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DIVISION II

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STATE OF WASHINGTON

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

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State of Washington  
Respondent

v.

**DAVID J. VERNON**  
Appellant

40110-0-II

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On Appeal from the Superior Court of the State of Washington for  
LEWIS COUNTY

Cause No.09-1-00353-4

The Honorable Nelson Hunt

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**BRIEF OF APPELLANT**

Law Office Of Jordan McCabe  
P.O. Box 7212, Bellevue, WA 98008-1212  
425-746-0520~jordan.mccabe@yahoo.com

09-1-00353-4  
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## **ASSIGNMENTS OF ERROR AND ISSUES**

### **A. Assignments of Error**

1. The trial court admitted propensity evidence in violation of ER 404(b).
2. The court entered ER 404(b) Findings 1.1; 1.2; 1.3; 1.4; and 1.5 without substantial supporting evidence.
3. The admissible evidence was insufficient to support the convictions.
4. Appellant did not receive an unbiased tribunal as required by Wash. Const. art 1, § 22 and the Sixth Amendment.
5. Appellant received ineffective assistance of counsel.
6. Appellant was denied an impartial jury contrary to Wash. Const. art 1, § 22 and the Sixth Amendment.
7. The sentencing court violated due process by imposing an excessive sentence contrary to the Sentencing Reform Act.
8. The sentencing court violated due process and exceed its statutory authority by imposing community conditions that were not crime-related.
9. The sentencing court violated due process by imposing costs of \$4,429.00.

### **B. Issues Pertaining to Assignments of Error**

1. Did the State establish alleged prior misconduct by a preponderance of the evidence? (Error No. 1)
2. Was the prior conduct evidence admissible for any legitimate ER 404(b) purpose? (Error No. 1)

3. Did the extreme prejudice of testimony regarding prior alleged voyeurism outweigh any conceivable probative value? (Error No. 1)
4. Was the ER404(b) error harmless to a reasonable probability? (Error No. 1)
5. Without the prejudicial prior bad acts evidence, was the evidence sufficient to prove the current offenses beyond a reasonable doubt? (Error No. 3)
6. Did the judges' prior involvement in prosecuting Appellant deny him an unbiased tribunal? (Error No. 4)
7. Was trial counsel ineffective in failing to raise a collateral estoppel challenge the State's ER404(b) witness and for failing to seek a change of venue in light of the biased tribunal? (Error No. 5)
8. Was Appellant denied an impartial jury contrary to Wash. Const. art 1, § 22 and the Sixth Amendment? (Error No. 6)
9. Did the sentencing court exceed its statutory authority by imposing an "exceptional" indeterminate sentence? (Error No. 7)
10. Did the sentencing court exceed its statutory authority by imposing community conditions that were not crime-related? (Error No. 8)
11. Did the court violate due process by imposing statutory trial costs of \$4,429.00 on an indigent defendant absent any evidence the defendant was able to pay or was ever likely to become able to pay. (Error No. 9)

## II. STATEMENT OF THE CASE

A. **Procedural Facts:** Appellant, David J. Vernon, was charged with two counts of voyeurism allegedly committed June 14, 2009. MRP 7.<sup>1,2</sup> Vernon was convicted after a jury trial September 24-25, 2009. The standard sentencing range for each offense was 43-57 months. CP 95. The court imposed indeterminate sex offender sentencing under RCW 9.94A.535. CP 93. The court also imposed an exceptionally harsh sentence by imposing minimum sentences of 60 months with a statutory maximum of five years and ordering the two sentences to be served consecutively. This resulted in an exceptional determinate sentence of ten years: “Total term of confinement ordered is 10 years (120 months.)” Court’s notation order, CP 97.

### B. **Substantive Facts:**

On June 14, 2009, Jerry and Rebecca (Becky) Schoelkopf were returning from a camping trip with Jerry’s son, Kirk, and daughter-in-law,

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<sup>1</sup> MRP denotes a single consecutively paginated volume containing verbatim reports of pretrial Motions held July 23, 2009; August 5, 6, 27, 2009; and September 17, 2009.

<sup>2</sup> RCW 9A.44.115(2)(a): A person commits the crime of voyeurism if, for the purpose of arousing or gratifying the sexual desire of any person, he or she knowingly views, photographs, or films: Another person without that person's knowledge and consent while the person being viewed, photographed, or filmed is in a place where he or she would have a reasonable expectation of privacy[.]

Kassandra Schoelkopf. Driving their separate campers, the two couples stopped at Mossyrock Dam for a spot of fishing. As soon as they arrived, Becky<sup>2</sup> walked over to the nearby port-a-potties. She used a large unit designed to accommodate handicapped visitors. RP 51, 60. Becky noticed a hole in the wall, but nothing unusual happened. RP 69. Something may have moved behind the hole, but Becky thought it was a piece of tarp moving in the breeze. RP 70, 80.

Kassandra entered the same port-a-potty immediately after Becky. Kassandra testified that she glanced up at the hole, which was high up in the wall, after pulling down her shorts but before she pulled down her underwear. RP 49, 54. While standing, she had been able to see only sky through the hole. RP53. But as she started to sit and was almost completely seated (although she had not yet disturbed her underwear), she could see through into the adjacent port-a-potty. RP 53, 54-55. She thought she saw human features — an eye, maybe a nose. She pulled up her shorts, went over to the hole and peered through it for a couple of minutes, “trying to make sure I was seeing what I was seeing.” RP 62. She finally convinced herself someone was looking at her from the next stall. RP 55.

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<sup>2</sup> Becky and Kassandra Schoelkopf are referred to by first names for clarity. No disrespect is intended.

She ran out yelling to her husband and watched the door of the adjacent next port-a-potty to be sure no-one left. RP 56, 84.

Kirk Schoelkopf entered the large port-a-potty to investigate. He saw the hole, but Kirk's description of the view through the hole was the exact opposite of Kassandra's. He was able to see into the next stall only from a standing position. When he assumed a squatting position, all he could see was the mesh around the top of the next unit. RP 91-92.

Kirk and Becky started yelling abuse at the occupant of the next port-a-potty unit where Kassandra thought she saw someone. They called him a pervert and hollered for him to come out. RP 56, 77. After a while, Kirk and Becky walked back toward their vehicles. Mr. Vernon then came out of the stall. RP 57. He yelled at the Schoelkopfs, asking what their problem was, that he was just using the facility to relieve himself. RP 57-58, 77. Vernon kept repeating, "What did I do, what did I do, what's wrong with you." RP 81.

After more mutual yelling, Vernon returned to his truck and angrily drove away, pantomiming a gun with his fingers. RP 59. The Schoelkopfs were able to get his license plate number, which they reported to the police.

The police located Vernon through his license information and questioned him at his home. RP 107. He was completely cooperative and

denied any wrong-doing. He voluntarily showed the officer a cutting tool that was in his truck. RP 110.

The State charged Vernon with two counts of voyeurism, one each against Becky and Kassandra Shoelkopf. CP 5-7. He was tried by jury.

***Trial:*** Pretrial motions were heard by the Honorable Judge Richard L. Brosey. The State argued that a conviction for voyeurism in 2003 was relevant and admissible against Vernon under ER 404(b), (a) to prove intent; and (b) to impeach Vernon if he should testify and assert a defense of mistake or accident. MRP 6-7, 15. Vernon did not testify; the defense rested without presenting any testimony. RP 130.

The State originally moved to admit the prior conduct under RCW 10.58.090 as well. MRP 6. The defense vigorously opposed this. MRP 8-10. The court unequivocally ruled out RCW 10.58.090 as a portal for this evidence. MRP 17.<sup>3</sup> The court admitted the prior conviction solely under ER 404(b) to show “proof of motive, intent, preparation, plan and absence of mistake or accident.” MRP 16.

The prosecutor assumed that Vernon’s sole defense would be accident. MRP 14. The court rejected this because it was physically

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<sup>3</sup> The court regarded RCW 10.58.090 as an attempted legislative “end run” around the rule-making power of the courts. MRP 17.

impossible to accidentally cut a hole in a wall and spy on people by mistake. MRP 12.

The State also argued the prior conviction would not be unduly prejudicial under ER 403, “especially if the defense raises any type of mistake or lack of intent, and as soon as that’s raised, the State believes that is going to in fact be necessary and would not be trumped by [ER]403.” MRP 15. Vernon defense was general denial. MRP 1. He did not testify. RP 119. Nevertheless, two judges allowed the State to introduce the prior conviction in its case in chief. MRP 17; RP 73. Trial counsel renewed the defense objection to the prior bad acts evidence to the trial judge. RP 41. The court reiterated the earlier ruling in favor of the State. RP 43.<sup>4</sup> Ruth Aetzel testified that in 2003, Vernon used a mirror to look up her skirt at the Chehalis Post Office. RP 114-16.

The jury convicted Vernon on both counts. CP 89, 90. He timely appealed. CP 13.

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<sup>4</sup> Defense counsel said he had “stipulated” to the 2003 facts. RP 43. This is inaccurate. Counsel argued strenuously that the prior offense was supported merely by allegations. Then, accepting those allegations hypothetically “for the sake of argument,” counsel argued ER 404(b) still did not permit the prior bad acts to come in. MRP 8-11.

### III. ARGUMENT

#### A. THE TRIAL COURT VIOLATED ER 404(b) IN ADMITTING THE PRIOR VOYEURISM EVIDENCE.

ER 404(b) presumptively bars evidence of other crimes that are relevant solely to prove character and show action in conformity therewith. ER 404(b); *State v. Powell*, 126 Wn.2d 244, 258-259, 893 P.2d 615, 24 (1995). Prior acts evidence may be admissible for other purposes, such as to prove “motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” ER 404(b); *Powell*, 126 Wn.2d at 259; *State v. Goebel*, 36 Wn.2d 367, 369, 218 P.2d 300 (1950).

When the erroneous admission of another crime is challenged on appeal, the Court considers the State’s theory for offering the evidence, the trial court’s theory for admitting it, and whether the error was harmless. *State v. Stanton*, 68 Wn. App. 855, 861, 845 P.2d 1365 (1993). The decision to admit ER 404(b) evidence is reviewed for abuse of discretion. *State v. Lane*, 125 Wn.2d 825, 831, 889 P.2d 929 (1995).

The trial court here relied on unsupported facts, applied the wrong legal standard, and based its ruling on an erroneous view of the law, all of which constitute abuse of discretion as a matter of law. *State v. Rohrich*,

149 Wn.2d 647, 654, 71 P.3d 638 (2003); *State v. Hudson*, 150 Wn. App. 646, 652, 208 P.3d 1236, 1239 (2009).

1. THE STATE FAILED TO ESTABLISH THE PRIOR ALLEGATIONS BY A PREPONDERANCE OF THE EVIDENCE.

To justify the introduction of “prior bad acts” evidence under ER 404(b), the State first must prove by a preponderance that the alleged misconduct actually happened. ER 404(b); *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002); *State v. Lough*, 125 Wn.2d 847, 853, 864, 889 P.2d 487 (1995). It is part of the court’s essential gate-keeping function to make a threshold determination that actual evidence supports the existence of alleged facts constituting a prior offense. *State v. Miller*, 156 Wn.2d 23, 31, 123 P.3d 827 (2005).

Here, the State had to produce two things: (a) evidence pretrial that the prior bad acts actually happened, and (b) admissible evidence at trial to present those acts to the jury. The State did neither. As a result, the motion court admitted the ER 404(b) evidence without a proper foundation, and Vernon’s jury heard inadmissible and highly prejudicial evidence that unquestionably determined the verdict.

(a) ***Facts Underlying Prior Conviction Were Not Proved.***

As a foundation for admitting the prior bad acts evidence, the State merely alleged the existence of an unspecified guilty plea. Based solely

on this, the court entered ER 404(b) Findings of Fact 1.1, 1.2, 1.3, 1.4, and 1.5 and permitted Ruth Aetzel, the alleged victim in 2003, to testify. CP 23-24. This was error. A certified copy of the plea statement and a transcript of the plea hearing was necessary to show whether Vernon entered a standard guilty plea or an *Alford*<sup>5</sup> plea. If the plea was an *Alford*, no facts were admitted or proved and the mere existence of the conviction did not constitute proof of conduct by a preponderance as required by ER 404(b).

Limited Evidentiary Value of an Alford Plea: Standing alone, the fact of a conviction based on an *Alford* guilty plea is not evidence of the underlying facts. *Clark v. Baines*, 150 Wn.2d 905, 912-14, 84 P.3d 245 (2004); *See also In re Pers. Restraint of Spencer*, 152 Wn. App. 698, 715, 218 P.3d 924 (2009).

Judge Brosey erred in accepting the fact of an undefined guilty plea as establishing by a preponderance the facts underlying the prior conviction without inquiring into the factual basis for the plea. To establish that essential facts were admitted or proved in 2003, the State needed to produce the Statement on Plea of Guilty or a transcript of the

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<sup>5</sup> *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

Plea Hearing. At minimum, the court should have made a record of whether the guilty plea was a standard plea or an Alford.

Defense counsel vigorously opposed the ER 404(b) motion, arguing that no facts were admitted or proved in 2003, and all that survived were mere allegations that were insufficient to prove the alleged conduct by a preponderance for ER 404(b) purposes. MRP 9. This suggests the 2003 plea may well have been an Alford. Counsel renewed the defense pretrial objection to the prior voyeurism evidence. RP 41.

ER 404(b) requires more than merely asserting that a defendant pleaded guilty after a trial that resulted in a hung jury when the jury could not agree on the facts. CP 23; MRP 7.

The 2003 conviction was admitted in error.

(b) ***Ruth Aetzel's Trial Testimony Was Inadmissible.***

Again, rather than producing a certified copy of the 2003 plea statement or hearing, the State resuscitated the witness from the hung-jury trial that preceded the guilty plea. The State was collaterally estopped from presenting this testimony.

The principles of collateral estoppel operate in criminal prosecutions. *State v. Eggleston*, 164 Wn.2d 61, 71, 187 P.3d 233, 237 (2008). In this context, the doctrine springs from the Fifth Amendment guarantee against double jeopardy. *Eggleston*, 164 Wn.2d at 71, citing

*Ashe v. Swenson*, 397 U.S. 436, 445, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970), and *State v. Peele*, 75 Wn.2d 28, 448 P.2d 923 (1968). As such, whether collateral estoppel applies to a particular case is a question of constitutional magnitude that can be raised for the first time on appeal. *Ashe*, 397 U.S. at 442-443; RAP 2.5(a)(3). This Court reviews constitutional questions de novo. *City of Redmond v. Moore*, 151 Wn.2d 664, 668, 91 P.3d 875 (2004).

The goal of collateral estoppel is to ensure judicial finality by preventing relitigation of causes that already have been determined. This prevents harassment in the courts and promotes judicial economy. *State v. Dupard*, 93 Wn.2d 268, 272, 609 P.2d 961, 963 (1980). As a matter of policy, our Supreme Court interprets the evidentiary rules so as to avoid mini-trials within trials. *See, e.g., State v. Kilgore*, 147 Wn.2d 288, 293, 53 P.3d 974, 977 (2002). That is why collateral estoppel precludes relitigation of determinate facts. *Dupard*, 93 Wn.2d at 272. Accordingly, “when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.” *State v. Tili*, 148 Wn.2d 350, 360, 60 P.3d 1192, 1197 (2003), quoting *Ashe*, 397 U.S. at 443. The following factors bring collateral estoppel into play:

- There is a final judgment on the merits.

- The factual issue decided in the first proceeding is identical with the one presented in the action in question.
- The party against whom collateral estoppel is asserted was a party or in privity with a party to the prior adjudication.
- The application of the doctrine does not work an injustice on the party against whom the doctrine is to be applied.

*Eggleston*, at 72, citing *Tili*, 148 Wn.2d at 361. Vernon, as the party invoking collateral estoppel, has the burden to demonstrate that the issue has been preclusively settled. *Dowling v. United States*, 493 U.S. 342, 351, 110 S. Ct. 668, 107 L. Ed. 2d 708 (1990).

Here, a guilty plea is a valid final judgment. Aetzel's testimony at this trial went to the exact same issue of whether Vernon perpetrated an offense against her in 2003. The same sovereign is involved in both instances. *See Dupard*, 93 Wn.2d at 273. And the State is not prejudiced by the operation of the doctrine, because it could easily have produced the 2003 plea documentation to prove its allegations.

The record does not show whether Vernon's 2003 plea was a standard plea or an Alford. This determines whether or not a plea has preclusive effect. While a standard guilty plea may have preclusive effect, an Alford plea presents a uniquely problematic situation because the defendant does not admit any facts. *In re Detention of Stout*, 159 Wn.2d 357, 365, 150 P.3d 86 (2007).

A guilty plea generally does not serve to collaterally estop a defendant from litigating the issue of guilt in future civil litigation. *Stout*, 159 Wn.2d at 365; *Baines*, 150 Wn.2d at 912-14. Neither may a civil plaintiff invoke a prior Alford plea to establish a party's intent. *N.Y. Underwriters Ins. Co. v. Doty*, 58 Wn. App. 546, 550-51, 794 P.2d 521 (1990).

In the criminal context, this Court held that the State could introduce a prior Alford statement on plea of guilty to prove the fact of that conviction, where ER 404(b) permitted the prior conviction to be admitted for a particular purpose. *State v. Price*, 126 Wn. App. 617, 636, 109 P.3d 27 (2005). But there is a difference between the fact of conviction and the facts underlying the conviction. *Stout*, 159 Wn.2d at 367, 150 P.3d 86, 92 (2007). Hence, this case is distinguishable from *Price*. The prosecutor in *Price* did not attempt to prove a guilty plea without producing the plea statement or hearing transcript. And the State in *Price* did not reach back in history to retrieve hypothetical testimony it would have presented at trial to prove facts underlying the plea. The guilty plea provides a sufficient and independent factual basis for conviction and punishment. *See Haring v. Prosise*, 462 U.S. 306, 321, 103 S. Ct. 2368, 76 L. Ed. 2d 595 (1983). Claims based on potential trial evidence that was never presented because the defendant pleaded guilty are precluded by the

plea. *See State v. Carrier*, 36 Wn. App. 755, 757, 677 P.2d 768 (1984); *see also State v. Davis*, 29 Wn. App. 691, 695-96, 630 P.2d 938 (1981).

The Fifth Amendment precludes the State from relitigating the facts underlying Vernon's prior guilty plea. By pleading guilty, a defendant surrenders his right to have a jury evaluate the credibility of the State's witnesses and decide disputed facts. CrR 4.2. Equally, the plea relieves the defendant of having to face witnesses alleging adverse facts at trial and divests the State of its right to present witnesses and argue facts to a jury. Once the court accepted Vernon's guilty plea, the State was precluded from relitigating the six-year-old charge with testimony the prosecutor previously elected to forego in order to secure a plea.

The factual basis must have been established in 2003 when the court accepted the guilty plea. *State v. Amos*, 147 Wn. App. 217, 228, 195 P.3d 564 (2008). That factual basis had to be included in the record of the plea. *State v. Osborne*, 102 Wn.2d 87, 95, 684 P.2d 683 (1984). Thus, either the 2003 plea statement establishes the facts by a preponderance for current ER 404(b) purposes, or it does not. If it does, a certified copy of the plea would provide the requisite foundation. If it does not, those facts were neither admitted nor proved. Therefore, a 2009 trial on unrelated charges was not a permissible forum for the State belatedly to prove those facts.

This case is unique in that a jury heard Ruth Aetzel's testimony in 2003 and was unable to agree on its significance. Still, if the State had dropped the 2003 voyeurism charge after the hung jury, Ruth Aetzel's testimony in the current trial would not be objectionable. Collateral estoppel does not exclude evidence relating to alleged offenses for which a defendant was acquitted. *Dowling*, 493 U.S. at 348.

Even if the trial court accepted at face value the State's bald assertion that the six-year-old guilty plea established underlying facts, the State chose in 2003 to avoid the risk of outright acquittal or a second hung jury by foregoing a second trial based on Aetzel's testimony and accepting a guilty plea instead. That choice works an estoppel now. Only Vernon's admissions in the guilty plea statement, not Aetzel's unproven allegations should ever have reached the ears of the jurors.

**2. THE PRIOR CONDUCT WAS NOT ADMISSIBLE FOR ANY LEGITIMATE ER 404(b) PURPOSE.**

After establishing by a preponderance that the misconduct actually occurred, and that the proposed evidence is not barred by the Fifth Amendment, the court was required to determine whether the evidence had any legitimate relevance to prove an element of the offense or negate a defense. ER 404(b) evidence is prohibited if its sole relevance is to show propensity. *Lane*, 125 Wn.2d at 831-32; *Powell*, 126 Wn.2d at 259, citing seminal Washington ER 404(b) cases and Robert H. Aronson, EVIDENCE IN WASHINGTON, 404-10 (2d ed. 1994).

Here, the court admitted the evidence to prove “motive, intent, preparation, plan and absence of mistake or accident.” MRP 16.

(a) ***Identity Was Not Disputed:*** Uncharged misconduct evidence may be admitted under the identity exception to ER 404(b) only if identity is at issue. *Thang*, 145 Wn.2d at 643. The similarity of a prior offense to the current charge may be relevant to show that both crimes were committed by the same unique means such that both crimes must have been perpetrated by a single individual. *Id.*; *State v. Coe*, 101 Wn.2d 772, 777, 684 P.2d 668 (1984); Edward J. Imwinkelried, UNCHARGED MISCONDUCT EVIDENCE § 3:10, at 3-43 (1995).

Here, the court recognized that identity was not at issue. MRP 12.

(b) *State of Mind Was Not at Issue*: The court ultimately admitted the prior conviction under ER 404(b) to show “proof of motive, intent, preparation, plan and absence of mistake or accident.” MRP 16.

Courts may admit prior offense evidence to prove a defendant’s state of mind at the time of the alleged offense solely if mental state is relevant. *State v. Acosta*, 123 Wn. App. 424, 434-35, 98 P.3d 503 (2004). Specifically, when a prior act is offered to show intent, there must be a logical theory — other than propensity — demonstrating how the prior act connects to intent the State must prove as an element of the charged offense. *State v. Wade*, 98 Wn. App. 328, 334, 989 P.2d 576 (1999). This exception does not apply.

Vernon’s state of mind was not at issue. The State argued vaguely that the prior offense was relevant to prove Vernon’s intent in the current situation. MRP 6-7. The court vaguely agreed. MRP 16. This was wrong. The court did not explain how allowing the admission of evidence with respect to the prior offense was relevant to Vernon’s state of mind in the current incident. The court must explain how a previous sex offense could be a motive or inducement to commit a similar offense years later. *State v. Saltarelli*, 98 Wn.2d 358, 365, 655 P.2d 697 (1982).; *State v. Jackson*, 102 Wn.2d 689, 695, 689 P.2d 76, 79 (1984).

*Saltarelli* is directly on point. There, the court admitted evidence of an assault years earlier, supposedly for the purpose of showing motive and intent. In reversing, the Supreme Court identified three implicit conclusions in the erroneous admission of the evidence: (1) that the defendant's motive and intent were facts of consequence to the outcome of the current case; (2) that evidence of the old assault was probative of present motive and intent; and (3) that the probative value of using old offense to establish present motive and intent outweighed its prejudicial effect. 98 Wn.2d at 363.

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

In *Harris*, intent was not at issue in a rape prosecution because the defendant admitted intentional intercourse but asserted a consent defense.

*Harris*, 36 Wn. App. at 751. Likewise here, the trial court recognized that intent was not at issue because it was inherent in the charged conduct. To find that a person cut a hole in a port-a-potty and peeped through it is necessarily to find that he did so intentionally. The conduct speaks for itself and simply cannot be put down to inadvertence, mistake, or accident.

(c) ***No Common Scheme or Plan***: Where the current and prior alleged incidents are similar enough, ER 404(b) permits evidence of prior sexual conduct to refute a consent defense to the current charge. *See, e.g. Lough*, 125 Wn.2d at 857, n.14.

The trial court here considered alleged similarities between the prior and current offenses, apparently addressing, sua sponte, relevance of the prior act to prove “common scheme or plan.” MRP 9; 11. Ultimately, the court correctly dropped “common scheme or plan” as a legitimate reason to admit the evidence. The similarities between the 2003 offense and the current charges extended no further than the name of the alleged offense. The 2003 case was a crime of opportunity involving a mirror allegedly dropped under a table to look under an elderly woman’s skirt. The current crime involved considerable advance planning and preparation and women similar in age to Vernon. MRP 9, 11. But the “common scheme or plan” was no more than what Imwinkelried calls a “spurious” justification for admitting the prior bad acts here. It merely showed a

pattern of conduct, whereby only arguable “plan” was simply to commit multiple similar but unlinked crimes. This “pattern of criminality” exception is simply a “guise” under which to admit pure propensity evidence. *See Harris* at 36 Wn. app. at 751, citing *Imwinkelried*, §§ 3:21-23. To be relevant, the uncharged offense should be part of a common design — not merely suggest an inclination to commit the charged crime. *State v. Krause*, 82 Wn. App. 688, 694-95, 919 P.2d 123 (1996), *review denied*, 131 Wn.2d 1007 (1997).

(d) **“Intent” Versus “Propensity” and “Guilt”**: Courts may admit ER 404(b) evidence to prove the defendant’s state of mind at the time of the alleged offense only if mental state is relevant. *Acosta*, 123 Wn. App. at 434-35. Thus, when evidence of prior acts is offered to demonstrate intent, there must be a logical theory other than propensity, demonstrating how the prior acts connect to intent the State must prove as an element of the charged offense. *Wade*, 98 Wn. App. at 334.

3. THE EXTREME PREJUDICE OF THE PRIOR VOYEURISM  
OUTWEIGHED ANY CONCEIVABLE PROBATIVE VALUE.

Evidence of prior crimes, wrongs or acts under ER 404(b) must, above all, be relevant and its probative value must be weighed against possible prejudice to the defendant. *Saltarelli*, 98 Wn.2d at 361-62. The ultimate test of admissibility for this sort of evidence is whether its relevance and necessity combine to outweigh its prejudice. *State v. Fernandez*, 28 Wn. App. 944, 951-52, 628 P.2d 818 (1980); *Goebel*, 36 Wn.2d at 379.

If the State offers an alleged prior offense, even for a legitimate purpose, then it is highly likely the jury will consider it for propensity purposes, even with a limiting instruction. *State v. Cook*, 131 Wn. App. 845, 853-54, 129 P.3d 834 (2006). The court must ensure that the evidence's potential for unfair prejudice does not outweigh its probative value, "in view of the availability of other means of proof and other factors." *Saltarelli*, 98 Wn.2d at 361; *Lough*, 125 Wn.2d at 853. The court must beware of straining "'the minute peg of relevancy" with the weight of "dirty linen hung upon it.'" *State v. Smith*, 106 Wn.2d 772, 774, 725 P.2d 951 (1986), quoting *Goebel*, 36 Wn.2d at 37. "There is no more insidious and dangerous testimony than that which attempts to convict a defendant by producing evidence of crimes other than the one for which

he is on trial, and such testimony should only be admitted when clearly necessary to establish the essential elements of the charge which is being prosecuted.” *State v. Smith*, 103 Wash. 267, 174 P. 9 (1918). This is especially true where a propensity for sexual deviancy is alleged. *Saltarelli*, 98 Wn.2d at 363. “Once the accused has been characterized as a person of abnormal bent, driven by biological inclination, it seems relatively easy to arrive at the conclusion that he must be guilty, he could not help but be otherwise.” *Id.*, quoting Slough and Knightly, OTHER VICES, OTHER CRIMES, 41 Iowa L. Rev. 325, 333-34 (1956). *Saltarelli* criticizes superficial analysis that does “little more than pay lip service to the great potential for prejudice inherent in evidence of prior sexual offenses.” 98 Wn.2d at 364. That is what happened here.

The prior acts evidence here had no probative value.

Characterizing Vernon as a “person of abnormal bent”, by contrast, carried a huge burden of prejudice. The trial court here realized the especially prejudicial effect of admitting the prior voyeurism conviction. MRP 17.

The court gave a limiting instruction to the jury. CP 83, Instr. 10A. Generally, the jury is presumed to follow the instructions. *State v. Davenport*, 100 Wn.2d 757, 763-64, 675 P.2d 1213 (1984). But prejudice resulting from evidence that is inherently prejudicial and likely to impress itself upon the minds of the jurors cannot be removed by instruction. *State*

v. *Miles*, 73 Wn.2d 67, 71, 436 P.2d 198 (1968). In addition to the jury, moreover, the record shows the judges also were biased by impermissible inferences of guilt based on their knowledge of evidence of propensity. Please see Issue C regarding bias of the tribunal.

4. THE ERROR WAS NOT HARMLESS.

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

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

The Court should reverse the convictions.

B. THE ADMISSIBLE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE CONVICTIONS.

Evidence is not sufficient to support a conviction unless a rational finder of fact could find the essential elements of the alleged crime beyond a reasonable doubt when viewing the evidence in the light most favorable to the State. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004), *aff'd*, 166 Wn.2d 380, 208 P.3d 1107 (2009). Insufficient evidence requires dismissal with prejudice as a matter of law. *State v. Stanton*, 68 Wn. App. 855, 867, 845 P.2d 1365 (1993).

Here, without the propensity-based presumption of guilt, the evidence against Vernon is less than compelling. It falls far short of the State's burden of proof beyond a reasonable doubt.

- For one thing, the jury would have recognized as meaningless self-aggrandizement fisherman Jeremy Wilson's testimony that he knew immediately that Vernon was "creepy." RP 122.
- The physical evidence was equally consistent with innocence. The State's photographic exhibits show a hole that opens onto a space a couple of feet wide between two port-a-potties. Ex. P-5. The State presented no evidence that an unrelated voyeur could not have spied from this space. Vernon could have been completely unaware of this hole.

- Had they not been told Vernon was a sleazy character who had done this sort of thing before, reasonable jurors would not likely have accepted KS's claim that she discerned facial features across the width of her own spacious unit, through a hole, across an intervening space, and through the insect-proof mesh of the adjacent facility. Especially when, by her own testimony, she had to spend two whole minutes staring through the hole. It is inconceivable that a thwarted voyeur would remain frozen for two minutes with his eye to a hole while the eye of his intended victim stared back at him from the other side.
- Finally, the sequence of events described by Kassandra Schoelkopf verges on the physically impossible. Schoelkopf said she lowered her shorts, then squatted over the toilet, and only then thought about pulling her underwear down. Every female juror would know this is simply not how it is done. No mentally competent female sits on the seat of a highway convenience. The unit is straddled, one foot on either side. This means the underwear either is loose enough to be pulled to one side or it is pulled down along with the shorts.

Therefore, without the impermissible inference of guilt derived from the erroneously-admitted proclivity evidence, the jurors' reasonable

doubts would have prevented them from finding the facts supporting these convictions.

“Retrial following reversal for insufficient evidence is ‘unequivocally prohibited’ and dismissal is the remedy.” *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998). The Court should reverse and dismiss with prejudice.

C. VERNON WAS DENIED AN UNBIASED  
TRIBUNAL IN VIOLATION OF WASH. CONST. ART.  
1, § 22 AND THE SIXTH AMENDMENT.

A fair trial before a fair tribunal is guaranteed by Wash. Const. art 1, § 22 and is a basic requirement of Sixth Amendment due process. Fairness requires more than the absence of actual bias. Courts must also avoid situations that create so much as the risk of bias or even the appearance of unfairness. *State v. Chamberlin*, 161 Wn.2d 30, 38, 162 P.3d 389, 393 (2007); *In re Murchison*, 349 U.S. 133, 136, 75 S. Ct. 623, 625, 99 L. Ed. 942 (1955).

In claiming an unconstitutional risk of bias, Appellant must overcome the presumption that judges perform their functions without bias or prejudice. *Chamberlin*, 161 Wn.2d at 38, citing *Withrow v. Larkin*, 421 U.S. 35, 47, 95 S. Ct. 1456, 43 L. Ed. 2d 712 (1975). Mr. Vernon honors this presumption and does not challenge the integrity of the Lewis County judges. But judges are human. *Offutt v. United States*, 348 U.S. 11, 14,

75 S. Ct. 11, 99 L. Ed. 11 (1954). As such, they are susceptible to the same limitations as other people. *Tumey v. State of Ohio*, 273 U.S. 510, 532, 47 S. Ct. 437, 444, 71 L. Ed. 749 (1927).

Therefore, the rules governing impartiality are stringent and sometimes may “bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way, ‘justice must satisfy the appearance of justice.’” *Murchison*, 349 U.S. at 136.

Here, Lewis County had three judges. One, Judge Lawler, was Vernon’s former defense counsel; the second, Judge Brosey, was the judge in Vernon’s prior voyeurism prosecution in 2003. MRP 5. The third, Judge Hunt, was Vernon’s former prosecutor. MRP 26-27.

Judge Brosey’s prior involvement contributed to his erroneous ER 404(b) ruling. Brosey recalled that Vernon was charged in 2003, and that he ultimately pleaded guilty. But the judge wrongly recollected that the facts underlying the offense were established. Brosey asserted that “we all know the facts” from 2003. MRP 5-6. But the 2003 conviction resulted from a guilty plea after a hung jury failed to reach a verdict. MRP 7. In other words, the facts alleged in that incident were never proved.

An unbiased judge would have recognized that the hung-jury mistrial required documentation of the guilty plea to determine what facts, if any, were either admitted or proved. Otherwise, the alleged prior conviction was not established by a preponderance of the evidence and could not be admitted. This did not happen. Instead, mere allegations from six years before were transformed into “facts” by the alchemy of the judge’s false memory, and the court admitted highly prejudicial prior bad act evidence without the requisite foundation.

Likewise, judge Nelson Hunt was a former prosecutor of Mr. Vernon. Judge Hunt initially refused to do this trial for that reason. MRP 26-27. For reasons not in the record, however, Judge Hunt changed his mind. As the trial judge, Hunt unquestioningly adopted the earlier erroneous ER 404(b) ruling. Judge Hunt also imposed the harshest possible sentence. RP 189.

Both judges were affected by the same irresistible but impermissible inference that Vernon was guilty, based on proclivity and propensity derived from knowledge of past conduct. This insidiously colored the courts’ rulings. Judge Hunt’s prosecutorial relationship with Mr. Vernon is particularly unmistakable in his misapplication of the sentencing laws that led the court to double Vernon’s lawful sentence. See Issues E, F and G, below.

This Court should reverse and remand for a new trial before an unbiased tribunal.

D. VERNON RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.

(1) ***Trial Counsel Was Ineffective for Failing to Exclude Ruth Aetzel's Testimony.***

Defendants in criminal prosecutions have the right to the effective assistance of counsel. Wash. Const. art. I, § 22; U.S. Const. amend. VI. A claim that counsel was ineffective requires an appellant to establish both deficient representation and resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Appellant must overcome a strong presumption that counsel was effective. *State v. Thomas*, 109 Wn.2d 222, 225, 743 P.2d 816 (1987). Alleged deficient performance cannot rest on matters that go to legitimate trial strategy or tactics. *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). The reviewing Court begins by presuming counsel's performance was effective. *Thomas*, 109 Wn.2d at 226. To show prejudice, Appellant must demonstrate a reasonable probability that, but for counsel's errors, the trial result would have been different. *Thomas*, 109 Wn.2d at 226.

Here, effective counsel would have raised a collateral estoppel objection to the testimony of Ruth Aetzel, as discussed above. Collateral estoppel is a fundamental legal principle that defense counsel are expected

to know. Even an off-the-cuff hand waving argument likely would have caused the court to reconsider its ruling.

This testimony was extremely prejudicial and determined the outcome of trial. The jury could not have been able to put aside the knowledge that the defendant had previously been convicted as a voyeur.

**2. *Counsel Was Ineffective for Not Seeking a Change of Venue.***

Counsel considered moving to change the venue but did not follow through. MRP 13, 24.

For one thing, the 2003 case received a great deal of publicity because the alleged victim was the mother of a Chehalis police officer. MRP 13. Also, as discussed above, Lewis County could not provide an unbiased judge. Of the three judges, one was Vernon's former defense counsel; one was the judge in Vernon's prior voyeurism prosecution; and one was Vernon's former prosecutor. MRP 5, 26-27. The judges' prior involvement contributed to their erroneous ER 404(b) rulings, which greatly prejudiced Mr. Vernon.

**E. VERNON WAS DENIED AN IMPARTIAL JURY  
IN VIOLATION OF WASH. CONST. ART. 1, § 22 AND  
THE SIXTH AMENDMENT.**

The trial court erroneously denied Vernon's motion for mistrial after the jury venire was exposed to highly prejudicial remarks by Juror number 35. RP 38-39.

Juror 35 was a Department of Corrections officer. The prospective jurors were asked if anyone had any knowledge of the matter. Juror 35 responded by announcing he had seen the defendant's name on the jail roster. RP 15. Defense counsel moved for a mistrial. Counsel argued this was no less prejudicial than if the jurors had seen the defendant in restraints or jail garb. RP 38. The court denied the motion:

COURT: I think you're right in everything you said, but the focus has to be on 'unduly,' and I don't think his references to some time that he saw the defendant's name on a jail browse is unduly suggestive. The jurors would have to have total vacuums in their heads not to figure out he's in custody, **there is a custody officer sitting four feet away from him** and that's not unduly suggestive. So the fact he was on a jail browse, this guy saw it, I don't see how that is going to be unduly suggestive. I'll deny the motion on that.

RP 38-39.

Every criminal defendant is entitled to be tried by an impartial jury. U.S. Const. amends. VI, XIV § 1; Wash. Const. art. I, §§ 3, 21, 22. A prerequisite to a fair trial is the right to the presumption of innocence. *Estelle v. Williams*, 425 U.S. 501, 503, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976); *State v. Crediford*, 130 Wn.2d 747, 759, 927 P.2d 1129 (1996).

This is the “bedrock foundation” in every criminal trial. *Morissette v. United States*, 342 U.S. 246, 275, 72 S. Ct. 240, 96 L. Ed. 288 (1952).

This means a defendant is entitled to be tried by jurors who do not know he is being held in custody. Indigent defendants have the same right to the unqualified presumption of innocence as do those who can afford to post bail. *State v. Gonzalez*, 129 Wn. App. 895, 897, 120 P.3d 645 (2005). A defendant is entitled to all “the physical indicia of innocence,” including that of facing his jury “with the appearance, dignity, and self-respect of a free and innocent man.” *Gonzalez*, 129 Wn. App. at 901, quoting *State v. Finch*, 137 Wn.2d 792, 844, 975 P.2d 967 (1999). It is the obligation of the trial court to be alert to fundamental due process issues and to protect the defendant’s presumption of innocence. *Gonzalez*, 129 Wn. App. 898, citing *Estelle*, 425 U.S. at 503 (“It is the duty of the court to give effect to the presumption by being alert to any factor that could “undermine the fairness of the fact-finding process.”)

Specifically, the court’s duty to shield the jury from routine courtroom security procedures is a constitutional mandate. *Gonzalez*, 129 Wn. App. 901, citing *State v. Hutchinson*, 135 Wn.2d 863, 887, 959 P.2d 1061 (1998). The presence of uniformed guards in the courtroom serves as a continuing reminder that the State perceives the defendant as meriting

the trappings of guilt. *Gonzalez*, 129 Wn. App. at 901-02, citing *Williams*, 425 U.S. at 503.

The court is vested with the duty and discretion to provide appropriate courtroom security. *State v. Hartzog*, 96 Wn.2d 383, 396, 635 P.2d 694 (1981). If the court determines the need for security measures that cannot be concealed from the jury, the judge must make a record of a compelling individualized threat of injury to people in the courtroom, disorderly conduct, or escape. *Id.* at 397-98. The court must make every effort to minimize the impact on the jury of any unavoidable exposure. *Gonzalez*, 129 Wn. App. at 902.

In *Gonzalez*, the jury was told the defendant was being held in jail because he could not post bail, so they might see him being transported to and from court in handcuffs and observe uniformed officers guarding him in the courtroom. This violated the presumption of innocence. *Gonzalez*, 129 Wn. App. at 897-898. The Court reversed and remanded for a new trial. *Gonzalez*, 129 Wn. App. at 899.

Here, a new trial is required for two reasons. First, juror No. 35 informed all the potential jurors the defendant was in custody. Second, a uniformed “custody officer” was seated a few feet from the defendant while the court made no inquiry into the need for this. RP 39.

The court understood that the presence of the uniformed guard meant the jurors could not have failed to be aware of Vernon's custody status. But the court did not hold a *Hartzog* hearing to learn why such intrusive security measures were necessary or whether anything could be done to mitigate the effect and protect Vernon's right to a fair trial. If Vernon were a serious security risk, for example, the jurors could have been told that security personnel in and out of uniform are assigned to every courtroom for the safety of all concerned. Instead, the court cited the presence of a uniform as a reason to ignore the highly prejudicial comments by No. 35. This was wrong. Rather than eliminating the problem, the presence of a uniformed guard doubled the prejudice.

In the Division I case of *State v. Mullin-Coston*, 115 Wn. App. 679, 64 P.3d 40 (2003), and the Division II case of *State v. Classen*, 143 Wn. App. 45, 176 P.3d 582 (2008), the trial court considered on the record factors pro and con as to whether to allow testimony that would incidentally disclose the defendant's custodial status. *Classen*, 143 Wn. App. at 62. This case is more like *Gonzalez*, in that the court was oblivious to the implications of the juror's comments or the presence of guards. Reversal is required.

F. THE SENTENCING COURT ERRONEOUSLY  
IMPOSED BOTH AN EXCEPTIONAL

SENTENCE AND AN INDETERMINATE  
SENTENCE.

A sentencing court's statutory authority under the Sentencing Reform Act of 1981 (SRA), chapter 9.94A RCW, is a question of law that this Court reviews de novo. *State v. Murray*, 118 Wn. App. 518, 521, 77 P.3d 1188 (2003). Likewise, the Court reviews constitutional challenges de novo. *Moore*, 151 Wn.2d at 668. A sentence in excess of the court's statutory authority violates Const. art. 1, § 22 and the Sixth Amendment.

A trial court may not base an exceptional sentence on factors already considered by the Legislature in establishing the presumptive range. *State v. Alexander*, 125 Wn.2d 717, 725, 888 P.2d 1169 (1995). Only factors that distinguish the crime from others of the same statutory category may justify a harsher sentence, not factors that are found in the entire class of crimes and do not distinguish the defendant's behavior from that inherent in all crimes of that classification. *Id.*, quoting D. Boerner, SENTENCING IN WASHINGTON, § 9.6 at 9-13 (1985).

Here, the sentencing court misinterpreted the SRA's sex offender sentencing scheme and erroneously concluded (a) that an exceptional sentence was warranted; and (b) that the court had the authority to impose an exceptional sentence.

The Legislature has enacted a unique sentencing scheme to impose enhanced punishment for sex offenses and to make sure that repeat offenders receive extremely harsh sentencing. The SRA provides that, where the current sentencing is for a sex offense and the defendant has a prior conviction for an offense listed in RCW 9.94A.030(34)(b), the court must impose an indeterminate sex offender sentence. RCW 9.94A.535.

This indeterminate sentencing applies here. Vernon's two current convictions are for voyeurism, a sex offense. CP 93; RCW 9.94A.030(43)(a)(i); RCW 9A.44.115. Vernon had three prior felonies and two current offenses, all sex offenses. Pre-Sentence Report (PSI), CP 133-136. Vernon also has a prior conviction for an offense listed in RCW 9.94A.030(34)(b). CP 95. Therefore, the SRA required the court to impose an indeterminate sex offender sentence. RCW 9.94A.535.

The indeterminate sentencing procedures are set forth in RCW 9.94A.507. *Id.* The SRA expressly requires the court to substitute RCW 9.94A.507 for the general sentencing statutes when sentencing a sex offender. RCW 9.94A.505(2)(a)(viii).

The statute requires the court to sentence the offender to a maximum term and a minimum term. RCW 9.94A.507(3)(a). The court first selects a fixed minimum sentence from the standard range for the offense. *State v. Brundage*, 126 Wn. App. 55, 62-63, 107 P.3d 742

(2005). The standard range is derived from a chart and matches the seriousness level of the offense with the defendant's offender score. RCW 9.94A.525. For most offenses, the offender score for each current offense will reflect one point for every prior felony and one point for each additional current felony. RCW 9.94A.525. For sex offenses, however, each prior and other current felony counts three points. RCW 9.94A.525(17).

Then the court imposes a maximum sentence, which always equals the statutory maximum for the offense. RCW 9.94A.507(3)(b). The Department of Corrections will eventually determine the release date within the resulting range. RCW 9.94A.535. Most importantly here, the SRA permits a sentence outside the standard sentence range solely in determinate sentences. RCW 9.94A.535. Here, the court erred by imposing a sentence that purported to be both exceptional and indeterminate.

Vernon's current offenses have a seriousness level of II. CP 95; RCW 9.94A.515 (Table 2). Accordingly, but for the sexual component, his standard range with an offender score of 4 for each offense would have been 12-14 month concurrent sentences. RCW 9.94A.510 Table 1 (2007). Incorporating the enhanced offender score, the PSI recommended a standard range sentence of 57 months. PSI, CP 136.

The general rule is that a court may impose an exceptional sentence outside the standard sentence range if it finds substantial and compelling reasons. RCW 9.94A.53. Facts supporting aggravated sentences, other than the fact of a prior conviction, however, must be determined pursuant to the provisions of RCW 9.94A.537. *Id.* For sex offenses, the court may impose an exceptional minimum only if the offense that caused the offender to be sentenced under RCW 9.94A.507 was indecent liberties by forcible compulsion, and there is a finding beyond reasonable doubt, pursuant to under RCW 9.94A.837, that the victim was under the age of fifteen at the time of the offense or a vulnerable adult. None of these provisions applies here.

The court erroneously made a finding that the short period between release from confinement and the current offense justified an exceptional sentence. CP 141. Under the revised post-*Blakely*<sup>6</sup> SRA provisions, this finding must be made by a jury. RCW 9.94A.507.

The court also erroneously determined that Vernon's high offender score resulted in the second offense going unpunished. CP 141. This ignores the SRA sex offense sentencing scheme which attaches three offender score points for every prior sex offense. Vernon had only three

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<sup>6</sup> *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

scorable prior offenses, but each of the current offenses incurred a score of 12. Remand for resentencing is in order with instructions to impose a determinate minimum sentence within the standard range.

A miscalculated offender score can be challenged for the first time on appeal. Vernon stipulated to four prior felonies, including failure to register as a sex offender. CP 91. His failure to register violation, however, was not a felony. RCW 9.94A.130; PSI, CP at 133. This miscalculation resulted in the prosecutor erroneously telling the court Vernon's sex offense offender score was 15. RP 185. This did not change the sentence, but Vernon asks the Court to clarify that he had three prior felonies, not four. (The sentencing court's confusion is illustrated by the standard range indicated in the Judgment and Sentence: "43-57 months to 60 months." CP 95.

Finally, the court erroneously ordered the current sentences to be served consecutively. But sentences for current offenses sentenced at the time are to be served concurrently. RCW 9.94A.589. Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535. These provisions do not provide for exceptional sentencing for sex offenses where the indeterminate sentencing provisions of RCW 9.94A.507 apply exclusively.

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

G. THE COURT ERRONEOUSLY IMPOSED NON-CRIME-RELATED PROHIBITIONS.

A sentencing court may impose crime-related prohibitions as part of any sentence. RCW 9.94A.505(8). Such prohibitions are reviewed for abuse of discretion. *State v. Berg*, 147 Wn. App. 923, 942, 198 P.3d 529 (2008). A prohibition is “crime-related” only if it directly relates to the circumstances of the crime for which the offender has been convicted. RCW 9.94A.030(10). Whether the statutory scheme authorizes a prohibition against using alcohol is a question of law that is reviewed de novo. *State v. Williams*, 158 Wn.2d 904, 908, 148 P.3d 993 (2006). A prohibition against consuming alcohol is impermissible absent evidence that alcohol contributed to the crime. *State v. Jones*, 118 Wn. App. 199, 205-06, 76 P.3d 258 (2003). Where the trial court lacks authority to impose a specific community custody condition, the appropriate remedy is remand. *State v. O’Cain*, 144 Wn. App. 772, 775, 184 P.3d 1262 (2008).

Here, the court adopted wholesale the conditions listed in the State’s proposed Appendix H and refused to consider limiting the conditions to reflect the requisite relationship to the crimes.

- Over defense objections, the court ordered Vernon to abstain from alcohol, even though it was not alleged that alcohol had anything to do with the offenses. CP 106-08; RP 187.
- The court also prohibited Mr. Vernon from associating with minors. CP 107; RP 187. This would disrupt his family life by excluding him from family gatherings attended by relatives with children. There was no evidence that any minor was involved in these offenses or that Mr. Vernon has any proclivity to harm or bother children.

These sentencing conditions should be stricken.

Also, since Mr. Vernon is likely to live with non-offending family members upon his release, the condition permitting the State to conduct unrestricted searches of the entire premises where he resides should be modified to exclude private areas such as bedrooms that are exclusively occupied by others. CP 107; RP 187-88.

#### H. THE COURT IMPOSED EXCESSIVE LEGAL FINANCIAL OBLIGATIONS.

Courts are permitted to require convicted defendants to pay costs. RCW 10.01.160(2). But these costs “cannot include expenses inherent in providing a constitutionally guaranteed jury trial or expenditures in connection with the maintenance and operation of government agencies

that must be made by the public irrespective of specific violations of law.” Constitutionally-guaranteed trial expenses include counsel for indigent defendants. *Fuller v. Oregon*, 417 U.S. 40, 52, 94 S. Ct. 2116, 40 L. Ed. 2d 642 (1974), citing *Powell v. Alabama*, 287 U.S. 45, 68-69, 53 S. Ct. 55, 64, 77 L. Ed. 158 (1932). *Fuller* was interpreting Oregon’s identical statute. *Fuller*, 417 U.S. at 43, n.5.

Specifically, imposing substantial costs on an indigent defendant is constitutional only if there is evidence that the defendant’s indigency will end. *Fuller*, 417 U.S. at 45. This ensures that only those who actually become capable of repaying the State will ever be obliged to do so. *Fuller*, 417 U.S. at 53. Washington courts follow this rule. *State v. Barklind*, 87 Wn.2d 814, 817, 557 P.2d 314, 317 (1977).

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

Here, the court assessed Vernon total non-restitution legal financial obligations of \$4,429. CP 98-99; RP 184-85. No Washington case has upheld such a substantial costs assessment against an indigent offender absent evidence the defendant's condition is likely to change.

IV. CONCLUSION

For the reasons stated, the Court should vacate the judgment and sentence. Respectfully submitted this 5<sup>th</sup> day of April, 2010.



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

DECLARATION OF SERVICE

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

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

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

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Jordan B. McCabe, WSBA No. 27211,

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Bellevue, Washington