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Court of Appeals No. 40681-1-II  
Clark County No. 09-1-01951-7

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**STATE OF WASHINGTON,**

**Respondent,**

**vs.**

**TYSON WESLEY GREGG**

**Appellant.**

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**BRIEF OF APPELLANT**

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**A. ASSIGNMENTS OF ERROR**

**I. RCW 10.58.090 VIOLATES THE CONSTITUTIONAL SEPARATION OF POWERS DOCTRINE.**

**II. RCW 10.58.090, AS APPLIED IN THIS CASE, VIOLATES THE EX POST FACTO CLAUSE OF THE FEDERAL CONSTITUTION.**

**III. RCW 10.58.090, AS APPLIED IN THIS CASE, VIOLATES THE EX POST FACTO CLAUSE OF THE WASHINGTON STATE CONSTITUTION.**

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

**I. 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. Under the separation of powers doctrine, the Washington Supreme Court has ultimate authority to govern state court procedures, and where a statute directly conflicts with a court rule, the rule must prevail.**
- b. The Washington Supreme Court's sole authority to govern court procedures includes the authority to promulgate rules of evidence.**
- c. RCW 10.58.090 conflicts with a court rule of evidence and therefore violates the separation of powers doctrine.**

**II. THE APPLICATION OF RCW 10.58.090 IN THIS CASE VIOLATES THE EX POST FACTO CLAUSE OF THE FEDERAL CONSTITUTION.**

- a. The federal Ex Post Facto Clause prohibits retroactive application of statutes that alter the rules of**

**evidence in order to supply a deficiency of legal proof in criminal prosecutions.**

**b. Application of the statute in this case violates the federal Ex Post Facto Clause.**

**III. THE APPLICATION OF RCW 10.58.090 IN THIS CASE VIOLATES THE EX POST FACTO CLAUSE OF THE WASHINGTON CONSTITUTION.**

**a. Gunwall analysis**

**b. RCW 10.58.090 violates the Ex Post Facto Clause of the Washington Constitution as applied in this case.**

**C. STATEMENT OF THE CASE**

Tyson Wesley Gregg and Ashley Day are cousins. RP, p. 148. Tyson is just under four years older than Ashley. RP, p. 139, 149. Ashley and Tyson's grandfather owns a farm out near the Washougal area in Clark County. RP 149-50. Ashley and Tyson would occasionally play hide and seek at their grandparents' farm with a couple of other cousins. RP, p. 160-162. Ashley claims that when she was between the ages of nine and twelve or thirteen, Tyson used to sexually abuse her by placing her hand on his penis and making her masturbate him. RP, p. 165-66. She claimed that he would do this while they were hiding during hide and seek. RP 161-66. She claims that she told Tyson's half brother Kyle about the alleged abuse around the time it was happening but Kyle, who

had a rocky relationship with Tyson, maintains that she never made any such disclosure. RP, p. 178, 212, 217.

Other than her disputed disclosure to Kyle, Ashley did not tell anyone about this alleged abuse until she was at least sixteen. RP, p. 116. She told her then-boyfriend Samuel Palomin that Mr. Gregg abused her. RP, p. 116. Mr. Palomin did not tell anyone what Ashley told him. RP, p. 117. Then, in March of 2009, she told her current boyfriend, Tim Hopper. RP 88, 98. Mr. Hopper was unsatisfied with the physical side of their relationship and Ashley explained that her reluctance to be physical with Mr. Hopper was due to her alleged abuse by Mr. Gregg. RP 88-89. Mr. Hopper decided to tell Ashley's mother about the allegation, and shortly after that the police were called. RP 91, 98, 101.

The State charged Mr. Gregg with four counts of child molestation in the first degree and one count of child molestation in the second degree. CP 1-2. Each count of first degree was alleged to have occurred on or between December 5, 1997 and December 4, 2000. CP 1-2. The count of child molestation second degree was alleged to have occurred on or between December 5, 2000 and December 4, 2002. CP 2. Prior to trial, the State moved in limine that it be allowed to present evidence that Mr. Gregg was convicted of Incest First Degree committed against his sister on or between December 1, 2000 and December 31, 2000. CP 5-16. The

court granted the motion and ruled, inter alia, that “[t]he necessity of the evidence beyond the testimonies otherwise offered at trial is high as the credibility of the complaining victim is paramount to the juror’s deliberations due to a lack of other eyewitnesses or corroboratory evidence.” CP 58. The court instructed the jury that:

The parties have agreed that the following evidence will be presented to you:

Tyson Wesley Gregg has a prior juvenile adjudication (conviction) for Incest in the First Degree from 2001. Then 16 year old Tyson Wesley Gregg had his then 8 year old half-sister perform oral sex on him on multiple occasions.

This is evidence that you will evaluate and weight with all of the other evidence.

CP 4. Mr. Gregg objected to the admission of his prior conviction and the issue is thus preserved for appeal. RP, p. 49.

The jury sent out two notes during deliberations, indicating they could not reach a verdict. CP 46. They were told, on both occasions, to keep deliberating. CP 46. The jury ultimately returned guilty verdicts as to all five counts. CP 47, 49, 51, 53, and 55. Although he would have received mere weeks in detention had Ms. Day pursued her claim in a timely fashion, Mr. Gregg was instead sentenced to 175 months in prison.

CP 63. This timely appeal followed. CP 80.

#### **D. ARGUMENT<sup>1</sup>**

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<sup>1</sup> The majority of the argument here has been adopted from the briefing done by Maureen Cyr of the Washington Appellate Project in *State v. Gresham*, which is currently pending review in the Supreme Court.

## **IA. SUMMARY OF ARGUMENT**

Ashley Day claims that she was molested by her cousin, Tyson Gregg, yet she waited seven years before initiating a complaint to police. There are no witnesses who corroborate her story. Rather than simply ask a jury to find her credible, the State sought to bolster its case by presenting evidence that Mr. Gregg molested a different victim, in a different manner, at a different time. There was no relevance to this evidence other than as propensity evidence, to show he acted in conformity with his earlier, unrelated act. This evidence was nothing short of a nuclear detonation in an otherwise unremarkable case. The stated basis for its admission was RCW 10.58.090, a statute designed to nullify Evidence Rule 404 (b) which explicitly prohibits the use of evidence of prior bad acts in order to demonstrate propensity. As argued below, RCW 10.58.090 is unconstitutional. The error in admitting this evidence was not harmless. This case, had it been tried to the jury properly, was a case of Ms. Day's word against Mr. Gregg's. That is why the State sought to admit propensity evidence—to lessen its burden of proving that Ms. Day was a credible witness. Indeed, that is the very reason that the legislature enacted RCW 10.58.090. Here, the jury twice tried to hang and was twice

instructed to continue deliberating. CP 46. Under no circumstance could it be said that the admission of this evidence affected the jury's verdict.

**I. 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.**

RCW 10.58.090 permits the court to admit, 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...notwithstanding Evidence Rule 404 (b)." RCW 10.58.090 (1). The statute directs courts to consider evidence of other sexual offenses in sexual misconduct prosecutions for any purpose. RCW 10.58.090. By its express 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). The statute further conflicts with ER 404 (b) to the extent it does not require courts to identify the purpose of the evidence or to limit its consideration by the jury for only that purpose.

As discussed below, in Washington, the Supreme Court has ultimate authority, inherent in the state constitution and delegated by statute, to promulgate rules governing procedures in state courts. Although that authority is often shared with the Legislature, it is well

settled that where a procedural statute conflicts with a procedural rule promulgated by the court, the rule must prevail.

The Evidence Rules, which “govern the proceedings in the courts of the state of Washington,” ER 101, are unquestionably a valid exercise of the Supreme Court’s rule-making power. Washington courts recognize that rules of evidence are generally rules of procedure subject to the Supreme Court’s ultimate authority and the constitutional separation of powers doctrine. Although the Legislature may enact statutes governing the admission of evidence, courts do not hesitate to invalidate evidence statutes that conflict with the Supreme Court’s evidence rules.

In this case, because RCW 10.58.090 directly conflicts with a procedural rule, ER 404 (b), it usurps the Supreme Court’s constitutional authority to govern the procedures of Washington courts and must be stricken.

**a. Under the separation of powers doctrine, the Washington Supreme Court has ultimate authority to govern state court procedures, and where a statute directly conflicts with a court rule, the rule must prevail.**

The doctrine of separation of powers stems from the constitutional distribution of the government’s authority into three branches. *State v. Moreno*, 147 Wn.2d 500, 505, 58 P.2d 265 (2002). The state constitution vests the “judicial power of the state” in the Supreme Court and the

various inferior courts designated. Wash. Const. art. 4, § 1. Each branch of government wields only the power it is given. *Moreno* at 505. 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.” *Id.*, quoting *Carrick v. Locke*, 125 Wn.2d 129, 135, 882 P.2d 173 (1994). 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, 906-07, 890 P.2d 1047 (1995) (citation omitted).

Although some overlap among the three branches of government is allowed, the separation of powers demands the independence of each branch. *Moreno* 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.” *Id.*, quoting *Carrick* at 135.

The function of the judicial branch is to govern has inherent power procedures. The Washington Supreme Court has inherent 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, §

1. The court also has power delegated by the Legislature to adopt rules of procedure. *City of Fircrest* at 394; *Fields* at 129; RCW 2.04.190 RCW 2.04.090 provides the supreme court 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 authority to prescribe procedural rules takes precedence over the Legislature’s. The intent of RCW 2.04.190, enacted 1925, 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); *The Rule-Making Power of the Courts*, 1 Wash. L. Rev. 163, 175, 228 (1925). RCW 2.04.200, enacted at the same time as RCW 2.04.190, makes clear that the court’s 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.” RCW 2.04.200; *State v. Williams*,

156 Wash. 6, 7, 286 P. 65 (1930) (RCW 2.04.090 and RCW 2.04.200 abrogated pre-existing statutes in conflict with the court's new rules).

Washington courts routinely and consistently recognize that the Supreme Court's procedural rules take precedence over conflicting legislative enactments. As the court explained in *State v. Smith*, 84 Wn.2d 498, 502, 527 P.2d 674 (1974), "[s]ince 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." See also, e.g., *City of Fircrest* 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. Templeton*, 148 Wn.2d 193, 217, 59 P.3d 632 (2002) ("Under *Smith* and *Fields* the validity of a court rule need not stand solely on either constitutional or statutory grounds. A nexus between the rule and the court's rule-making authority over procedural matters validates the court rule, despite possible discrepancies between the rule and legislation or the constitution."); *State v. Ryan*, 103 Wn.2d 165, 178, 691 P.2d 197 (1984) ("statutory enactments of evidentiary rules are subject to judicial review, this court being the final arbiter of evidentiary rules."); *Fields* at 129-30 (CrR 2.3 (b), governing issuance of search warrants, trumps its counterpart in RCW 10.79.015).

The Washington Supreme Court's sole authority to govern matters of procedure in Washington courts is not shared by courts in many other jurisdictions. In 1925, when RCW 2.04.190 was enacted, the judiciary in most states was expressly limited by either constitution or statute from making rules that were inconsistent with statute. *The Rule-Making Power of the Courts, supra*, at 172-80. Today, the extent of state legislative competence over rules of procedure used in state courts still varies considerably. 1 John H. Wigmore, *Evidence in Trials at Common Law*, § 7, at 462 n. 1 (Tillers rev. ed. 1983). For example, the constitutional provisions of several states clearly give the legislature sole authority to prescribe rules of practice and procedure, while in several other states, judicial decisions have established the principle of legislative supremacy. *Id.*

Similarly, in the federal system, the judiciary's power to "create and enforce nonconstitutional 'rules of procedure and evidence for the federal courts exists only in the absence of a relevant Act of Congress.'" *Dickerson v. United States*, 530 U.S. 428, 437, 120 S.Ct. 2326 (2000) (quoting *Palermo v. United States*, 360 U.S. 343, 353 n. 11, 79 S.Ct. 1217 (1959)). The Rules Enabling Act directs the federal courts to draft the rules of evidence, practice, and procedure for the federal courts, consistent with the Acts of Congress and subject to Congressional approval. See 28

U.S.C. §§ 2071-77. Thus, Congress retains the ultimate authority to modify or set aside any judicially created rules of evidence and procedure that are not required by the Constitution. *Dickerson*, 530 U.S. at 437 (citations omitted).

**b. The Washington Supreme Court's sole authority to govern court procedures includes the authority to promulgate rules of evidence.**

The court's constitutional authority to govern matters of court procedure contrasts with the Legislature's authority to govern matters of substance. *Fields* at 129; *Smith* at 501. "Substantive law prescribes norms for societal conduct and punishments for violations thereof. It thus creates, defines, and regulates primary rights. In contrast, practice and procedure pertain to the essentially mechanical operations of the courts by which substantive law, rights, and remedies are effectuated." *City of Fircrest* at 394 (quoting *Smith* at 501). Promulgation of state court rules creates procedural rights; creation of substantive rights is in the province of the Legislature absent any constitutional prohibition. *Templeton* at 212.

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* 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 an

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>2</sup>) see also, e.g. *Teter v. Old Colony Co.*, 190 W.Va. 711, 441 S.E. 2d 728 (1994) (language of ER 101 alone, even without explicit constitutional authority, makes clear that legislative enactment contrary to provisions of Evidence Rules is invalid). The very fact of adoption of the Evidence Rules by the court “is conclusive of its determination that at least these rules as adopted are procedural.” *Ammerman v. Hubbard Broadcasting, Inc.*, 89 N.M. 307, 310 (N.M. 1976).

Rules of evidence are rules of procedure, because they “pertain to the essentially mechanical operations of the courts by which substantive law, rights, and remedies are effectuated.” *City of Fircrest* at 394 (quoting *Smith* at 501). Rules of evidence generally “strike at the very heart of a court’s exercise of judicial power,” in that they govern “the powers to hear facts, to decide the issues of fact made by the pleadings, and to decide the questions of law involved.” *State v. Mallard*, 40 S.W. 3d 473, 483 (Tenn. 2001). In criminal cases, “while [t]he legislature has the power to declare what acts are criminal and to establish the

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<sup>2</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).

punishment for those acts as part of the substantive law[,]...the court regulates the method by which the guilt or innocence of one who is accused of violating a criminal statute is determined.” *State v. Losh*, 721 N.W. 2d 886, 891 (Minn. 2006) (citation omitted).

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. In *City of Fircrest, supra*, 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. *Id.* at 399.

Similarly, in *Ryan, supra*, at 165, the court examined whether the child hearsay statute conflicted with the court’s authority to promulgate rules of evidence. The court concluded the statute did not conflict with the Evidence Rules because “[l]egislative enactment of hearsay exceptions is specifically contemplated by the Rules of Evidence,”<sup>3</sup> and because the statute allowed admission of the child’s statement only if it bore “particularized guarantees of trustworthiness.” *Id.* at 178-79.

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<sup>3</sup> “ER 802 states: ‘Hearsay is not admissible except as provided by these rules, by other court rules, or by statute.’” *Ryan* at 178 (emphasis in *Ryan*).

But 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, providing that rules of evidence do not apply at restitution hearings, 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).

Courts in other jurisdictions in which the judiciary has sole authority over matters of procedure generally agree that rules of evidence are rules of procedure that are subject to the separation of powers doctrine. See *State v. Zimmerman*, 121 Idaho 971, 829 P.2d 861 (1992); *Manns v. Commonwealth*, 80 S.W.3d 439, 446 (Ken. 2002); *People v. McDonald*, 201 Mich.App. 270, 272, 505 N.W.2d 903 (1993); *Opinion of the Justices (Prior Sexual Assault Evidence)*, 141 N.H. 562, 577, 688 A.2d 1006 (1997); *State v. Herrera*, 92 N.M. 7, 12, 582 P.2d 384 (N.M. Ct. App. 1978); *Ammerman v. Hubbard Broadcasting, Inc.*, 89 N.M. 307, 310 (N.M. 1976); *State v. Mallard*, 40 S.W.3d 473 (Tenn. 2001); *State v. Teter, supra*, 190 W.Va. 711, 724-26.

**c. RCW 10.58.090 conflicts with a court rule of evidence and therefore violates the separation of powers doctrine.**

As stated, RCW 10.58.090 permits the court to admit, 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...notwithstanding Evidence Rule 404 (b).” The statute permits courts to admit evidence of prior offenses for *any* purpose, including for the purpose of proving the defendant’s propensity to commit the crime, which ER 404 (b) categorically forbids. The state therefore conflicts with a court procedural rule and violates the separation of powers doctrine.

Unlike the child hearsay statute examined in *State v. Ryan*, 103 Wn.2d 165, statutes permitting propensity evidence cannot be harmonized with the Evidence Rules. As discussed above, ER 802 provides that *hearsay* evidence may be admissible pursuant to statute, notwithstanding the Evidence Rules. But no such exception exists for propensity evidence. Although ER 402 provides that “[a]ll relevant evidence is admissible, except as...otherwise provided by statute,” that rule permits the Legislature only to *bar* otherwise relevant evidence. 5 Karl B. Tegland, *Washington Practice Series: Evidence Law and Practice*, §402.2 at 275 (5<sup>th</sup> ed. 2007). It does not permit the Legislature to *allow* admission of evidence that the Evidence Rules prohibit.

Although the statute requires courts to weigh the probative value of the prior offense evidence against the danger of unfair prejudice, using the

analysis provided in ER 403, see RCW 10.58.090 (1), (6) (g), the statute usurps the court's constitutional 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.

The common law in Washington has been consistent with the tradition elsewhere. ER 404 (b) reflects the traditional common law rule that a person's prior crimes, wrongs, or acts are inadmissible to demonstrate the person's character or general propensities. 5 Tegland, *Washington Practice, supra*, §404.9 at 497. Historically, the evidence of past sexual misconduct has been admissible in Washington only to show the defendant's "lustful disposition" *toward the complainant*. See e.g. *State v. Crowder*, 119 Wash. 450, 451-52, 205 P.850 (1922) (allowing admission of evidence of prior acts of sexual intercourse *between the parties* to show lustful disposition of defendant). The judiciary in Washington has consistently affirmed its allegiance to ER 404 (b)'s general ban on sexual misconduct propensity evidence. See e.g. *State v. Sutherby*, 165 Wn.2d 870, 886, 204 P.3d 916 (2009) (explaining that pornography evidence is admissible only to show sexual desire for particular victim; otherwise, such evidence "would merely show

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

In its statement of purpose, the Legislature asserted it had authority to enact RCW 10.58.090 as part of its authority to enact "rules as substantive law." Laws 2008, ch. 90, § 1, Statement of Purpose. The Legislature explained:

**Purpose—Exception to Evidence Rule—2008 c 90:** In Washington, the legislature and the courts share the responsibility for enacting rules of evidence arises from a statutory delegation of that responsibility to the court and from Article IV, section 1 of the state Constitution. (citing *State v. Fields*, 85 Wn.2d 126, 129, 530 P.2d 284 (1975)).

The legislature's authority for enacting rules of evidence arises from the Washington supreme court's prior classification of such rules as substantive law. (citing *State v. Sears*, 4 Wn.2d 200, 215, 103 P.2d 337 (1940) (the legislature has the power to enact laws which create rules of evidence); *State v. Pavelich*, 153 Wash. 379, 279 P. 1102 (1929) ("rules of evidence are substantive law."))

The legislature adopts this exception to Evidence Rule 404 (b) to ensure that juries receive the necessary evidence to reach a just and fair verdict. *Id.*

But as discussed above, Washington courts consistently characterize rules of evidence as rules of procedure subject to the judiciary's ultimate authority. In criminal cases, rules of evidence are central to the courts' core purpose to regulate the manner in which the fact-finder decides guilt or innocence.

The cases cited by the Legislature in its statement of purpose are not inconsistent with the Supreme Court's characterization of rules of

evidence as subject to its sole authority. In *State v. Sears, supra* at 215, the court merely recognized that the legislature may create rules of evidence. The Legislature's authority to enact statutory rules of evidence is not in doubt. But under the separation of powers doctrine, evidence statutes must give way to court rules when they directly conflict.

Similarly, in *State v. Pavelich*, 153 Wn.2d 379, 279 P. 1102 (1929) the court did not hold that the Legislature may enact evidence statutes that conflict with court rules. The issue in *Pavelich* was whether a court rule that abolished a trial court's mandatory duty to inform the jury that it could draw no inference of guilt from the accused's failure to testify, was an unconstitutional usurpation of legislative authority. *Id.* at 385-86. The court stated in dicta that "[r]ules of evidence constitute substantive law, and cannot be governed by rules of court." *Id.* at 382. But the court did not explain the statement and it was not necessary to its decision.

Moreover, the statement is inconsistent with the case law discussed above.

As discussed more fully in the sections below, rules of evidence may be characterized as "substantive" if they change "the amount of evidence necessary to support a conviction." E.g. *Ludvigsen v. City of Seattle*, 162 Wn.2d 660, 671, 174 P.3d 43(2007). Such rules may not be applied retroactively, however without violating the Ex Post facto Clause. *Id.*

In *Brim v. State*, 624 N.E.2d 27, 33 n.2 (Ind. Ct. App. 1993) and *State v. Day*, 643 N.E.2d 1 (Ind. Ct.App. 1995), the Indiana Court of Appeals struck down a statute similar to RCW 10.58.090<sup>4</sup> because it conflicted with the common law and the evidence rules.

Similarly, RCW 10.58.090 directly conflicts with a court rule and therefore violates the constitutional separation of powers doctrine. The statute is void. *State v. Thorne*, 129 Wn.2d 736, 762, 921 P.2d 514 (1996) (legislation that violates separation of powers doctrine is void).

Division I of the Court of Appeals, in *State v. Scherner*, 153 Wn.App. 621, 225 P.3d 248, *review granted*, 168 Wn.2d 1036, 233 P.3d 888 (2009) and *State v. Gresham*, 153 Wn.App. 659, 223 P.3d 1194, *review granted*, 168 Wn.2d 1036, 233 P.3d 888 (2009), rejected the argument that RCW 10.58.090 violates the separation of powers doctrine. Review of the decision of the Court of Appeals was granted by the Supreme Court and oral argument in those consolidated cases is set for March 17<sup>th</sup>, 2011. This question of law, therefore, is unsettled and will remain unsettled until the Supreme Court issues its opinion.

**II. THE APPLICATION OF RCW 10.58.090 IN THIS CASE VIOLATES THE EX POST FACTO CLAUSE OF THE FEDERAL CONSTITUTION.**

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<sup>4</sup> The Indiana statute permitted, in a prosecution for child molestation, the admission of evidence of the defendant's prior sexual molestation of a different victim. Ind. Code 35-37-4-15 (cited in *Brim* at 33 n.2)

RCW 10.58.090 allows the State to rely upon highly incriminating evidence of a defendant's past sexual conduct, which would otherwise be inadmissible in order to convict him of a current sexual offense. The Legislature's intent in enacting the statute was to supply a deficiency of legal proof common in sex offense prosecutions. Moreover, the statute permits courts to consider, in deciding whether to admit the prior offense evidence, the "necessity" for the evidence in light of the State's other evidence already admitted. RCW 10.58.090 (6) (e). In these ways, the statute effectively alters the standard of proof required to convict a person of a sex offense.

Because the statute is a substantive rule of evidence that alters the standard of proof required to convict a person of a class of crime, its application in this case violates the Ex Post Facto Clause of the United States constitution.

**a. The federal Ex Post Facto Clause prohibits retroactive application of statutes that alter the rules of evidence in order to supply a deficiency of legal proof in criminal prosecutions.**

Article 1, § 10 of the United States Constitution provides: "No State shall...pass any Bill of Attainder, ex post facto law, or Law impairing the Obligation of Contracts."

The test for determining whether a statutory enactment may be applied in a prosecution for conduct that occurred before its enactment, is

set forth in *Calder v. Bull*, 3 U.S. 386, 1 L.Ed. 648 (1798). *Ludvigsen v.*

*Seattle, supra* at 668. Ex post facto laws fall into four categories:

1<sup>st</sup>. Every law that makes an action, done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2<sup>nd</sup>. Every law that aggravates a crime, or makes it greater than it was, when committed. 3<sup>rd</sup>. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4<sup>th</sup>. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender. All these, and similar laws, are manifestly unjust and oppressive.

*Calder*, 3 U.S. at 390-91.

The fourth *Calder* category, prohibiting the retroactive application of laws that alter the legal rules of evidence, is at issue in this case. Only laws that “change the rules of evidence, for the purpose of conviction,” fall within the category. *Id.* at 391. The ex post facto prohibition against such laws arose in opposition to the British practice of, among other things, enacting laws that “violated the rules of evidence,” in order to supply a deficiency of legal proof” in criminal prosecutions. *Id.* at 389.

In determining whether an alteration in an evidence statute may be applied to conduct pre-dating its enactment, the question is whether the alteration is characterized as “procedural” or “substantive.” *Ludvigsen* at 671. “If it is characterized as a procedural change in the admissibility of evidence, it does not violate the ex post facto clause. If it is characterized

as a substantive change in the amount of evidence necessary to support a conviction, then it violates the ex post facto clause.” *Id.* The difference between “ordinary” rules of evidence, which are procedural, and those addressed by the Ex Post Facto Clause, “is their impact on the sufficiency of evidence necessary to convict.” *Id.* “[O]rdinary’ rules of evidence do not implicate ex post facto concerns because ‘they do not concern whether the admissible evidence is sufficient to overcome the presumption [of innocence].’” *Id.*, quoting *Carnell v. Texas*, 529 U.S. 513, 533 n. 23, 120 S.Ct. 1620 (1999)). In contrast, “substantive” rules “reduc[e] the quantum of evidence required to convict an offender.” *Carnell* at 532-33. Such rules are unfair because, in each instance, the government has altered the rules after the fact “in a way that is advantageous only to the State, to facilitate an easier conviction.” *Id.*

In *Ludvigsen*, the court examined a change in the law of evidence regarding the crime of driving under the influence. Before that change, in order to prove the crime under the “per se” prong of the DUI ordinance, the City was required to prove the blood alcohol test machine’s thermometer was certified; after the change, the City no longer had to prove the thermometer was certified. *Id.* at 663, 666. The court concluded the change in the law was “substantive,” because it “disadvantage[d] the defendant by permitting a conviction based on less

evidence than was previously required.” *Id.* at 672. The change in law was not merely procedural, as the amendments “d[id] not simply let more evidence in to trial; they change[d] the quantum of evidence necessary to support a conviction.” *Id.* at 674.

By contrast, in *State v. Clevenger*, 69 Wn.2d 136, 417 P.2d 626 (1966), the court addressed a “procedural” change in a rule of evidence that did not raise ex post facto concerns. In *Clevenger*, after the crime occurred but before trial, the Legislature amended the marital privilege statute to permit one spouse to testify against another in a criminal action for a crime committed by the spouse against his or her child. *Id.* at 140-41. The statute was “procedural” because it did not “authorize conviction upon less proof, in amount or degree, than was required when the offense was committed.” *Id.* at 142 (quoting *Hopt v. People of Territory of Utah*, 110 U.S. 574, 589, 4 S.Ct. 202 (1884)). Instead, the law “only remove[d] existing restrictions upon the competency of certain classes of persons as witnesses.” *Id.* at 142, quoting *Hopt* at 589.

Similarly, in *Thompson v. Missouri*, 171 U.S. 380, 387-88, 18 S.Ct. 922 (1898), the United States Supreme Court concluded that a procedural change permitting the court to admit letters written by the defendant to his wife for the purposes of comparing them to letters

admitted into evidence was not an ex post facto violation because the change in law

[D]id nothing more than remove an obstacle arising out of a rule of evidence that withdrew from the consideration of the jury testimony which, in the opinion of the legislature, tended to elucidate the ultimate, essential fact to be established, namely, the guilt of the accused. Nor did it give the prosecution any right that was denied to the accused. It placed the state and the accused upon an equality.

Yet, any simple distinction between rules affecting admissibility or competency of evidence and rules affecting the amount or degree of proof required for conviction “neglect [] the practical relationship between rules of admissibility and standards of proof.” 1 John H. Wigmore, *Evidence in Trials at Common Law*. §7, at 468 n. 4 (Tillers rev.ed. 1983). Such distinctions can be unhelpful, because the standard of proof is effectively altered in a class of cases by any rule, specifically directed at criminal defendants, that allows admission of prejudicial evidence for the purpose of supplying a deficiency of legal proof. When the Legislature alters the rules of evidence in order to supply a deficiency of legal proof, application of the new statute to crimes pre-dating its enactment is oppressive in the manner the Ex Post Facto Clause was meant to address. See *Calder*, 3 U.S. at 389.

In Sum, a statute that alters the rules of evidence for the purpose of supplying a deficiency of legal proof for a class of crime, in order to

convict offenders, may not be applied to crimes pre-dating its enactment. *Calder* at 390-91. Such a statute effectively alters the State's burden of proof.

**b. Application of the statute in this case violates the federal Ex Post Facto Clause.**

It is plain that the Legislature enacted RCW 10.58.090 to make obtaining convictions for sex offenses easier for the State. The Legislature adopted the provision "to ensure that juries receive the necessary evidence to reach a just and fair verdict." Laws 2008, ch. 90, § 2, Statement of Purpose. But unlike the evidence rule at issue in *Clevenger, supra*, and *Thompson, supra*, the provision does not place "the state and the accused upon an equality." *Thompson*, 171 U.S. at 387-88. To the contrary, the purpose and effect of the statute is to overcome deficiencies of proof common to sex offense prosecutions and make conviction easier.

The statute directs courts to consider "the necessity of the evidence beyond the testimonies already offered at trial." RCW 10.58.090 (6) (e). The purpose of this provision, and the statute as a whole, is to facilitate sex abuse convictions, which previously often depended upon the victim's testimony alone. Testimony in favor of the bill in the House Report states: "We need to allow for admission of [prior sex offense] evidence that did not result in a conviction because the nature of these offenses often result

in no charge being filed and no convictions.” H.R. B. Rep., 2008 Reg. Sess. S.B. 6933. Testimony at the Senate Hearing states: “ER 404 (b) should be charged as it applies to trials of sex offenses, “because juries in such cases too often are unable to reach a verdict. S.B. Rep., 2008 Reg. Sess. S.B. 6933.

Applying RCW 10.58.090 (6) (e), the trial court in this case found that because this case was, for lack of a more sophisticated term, a “he said” versus “she said,” the State was entitled to bolster its case by arguing that because Mr. Gregg committed a sex offense once, he must have done it again. There was no other purpose in admitting this evidence but to lessen the State’s burden of establishing Ms. Day as a credible witness.

In conclusion, the statute as intended by the Legislature and as applied by the trial court in this case, effectively alters the degree of proof the State must present to obtain a conviction for a sex offense. The Legislature’s statement of purpose reflects its understanding that this is indeed a “substantive law.” Laws 2008, ch. 90, § 2, Statement of Purpose. For these reasons, application of the law in Mr. Gregg’s case violated the Ex Post Facto Clause.

Like the separation of powers issue, the Court of Appeals, in *State v. Scherner*, 153 Wn.App. 621, 225 P.3d 248, *review granted*, 168 Wn.2d 1036, 233 P.3d 888 (2009) and *State v. Gresham*, 153 Wn.App. 659, 223

P.3d 1194, *review granted*, 168 Wn.2d 1036, 233 P.3d 888 (2009), rejected the argument that RCW 10.58.090 violates the Ex Post Facto Clause of the United States Constitution. As noted above, oral argument is set in those consolidated cases for March 17<sup>th</sup>, 2011. Until such time as the Supreme Court issues its opinion, this question of law remains unsettled.

**III. THE APPLICATION OF RCW 10.58.090 IN THIS CASE VIOLATES THE EX POST FACTO CLAUSE OF THE WASHINGTON CONSTITUTION.**

RCW 10.58.090 plainly alters the rules of evidence for the purpose of convicting a person charged with a sex offense. The statute therefore falls under the fourth category of ex post facto laws set forth in *Calder*, 3 U.S. at 390-91, namely that “[e]very law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender.” A *Gunwall*<sup>5</sup> analysis reveals the Founders of the Washington Constitution would have understood that the state ex post facto clause applied to laws falling under the fourth *Calder* category. Therefore, the

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<sup>5</sup> The six non-exclusive *Gunwall* factors are: (1) the textual language of the state constitution; (2) significant differences in the tests of parallel provisions of the federal and state constitutions; (3) state constitutional and common law history; (4) preexisting state law; (5) differences in structure between the federal and state constitutions; and (6) matters of particular state interest or local concern. *State v. Gunwall*, 106 Wn.2d 54, 61-62, 720 P.2d 808 (1986).

Founders would have intended that application of RCW 10.58.090 to Mr. Gregg's case was in violation of Wash. Const. article 1, § 23.

a. **Gunwall analysis**

i. Factors one and two—textual language of the Washington Constitution and significant differences between the state and federal Ex Post Facto Clauses. Article 1, § 10 of the United States Constitution provides “No State shall...pass any Bill of Attainder, ex post facto law, or Law impairing the Obligation of Contracts.” The Washington Constitution ex post facto prohibition provides: “[n]o bill of attainder, ex post facto law, or law impairing the obligations of contracts shall ever be passed.” Const. art. 1, §23. Although the language of the two provisions is similar, use of the word “ever” in the state provision suggests an emphatic intent by the Founders to forbid ex post facto laws.

ii. Pre-existing state law.

Very few cases addressing the ex post facto prohibition pre-date the adoption of the Washington Constitution. In *Fox v. Territory*, 2 Wash. Terr. 297, 300, 5 P. 603 (1884), the Washington Supreme Court held a law that prescribed qualifications for persons proposing to practice medicine in the territory and that excluded many from the practice who might otherwise engage in it, was not ex post facto under the federal constitution, because it “[did] not proceed upon the idea of punishment for past acts.”

The court explained that ex post facto laws prohibited by the federal constitution include those that are “directed at particular classes, prescribing additional penalties for acts before that declared crimes, rendering punishable acts not before criminal, and changing the rules of evidence by which less or different testimony was made sufficient to convict.” *Id.* at 300.

iii. History of constitutional provision.

The delegates at the Washington constitutional convention borrowed the language in Section 23 from the California and Oregon Constitutions, the Hill draft, and the federal Constitution. Robert F. Utter and Hugh D. Spitzer, The Washington State Constitution: A Reference Guide, 37-38 (2002). The language of the Washington provision is identical to the Oregon provision. *State v. Fugate*, 223 Or. 195, 210 n.5, 26 P.3d 802 (2001) (article 2, §21 of the Oregon Constitution provides, “No *ex post facto* law...shall ever be passed.”) The Oregon provision, in turn, was derived from the Indiana Constitution. *Id.* at 211.

Washington’s Constitution reflects the political ideals of the Progressive Era and their influence on western state politics of the period. Cornell W. Clayton, Toward a Theory of the Washington Constitution, 37 *Gonz. L. Rev.* 41, 67-68 (2001/2002). The historical milieu and political culture in Washington at the time included the aim to secure a popular,

democratic government against corruption and special corporate privilege, while simultaneously protecting individual rights, which included traditional legislative prohibitions on bills of attainder and ex post facto laws. *Id.*

iv. Differences in structure between the federal and state constitutions.

The United States Constitution is a grant of limited power to the federal government, whereas the Washington Constitution imposes limitations on the otherwise plenary power of the state. *State v. Gunwall*, 106 Wn.2d 54, 61, 720 P.2d 808 (1986). This means that, at the state level, protection from legislative power is found solely in positive constitutional affirmations of individual liberties. Clayton, Toward a Theory of the Washington Constitution, *supra*, at 74.

v. Matters of particular state interest.

The regulation of criminal trials is a matter of particular state concern. *State v. Boland*, 115 Wn.2d 571, 576, 800 P.2d 1112 (1990); *Gunwall* at 62.

vi. Common law history.

Early decisions from the Washington Supreme Court indicate the Court understood that laws altering the rules of evidence to make conviction easier could not be applied to crimes pre-dating their

enactment. *Lybarger v. State*, 2 Wash. 552, 560-61, 27 P. 449 (1891). In *Lybarger*, the court addressed whether the state constitutional provision allowing prosecution by information rather than presentment to grand jury was ex post fact as applied to crimes occurring before the constitution was adopted. *Lybarger* at 555. The court applied the four factors set forth in *Calder, supra*, and held the change in law at issue in *Lybarger* was merely “procedural” and did not fall under any of the factors. *Lybarger* at 557. The Court explained it understood the fourth *Calder* factor to bar “change[s in] the rules of evidence to make conviction more easy.” *Id.* at 560-61.

The Washington Supreme Court’s early understanding of the fourth *Calder* category parallels the early understanding of the Oregon and Indiana courts. *State v. Fugate*, 332 Or. 195, 26 P.3d 802 (Or. 2001). Again, article 1, section 23 of the Washington Constitution is derived from the identical provision in the Oregon Constitution, which, in turn, is derived from the Indiana Constitution. *Id.* at 211. In *Fugate*, the Oregon court noted that the Indiana Supreme Court had construed the meaning of its ex post facto clause as prohibiting the application of laws that “retrench the rules of evidence, so as to make conviction more easy.” *Id.*, quoting *Strong v. State*, 1 Blackf. 193, 196 (Ind. 1822). The Indiana court had cited to *Calder v. Bull, supra*. *Fugate* at 211 (citing *Strong*,

*supra*, at 2, n.2). The Oregon court observed that the Indiana court's decision in *Strong* would have been available to the Oregon framers when they decided to adopt the ex post facto provision of the state constitution. *Fugate* at 212, 213 n.6. Thus, the Oregon Constitution forbids the retroactive application of laws that fall within the fourth *Calder* category. *Id.* at 213. In other words, "laws that alter the rules of evidence in a one-sided way that makes conviction of a defendant more likely," may not be applied to crimes committed before their enactment. *Id.*

In *Fugate*, the Oregon court independently applied its state constitutional provision to a statutory amendment that barred the exclusion of evidence obtained in violation of statute unless exclusion was otherwise required by law. *Id.* at 198-99. The acknowledged purpose of the Oregon law was to make criminal convictions easier. *Id.* at 214-15. Applying the fourth *Calder* category, the court held the provision violated the ex post facto clause of the Oregon Constitution because it operated retroactively and to the exclusive benefit of the prosecution. *Id.*

**b. RCW 10.58.090 violates the Ex Post Facto Clause of the Washington Constitution as applied in this case.**

RCW 10.58.090 plainly alters the rules of evidence, permitting different evidence than was earlier allowed, in order to make conviction in a sex offense prosecution more likely. In *Calder v. Bull*, *supra* at 390-91,

the United States Supreme Court explained: “Every law that alters the legal rules of evidence, and receives less, or different testimony, than the law required at the time of the commission of the offence, in order to convict the offender” is ex post facto when applied to crimes occurring before its enactment. At the time of the founding of the Washington Constitution, court applied the *Calder* framework. *Lybarger* at 557, *Fugate* at 212-13. Thus, the founders of the Washington Constitution would have understood that “laws that alter the rules of evidence in a one-sided way that make conviction of a defendant more likely,” may not be applied to crimes pre-dating their enactment. *Fugate* at 213.

The Court of Appeals, in *State v. Scherner*, 153 Wn.App. 621, 225 P.3d 248, *review granted*, 168 Wn.2d 1036, 233 P.3d 888 (2009) and *State v. Gresham*, 153 Wn.App. 659, 223 P.3d 1194, *review granted*, 168 Wn.2d 1036, 233 P.3d 888 (2009), rejected the argument that RCW 10.58.090 violates the Ex Post Facto Clause of Washington Constitution. Again, this question of law will remain unsettled until the Supreme Court issues its opinion in those consolidated cases, sometime after March 17<sup>th</sup>, 2011.

In light of these considerations, this Court should hold that RCW 10.58.090, as applied to Mr. Gregg’s case, violates article 1, section 23 of the Washington Constitution.

**E. CONCLUSION**

RCW 10.58.090 is unconstitutional and the trial court erred in admitting evidence of Mr. Gregg's prior conviction for Incest First Degree. His conviction should be reversed and his case remanded for a new trial.

RESPECTFULLY SUBMITTED this 27<sup>th</sup> day of December, 2010.

  
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ANNE M. CRUSER, WSBA #27944  
Attorney for Mr. Gregg

## APPENDIX

### **10.58.090. Sex Offenses--Admissibility**

(1) 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.

(2) In a case in which the state intends to offer evidence under this rule, the attorney for the state shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

(3) This section shall not be construed to limit the admission or consideration of evidence under any other evidence rule.

(4) For purposes of this section, "sex offense" means:

(a) Any offense defined as a sex offense by RCW 9.94A.030;

(b) Any violation under RCW 9A.44.096 (sexual misconduct with a minor in the second degree); and

(c) Any violation under RCW 9.68A.090 (communication with a minor for immoral purposes).

(5) For purposes of this section, uncharged conduct is included in the definition of "sex offense."

(6) When evaluating whether evidence of the defendant's commission of another sexual offense or offenses should be excluded pursuant to Evidence Rule 403, the trial judge shall consider the following factors:

(a) The similarity of the prior acts to the acts charged;

(b) The closeness in time of the prior acts to the acts charged;

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(c) The frequency of the prior acts;

(d) The presence or lack of intervening circumstances;

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(e) The necessity of the evidence beyond the testimonies already offered at trial;

(f) Whether the prior act was a criminal conviction;

(g) Whether the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence; and

(h) Other facts and circumstances.

**CERTIFICATE OF MAILING**

I, Anne M. Crusier, certify that on 12/27/10 I placed a copy of this document in the mails of the United States addressed to: (1) David C. Ponzoha, Clerk, Court of Appeals, Division II, 950 Broadway, Suite 300, Tacoma, WA 98402; (2) Michael C. Kinnie, Deputy Prosecuting Attorney, Clark County Prosecutor's Office, P.O. Box 5000, Vancouver, WA 98666; (3) Tyson Gregg, Mr. Tyson W. Gregg, DOC# 339331, Airway Heights Corrections Center, P.O. Box 1899, Airway Heights, WA 99001.