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DIVISION II

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STATE OF WASHINGTON

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NO. 39883-4-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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**STATE OF WASHINGTON**, Respondent,

v.

**DAVID GOWER**, Appellant.

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APPELLANT'S BRIEF

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## **I. ASSIGNMENTS OF ERROR**

1. The trial court erred by convicting Mr. Gower of indecent liberties without sufficient evidence of forcible compulsion.
2. The trial court erred by convicting Mr. Gower of incest in the second degree without sufficient evidence that the acts occurred in the state of Washington.
3. The trial court erred by finding without sufficient evidence that the acts amounting to incest occurred in the state of Washington.
4. The trial court erred by convicting Mr. Gower for indecent liberties without sufficient evidence that the spanking was sexually motivated.
5. Mr. Gower's convictions were obtained in violation of his right to due process because they were based on propensity evidence.
6. The trial court erred by admitting evidence of alleged uncharged physical abuse of Mr. Gower's biological daughter under RCW 10.58.090.
7. The trial court erred by finding without evidence that there was a sexual motivation to the spanking testified to by C.M.
8. RCW 10.58.090 was enacted in violation of the constitutional separation of powers.

9. RCW 10.58.090 is void because it conflicts with ER 404(b) and usurps the Supreme Court's authority to govern trials.
10. Cumulative error in this case deprived Mr. Gower of his constitutional right to a fair trial.

## **II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. THE TRIAL COURT ERRED BY CONVICTING MR. GOWER OF INDECENT LIBERTIES BY FORCIBLE COMPULSION AS CHARGED IN COUNT II WHERE THERE IS INSUFFICIENT PROOF OF "FORCIBLE COMPULSION."
2. THE TRIAL COURT ERRED BY CONVICTING MR. GOWER OF INCEST IN THE SECOND DEGREE FOR ACTS THAT ALLEGEDLY OCCURRED DURING A DRIVE FROM TACOMA, WASHINGTON TO ASTORIA, OREGON, WHERE THERE IS INSUFFICIENT PROOF THAT THE ACTS OCCURRED IN THE STATE OF WASHINGTON.
3. THE TRIAL COURT ERRED BY CONVICTING MR. GOWER OF INDECENT LIBERTIES BY FORCIBLE COMPULSION AS CHARGED IN COUNT IV WHERE THERE IS INSUFFICIENT EVIDENCE OF A SEXUAL PURPOSE.
4. MR. GOWER'S CONVICTIONS WERE OBTAINED IN VIOLATION OF HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE THE STATE INTRODUCED PROPENSITY EVIDENCE AS SUBSTANTIVE PROOF OF GUILT.
5. RCW 10.58.090 VIOLATES THE CONSTITUTIONAL SEPARATION OF POWERS DOCTRINE BECAUSE IT DIRECTLY CONFLICTS WITH ER 404(B), A VALID PROCEDURAL RULE PROMULGATED BY THE WASHINGTON SUPREME COURT.
6. THE TRIAL COURT ERRED BY ADMITTING C.M.'S TESTIMONY REGARDING PRIOR PHYSICAL ABUSE BY MR. GOWER WHEN THIS TESTIMONY IS NOT REGARDING PRIOR SEXUAL MISCONDUCT AND IS NOT THEREFORE ADMISSIBLE UNDER RCW 10.58.090 AND THE COURT HAD RULED IT WAS NOT ADMISSIBLE UNDER ER 404(B).

7. THE CUMULATIVE ERROR IN THIS TRIAL DEPRIVED MR. GOWER OF HIS RIGHT TO A FAIR TRIAL.

### **III. STATEMENT OF THE CASE**

In 2007, David Joel Gower lived in a house with his wife, Sivilina Gower, and Mrs. Gower's two teenage daughters, S.E.H. and S.H. RP 159. This case arose from two alleged incidents with his 17-year-old stepdaughter, S.E.H.

In the first incident, in late summer, 2007, when S.E.H. was two months short of her eighteenth birthday, S.E.H. was told that, as a punishment for bad behavior, she would either be spanked, or would have to accompany her step-father on a short-haul trucking trip. RP 286, 301, 304.

Together, they drove from Tacoma to Astoria, Oregon and back in one day. According to S.E.H., as soon as the truck heater warmed up the cab, she was told to take her pants off and sit behind Mr. Gower in the cab. RP 309. Then, according to S.E.H., Mr. Gower proceeded to touch her breast and vagina as he drove. RP 306-7, 356. Obviously, there were no witnesses who could confirm or deny S.E.H.'s allegations, but Mr. Gower denied that anything sexual had occurred between them on the trip.

RP 489. And, when the truck was stopped by a state trooper on the way back, S.E.H. did not ask for help or seem to need it. RP 492.

The second incident allegedly occurred in September of 2007, when S.E.H. caused the kitchen plumbing to back up by placing potato peelings down the drain, as she had apparently done several times before. RP 310. Mr. Gower admitted to being very angry and ordering S.E.H. “out of his sight” down to the basement. RP 475. S.E.H. testified that, once downstairs, Mr. Gower joined her, ordered her to undress, and spanked her with a plastic coat hanger. RP 310, 312, 333. S.E.H. also testified that this was a typical punishment in the household for “bad grades or doing something wrong.” RP 300. S.E.H. said the spanking hurt, but she had no marks or bruises from it. RP 333. S.E.H. did not see Mr. Gower become aroused during the punishment. RP 347.

S.E.H.’s sister, 15-year-old S.H., testified that she had never been sexually abused by Mr. Gower. RP 269, 276, 278. S.H. said that she had been spanked on occasion, with her pants down, but that she never considered this to be abuse, only one of the punishments for misbehavior. RP 274, 276. S.H. said the spanking did hurt, but did not leave marks. RP 278. S.H. had seen S.E.H. return to their room from the basement, “slightly pissed off and crying,” and assumed this was following punishment. RP 272.

Mr. Gower denied ever seeing S.E.H. naked, denied forcing her to undress, denied spanking her or hitting her with a coat-hanger or anything else. RP 476-77. He said the most he had ever done was “swat” S.E.H. on the butt. RP 477.

Mr. Gower testified that S.E.H. had accompanied him in the truck twice in the summer of 2007, that once it was by her choice and once was punishment for reckless driving. RP 484-85. But he denied that he ever touched her or made her remove her clothing. RP 489.

*S&M Lifestyle Evidence:*

Detective Jason Brooks testified that he found an “S&M room” in the Gower house. RP 162. In this room, he found during a search: condoms, sex toys, DVDs, and “other devices” that he thought could be possibly used for “spanking or hitting.” RP 170-71, 179, 181. He also said he found a game, entitled “Spanky Spanky,” which contained some spanking implements. RP 181. The detective was permitted, over defense objection, to read from the game box in detail. RP 258-61.

Detective Brooks admitted that S.E.H. had told him the S&M room was always locked and that she had never been in there—had never been punished in there. RP 231, 236.

Boris Hodak, a participant in the S&M lifestyle group Mr. Gower and his wife belonged to, testified that Mr. Gower was only “passively

involved in the group—that his wife was “a lot more involved in the parties and the lifestyle.” RP 385. Mr. Gower only participated in the group with his wife, never alone. RP 385. Mr. Hodak testified that, in the S&M culture, “spankings can have different meanings for every single person,” but that he himself did not engage in spanking as part of the lifestyle. RP 387. Within the lifestyle, spanking can be used as a “form of pleasure.” RP 404. Mr. Hodak also testified that the lifestyle was about role-playing where the submissive person dictates what will happen. RP 387-89. The behavior was always consensual between adults. RP 390, 397. He said that he himself had no problem separating his consensual behavior in the lifestyle from parenting behavior. RP 390-91. Mr. Hodak never testified as to what Mr. Gower did within the group or if he was engaging in spanking as a part of the lifestyle.

In closing argument, the prosecutor argued that the S&M evidence was relevant to showing Mr. Gower had a sexual purpose in spanking S.E.H. RP 550.

*Prior Sexual Crime Evidence:*

Prior to trial, the State sought, over defense objection, to introduce the testimony of C.M., Mr. Gower’s biological daughter, regarding two 1995 convictions for first degree child molestation. RP 500, CP 28

C.M. testified that Mr. Gower had sexually and physically abused her from 1992-1995. RP 46. According to C.M., her father had progressed from initially informing her about male anatomy, to showing her his own body and making her touch him as she sat on his lap with her breasts exposed. RP 49. She was in third grade. RP 50.

In the summer of 1995, when C.M. was ten, Mr. Gower would wake her in the middle of the night, make her take off her panties, bend over, and spread her buttocks as he looked and masturbated. RP 52. C.M. said this occurred two to three times a week. RP 60.

C.M. also remembered watching pornography with Mr. Gower as he masturbated, or sometimes touched her. RP 52-53. He also made her sit naked by the window. RP 53.

C.M. also testified to physical abuse by Mr. Gower, saying that he hit her often and she was afraid of him. RP 54. C.M. said that Mr. Gower had spanked her to the point of bruising. RP 62.

Eventually, in 1995, C.M. told a teacher what was happening, and Mr. Gower was charged and pled guilty to two counts of child molestation in the first degree. RP 500. C.M. had not seen her father since then. RP 46.

The trial court ruled that C.M.'s testimony was inadmissible under ER 404(b),<sup>1</sup> but that this evidence only had to be related to a sex offense and admissible under ER 403 to be admissible under RCW 10.58.090. RP 132, 134, 285, CP 30-31.

The court also ruled that even C.M.'s testimony regarding the spanking was admissible under RCW 10.58.090 because the court found that there "may be" a sexual component to the spanking. RP 135-36, CP 31. The court ruled that, although the spanking was not a part of the convictions, he found it more probably than not occurred. RP 138-39.

Mr. Gower admitted that he was convicted of a sex offense for his behavior with his daughter, C.M., in 1995. RP 499. He admitted he pled guilty to making C.M. get up at night, take off her clothes and bend over in front of him, and to attempting to get her to perform oral sex. RP 500.

Mr. Gower was under supervision for these convictions until 2004, taking monthly polygraph tests without incident. RP 495-96. The supervision ended in the summer of 2004, and that is when he moved into Sivilina Gower's house. RP 498.

In closing the prosecution argued that the prior convictions were relevant to S.E.H.'s "credibility." RP 546, 551. He also compared S.M.

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<sup>1</sup> The court ruled that C.M.'s testimony was not similar enough to S.E.H.'s allegations to be considered a common scheme or plan under ER 404(b). RP 132.

to S.E.H. RP 545-46. Essentially, the prosecutor's entire argument was that because Mr. Gower had previously been convicted of molesting his biological daughter, he must be guilty of the same behavior with S.E.H.

He argued that:

Your Honor, essentially, this case is a credibility determination for the Court. You have two different stories of what occurred. One story is credible, and that is [S.E.H.]. One story is not, and that is the defendant. The defendant acknowledged that he made rules and that he broke them. The defendant acknowledged that he previously molested his daughter. The defendant's explanation of what occurred in this case is simply not credible. [S.E.H.'s] is.

RP 551.

*Procedural History:*

David Joel Gower was charged with one count of rape of a child in the second degree, two counts of indecent liberties, one count of incest in the first degree, and one count of assault in the second degree. CP 11.

Although not a victim of the crimes charged in this trial, C.M. was permitted to testify in the sentencing hearing, over defense objection. RP 589-92.

The court found Mr. Gower not guilty of the rape of a child and assault in the second degree charges, but guilty of two counts of indecent liberties and one count of incest in the first degree. CP 16-18.

He was sentenced to mandatory life sentences for counts II and IV. RP 593, Supp. CP (Judgment and Sentence at p. 6). He was also concurrently sentenced to sixty months on count III. Supp. CP (Judgment and Sentence at p. 6). This appeal timely follows.

#### **IV. ARGUMENT**

**ISSUE 1: THE TRIAL COURT ERRED BY CONVICTING MR. GOWER OF INDECENT LIBERTIES BY FORCIBLE COMPULSION AS CHARGED IN COUNT II WHERE THERE IS INSUFFICIENT PROOF OF “FORCIBLE COMPULSION.”**

The trial court found Mr. Gower guilty of indecent liberties by forcible compulsion for the sexual acts that allegedly occurred during the truck trip. CP 16-17. RCW 9A.44.100(1)(a) states that: “A person is guilty of indecent liberties when he or she knowingly causes another person who is not his or her spouse to have sexual contact with him or her or another . . . By forcible compulsion.” RCW 9A.44.010(6) defines “forcible compulsion” as:

physical force which overcomes resistance, or a threat, express or implied, that places a person in fear of death or physical injury to herself or himself or another person, or in fear that she or he or another person will be kidnapped.

In this case, State has failed to prove that the sexual contact that allegedly occurred during the truck trip was by “forcible compulsion.”

The trial court concluded that:

That S.E.H.’s account of the road trip to Astoria did in fact describe sexual contact by forcible compulsion.

While the defendant had a reasonable basis to discipline S.E.H. for dangerous driving, her account that she was given the option of a spanking instead of going on the trip is credible evidence of forcible compulsion. S.E.H. had a reasonable fear of physical injury given the history of being struck by objects if she had not submitted to the sexual contact inside of the truck during the trip to Astoria. S.E.H. had to submit to reasonable discipline, not to sexual contact.

CP 16. This finding did not support the conviction for indecent liberties because (1) a spanking is not “forcible compulsion” as defined by statute, and (2) S.E.H. never testified that she submitted to sexual contact because of the spanking threat—only that she chose instead to go on a truck trip (without any knowledge that this was a sexual option).

Evidence is sufficient if, viewed in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Theroff*, 95 Wn.2d 385, 388, 622 P.2d 1240 (1980), citing *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

S.E.H. testified that she went on the truck trip with her stepfather because “my grades weren’t that great. It was punishment to go with him.”

RP 304. She was asked if she was given a choice about whether she would go on the trip, and she replied that she was, that she was to “either go into the truck or when he would come back, I would get hit with

whatever he chose to choose.” RP 304. She said she took this to mean the kind of spanking she had described in this case. RP 304-5.

S.E.H. testified that it was only after she was on the trip, that the sexual contact was initiated/introduced. RP 306. She said that she did not think about the other potential punishment—spanking—during the truck trip. RP 309. She never testified that this was the reason she submitted to sexual contact.

There is insufficient evidence of sexual contact by forcible compulsion as defined by statute and therefore the trial court erred by convicting Mr. Gower of indecent liberties.

**ISSUE 2: THE TRIAL COURT ERRED BY CONVICTING MR. GOWER OF INCEST IN THE SECOND DEGREE FOR ACTS THAT ALLEGEDLY OCCURRED DURING A DRIVE FROM TACOMA, WASHINGTON TO ASTORIA, OREGON, WHERE THERE IS INSUFFICIENT PROOF THAT THE ACTS OCCURRED IN THE STATE OF WASHINGTON.**

The trial court found that:

S.E.H.’s testimony regarding the incident in the truck was credible, but it was unclear as to whether sexual contact or sexual intercourse occurred within the State of Washington or the State of Oregon. It was clear beyond a reasonable doubt that sexual contact occurred within the State of Washington, and that sexual intercourse occurred somewhere during the course of the trip to Astoria, but it was not clear beyond a reasonable doubt that sexual intercourse occurred in the State of Washington.

As a result, the defendant is not guilty of the crime of Incest in the First Degree, and guilty beyond a reasonable doubt of the lesser included crime of Incest in the Second Degree . . .

CP 17.

Evidence is sufficient if, viewed in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Theroff*, 95 Wn.2d 385, 388, 622 P.2d 1240 (1980), citing *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

S.E.H. could not be specific about where the truck was when the sexual contact occurred. She said it did not continue during the entire ride, but was “sporadic.” RP 308. That she removed her pants after leaving Tacoma and put them back on when they arrived in Astoria. RP 308-9. She did not remember if she was in I-5 (in Washington) when the actual contact occurred. RP 346.

This testimony is too vague to support a finding that the illegal conduct actually occurred in Washington. Therefore, the conviction is not supported by substantial evidence.

**ISSUE 3: THE TRIAL COURT ERRED BY CONVICTING MR. GOWER OF INDECENT LIBERTIES BY FORCIBLE COMPULSION AS CHARGED IN COUNT IV WHERE THERE IS INSUFFICIENT EVIDENCE OF “SEXUAL CONTACT.”**

The trial court convicted Mr. Gower of indecent liberties by forcible compulsion for the spanking described by S.E.H. CP 17-18. This conviction is not supported by substantial evidence because the trial court

found that the spanking itself was punishment legal under RCW 9A.16.100, but found without sufficient evidence that nonetheless the spanking was “sexual contact.” CP 17-18.

RCW 9A.44.100(1)(a) provides that: “A person is guilty of indecent liberties when he or she knowingly causes another person who is not his or her spouse to have sexual contact with him or her or another . . . By forcible compulsion.” “Sexual contact” is defined as “touching of the sexual or other intimate parts of the person done for the purpose of gratifying sexual desire” that does not include penetration. RCW 9A.44.010(2).

The Stated failed to present sufficient evidence to prove that the spanking was “sexual contact.” Evidence is sufficient if, viewed in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Theroff*, 95 Wn.2d 385, 388, 622 P.2d 1240 (1980), citing *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). To prove a charge of child molestation, the State must prove that the defendant had “sexual contact” with the victim. RCW 9A.44.010(2) defines “sexual contact” as “any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party.”

The trial court found that Mr. Gower's conduct in spanking his step-daughter was physical discipline authorized by RCW 9A.16.100, but that there was a sexual component that nevertheless converted this legal behavior into child molestation. Supp. CP, Decision Summary, filed 7/22/09, CP 17-18. Yet there is no evidence that the purpose of the spanking was anything other than punishment. Both Mr. Gower and S.H. testified that she was being punished and there was no testimony that Mr. Gower was sexual in any way.

The State argued that the court could find the spanking was sexual by comparing what happened to C.M. to S.E.H. But, as with S.E.H., C.M. never testified to any sexual component to the punishments (spankings). C.M.'s testimony regarding the sexual abuse was completely separate from her reference to spankings. RP 545-46.

The State also argued that Mr. Gower's involvement in the S&M community somehow proved the sexual component because some participants in the voluntary adult lifestyle engage in spanking for sexual gratification. RP 550. The trial court also references this general testimony. CP 14. Yet there was no testimony that Mr. Gower ever engaged in this behavior. Furthermore, even if he had engaged in consensual adult behavior like that—it is not relevant to the crime of child molestation.

There is no testimony in this record that connects the spanking, which the trial court found was authorized physical discipline under RCW 9A.16.100, to a sexual purpose. Therefore, the trial court erred by convicting Mr. Gower of indecent liberties by forcible compulsion.

**ISSUE 4: MR. GOWER'S CONVICTIONS WERE OBTAINED IN VIOLATION OF HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE THE STATE INTRODUCED PROPENSITY EVIDENCE AS SUBSTANTIVE PROOF OF GUILT.**

The use of propensity evidence to prove a crime violates the due process clause. U.S. Const. Amend. XIV; *Garceau v. Woodford*, 275 F.3d 769, 775 (9<sup>th</sup> Cir. 2001), reversed on other grounds at 538 U.S. 202 (2003); *see also McKinney v. Rees*, 993 F.2d 1378 (9<sup>th</sup> Cir. 1993); *Estelle v. McGuire*, 502 U.S. 62, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991) (reserving ruling on this issue). A conviction that is based, even in part, on propensity evidence, is not the result of a fair trial. *Garceau*, 275 F.3d at 776-778.

Propensity evidence has consistently been banned from trials by courts, which have found it to be unfairly prejudicial to the defendant.

There are many reasons courts have excluded this evidence:

For example, courts, reasoning that jurors may convict an accused because the accused is a "bad person," have typically excluded propensity evidence on grounds that such evidence jeopardizes the constitutionally mandated presumption of innocence until proven guilty. The jury, repulsed by evidence of prior "bad acts," may overlook

weaknesses in the prosecution's case in order to punish the accused for the prior offense. Moreover, as scholars have suggested, jurors may not regret wrongfully convicting the accused if they believe the accused committed prior offenses. Courts have also barred admission of propensity evidence on grounds that jurors will credit propensity evidence with more weight than such evidence deserves. Researchers have shown that character traits are not sufficiently stable temporally to permit reliable inferences that one acted in conformity with a character trait. Furthermore, courts have excluded propensity evidence because such evidence blurs the issues in the case, redirecting the jury's attention away from the determination of guilt for the crime charged.

Are You Going to Arraign His Whole Life?: How Sexual Propensity Evidence Violates the Due Process Clause, 28 Loyola U. Chi. L.J. 1, at 11-12 (1996).

In Washington, propensity evidence has traditionally been excluded under ER 404(b). The state Supreme Court has held that a trial court "must always begin with the presumption that evidence of prior bad acts is inadmissible. *State v. DeVincentis*, 150 Wn.2d 11, 17-18, 74 P.3d 119 (2003). The courts have consistently affirmed ER 404(b)'s ban on the use of sexual misconduct evidence to show propensity. *See e.g., State v. Sutherby*, 165 Wn.2d 870, 886, 204 P.3d 916 (2009) (holding that pornography evidence is admissible only to show sexual desire for a particular victim; otherwise, such evidence 'would merely show

Sutherby's predisposition toward molesting children and is subject to exclusion under ER 404(b)').

In 2008, the legislature attempted to circumvent jurisprudence and ER 404(b) with RCW 10.58.090. RCW 10.58.090(1) states:

In a criminal action in which the defendant is accused of a sex offense, evidence of the defendant's commission of another sex offense or sex offenses is admissible, notwithstanding Evidence Rule 404(b), if the evidence is not inadmissible pursuant to Evidence Rule 403.

Under this statute, evidence of prior sexual misconduct, convicted or not, is "necessary" to the State's case, and admissible under ER 403, it is admissible as substantive evidence even if it is inadmissible under ER 404(b). RCW 10.58.090. There is no limitation on the use of evidence admitted under RCW 10.58.090—it can be used to show propensity.

Essentially, the prosecutor's entire argument in this case was that because Mr. Gower had previously been convicted of molesting his biological daughter, he must be guilty of the same behavior with S.E.H. He argued that:

Your Honor, essentially, this case is a credibility determination for the Court. You have two different stories of what occurred. One story is credible, and that is [S.E.H.]. One story is not, and that is the defendant. The defendant acknowledged that he made rules and that he broke them. The defendant acknowledged that he previously molested his daughter. The defendant's explanation of what occurred in this case is simply not credible. [S.E.H.'s] is.

RP 551, see also e.g., RP 545-46. The prosecutor also argued that because Mr. Gower was involved in the S&M lifestyle, the spanking must be sexually motivated. RP 550. This is propensity evidence that has traditionally been excluded because it distracts from the actual evidence that the defendant committed the crime.

The admission of propensity evidence undermines the presumption of innocence. It enables a conviction that is based on character and prior acts rather than evidence. The prosecutor glossed over the weaknesses in his case—namely whether the spanking was “sexual contact,” by painting Mr. Gower as the type of person who could not be believed and who is capable of anything. The admission of propensity evidence—namely the prior acts against C.M. and the S&M lifestyle evidence, violated Mr. Gower’s Fourteenth Amendment right to due process. *Garcequ, supra*. Therefore, his convictions should be reversed.

**ISSUE 5: RCW 10.58.090 VIOLATES THE CONSTITUTIONAL SEPARATION OF POWERS DOCTRINE BECAUSE IT DIRECTLY CONFLICTS WITH ER 404(B), A VALID PROCEDURAL RULE PROMULGATED BY THE WASHINGTON SUPREME COURT.**

*A. The Supreme Court has the power to make the court rules, and the Legislature is attempting to usurp that authority with RCW 10.58.090.*

The purpose of the separation of powers doctrine “is to prevent one branch of government from aggrandizing itself or encroaching upon the

‘fundamental functions’ of another.” *State v. Moreno*, 147 Wn.2d 500, 505, 58 P.2d 265 (2002). The doctrine is essential to “the maintenance of a republican form of government,” and in “guaranteeing the liberties of the people, and preventing the exercise of autocratic power.” *Washington State Bar Ass’n v. State*, 125 Wn.2d 901, 906-7, 890 P.2d 1047 (1995).

Although some overlap among the three branches of government is allowed, the separation of powers demands the independence of each branch. *Moreno*, 147 Wn.2d at 505. Thus, the question is “not whether two branches of government engage in coinciding activities, but rather whether the activity of one branch threatens the independence or integrity or invades the prerogatives of another.” *Moreno*, at 505.

The function of the judicial branch is to govern court procedures. The Washington Supreme Court has the vested power to govern court procedures, stemming from article 4 of the state constitution. *City of Fircrest v. Jensen*, 158 Wn.2d 384, 394, 143 P.3d 776 (2006); *State v. Fields*, 85 Wn.2d 126, 129, 530 P.2d 284 (1975); Const. art 4, sect. 1. The court also has power delegated by the Legislature to adopt rules of procedure. *City of Fircrest*, 158 Wn.2d at 394, *Fields*, 85 Wn.2d at 129; RCW 2.04.190. RCW 2.04.190 provides that the Supreme Court has the power “to regulate and prescribe by rule the forms for and the kind and character of the entire pleading, practice and procedure to be used in all

suits, actions, appeals and proceedings of whatever nature by the supreme court, superior courts, and district courts of the state.”

Although the authority to govern matters of court procedure is often shared between the judicial and legislative branches, in Washington, unlike many other jurisdictions, the Supreme Court’s rules are expressly controlling over the Legislature’s.<sup>2</sup> The intent of RCW 2.04.190 was to grant the courts sole authority to prescribe court procedure and practice. *State ex rel. Foster-Wyman Lumber Co. v. Superior Court for King County*, 148 Wash. 1, 4, 9, 267 P. 770 (1928). RCW 2.04.200 (enacted with RCW 2.04.190), states that court rules of procedure trump the laws of the Legislature: “When and as the rules of courts herein authorized shall be promulgated all laws in conflict therewith shall be and become of no further force or effect.” *State v. Williams*, 156 Wash. 6, 7, 286 P. 65 (1930).

“Since the promulgation of rules of procedure is an inherent attribute of the Supreme Court and an integral part of the judicial process, such rules cannot be abridged or modified by the legislature.” *State v. Smith*, 84 Wn.2d 498, 502, 527 P.2d 674 (1974); *see also, City of Fircrest*,

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<sup>2</sup> Washington is unique in giving primary rule making authority to the courts—this varies by state and in the federal system. *Dickerson v. United States*, 530 U.S. 428, 437, 120 S. Ct. 2326, 147 L.Ed.2d 405 (2000); The Rule Making Power of the Courts, 1 Wash. L. Rev. 163, 175, 228 (1925).

158 Wn.2d at 394 (“Whenever there is an irreconcilable conflict between a court rule and a statute concerning a matter related to the court’s inherent power, the court rule will prevail.”); *State v. Ryan*, 103 Wn.2d 165, 178, 691 P.2d 197 (1984) (the court is the final arbiter of evidentiary rules).

The Washington Supreme Court has unequivocally held that the Evidence Rules fall within the court’s constitutional and statutory authority to govern matters of procedure. *City of Fircrest*, 158 Wn.2d at 394. The language of ER 101 makes clear that the Evidence Rules govern the admissibility of evidence in Washington trials, and that in the event of irreconcilable conflict between a rule and a statute, the rule will govern. ER 101 (“These rules govern proceedings in the courts of the state of Washington to the extent and with the exceptions stated in rule 1101.”<sup>3</sup>).

Washington courts consistently recognize that, pursuant to the court’s sole authority over matters of procedure, the Evidence Rules take precedence over statutes that are directly in conflict. Where the court determines a statute does conflict with an evidence rule, after attempts to harmonize them, it will not hesitate to find the statute invalid. See e.g., *State v. Pollard*, 66 Wn. App. 779, 783-84, 834 P.2d 51 (1992) (ER 1101

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<sup>3</sup> According to the exceptions stated in ER 1101, the Evidence Rules do not apply to the determination of questions of fact preliminary to the determination of admissibility of evidence, or to various sorts of non-jury trial proceedings not relevant here. ER 1101(c).

superseded statute to the contrary); *State v. Saldano*, 36 Wn. App. 344, 350, 675 P.2d 1231 (1984) (ER 609 superseded pre-existing statute that allowed admission of an accused's prior convictions for the purpose of affecting the weight of his testimony).

In *City of Fircrest*, for example, the court examined whether a statute that allowed the admission of BAC test results despite a suspect's challenges to them, conflicted with the rules of evidence. The court concluded that, because admission of the evidence was permissive and not mandatory, the statute could be harmonized with the rules of evidence and did not violate the separation of powers doctrine. 158 Wn.2d 384, 399.

In other jurisdictions where the judiciary has sole authority over matters of court procedure and has considered statutes in conflict with court rules, the courts have held that rules of evidence are subject to the separation of powers doctrine. See *Opinion of the Justices (Prior Sexual Assault Evidence)*, 688 A.2d 1006 (N.H. 1997) (The Court answered the Senate's request for an opinion regarding constitutionality of proposed legislation creating presumption that evidence of other sexual assaults will be admissible in certain civil and criminal sexual assault cases—holding that enactment of this legislation would violate separation of powers doctrine); *State v. Herrera*, 582 P.2d 384 (N.M. App. 1978) (statute regulating admission of victim's past sexual conduct "goes to practice and

procedure and, thus, pertains to matters within the control of the Supreme Court.”); *Johnson v. Rockwell Automation, Inc.*, 2009 Ark. 241, 2009 WL 1218362 (2009) (statute limiting evidence that may be introduced relating to the value of medical expenses in tort action was procedural and violated separation of powers doctrine); *State v. Zimmerman*, 121 Idaho 971, 829 P.2d 861 (1992) (statute allowing admission of child’s out-of-court statements regarding sexual or physical abuse was procedural and subject to separation of powers doctrine); *Manns v. Commonwealth*, 80 S.W.3d 439, 446 (Ken. 2002) (statute allowing admission at trial of evidence of defendant’s prior juvenile adjudications was procedural and therefore violated separation of powers doctrine); *State v. Mallard*, 40 S.W.3d 473 (Tenn. 2001) (Statute governing admission of evidence of defendant’s prior convictions subject to evaluation under separation of powers doctrine.)

B. *RCW 10.58.090 is in conflict with ER 404(b) and therefore ER 404(b) should trump the statute.*

ER 404(b) states that:

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

RCW 10.58.090(1) states:

In a criminal action in which the defendant is accused of a sex offense, evidence of the defendant's commission of another sex offense or sex offenses is admissible, notwithstanding Evidence Rule 404(b), if the evidence is not inadmissible pursuant to Evidence Rule 403.

The definition of "sex offense" is very broad, including even uncharged conduct. RCW 10.58.090(4), (5). The legislature has also defined the considerations the judge will use to determine if the evidence is admissible under ER 403. RCW 10.58.090(6). The statute directs courts to consider evidence of other sexual offenses in sexual misconduct prosecutions for any purpose. RCW 10.58.090.

RCW 10.58.090 is an express attempt by the legislature to supersede the Supreme Court's authority to make court rules. By its terms, the statute conflicts with ER 404(b), which categorically bans the admission of prior misconduct evidence for the purpose of "prov[ing] the character of a person in order to show action in conformity therewith." ER 404(b). RCW 10.58.090 not only makes admissible otherwise inadmissible propensity evidence, it removes ER 404(b)'s requirement that the purpose of the evidence be identified and consideration be limited to that purpose.

Although the statute provides factors for the court to consider in determining whether the evidence is relevant, mirroring ER 403, it usurps the court's authority to ban propensity evidence outright. ER 404(b)

reflects the judiciary's long-standing judgment that the relevance of propensity evidence is simply too attenuated, and its potential for prejudice too great, to be allowed in any prosecution. Indeed, the ban on propensity evidence has been firmly and historically adhered to in the common law since at least the seventeenth century in England, and to the present in this country. Are you Going to Arraign His Whole Life? How Sexual Propensity Evidence Violates the Due Process Clause, 28 Loy. U. Chi. L.J. 1, 14 (1996); 1A Wigmore on Evidence, § 58.2, at 1213.

The courts have consistently affirmed ER 404(b)'s ban on the use of sexual misconduct evidence to show propensity. *See e.g., State v. Sutherby*, 165 Wn.2d 870, 886, 204 P.3d 916 (2009) (holding that pornography evidence is admissible only to show sexual desire for a particular victim; otherwise, such evidence 'would merely show Sutherby's predisposition toward molesting children and is subject to exclusion under ER 404(b)').

It is therefore clear that RCW 10.58.090 is in direct conflict with ER 404(b) in that the statute removes the prohibition on propensity evidence and makes otherwise inadmissible evidence admissible. Therefore, the Legislature has violated the separation of powers doctrine by attempting to supersede the Court's rule-making authority. Therefore, the statute should be held to be unconstitutional.

In this case specifically, the trial court held that C.M.'s testimony would be inadmissible under ER 404(b)—that it was not a common scheme or plan, but that the evidence must be admitted under RCW 10.58.090 if it is related to a sex offense and admissible under ER 403. RP 132-35, CP 30-31. On this basis, the court ruled that C.M.'s testimony would be admitted under the statute. RP 135-36, CP 30-31. Without the application of the statute, this evidence would have been excluded. Therefore, this error requires the reversal of the convictions against Mr. Gower.

*C. Division II should not follow Division I's decisions in Gresham and Scherner.*

In two recent decisions, Division I rejected a challenge to RCW 10.58.090, holding that the statute did not violate the ex post facto clause, was not a violation of the separation of powers doctrine, and was not in conflict with ER 404(b). *See State v. Scherner*, 153 Wn. App. 621, 225 P.3d 248 (2009); *State v. Gresham*, 153 Wn. App. 659, 223 P.3d 1194 (2009).

This court should not follow Division I because the court erroneously concluded that RCW 10.58.090 did not conflict with ER 404(b). *See Scherner*, 153 Wn. App. at 645. It is clear that RCW 10.58.090, by its own terms, makes admissible propensity evidence that

was inadmissible under ER 404(b). The judge in this case held that the prior convictions were not admissible for purposes permissible under ER 404(b). The statute and the rule cannot be harmonized and, therefore, the court rule must prevail. *See Fircrest*, 158 Wn.2d at 394.

Moreover, Division I erroneously held that RCW 10.58.090 did not supersede the judge's ultimate decision on whether the evidence is admissible. *See Scherner*, 153 Wn. App. at 642. The language of the statute is mandatory, not permissive: "evidence of the defendant's commission of another sex offense or sex offenses **is admissible.**" RCW 10.58.090 (emphasis added). Moreover, it is clear in this case that the judge believed that RCW 10.58.090 was not permissive, but required the admission of the prior sex offenses, despite the prohibition on propensity evidence in ER 404(b), so long as the less-stringent ER 403 standard was met. RP 132.

Division II should not follow Division I, but rather should find that ER 404(b) is in conflict with RCW 10.58.090 and that court should adhere to ER 404(b), which is based on years of jurisprudence finding that propensity evidence is inadmissible.

**ISSUE 6: THE TRIAL COURT ERRED BY ADMITTING C.M.'S TESTIMONY REGARDING PRIOR PHYSICAL ABUSE BY MR. GOWER WHEN THIS TESTIMONY IS NOT REGARDING PRIOR SEXUAL MISCONDUCT AND IS NOT THEREFORE ADMISSIBLE UNDER RCW 10.58.090 AND THE COURT HAD RULED IT WAS NOT ADMISSIBLE UNDER ER 404(B).**

The trial court erroneously held that RCW 10.58.090 authorized the admission of C.M.'s testimony to uncharged physical abuse by Mr. Gower as substantive evidence that his spanking of S.E.H. was sexually motivated. CP 29, 31. Although finding that this evidence was inadmissible under ER 404(b), the court found that it was admissible under RCW 10.58.090 because: "the court finds that there may be a sexual motivation to the spanking of C.M. by the defendant." CP 31.

RCW 10.58.090(1) states:

In a criminal action in which the defendant is accused of a sex offense, evidence of the defendant's commission of another sex offense or sex offenses is admissible, notwithstanding Evidence Rule 404(b), if the evidence is not inadmissible pursuant to Evidence Rule 403.

Therefore, the only way C.M.'s testimony regarding spankings she received from her father more than 10 years before were admissible under RCW 10.58.090 were admissible is if this can be characterized as a "sex offense."

As stated above, there was never any testimony by C.M. that the spankings she received by her father were in any way sexual. C.M. testified in detail to the sexual abuse that occurred and that was eventually

charged, but her passing reference to the spankings was never connected to the sexual abuse. There is absolutely no evidence that the spankings were sexual.

Moreover, the trial court only found that the spanking of C.M. “may be” sexually motivated. CP 31. Nothing in RCW 10.58.090 indicates that the State is relieved of its commonlaw burden of proving the misconduct occurred by a preponderance of the evidence. *State v. Gresham*, 153 Wn. App. 659, 223 P.3d 1194 (2009) (citing 5 Karl B. Tegland, Washington Practice: Evidence Law and Practice § 404.33 (5<sup>th</sup> Ed. 2007) (under ER 404(b), the proponent of prior misconduct evidence must show that such conduct occurred by a preponderance of the evidence as a precondition to admissibility)). In this case, this means that the court had to find not only that the spanking occurred, but that it was, by a preponderance of the evidence, a sexual act. The trial court could not make that finding, only that the spanking “may be” sexual.

C.M.’s testimony regarding spankings and other alleged uncharged physical abuse was improperly admitted under RCW 10.58.090, was inadmissible prior bad act testimony excluded under ER 404(b), and was improperly considered by the trial court in reaching a verdict. See CP 12-13.

**ISSUE 7: THE CUMULATIVE ERROR IN THIS TRIAL DEPRIVED MR. GOWER OF HIS RIGHT TO A FAIR TRIAL.**

The combined effects of error may require a new trial even when those errors individually might not require reversal. *State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984). Reversal is required where the cumulative effect of several errors is so prejudicial as to deny the defendant a constitutionally fair trial under the federal and state constitutions. *Mak v. Blodgett*, 970 F.2d 614 (9<sup>th</sup> Cir. 1992); *United States v. Frederick*, 78 F.3d 1370, 1381 (9<sup>th</sup> Cir. 1996). In this case, all of the errors combined to enhance the unfair prejudice to Mr. Gower, and his convictions should be reversed even if the court should find that the errors do not individually require reversal.

**V. CONCLUSION**

Mr. Gower's convictions for indecent liberties by forcible compulsion and for incest in the second degree are not supported by substantial evidence and therefore must be reversed.

In addition, his convictions must be reversed because they are based on the erroneous admission of evidence under RCW 10.58.090, which is an unconstitutional statute and has led to the unconstitutional admission of propensity evidence in violation of due process.

Furthermore, the cumulative effect of these errors has fundamentally compromised this trial such that due process has been violated.

Therefore, Mr. Gower's convictions should be reversed.

DATED: April 27, 2010.

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