

NO. 84148-9

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ROGER SCHERNER,

Petitioner.

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SUPREME COURT
STATE OF WASHINGTON

STATE'S SUPPLEMENTAL BRIEF

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TABLE OF CONTENTS

Page

A. ISSUES PRESENTED 1

B. STATEMENT OF THE CASE..... 1

C. ARGUMENT..... 3

1. THE LEGISLATURE ENACTED RCW
10.58.090 WITHOUT VIOLATING THE
SEPARATION OF POWERS DOCTRINE 4

2. RCW 10.58.090 DOES NOT VIOLATE DUE
PROCESS 9

3. THE ADMISSION OF TESTIMONY UNDER
RCW 10.58.090 DID NOT VIOLATE THE
EX POST FACTO CLAUSE..... 17

4. RCW 10.58.090 DOES NOT VIOLATE EQUAL
PROTECTION 20

5. THE SUPERIOR COURT PROPERLY
ADMITTED SCHERNER'S PRIOR ACTS OF
CHILD MOLESTATION UNDER RCW
10.58.090 AND ER 403 22

6. SCHERNER'S PRIOR ACTS OF CHILD
MOLESTATION WERE ADMISSIBLE UNDER
ER 404(b) 23

D. CONCLUSION 24

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Carmell v. Texas, 529 U.S. 513,
120 S. Ct. 1620, 146 L. Ed. 2d 577 (2000) 18

Collins v. Youngblood, 497 U.S. 37,
110 S. Ct. 2715, 111 L. Ed. 2d 30 (1990) 18

Dowling v. United States, 493 U.S. 342,
110 S. Ct. 668, 107 L. Ed. 2d 708 (1990) 10

Hopt v. Utah, 110 U.S. 574,
4 S. Ct. 202, 28 L. Ed. 262 (1884) 19

Nebbia v. New York, 291 U.S. 502,
54 S. Ct. 505, 78 L. Ed. 940 (1934) 4

United State v. Enjady, 134 F.3d 1427
(10th Cir. 1998) 10, 15

United States v. Castillo, 140 F.3d 874
(10th Cir. 1998) 11, 21

United States v. Guardia, 135 F.3d 1326
(10th Cir. 1998) 15

United States v. Julian, 427 F.3d 471
(7th Cir. 2005) 21

United States v. LeMay, 260 F.3d 1018
(9th Cir. 2001) 9, 11, 12, 15

United States v. Mound, 149 F.3d 799
(8th Cir. 1998) 15

Washington State:

<u>Amunrud v. Board of Appeals</u> , 158 Wn.2d 208, 143 P.3d 571 (2006).....	4
<u>Brown v. Owen</u> , 165 Wn.2d 706, 206 P.3d 310 (2009).....	6
<u>Carrick v. Locke</u> , 125 Wn.2d 129, 882 P.2d 173 (1994).....	5
<u>City of Fircrest v. Jensen</u> , 158 Wn.2d 384, 143 P.3d 776 (2006).....	5, 6
<u>City of Spokane v. County of Spokane</u> , 158 Wn.2d 661, 146 P.3d 893 (2006).....	5, 7
<u>Crossen v. Skagit County</u> , 100 Wn.2d 355, 669 P.2d 1244 (1983).....	24
<u>Ludvigsen v. City of Seattle</u> , 162 Wn.2d 660, 174 P.3d 43 (2007).....	19
<u>State v. Abrams</u> , 163 Wn.2d 277, 178 P.3d 1021 (2008).....	17
<u>State v. Angehrn</u> , 90 Wn. App. 339, 952 P.2d 195 (1998).....	18
<u>State v. Clevenger</u> , 69 Wn.2d 136, 417 P.2d 626 (1966).....	19
<u>State v. DeVincentis</u> , 150 Wn.2d 11, 74 P.3d 119 (2003).....	23
<u>State v. Ferguson</u> , 100 Wn.2d 131, 667 P.2d 68 (1983).....	8
<u>State v. Grant</u> , 83 Wn. App. 98, 920 P.2d 609 (1996).....	7
<u>State v. Harner</u> , 153 Wn.2d 228, 103 P.3d 738 (2004).....	20

<u>State v. Lane</u> , 125 Wn.2d 825, 889 P.2d 929 (1995).....	7
<u>State v. Myers</u> , 133 Wn.2d 26, 941 P.2d 1102 (1997).....	24
<u>State v. Osman</u> , 157 Wn.2d 474, 139 P.3d 334 (2006).....	21
<u>State v. Ray</u> , 116 Wn.2d 531, 806 P.2d 1220 (1991).....	8, 11
<u>State v. Reyes</u> , 104 Wn.2d 35, 700 P.2d 1155 (1985).....	4
<u>State v. Ryan</u> , 103 Wn.2d 165, 691 P.2d 197 (1984).....	7, 19
<u>State v. Sears</u> , 4 Wn.2d 200, 103 P.2d 337 (1940).....	6
<u>State v. Scherner</u> , 153 Wn. App. 621, 225 P.3d 248 (2009), rev. granted, ___ Wn.2d ___ (2010).....	2
<u>State v. Tharp</u> , 96 Wn.2d 591, 637 P.2d 961 (1981).....	16
<u>State v. Thorne</u> , 43 Wn.2d 47, 260 P.2d 331 (1953).....	12
<u>State v. Thorne</u> , 129 Wn.2d 736, 921 P.2d 514 (1996).....	3
<u>State v. Tilden</u> , 79 Wash. 472, 140 P. 680 (1914).....	11
 <u>Other Jurisdictions:</u>	
<u>Cooper v. State</u> , 173 Ga. App. 254, 325 S.E.2d 877 (Ga. Ct. App.1985).....	14

<u>Elliott v. State</u> , 600 P.2d 1044 (Wyo. 1979).....	11
<u>Gezzi v. State</u> , 780 P.2d 972 (Wyo.1989).....	14
<u>Horn v. State</u> , 204 P.3d 777 (Okla. Crim. App. 2009).....	15, 21
<u>James v. State</u> , 204 P.3d 793 (Okla. Crim. App. 2009).....	20
<u>McLean v. State</u> , 934 So.2d 1248 (Fla. 2006).....	15
<u>People v. Beaty</u> , 377 Ill.App.3d 861, 880 N.E.2d 237 (Ill. Ct. App. 2007).....	15
<u>People v. Donoho</u> , 204 Ill.2d 159, 788 N.E.2d 707 (2003).....	21
<u>People v. Falsetta</u> , 21 Cal.4th 903, 986 P.2d 182, 89 Cal.Rptr.2d 847 (1999).....	15
<u>People v. Pattison</u> , 276 Mich. App. 613, 741 N.W.2d 558 (Mich. Ct. App. 2007).....	20
<u>State v. Cox</u> , 781 N.W.2d 757 (Iowa 2010).....	15
<u>State v. DeJesus</u> , 288 Conn. 418, 953 A.2d 45 (2008).....	13
<u>State v. Edward Charles L., Sr.</u> , 183 W.Va. 641, 398 S.E.2d 123 (1990).....	14
<u>State v. Frazier</u> , 344 N.C. 611, 476 S.E.2d 297 (1996).....	14
<u>State v. Friedrich</u> , 135 Wis.2d 1, 398 N.W.2d 763 (1987).....	13

<u>State v. L.W.</u> , ___ A.2d ___, 122 Conn. App. 324 (2010)	14
<u>State v. Willis</u> , 915 So.2d 365 (La. Ct. App. 2005)	20
<u>Thacker v. Commonwealth</u> , 816 S.W.2d 660 (Ky. Ct. App.1991)	14

Constitutional Provisions

Federal:

U.S. Const. art 1, § 10.....	17
------------------------------	----

Washington State:

Const. art. 1, § 23.....	17
--------------------------	----

Statutes

Washington State:

RCW 5.45.020.....	6
RCW 5.46.010.....	6
RCW 5.60.060.....	6
RCW 5.66.010.....	6
RCW 9A.44.020	7
RCW 9A.44.120	7
RCW 9A.44.150	7
RCW 10.58.090.....	<i>passim</i>

Rules and Regulations

Federal:

FRE 403	15
FRE 413	3, 21
FRE 414	3, 21
FRE 415	3

Washington State:

ER 403	1, 3, 8, 15, 16, 22
ER 404	1, 3, 4, 7, 8, 16, 23, 24
ER 609	16

Other:

Alaska Evid. Rule 404	14
Arizona Evid. Rule 404	14
Ark. Code Ann. § 16-42-103	14
Cal. Evid. Code § 1108	14
Fla. Stat. § 90.404	14
725 Ill. Comp. Stat. 5/115-7.3	14
Kan. Stat. Ann. § 60-455	14
La. Code Evid. Ann. art. 412.2	14
Mich. Comp. Laws § 768.27a	14
Neb. Rev. Stat. § 27-414	14

Okla. Stat. 12, § 2413	14
Utah Evid. Rule 404	14
Wis. Stat. § 904.04	14

Other Authorities

140 Cong. Rec. H5437-03 (daily ed. June 29, 1994)	12
1A Wigmore, Evidence § 62.2 at 1334-35 (Tillers rev. 1983)	10
5 K. Tegland, Washington Practice, Evidence Law and Practice, at V-IX (2nd ed. 1982)	6

A. ISSUES PRESENTED

1. Whether the legislature enacted RCW 10.58.090 without violating the separation of powers doctrine.

2. Whether Roger Scherner has failed to establish that RCW 10.58.090 violates the due process clause.

3. Whether the application of RCW 10.58.090 to Scherner's case did not violate the ex post facto clause.

4. Whether Scherner has not established that RCW 10.58.090 violates the equal protection clause.

5. Whether the trial court properly admitted the evidence of Scherner's prior acts of child molestation after engaging in an ER 403 balancing test and considering the non-exclusive factors in RCW 10.58.090.

6. Whether the trial court properly found that Scherner's prior acts of child molestation were admissible under ER 404(b).

B. STATEMENT OF THE CASE

A detailed statement of the facts is set forth in the State's brief filed in the Court of Appeals.

M.S. is Scherner's granddaughter; at relevant times, both lived in California. Brief of Respondent at 2. Beginning when M.S.

was five or six years old, Scherner began sexually molesting her. Id. at 2-3. In the summer of 2001 or 2002, he took M.S. on a trip to visit relatives in Bellevue and molested her during the trip. Id. at 3-4. The next year, M.S. gradually and reluctantly disclosed the details of the abuse. Id. at 4-5.

In 2007, the Bellevue police secretly recorded a telephone conversation in which M.S. confronted Scherner about the abuse. Id. at 9. Scherner apologized for his behavior and claimed that he “had too many drinks” and “didn't realize what was happening.” Id.

The State charged Scherner with three counts of first-degree child molestation. Id. at 12. Before trial, Scherner fled to Florida, where he was later arrested, using a fake identity. Id.

After M.S.'s disclosure, numerous other family members and friends revealed that Scherner had molested them. Brief of Respondent at 6-9. At trial, pursuant to RCW 10.58.090, two of Scherner's nieces, one granddaughter, and the daughter of family friends all described how Scherner had molested them. Id.

The jury found Scherner guilty as charged, and the Court of Appeals affirmed his convictions, rejecting his challenges to RCW 10.58.090. State v. Scherner, 153 Wn. App. 621, 225 P.3d 248 (2009), rev. granted, ___ Wn.2d ___ (2010).

C. ARGUMENT

During the 2008 session, the Washington Legislature enacted RCW 10.58.090. The statute provides that in sex offense cases, evidence of the defendant's commission of another sex offense is admissible subject to the court's balancing of factors under ER 403.¹ This statute was patterned after Federal Rules of Evidence 413, 414 and 415 and federal caselaw interpreting the rules.

Scherner has raised four constitutional challenges to RCW 10.58.090. He claims that the statute violates the separation of powers, the ex post facto clause, the equal protection clause and the due process clause.²

RCW 10.58.090 is presumed to be constitutional, and Scherner bears the burden of proving its unconstitutionality beyond a reasonable doubt. State v. Thorne, 129 Wn.2d 736, 769-70, 921 P.2d 514 (1996). "Wherever possible, it is the duty of this court

¹ RCW 10.58.090(1) provides, "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 This Court consolidated this appeal with State v. Gresham. Gresham has only raised the separation of powers and the ex post facto clause challenges.

to construe a statute so as to uphold its constitutionality.” State v. Reyes, 104 Wn.2d 35, 41, 700 P.2d 1155 (1985). Although a court may hold views inconsistent with the wisdom of a law, it may not be annulled unless it is “palpably” in excess of legislative power. Amunrud v. Board of Appeals, 158 Wn.2d 208, 215, 143 P.3d 571 (2006) (citing Nebbia v. New York, 291 U.S. 502, 537-38, 54 S. Ct. 505, 78 L. Ed. 940 (1934)).

Scherner has not met his burden in establishing that RCW 10.58.090 is unconstitutional; the State's brief filed in the Court of Appeals fully addresses his claims. The State supplements that argument with the following discussion.

1. THE LEGISLATURE ENACTED RCW 10.58.090 WITHOUT VIOLATING THE SEPARATION OF POWERS DOCTRINE.

Scherner argues that the legislature's enactment of RCW 10.58.090 violates the separation of powers. A separation of powers violation occurs when the activity of one branch threatens the independence or integrity of another branch or invades the prerogatives of the other. Here, the legislature has authority to create rules of evidence, and its action in this area does not invade the prerogatives of the judiciary. Scherner's claim that the statute

irreconcilably conflicts with ER 404(b) overlooks the fact that the evidence rule contains a non-exclusive list of exceptions, and that the statute simply provides another exception to that rule. Given that the statute leaves the ultimate decision whether to admit evidence under RCW 10.58.090 to the trial court's discretion, the legislature's action hardly threatens the independence or integrity of the judiciary. This Court should reject Scherner's separation of powers challenge to RCW 10.58.090.

The Washington State Constitution does not contain a formal separation of powers clause. Carrick v. Locke, 125 Wn.2d 129, 134-35, 882 P.2d 173 (1994). Instead, the division of the government into different branches has been presumed to give rise to the separation of powers doctrine. Id. at 135. "The doctrine of separation of powers serves mainly to ensure that the *fundamental functions* of each branch remain inviolate." City of Spokane v. County of Spokane, 158 Wn.2d 661, 680, 146 P.3d 893 (2006) (emphasis in original). "Though the doctrine is designed to prevent one branch from usurping the power given to a different branch, the three branches are not hermetically sealed and some overlap must exist." City of Fircrest v. Jensen, 158 Wn.2d 384, 393-94, 143 P.3d 776 (2006). To determine whether a particular action violates

separation of powers, the court looks not to 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. Brown v. Owen, 165 Wn.2d 706, 718, 206 P.3d 310 (2009).

By enacting RCW 10.58.090, the legislature did not invade a fundamental function of the judiciary. Rather, both the court and the legislature have authority to enact rules of evidence. Fircrest, 158 Wn.2d at 394; State v. Sears, 4 Wn.2d 200, 215, 103 P.2d 337 (1940). This Court has acknowledged that the adoption of the rules of evidence is a legislatively delegated power of the judiciary. Fircrest, 158 Wn.2d at 394. Historically, the legislature and the courts have shared the responsibility for enacting rules of evidence; representatives of both the legislature and the judiciary drafted the current rules of evidence. 5 K. Tegland, *Washington Practice, Evidence Law and Practice*, at V-IX (2nd ed. 1982). Currently, numerous statutes supplement the Rules of Evidence on various issues.³ Several existing statutes govern evidence and testimony

³ See, e.g., RCW 5.45.020 (business records); RCW 5.46.010 (copies of business and public records); RCW 5.60.060 (evidentiary privileges); RCW 5.66.010 (admissibility of expressions of apology, sympathy, fault).

in sex offense cases.⁴ Accordingly, the legislature's enactment of RCW 10.58.090 is consistent with its history of involvement with evidentiary matters.

Scherner insists that the statute conflicts with ER 404(b). However, when considering a separation of powers challenge to a statute, this Court has repeatedly held that "apparent conflicts between a court rule and a statutory provision should be harmonized, and both given effect if possible." State v. Ryan, 103 Wn.2d 165, 178, 691 P.2d 197 (1984). The inability to harmonize a court rule with a statute occurs only when the statute directly and unavoidably conflicts with the court rule. City of Spokane, 158 Wn.2d at 679.

It is not difficult to harmonize ER 404(b) with RCW 10.58.090 and give effect to both. While ER 404(b) generally prohibits evidence of a defendant's prior bad acts, it contains a list of exceptions. The list of exceptions is not exclusive and many are creatures of common law.⁵ One of the well-settled common law

⁴ RCW 9A.44.020 (rape shield); RCW 9A.44.120 (child hearsay statute); RCW 9A.44.150 (child witness testimony concerning sexual or physical abuse).

⁵ State v. Lane, 125 Wn.2d 825, 831, 889 P.2d 929 (1995) (discussing the "res gestae" exception to ER 404(b)); State v. Grant, 83 Wn. App. 98, 105, 920 P.2d 609 (1996) ("The list of other purposes for which evidence of a defendant's prior misconduct may be introduced is not exclusive.").

exceptions to ER 404(b), lustful disposition, allows for the admission of the same type of evidence as in RCW 10.58.090. Under the lustful disposition exception, evidence of a defendant's prior sexual misconduct against the same victim is admissible in order to show the defendant's lustful disposition toward that victim. State v. Ray, 116 Wn.2d 531, 547, 806 P.2d 1220 (1991); State v. Ferguson, 100 Wn.2d 131, 133-34, 667 P.2d 68 (1983). Given that ER 404(b)'s prohibition against prior bad acts evidence is not absolute and this Court's recognition of numerous exceptions to the rule, the Court can harmonize the statute as creating another exception to the rule. The statute and rule do not irreconcilably conflict.

Finally, RCW 10.58.090 is not a mandatory rule of admission, and leaves the determination whether to admit such evidence to the trial court as a discretionary decision. The statute directs the court to consider a variety of factors in deciding whether, under ER 403, the probative value of the evidence is outweighed by the danger of unfair prejudice. Given that the judiciary retains the final say on whether such evidence is admitted, the existence of RCW 10.58.090 does not threaten the independence or integrity of the courts.

This Court should hold that the legislature's enactment of RCW 10.58.090 did not violate the separation of powers doctrine.

2. RCW 10.58.090 DOES NOT VIOLATE DUE PROCESS.

Scherner claims that RCW 10.58.090 violates due process, arguing that, among other things, it conflicts with centuries of caselaw prohibiting propensity evidence.⁶ The flaws in this argument are that historical practice alone does not create a constitutional right and that historically (and currently) in sex offense cases, courts have often admitted evidence of a defendant's past sexual misconduct, despite the general prohibition against propensity evidence.

At the outset, “[t]he Constitution does not encompass all traditional legal rules and customs, no matter how longstanding and widespread such practices may be.” United States v. LeMay, 260 F.3d 1018, 1024 (9th Cir. 2001). “That the practice is ancient does not mean it is embodied in the Constitution. Many procedural practices - including evidentiary rules - that have long existed have

⁶ Briefs filed in the consolidated case, State v. Gresham, make the same argument at length, albeit in support of a separation of powers claim. See Gresham's Petition for Review at 5, 10; Brief of Amicus Curiae, The Washington Association of Criminal Defense Attorneys, dated March 19, 2010 at 4-8.

been changed without being held unconstitutional." United State v. Enjady, 134 F.3d 1427, 1432 (10th Cir. 1998).

An evidentiary rule fails the due process test of fundamental fairness only if "the introduction of this type of evidence is so extremely unfair that its admission violates fundamental conceptions of justice." Dowling v. United States, 493 U.S. 342, 352, 110 S. Ct. 668, 107 L. Ed. 2d 708 (1990). Courts should construe the category of evidentiary rules that violate this rule "very narrowly." Id. at 352.

In sex offense cases, courts have long made exceptions to the general rule against the admission of propensity evidence.

Approximately three decades ago, Wigmore observed:

An exhaustive analysis of the cases found elsewhere in the Treatise... shows there is a strong tendency in prosecutions for sex offenses to admit evidence of the accused's sexual proclivities. Do such decisions show that the general rule against the use of propensity evidence against an accused is not honored in sex offense prosecutions? We think so.

1A Wigmore, Evidence § 62.2 at 1334-35 (Tillers rev. 1983).

In 1979, the Wyoming Supreme Court, citing numerous cases from other states, observed that "[o]ur analysis of cases from other jurisdictions leads to the conclusion that in recent years a preponderance of the courts have sustained the admissibility of the

testimony of third persons as to prior or subsequent similar crimes, wrongs or acts in cases involving sexual offenses." Elliott v. State, 600 P.2d 1044, 1047 (Wyo. 1979). The Ninth Circuit, after examining the historical evidence, also concluded that "courts have routinely allowed propensity evidence in sex-offense cases, even while disallowing it in other criminal prosecutions." LeMay, 260 F.3d at 1025; see also United States v. Castillo, 140 F.3d 874, 881 (10th Cir. 1998).

In Washington, for over 100 years, evidence of a defendant's prior sexual misconduct against the same victim has been admissible in order to show the defendant's lustful disposition toward that victim. Ray, 116 Wn.2d at 547. Nearly one hundred years ago, this Court explained:

Offenses involving carnal intercourse of the sexes furnish a well-recognized exception to the general rule excluding evidence of other like crimes. For a reason peculiar to those crimes, the rule has been most liberally extended, until it may be safely asserted that, where the charge is made of the commission of any of the crimes known as sexual offenses, evidence of prior acts of the same character is admissible, even though such prior act is itself a crime.

State v. Tilden, 79 Wash. 472, 473, 140 P. 680 (1914). This Court has acknowledged that such evidence was admissible as propensity evidence, explaining that the defendant's lustful

disposition "makes it more probable that the defendant committed the offense charged." State v. Thorne, 43 Wn.2d 47, 60, 260 P.2d 331 (1953).

Here, RCW 10.58.090 essentially extends the lustful disposition exception to sex offenses involving other victims. The elimination of the same victim requirement is no more unfair or irrational than the lustful disposition exception. As the facts in Scherner's case ably demonstrate, an individual who preys on young children must seek out new victims. The fact that Scherner was sexually attracted to young female children in the past made it more probable that he molested another young female relative.

Such evidence is clearly relevant in assessing credibility, a frequently contested issue in sex offense cases. This was one of the original rationales for the passage of the federal rules. "[I]n most rape or molestation cases, it is the word of the defendant against the word of the victim. If the defendant has committed similar acts in the past, the claims of the victim are more likely to be considered truthful if there is substantiation of other assaults." LeMay, 260 F.3d at 1033 (quoting 140 Cong. Rec. H5437-03, *H5439 (daily ed. June 29, 1994) (statement of Rep. Kyl)).

Similarly, the Connecticut Supreme Court has explained its rationale for allowing evidence of other sexual misconduct as propensity evidence:

[W]e recognize that strong public policy reasons continue to exist to admit evidence of uncharged misconduct more liberally in sexual assault cases than in other criminal cases. As we observed in State v. Merriam, supra, 264 Conn. at 669-71, 835 A.2d 895, "[f]irst, in sex crime cases generally, and in child molestation cases in particular, the offense often is committed surreptitiously, in the absence of any neutral witnesses. Consequently, courts allow prosecutorial authorities greater latitude in using prior misconduct evidence to bolster the credibility of the complaining witness and to aid in the obvious difficulty of proof. Second, because of the unusually aberrant and pathological nature of the crime of child molestation, prior acts of similar misconduct, as opposed to other types of misconduct, are deemed to be highly probative because they tend to establish a necessary motive or explanation for an otherwise inexplicably horrible crime; and assist the jury in assessing the probability that a defendant has been falsely accused of such shocking behavior."

State v. DeJesus, 288 Conn. 418, 468-70, 953 A.2d 45 (2008)

(internal citations and footnote omitted); see also State v. Friedrich, 135 Wis.2d 1, 27-28, 398 N.W.2d 763 (1987) ("To a person of normal, social and moral sensibility, the idea of the sexual exploitation of the young is so repulsive that it's almost impossible to believe that none but the most depraved and degenerate would commit such an act.").

Currently, at least thirteen other states have enacted statutes or rules similar to RCW 10.58.090.⁷ In several other states, there is little need for such a statute because the courts already liberally allow for the admission of prior sex offense evidence.⁸

Given both historical and current practices, the admission of prior sex offense evidence under RCW 10.58.090 does not violate fundamental conceptions of justice. Virtually every court to have

⁷ See Alaska Evid. Rule 404(b)(2); Arizona Evid. Rule 404(c); Ark. Code Ann. § 16-42-103; Cal. Evid. Code § 1108; Fla. Stat. § 90.404(2)(b); 725 Ill. Comp. Stat. 5/115-7.3; Kan. Stat. Ann. § 60-455(d); La. Code Evid. Ann. art. 412.2; Mich. Comp. Laws § 768.27a; Neb. Rev. Stat. § 27-414; Okla. Stat. 12, § 2413; Utah Evid. Rule 404(c); Wis. Stat. § 904.04(2)(b).

⁸ State v. L.W., ___ A.2d ___, 122 Conn. App. 324 (2010) (uncharged misconduct in sex crime cases may be admitted to demonstrate a defendant's *propensity* to engage in sexual misconduct); Cooper v. State, 173 Ga. App. 254, 255, 325 S.E.2d 877, 878 (Ga. Ct. App. 1985) (evidence of prior sex offenses may be admitted to show the defendant's "bent of mind"); Thacker v. Commonwealth, 816 S.W.2d 660, 662 (Ky. Ct. App. 1991) (the rules governing the admission of other crimes evidence are applied "in an unusual manner" in child sexual assault cases); State v. Frazier, 344 N.C. 611, 476 S.E.2d 297, 300 (1996) ("This Court has been liberal in allowing evidence of similar offenses in trials on sexual crime charges."); State v. Edward Charles L., Sr., 183 W.Va. 641, 398 S.E.2d 123, 132-33 (1990) (other crimes evidence may be admitted in cases involving child sexual assault in order to establish the perpetrator's lustful disposition); Gezzi v. State, 780 P.2d 972, 974-76 (Wyo. 1989) (exceptions to the rule that other crimes evidence is generally inadmissible have been treated expansively in sexual assault cases).

considered a due process challenge to a statute or rule similar to RCW 10.58.090 has rejected it.⁹

In addition, Scherner argues that RCW 10.58.090 violates due process because one of eight non-exclusive factors that the trial court considers when determining whether to exclude the evidence under ER 403 is "[t]he necessity of the evidence beyond the testimonies already offered at trial." RCW 10.58.090(6).

Scherner insists that this factor improperly requires the judge to relinquish his or her impartiality and make a decision based upon "what's best for one party to the litigation." Petition at 14.

The legislature adopted this factor, along with the others, from federal caselaw. The factors in RCW 10.58.090 were developed by federal courts, in order to give guidance to the trial court when conducting the balancing test under Federal Rule of Evidence 403. LeMay, 260 F.3d at 1028; United States v. Guardia, 135 F.3d 1326, 1331 (10th Cir. 1998). Contrary to Scherner's complaint, there is nothing unique about a trial court considering

⁹ See LeMay, 260 F.3d at 1024-30; United States v. Mound, 149 F.3d 799, 801 (8th Cir. 1998); Enjady, 134 F.3d at 1432; People v. Falsetta, 21 Cal.4th 903, 912, 986 P.2d 182, 89 Cal.Rptr.2d 847 (1999); McLean v. State, 934 So.2d 1248 (Fla. 2006); People v. Beaty, 377 Ill.App.3d 861, 884, 880 N.E.2d 237, 255 (Ill. Ct. App. 2007); Horn v. State, 204 P.3d 777, 784 (Okla. Crim. App. 2009); but see State v. Cox, 781 N.W.2d 757 (Iowa 2010).

the necessity of evidence when determining its admissibility.¹⁰

Under ER 403, the court considers whether the probative value of the evidence is outweighed by the danger of unfair prejudice.

Scherner claims that this factor is one-sided and can only favor the State, yet he overlooks the possibility that the State's case may be so strong that evidence of the defendant's prior sexual misconduct is not necessary. For example, in a child rape case where the defendant caused the victim to become pregnant and DNA evidence conclusively establishes the defendant's paternity, a trial court might reasonably find that evidence of the defendant's prior sexual misconduct was not necessary. Scherner's due process challenge to this factor is without merit.

Even if this Court concluded that Scherner's constitutional challenge to the "necessity" factor had merit, the proper remedy would be to strike and sever that factor, rather than invalidate the entire statute. Constitutional and unconstitutional provisions of legislation are severable unless (1) the constitutional and

¹⁰ See State v. Tharp, 96 Wn.2d 591, 597, 637 P.2d 961 (1981) (under ER 404(b), "the trial court should weigh the necessity for its admission against the prejudice that it may engender in the minds of the jury"); ER 609(d) (the court may admit a witness's juvenile adjudication if "the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence").

unconstitutional provisions are so connected that it is not plausible that the legislature would have passed one without the other, or (2) the part eliminated is so intimately connected with the balance of the act as to make it useless to accomplish the purposes of the legislature. State v. Abrams, 163 Wn.2d 277, 285-86, 178 P.3d 1021 (2008). One cannot seriously contend that the legislature would not have passed RCW 10.58.090 without this factor or that the statute, absent this factor, no longer accomplishes the legislature's intended purposes.

3. THE ADMISSION OF TESTIMONY UNDER RCW 10.58.090 DID NOT VIOLATE THE EX POST FACTO CLAUSE.

Because Scherner committed his crimes before the enactment of RCW 10.58.090, he argues that the admission of evidence under the statute violated the federal and state ex post facto clauses.¹¹ U.S. Const. art 1, § 10; Const. art. 1, § 23. The flaw in this argument is that RCW 10.58.090 does not reduce the quantum of evidence necessary to establish a prima facie case; it

¹¹ Gresham has also argued that the state ex post facto clause is more protective than the federal clause. Scherner has not made this argument.

simply allows for the testimony of witnesses who otherwise may not have been permitted to testify.

"The ex post facto clauses prohibit states from enacting any law that (1) punishes an act that was not punishable at the time the act was committed, (2) aggravates a crime or makes the crime greater than it was when committed, (3) increases the punishment for an act after the act was committed, and (4) changes the rules of evidence to receive less or different testimony than required at the time the act was committed in order to convict the offender." State v. Angehrn, 90 Wn. App. 339, 342-43, 952 P.2d 195 (1998) (citing Collins v. Youngblood, 497 U.S. 37, 42, 110 S. Ct. 2715, 2719, 111 L. Ed. 2d 30 (1990)).

Scherner claims that the admission of evidence under RCW 10.58.090 in his trial violated this fourth category.¹² However, laws implicated under this category are those that changed the amount of proof necessary to establish the crime. See Carmell v. Texas, 529 U.S. 513, 120 S. Ct. 1620, 146 L. Ed. 2d 577 (2000) (change to law providing that victim's testimony alone was legally insufficient to prove offense if crime was not reported within

¹² Scherner's original trial was set to begin several months before RCW 10.58.090 was enacted. If he had not fled to Florida, he would have avoided the consequences of the new law.

6 months); Ludvigsen v. City of Seattle, 162 Wn.2d 660, 174 P.3d 43 (2007) (change to the meaning of a valid breath test). In contrast, an evidentiary rule that allows for the admission of previously prohibited witness testimony does not violate the ex post facto clause. In State v. Clevenger, 69 Wn.2d 136, 141, 417 P.2d 626 (1966), this Court rejected an ex post facto challenge to an amendment to the spousal privilege statute that created an exception for crimes committed against one's child. The court explained that changes to the rules of evidence that "only remove existing restrictions upon the competency of certain classes of persons as witnesses, relate to modes of procedure only, in which no one can be said to have a vested right, and which the State, upon grounds of public policy, may regulate at pleasure." 69 Wn.2d at 142 (quoting Hopt v. Utah, 110 U.S. 574, 590, 4 S. Ct. 202, 28 L. Ed. 262 (1884)); see also Ryan, 103 Wn.2d at 179 (rejecting ex post facto challenge to child hearsay statute).

Scherner complains that RCW 10.58.090 is not even-handed and benefits the state. But that is not the test for determining an ex post facto violation. If it were, the changes to the spousal privilege statute at issue in Clevenger and the child hearsay statute at issue in Ryan would have run afoul of the ex post facto clauses.

In both cases, the new statutes serve to permit testimony that would undoubtedly favor the State in criminal cases. Because RCW 10.58.090 did not reduce the quantum of evidence necessary to establish a prima facie case, Scherner's ex post facto challenge should be rejected.¹³

4. RCW 10.58.090 DOES NOT VIOLATE EQUAL PROTECTION.

Scherner claims that RCW 10.58.090 violates the equal protection clauses because it treats individuals charged with sex offenses differently than individuals charged with non-sex offenses. This argument is without merit.

The equal protection clauses of the federal and state constitutions require that persons similarly situated with respect to a legitimate purpose of the law receive like treatment. State v. Harner, 153 Wn.2d 228, 235, 103 P.3d 738 (2004). Scherner does

¹³ Courts in other jurisdictions have rejected ex post facto challenges to statutes similar to RCW 10.58.090. See State v. Willis, 915 So.2d 365, 383 (La. Ct. App. 2005) (rejecting ex post facto challenge and holding that Louisiana statute "did not alter the amount of proof required in the Defendant's case as it merely pertains to the *type of evidence* which may be introduced."); People v. Pattison, 276 Mich. App. 613, 619, 741 N.W.2d 558 (Mich. Ct. App. 2007) (rejecting ex post facto challenge to Michigan law); James v. State, 204 P.3d 793, 795-96 (Okla. Crim. App. 2009) (same).

not claim that a fundamental right or a suspect or semi-suspect class is involved. Accordingly, the court applies the rational basis test and examines whether the challenged law reflects a legitimate state objective, and whether the law is not wholly irrelevant to achieving that objective. State v. Osman, 157 Wn.2d 474, 486, 139 P.3d 334 (2006).

RCW 10.58.090 has a clearly legitimate state objective: it allows the jury to hear and consider pertinent evidence of a defendant's history of sex offenses when considering a current sex offense charge. The government has a particular need for corroborating evidence in cases of sexual abuse because of the highly secretive nature of these sex crimes and because often the only available proof is the victim's testimony. Scherner has not met his burden of showing that RCW 10.58.090 violates equal protection.¹⁴

¹⁴ See United States v. Julian, 427 F.3d 471, 487 (7th Cir. 2005) (rejecting equal protection challenge to Federal Rule 413); Castillo, 140 F.3d at 883 (rejecting equal protection challenge to Federal Rule 414); People v. Donoho, 204 Ill.2d 159, 176-78, 788 N.E.2d 707 (2003) (rejecting equal protection challenge to Illinois statute admitting evidence of defendant's other sex crimes); Horn, 204 P.3d at 784-86 (rejecting equal protection challenge to Oklahoma statute admitting evidence of defendant's other sex crimes).

5. THE SUPERIOR COURT PROPERLY ADMITTED EVIDENCE OF SCHERNER'S PRIOR ACTS OF CHILD MOLESTATION UNDER RCW 10.58.090 AND ER 403.

RCW 10.58.090(6) requires that the trial court consider several non-exclusive factors when deciding whether to exclude evidence of the defendant's other sex offenses under ER 403. In this case, the trial court considered each of these factors and concluded that the probative value of the evidence outweighed the prejudicial effect. RP 106-18. On appeal, Scherner argued, after consideration of these factors, that the trial court should have excluded the evidence. Brief of Appellant at 49-55. The State fully responded to this argument. Brief of Respondent at 41-46.

In his petition, Scherner characterizes the Court of Appeals's opinion as excusing a trial court "from performing a detailed ER 403 analysis." Petition for Review at 18. This characterization is inaccurate. In considering Scherner's claim that the evidence was not admissible under ER 403, the Court of Appeals noted that the trial court had considered all of the factors set forth in RCW 10.58.090(6) and held that the court's decision to admit the evidence was not an abuse of discretion. 153 Wn. App. at 657-58. The Court of Appeals never suggested that a trial court was not

required to conduct a proper ER 403 analysis, and the record in this case shows that the trial court conducted a thorough and thoughtful analysis of the factors.

6. SCHERNER'S PRIOR ACTS OF CHILD MOLESTATION WERE ADMISSIBLE UNDER ER 404(b).

In his petition, Scherner assigns error to (1) the trial court's ruling that the testimony of his four other victims was admissible under ER 404(b) as evidence of his common scheme or plan and (2) the court's failure to provide an ER 404(b) limiting instruction. Both claims are fully addressed in the State's previously filed briefing. Brief of Respondent at 46-52. Because ER 404(b) simply provided an alternative basis to admit the evidence, these issues are moot if this Court rejects Scherner's challenges to RCW 10.58.090.

The testimony from Scherner's other victims was admissible under ER 404(b) because it established that Scherner employed a common scheme in satisfying his sexual desire for young children by molesting young girls staying at his house or traveling with him. See State v. DeVincentis, 150 Wn.2d 11, 17-18, 74 P.3d 119

(2003). Scherner's prior bad acts established a pattern with marked similarities to the current charges against him.

With respect to Scherner's claim concerning an ER 404(b) limiting instruction, he never proposed a proper limiting instruction and thereby has waived the issue. Crossen v. Skagit County, 100 Wn.2d 355, 361 n.1, 669 P.2d 1244 (1983); see also State v. Myers, 133 Wn.2d 26, 36; 941 P.2d 1102 (1997) (the trial court's failure to give a limiting instruction is not error if no instruction was requested).

D. CONCLUSION

For all the foregoing reasons, the Court should affirm Scherner's convictions.

DATED this 22nd day of July, 2010.

Respectfully submitted,

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Maureen Cyr, the attorney for the petitioner Michael Gresham, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, and

Kathleen Webber, the attorney for the State of Washington in State v. Gresham at the Snohomish County Prosecutor's Office, 3000 Rockefeller Avenue, M/S #504, Everett, Washington 98201

containing a copy of the SUPPLEMENTAL BRIEF OF RESPONDENT, in STATE V. SCHERNER, Cause No. 84148-9, in the Washington Supreme Court.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

U Brame
Name
Done in Seattle, Washington

7/23/10
Date