159 L.Ed.2d 556 (2002); *Apprendi v. New Jersey*, 530 U.S. 466, 476-77, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). This right includes the right to “a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.” *Id.* If the State makes an increase in a defendant’s authorized punishment contingent on the finding of a fact, that

fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt. *Apprendi*, 530 U.S. at 482-83, *see also id.*, at 501 (Thomas J., concurring) (“[I]f the legislature defines some core crime and then provides for increasing punishment of that crime upon a finding of some aggravating fact[,]...the core crime and the aggravating fact together constitute an aggravated crime, just as much as grand larceny is an aggravated form of petit larceny. The aggravating fact is an element of the aggravated crime.”) *See also Blakely*, 542 U.S. at 303-04; *Ring*, 536 U.S. at 602 (“A defendant may not be ‘expose[d]...to a penalty *exceeding* the maximum he would receive if punished according to the facts as reflected in the jury verdict alone.”, *quoting Apprendi*, 530 U. S. at 482-83 (emphasis in original).

Whether the State calls the fact which increases the sentence a “sentencing factor” and not an element is of no moment:

Our decision in *Apprendi* makes clear that “[a]ny possible distinction between an ‘element’ of a felony offense and a ‘sentencing factor’ was unknown to the practice of criminal indictment, trial by jury, and judgment by court as it existed during the years surrounding our Nation’s founding.” 530 U.S., at 478, 120 S. Ct. 2348, 147 L. Ed. 2d 435.

Washington v. Recuenco, 548 U.S. 212, 126 S. Ct. 2546, 2552, 165 L.Ed.2d 466 (2006).

Here, the prior Oregon convictions found by the court which elevated

Harrison to the status of a persistent offender were elements of the offense which were required to be proved beyond a reasonable doubt and found by a jury.

b. Whether Harrison had prior convictions they constituted qualifying or “strike” crimes was required to be determined by the jury beyond a reasonable doubt.

RCW 9.94A.570 states: “Notwithstanding the statutory maximum sentence or any other provision of this chapter, a persistent offender shall be sentenced to a term of total confinement for life without the possibility of parole[.] Without the persistent offender provision of the SRA, Harrison would have been sentenced on second degree assault with an offender score of 5, and his standard range would have been 22 to 29 months. RCW 9A.36.021.

The persistent offender allegation, based upon the State’s contention that Harrison has two qualifying prior convictions, elevated his punishment to life imprisonment without the possibility of parole. RCW 9.94A.570 recognizes that the statutory maximum no longer applies for persistent offenders and they must be sentenced to life imprisonment once the two qualifying prior convictions are found.

Thus, Harrison’s two qualifying prior convictions—as asserted by

the State—were facts that increased the maximum penalty for the crimes charges. As such, the jury was required to find the existence of the prior convictions beyond a reasonable doubt. *Apprendi*, 530 U.S. at 482-83.

It may be argued the “fact” that increased Harrison’s sentence from a standard range to a persistent offender was the fact of a prior conviction, which was excluded in *Apprendi*. *Apprendi*, 530 U.S. at 489. This argument overlooks two important factors.

First, the “exception” for prior convictions in *Apprendi* was taken from the Court’s decision in *Almendarez-Torrez v. United States*, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998). Yet, the Court has retrenched from this position. In *Apprendi*, the Court criticized the “exception” for prior convictions, noting that it was arguable that *Almendarez-Torres* was incorrectly decided. *Apprendi*, 530 U.S. at 489.

Even though it is arguable that *Almendarez-Torres* was incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were contested, *Apprendi* does not contest the decision’s validity and we need not revisit it for the purposes of our decision today to treat the case as a narrow exception to the general rule we recalled at the outset. *Id.*

The Court also noted that *Almendarez-Torres* represented “at best an exceptional departure from the historic practice we have described.” *Id.* at

487. Further, the Court noted one of the reasons for the decision in *Almendarez-Torres* was the fact the defendant had pleaded guilty and admitted the prior convictions, thus mitigating “the due process and Sixth Amendment concerns otherwise implicated in allowing a judge to determine a ‘fact’ increasing punishment beyond the maximum of the statutory range.” *Id.* at 488. Finally, in *Ring*, the Court expanded *Apprendi* so that it applied to any fact which increases the punishment beyond that authorized by the jury verdict, thus seemingly overruling *Almendarez-Torres sub silentio*. *Ring*, 536 U.S. at 607-09.

But more importantly in this case, it is not the simple “fact” of the two prior convictions that increases the punishment, but it extends beyond that to specific “types” of prior convictions. In order to qualify as a persistent offender it is not enough to simply have suffered two prior convictions, but the defendant must have suffered two prior convictions for felonies defined as “most serious offenses.” RCW 9.94A.030 (29), (31). Thus it is not simply the fact of the prior conviction. As a consequence, the “exception” for the fact of prior convictions enumerated in *Almendarez-Torres* does not apply.

- c. **Harrison's sentence as a persistent offender must be reversed and remanded for Resentencing within the standard range.**

The remedy for a court’s imposition of a sentence which exceeds the jury

verdict is reversal of the sentence and remand for resentencing to a term authorized by the jury's verdict. *Blakely*, 542 U.S. at 303-04; *Apprendi*, 530 U.S. at 482-83.

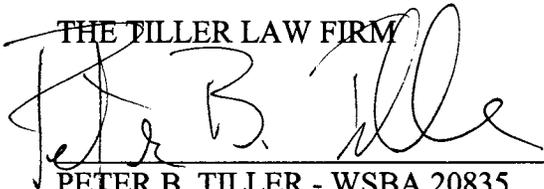
Here, the jury's verdict following trial authorized a sentence for second degree assault. Since the jury was not required to find beyond a reasonable doubt that Harrison had suffered two prior convictions which constituted "most serious offenses," the court could only sentence him to a maximum term of 29 months. This Court must reverse Harrison's sentence and remand for resentencing to a term authorized by the jury's verdict.

F. CONCLUSION

For the foregoing reasons, Harrison respectfully requests that this Court reverse his conviction with prejudice. In the alternative, Harrison's POAA sentence should be reversed and his case remanded for resentencing within the standard range. In the unlikely event that he does not prevail, he asks this Court to deny any State request for costs on appeal.

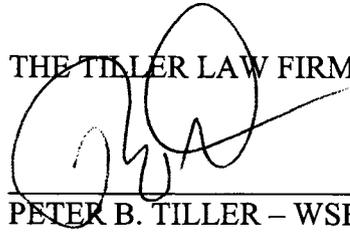
DATED: December 10, 2008.

Respectfully submitted,

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A handwritten signature in black ink, appearing to read 'P. Tiller', is written over a horizontal line. The signature is stylized and cursive.

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CERTIFICATE OF HAND
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