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STATE OF WASHINGTON

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R/h

Supreme Court No. 84148-9
Court of Appeals No. 62862-3-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL TYRONE GRESHAM,

Petitioner.

ON REVIEW FROM THE COURT OF APPEALS, DIVISION ONE

SUPPLEMENTAL BRIEF OF PETITIONER

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FILED AS
ATTACHMENT TO EMAIL

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A. SUMMARY OF APPEAL

At Michael Gresham's trial on charges of child molestation, the trial court admitted evidence, pursuant to RCW 10.58.090, that he committed sex offenses against a different victim several years earlier, even though the court specifically found that ER 404(b) otherwise barred the evidence. The jury was permitted to use the evidence to find Mr. Gresham was predisposed to molest children and therefore more likely to have committed the present crimes. Washington common law and ER 404(b) categorically prohibit trial courts from admitting evidence of a defendant's prior sexual misconduct to show his propensity to commit the charged crime, in recognition of the defendant's fundamental right to be tried only for the offense charged, and due to the significant potential that such evidence will encourage convictions based upon the defendant's character rather than the evidence in the case. Because the statute directly conflicts with ER 404(b) and Washington common law, it violates the separation of powers doctrine and is void.

In addition, the statute alters the rules of evidence, permitting different evidence than was earlier allowed in order to facilitate convictions in sex abuse cases, and therefore violates the federal and state Ex Post Facto Clauses as applied in this case.

B. ISSUES PRESENTED

1. RCW 10.58.090 directly conflicts with ER 404(b) and common law. Does it violate the separation of powers doctrine?

2. Does RCW 10.58.090, which effectively alters the standard of proof necessary to obtain a conviction in sex offense cases, violate the federal Ex Post Facto Clause?

3. Does RCW 10.58.090, which alters the rules of evidence, permitting different evidence than was earlier allowed in order to obtain a conviction, separately violate the Washington Constitution?

C. STATEMENT OF THE CASE

The State charged Mr. Gresham with four counts of first degree child molestation against J.L. CP 127-28. Prior to trial, the State moved to admit evidence, pursuant to RCW 10.58.090 and ER 404(b), that Mr. Gresham committed child rape several years earlier against A.C. 10/21/08RP 29. The trial court found the evidence of the prior offenses was not admissible under ER 404(b) but was admissible under RCW 10.58.090. CP 4-15. In particular, the court found the evidence was "necessary" to the State's case, because "evidence of the prior acts is the only form of evidence that could corroborate testimony of the current victim." CP 13-14.

At the jury trial, J.L. testified about the current allegations, 11/04/08RP 127-57, while A.C. testified about the prior alleged offenses, 11/04/08RP 215-28. A.C. was permitted to testify about acts that, if true, amounted to child rape, even though Mr. Gresham was never convicted of child rape in that case.¹ During closing argument, the prosecutor emphasized A.C.'s testimony, arguing Mr. Gresham did the "same thing" to A.C. as he did to J.L. 11/06/08RP 461-62. The prosecutor urged the jury to find the prior offenses were highly relevant "because it's so similar. And what does that show? That shows that this man does that, or he did it then, and he's done it again." 11/06/08RP 491.

The jury found Gresham guilty of three counts of first degree child molestation and one count of attempted first degree child molestation. CP 39.

¹ Mr. Gresham was charged with two counts of child rape against A.C. but was convicted only of one count of second degree assault with sexual motivation. 10/21/08RP 16.

D. ARGUMENT

1. RCW 10.58.090 VIOLATES THE SEPARATION OF POWERS DOCTRINE, BECAUSE IT PERMITS THE ADMISSION OF EVIDENCE THAT THE RULES OF EVIDENCE CATEGORICALLY EXCLUDE

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). By its express terms, the statute conflicts with ER 404(b), which categorically bars 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).² Because RCW 10.58.090 and ER 404(b) cannot both be given effect, the statute violates the separation of powers doctrine.

a. This Court's authority to govern the admission of evidence in criminal trials is superior to the Legislature's. The doctrine of separation of powers stems from the constitutional distribution of the government's authority into three coequal

² For the Court's convenience, the appendix sets forth the relevant portions of all of the Washington and federal Rules of Evidence cited in this brief.

branches: executive, legislative, and judicial. Waples v. Yi, ___ Wn.2d ___, 2010 WL 2615576 (No. 82142-9, July 1, 2010) (citing City of Fircrest v. Jensen, 158 Wn.2d 384, 393-94, 143 P.3d 776 (2006)). "If "the activity of one branch threatens the independence or integrity or invades the prerogatives of another," it violates the separation of powers." Waples, 2010 WL 2615576, at *2 (quoting Jensen, 158 Wn.2d at 394 (internal quotation marks omitted) (quoting State v. Moreno, 147 Wn.2d 500, 505-06, 58 P.3d 265 (2002))).

This Court has inherent power to govern court procedures, stemming from article 4 of the state constitution. Jensen, 158 Wn.2d at 394; State v. Fields, 85 Wn.2d 126, 129, 530 P.2d 284 (1975); Const. art. 4, § 1. The Court's authority over matters of procedure contrasts with the Legislature's authority over matters of substance.³ Fields, 85 Wn.2d at 129; State v. Smith, 84 Wn.2d 498, 501, 527 P.2d 674 (1974).

³ This Court's superior authority over procedure is not shared by courts in many other jurisdictions. The extent of state legislative competence over rules of procedure used in state courts varies considerably. 1 John H. Wigmore, Evidence in Trials at Common Law, § 7, at 462 n.1 (Tillers rev. ed. 1983). Similarly, in the federal system, the judiciary's power to "create and enforce nonconstitutional rules of procedure and evidence for the federal courts exists

"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."

Jensen, 158 Wn.2d at 394 (quoting Smith, 84 Wn.2d at 501).

Rules of evidence are rules of procedure that fall under the Court's inherent authority.⁴ Rules of evidence "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 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.⁵

only in the absence of a relevant Act of Congress." Dickerson v. United States, 530 U.S. 428, 437, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000) (quoting Palermo v. United States, 360 U.S. 343, 353 n.11, 79 S.Ct. 1217, 3 L.Ed.2d 1287 (1959)).

⁴ The Court also has authority delegated by the Legislature to enact rules of evidence. RCW 2.04.190 (supreme court has power to prescribe procedures for "taking and obtaining evidence").

⁵ 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 to conduct pre-dating their enactment, however, without violating the Ex Post Facto Clause. Id.

State v. Losh, 721 N.W.2d 886, 891 (Minn. 2006).⁶

"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." Smith, 84 Wn.2d at 502. "If a statute appears to

⁶ Courts in other jurisdictions like Washington, in which the judiciary has superior 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 Johnson v. Rockwell Automation, Inc., 308 S.W.3d 135, 2009 Ark. 241 (Ark. 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); People v. McDonald, 201 Mich. App. 270, 272, 505 N.W.2d 903 (1993) ("The rules of practice and procedure include the rules of evidence."); Opinion of the Justices (Prior Sexual Assault Evidence), 141 N.H. 562, 577, 688 A.2d 1006 (1997) ("A court's constitutional function to independently decide controversies is impaired if it must depend on, or is limited by, another branch of government in determining and evaluating the facts of the controversies it must adjudicate."); State v. Herrera, 92 N.M. 7, 12, 582 P.2d 384 (N.M. Ct. 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"); Ammerman v. Hubbard Broadcasting, Inc., 89 N.M. 307, 310 (N.M. 1976) ("[R]ules of evidence are procedural, in that they are a part of the judicial machinery administered by the courts for determining the facts upon which the substantive rights of the litigant rest and are resolved."); 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); Teter v. Old Colony Co., 190 W.Va. 711, 724-26, 441 S.E.2d 728 (1994) (statute precluding expert real estate appraiser from testifying in court unless appraiser was licensed under the act, conflicted with ER 702 and therefore violated separation of powers doctrine).

conflict with a court rule, this court will first attempt to harmonize them and give effect to both, but if they cannot be harmonized, the court rule will prevail in procedural matters and the statute will prevail in substantive matters." Waples, 2010 WL 2615576, at *3; see also Jensen, 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.").

b. An evidentiary statute violates the separation of powers doctrine if it conflicts with the Rules of Evidence. The Court's authority to govern the admissibility of evidence in Washington trials is embodied in the Rules of Evidence: ER 101 makes clear 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 . . ."); 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 Rules of Evidence is invalid). The very fact of the Court's adoption of the Rules of Evidence "is conclusive of its determination that at least these rules as adopted are

procedural." Ammerman v. Hubbard Broad., Inc., 89 N.M. 307, 310 (N.M. 1976).

Generally in Washington, evidence rules may be promulgated by both the legislative and judicial branches. Jensen, 158 Wn.2d at 394. The Rules of Evidence expressly defer to most statutes addressing admissibility of evidence, thus leaving the statutes intact. E.g., ER 402 (deferring to all statutes rendering otherwise relevant evidence inadmissible); ER 601 (deferring to all statutes governing competency of witnesses); ER 802 (deferring to all statutory hearsay exceptions); ER 901 (deferring to all statutory methods of authentication and identification).

Thus, in State v. Ryan, this Court held the child hearsay statute did not violate the separation of powers doctrine, because "[l]egislative enactment of hearsay exceptions is specifically contemplated by the Rules of Evidence." 103 Wn.2d 165, 178-79, 691 P.2d 197 (1984) (citing ER 802, which provides, "[h]earsay is not admissible except as provided by these rules, by other court rules, or by statute") (emphasis added); cf. State v. Zimmerman, 121 Idaho 971, 829 P.2d 861 (1992) (holding Idaho's child hearsay

statute violated separation of powers doctrine, where Idaho's Rules of Evidence did *not* contemplate statutory hearsay exceptions⁷).

But where the Rules of Evidence do not contemplate a particular statutory exception, an evidence statute that conflicts with the Rules violates the separation of powers doctrine. For example, in State v. Saldano, 36 Wn. App. 344, 675 P.2d 1231, rev. denied, 102 Wn.2d 1018 (1984), the Court of Appeals held that a statute allowing admission of an accused's prior convictions to attack his credibility *whenever* he testified conflicted with and was superseded by ER 609, which permits admission of prior convictions to attack a defendant's credibility only if certain requirements are met.

c. RCW 10.58.090 violates the separation of powers doctrine because it conflicts with the Rules of Evidence. In determining whether a procedural statute conflicts with a court rule, the question is whether both can be given effect. Waples, 2010 WL 2615576, at *3. 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

⁷ I.R.E. 802 provides: "Hearsay is not admissible except as provided by these rules or other rules promulgated by the Supreme Court of Idaho."

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 character and propensity to commit the crime, which ER 404(b) categorically forbids. The statute therefore conflicts with the Rules of Evidence and violates the separation of powers doctrine.⁸

Unlike the child hearsay statute examined in Ryan, RCW 10.58.090 does not fall under any legislative exception specifically contemplated by the Evidence Rules. Although ER 402 defers to statutes rendering relevant evidence *inadmissible*, no Evidence Rule specifically contemplates a statute that allows *admission* of

⁸ Cases from other states support the conclusion that an evidence statute that permits the admission of evidence that ER 404(b) prohibits is in direct conflict with the Rules of Evidence. See Brim v. State, 624 N.E.2d 27, 33 n.2 (Ind. Ct. App. 1993) (statute allowing admission of evidence of defendant's previous sex offenses for purposes of showing defendant's depraved sexual instinct conflicted with ER 404(b) and was a nullity); State v. McCoy, 682 N.W.2d 153, 158-59 (Minn. 2004) (statute allowing admission of evidence of similar conduct by accused against alleged victim of domestic abuse directly conflicted with ER 404(b)); Opinion of the Justices (Prior Sexual Assault Evidence), 141 N.H. 562, 577, 688 A.2d 1006 (1997) (proposed bill that would allow admission in sex offense prosecution of prior sexual assault, for any relevant purpose other than showing propensity, directly conflicted with ER 404(b), which imposed more limits on purposes for which such evidence could be admitted); State v. Mallard, 40 S.W.3d 473 (Tenn. 2001) (statute permitting admission of defendant's prior drug offenses in prosecution for unlawful possession of drug paraphernalia conflicted with ER 404(b) unless it could be read to allow admission of evidence only if relevant to some material issue other than propensity).

evidence that the Rules of Evidence deem irrelevant or overly prejudicial, such as character and propensity evidence.

In upholding the statute, the Court of Appeals recognized the "apparent" conflict posed by the statutory language permitting admission of prior sex offense evidence "notwithstanding Evidence Rule 404(b)." State v. Gresham, 153 Wn. App. 659, 667, 223 P.3d 1194 (2009). But the court held there was no real conflict between the statute and the Rules of Evidence, because the statute permits admission of the evidence only "*if the evidence is not inadmissible pursuant to Evidence Rule 403.*" Id. at 669-70 (quoting RCW 10.58.090(1)) (emphasis in Gresham). The court relied on Jensen, where this Court upheld a statute that permitted admission of evidence in DUI prosecutions that the Court had previously held, in a 2004 case, was inadmissible. Gresham, 153 Wn. App. at 668-70 (citing Jensen, 158 Wn.2d at 397-98 (citing City of Seattle v. Clark-Munoz, 152 Wn.2d 39, 93 P.3d 141 (2004))). Jensen explained the statute at issue did not violate the separation of powers doctrine, although it conflicted with the Clark-Munoz decision, because it did *not* conflict with the Rules of Evidence. Jensen, 158 Wn.2d at 399. Instead, the evidence was subject to the ordinary admissibility requirements of the Rules of Evidence. Id.

Jensen thus supports Mr. Gresham's argument and not the Court of Appeals'. The statute at issue in Jensen did not conflict with the Rules of Evidence but only with a court decision issued just months earlier. Under those circumstances, the Legislature was "not invading the prerogative of the courts," nor "threatening judicial independence." Jensen, 158 Wn.2d at 399. But the same cannot be said where a statute directly conflicts with ER 404(b) and overturns centuries of common law, which RCW 10.58.090 does.

Moreover, the Court of Appeals opinion rests on a misunderstanding of the relationship between ER 403 and the other Rules of Evidence. Evidence Rule 403 was designed as a guide for the handling of situations for which no specific rules have been formulated. Robert H. Aronson, The Law of Evidence in Washington, at 403-4 (4th ed. 2009) (citing FRE Advisory Committee's Note). The specific rules following ER 403, such as ER 404(b), deal with conduct or statements with a high probability for unduly prejudicing the jury. Id. These specific rules, unlike ER 403, severely limit trial court discretion. Id. Thus, ER 404(b) *precludes* a court from admitting evidence of a person's character "in order to show action in conformity therewith." A court may admit prior misconduct evidence, using the balancing test of ER 403, only

after determining the evidence is admissible for a legitimate purpose. Thus, to say that RCW 10.58.090 does not conflict with the Rules of Evidence because trial courts retain discretion to balance the probative value of the evidence against its potential for prejudice misses the point of ER 404(b), which is to *limit* discretion.

Moreover, under the traditional balancing applied when evidence of prior bad acts is admitted for a legitimate issue other than propensity, the potential prejudice to be considered is the inevitable risk that the jury will regard the evidence as demonstrating propensity. State v. Saltarelli, 98 Wn.2d 358, 362-63, 655 P.2d 697 (1982). The traditional balancing test is therefore subverted when evidence is admitted for the purpose of proving propensity, which RCW 10.58.090 now allows. In such a case,

a trial judge must balance the probative value of general propensity evidence against the prejudicial effect of general propensity evidence. Stated another way, that which makes the evidence more probative—the similarity of the prior act to the charged act—also makes it more prejudicial.

Cox v. Iowa, 781 N.W.2d 757, 769 (Iowa 2010).

Finally, because of the radical departure presented by the new statute, it is reasonable to question whether ER 403, even while technically still in force, has the power to exclude unfair

propensity evidence and protect the rights of the accused. See Aviva Orenstein, Deviance, Due Process, and the False Promise of Federal Rule of Evidence 403, 90 Cornell L.Rev. 1487, 1519-27 (2005). Courts may perform a restrained ER 403 analysis because of the belief that the statute embodies a legislative judgment that propensity evidence regarding sexual assaults is never too prejudicial and generally should be admitted. Id. Such concerns are borne out in the federal system, where appellate courts addressing whether FRE 413 and 414 violate due process have upheld the rules in part because the prior sex offense evidence is still subject to the balancing test of FRE 403. William E. Marcantel, Note: Protecting the Predator or the Prey? The Missouri Supreme Court's Refusal to Allow Past Sexual Misconduct as Propensity Evidence, 74 Mo. L.Rev. 211, 227 (2009). But the federal courts have in practice weakened FRE 403 by tending to admit evidence of prior sexual offenses automatically under a *pro forma* approach to Rule 403. Orenstein, Deviance, Due Process, and the False Promise of Federal Rule of Evidence 403, supra, at 1520; see, e.g., United States v. LeCompte, 131 F.3d 767, 768 (8th Cir. 1997) (holding FRE 403 must be read "to give effect to the decision of Congress, expressed in recently enacted Rule 414, to loosen to a

substantial degree the restrictions of prior law on the admissibility of such evidence"); United States v. Meacham, 115 F.3d 1488, 1492 (10th Cir. 1997) (holding that "clearly under Rule 414 the courts are to 'liberally' admit evidence of prior uncharged sex offenses").

d. RCW 10.58.090 conflicts with the common law history behind ER 404(b) and the policies underlying it. The ban on propensity evidence in criminal trials is firmly rooted in Washington common law. See 5 Karl B. Tegland, Washington Practice: Evidence Law and Practice, § 404.10, at 497-99 (5th ed. 2007) (and cases cited therein). Traditionally in Washington, the State may not introduce evidence of a defendant's prior bad acts, because "such evidence has a great capacity to arouse prejudice." State v. Kelly, 102 Wn.2d 188, 199, 685 P.2d 564 (1984); State v. Jones, 101 Wn.2d 113, 120, 677 P.2d 131 (1984), overruled on other grounds by State v. Brown, 113 Wn.2d 520, 782 P.2d 1013 (1989) ("Statistical studies have shown that even with limiting instructions, a jury is more likely to convict a defendant with a criminal record"). This Court has recognized the potential for unfair prejudice is particularly high in sex abuse cases: "Once the accused has been characterized as a person of abnormal bent, driven by biological inclination, it seems relatively easy to arrive at

the conclusion that he must be guilty, that he could not help be otherwise." Saltarelli, 98 Wn.2d at 363 (citation omitted). The restrictions on the admission of prior acts of misconduct also give effect to the fundamental right of the accused to be tried only for the offense charged. State v. Mack, 80 Wn.2d 19, 21, 490 P.2d 1303 (1971); State v. Emmanuel, 42 Wn.2d 1, 13, 253 P.2d 386 (1953).

Historically, evidence of past sexual misconduct has been generally 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) (prior acts of sexual intercourse between parties admissible to show lustful disposition of defendant). Such evidence is arguably relevant to a legitimate issue, because it is not offered to show a general propensity to commit sexual crimes, but to demonstrate the nature of the defendant's relationship to and feelings toward a specific individual, and is probative of the defendant's motivation and intent in subsequent situations. Cox, 781 N.W.2d at 768.

More recently, evidence of prior sex offenses against a *different* victim has been held admissible as part of a common scheme or plan. See, e.g., State v. DeVincentis, 150 Wn.2d 11, 74 P.3d 119 (2003) (evidence of prior sex offense held admissible to

show common scheme or plan to "groom" child). The evidence is admitted not to show the defendant's predisposition to commit the crime, but to explain the presence of "unusual" or "abnormal" elements as part of a common plan:

[t]he more often that unusual and abnormal elements are present in similar instances with similar results, the less likely it is that an innocent intent underlies the abnormal elements Sufficient repetition of complex common features leads to a logical inference that all of the acts are separate manifestations of the same overarching plan, scheme, or design.

State v. Burkins, 94 Wn. App. 677, 689, 973 P.2d 15 (1999).

Other courts have held that state statutes similar to RCW 10.58.090 conflict with these basic principles. See Cox, 781 N.W.2d 757 (holding Iowa statute violated state constitutional due process clause and fundamental notions of fairness, even though trial court was permitted to weigh probative value of evidence against potential for prejudice); State v. Ellison, 239 S.W.3d 603 (Mo. 2007) (holding Missouri statute violated state constitutional provision granting defendants the right to be tried only for offense charged, even though statute allowed trial court to balance probative value of evidence against potential for prejudice).

2. THE APPLICATION OF RCW 10.58.090 IN
THIS CASE VIOLATES THE FEDERAL EX
POST FACTO CLAUSE

RCW 10.58.090 allows the State to rely upon highly incriminating evidence of a defendant's past sexual misconduct, which would otherwise be inadmissible, in order to convict him of a current sexual offense. The statute permits courts to consider the "necessity" for the evidence in light of the other evidence of guilt. RCW 10.58.090(6)(e). In these ways, the statute effectively alters the standard of proof required for conviction and violates the federal Ex Post Facto Clause⁹ as applied in this case.¹⁰

The test for determining whether a statute may be applied to 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, 162 Wn.2d 660, 668, 174 P.3d 43 (2007). A law that "change[s] the rules of evidence, for the purpose of conviction," violates the federal Ex Post Facto Clause. Calder, 3 U.S. at 391.

⁹ Article 1, section 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."

¹⁰ The statute took effect on June 12, 2008, after the alleged crimes in this case. Laws 2008, ch. 90, § 2; CP 127-28.

The Court of Appeals held RCW 10.58.090 did not violate the federal Ex Post Facto Clause, because it "does not alter the facts necessary to establish guilt, and it leaves unaltered the degree of proof required for a sex offense conviction." Gresham, 153 Wn. App. at 673. The court relied upon Carmell v. Texas, 529 U.S. 513, 525, 120 S.Ct. 1620, 146 L.Ed.2d 577 (2000) and Ludvigsen, 162 Wn.2d 660.

But RCW 10.58.090 has the same effect on sex abuse prosecutions as the statutes at issue in Carmell and Ludvigsen had in those cases. The statute lowers the quantum of evidence necessary to convict a defendant in a class of cases by lowering the requirements for admitting highly prejudicial evidence. The Legislature's purpose in enacting the statute was to facilitate sex abuse prosecutions, which previously often depended on the victim's testimony alone. See, e.g., S.B. Rep., 2008 Reg. Sess. S.B. 6933 (Senate Hearing testimony) ("ER 404(b) should be changed as it applies to trials of sex offenses," because juries in such cases are too often unable to reach a verdict). Further, the statute directs courts to consider "the necessity of the evidence beyond the testimonies already offered at trial." RCW 10.58.090(6)(e).

There should be no question that RCW 10.58.090 facilitates convictions by allowing the State to rely on highly prejudicial evidence that would otherwise be excluded. The statute "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." Calder, 3 U.S. at 390-91.

The Court of Appeals held RCW 10.58.090 is like the evidence statute at issue in State v. Clevenger, 69 Wn.2d 136, 417 P.2d 626 (1966). Gresham, 153 Wn. App. at 673. But in Clevenger, the statute removing the marital privilege in criminal prosecutions was not inherently beneficial to the State. 69 Wn.2d at 140. In contrast, RCW 10.58.090 is "inherently beneficial to the State." Ludvigsen, 162 Wn.2d at 672. It is therefore ex post facto.

Finally, any simple distinction between rules affecting admissibility and rules affecting the amount of proof required for conviction "neglects 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). A statute that alters the rules of evidence for the purpose of facilitating convictions for a class of crime, as RCW 10.58.090 does, effectively alters the State's burden of proof.

3. THE APPLICATION OF RCW 10.58.090 IN THIS CASE VIOLATES THE STATE EX POST FACTO CLAUSE

This Court should interpret Washington's Ex Post Facto Clause as applying to evidence statutes such as RCW 10.58.090, which ""retrench the rules of evidence, so as to make conviction more easy."" State v. Fugate, 332 Or. 195, 211, 26 P.3d 802 (2001) (quoting State v. Cookman, 324 Or. 19, 28, 920 P.2d 1086 (1996) (quoting Strong v. State, 1 Blackf. 193, 196 (Ind. 1822))).

a. Gunwall analysis.¹¹

i. Factors one and two—textual language of the Washington Constitution and significant differences between the state and federal Ex Post Facto Clauses. Washington's ex post facto prohibition states: "[n]o bill of attainder, ex post facto law, or law impairing the obligations of contracts shall ever be passed." Const. art. 1, § 23. Article 1, section 10 of the United States Constitution states, "No State shall . . . pass any Bill of Attainder, ex post facto law, or Law impairing the Obligation of Contracts." Although the language of the two provisions is similar, use of the

¹¹ State v. Gunwall, 106 Wn.2d 54, 61-62, 720 P.2d 808 (1986).

word "ever" in the state provision suggests an emphatic intent by the Founders to forbid ex post facto laws.

Moreover, the federal clause explicitly bans state ex post facto laws, which supports the position that Washington's provision affords different protection. Otherwise, the state clause would be superfluous, violating well-established rules of construction. Neil C. McCabe, Ex Post Facto Provisions of State Constitutions, 4 Emerging Issues St. Const. L. 133; 156 (1991).

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), this Court stated it understood the federal clause to prohibit retroactive application of laws that "chang[e] the rules of evidence by which less or different testimony was made sufficient to convict."

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 1, section 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.

iv. Common law history. In Lybarger v. State, 2 Wash. 552, 560, 27 P. 449 (1891), this Court explained it understood the fourth Calder factor to bar "change[s in] the rules of evidence to make conviction more easy."

That interpretation parallels the early understanding of the Oregon and Indiana courts. State v. Fugate, 332 Or. 195, 26 P.3d 802 (Or. 2001). 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)). 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. Fugate, 332 Or. at 213. Because Washington's constitution was also modeled on Indiana's, the same interpretation should apply to the Washington clause.

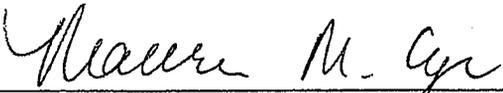
Fugate independently applied the Oregon Constitution to a statutory amendment that barred the exclusion of evidence obtained in violation of statute unless exclusion was otherwise required by law. Id. at 198-99. The acknowledged purpose of the Oregon law was to make criminal convictions easier. Id. at 214-15. The court held the provision was ex post facto because it operated to the exclusive benefit of the prosecution. Id.

b. RCW 10.58.090 violates the state constitution in this case. Like the law at issue in Fugate, RCW 10.58.090 operates only in favor of the prosecution. It retrenches the rules of evidence so as to make conviction more easy. It therefore violates the state Ex Post Facto Clause as applied in this case.

E. CONCLUSION

Because RCW 10.58.090 violates the separation of powers doctrine, it is void. Alternatively, the application of the statute in this case violated the state and federal Ex Post Facto Clauses. Mr. Gresham's convictions must be reversed.

Respectfully submitted this 23rd day of July, 2010.


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APPENDIX

WASHINGTON AND FEDERAL RULES OF EVIDENCE CITED IN BRIEF

Washington Rules of Evidence

RULE 101. SCOPE

These rules govern proceedings in the courts of the state of Washington to the extent and with the exceptions stated in rule 1101.

RULE 402. RELEVANT EVIDENCE GENERALLY ADMISSIBLE; IRRELEVANT EVIDENCE INADMISSIBLE

All relevant evidence is admissible, except as limited by constitutional requirements or as otherwise provided by statute, by these rules, or by other rules or regulations applicable in the courts of this state. Evidence which is not relevant is not admissible.

RULE 403. EXCLUSION OF RELEVANT EVIDENCE ON GROUNDS OF PREJUDICE, CONFUSION, OR WASTE OF TIME

Although relevant, evidence may be excluded if its 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.

RULE 404. CHARACTER EVIDENCE NOT ADMISSIBLE TO PROVE CONDUCT; EXCEPTIONS; OTHER CRIMES

.....

(b) Other Crimes, Wrongs, or Acts. 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.

RULE 601. GENERAL RULE OF COMPETENCY

Every person is competent to be a witness except as otherwise provided by statute or by court rule.

RULE 609. IMPEACHMENT BY EVIDENCE OF CONVICTION OF CRIME

(a) General Rule. For the purpose of attacking the credibility of a witness in a criminal or civil case, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during examination of the witness but only if the crime (1) was punishable by death or imprisonment in excess of 1 year under the law under which the witness was convicted, and the court determines that the probative value of admitting this evidence outweighs the prejudice to the party against whom the evidence is offered, or (2) involved dishonesty or false statement, regardless of the punishment.

(b) Time Limit. Evidence of a conviction under this rule is not admissible if a period of more than 10 years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(c) Effect of Pardon, Annulment, or Certificate of Rehabilitation. Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of 1 year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) Juvenile Adjudications. Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a finding of guilt in a juvenile offense proceeding of a witness other than the

accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

(e) Pendency of Appeal. The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

RULE 802. HEARSAY RULE

Hearsay is not admissible except as provided by these rules, by other court rules, or by statute.

RULE 901. REQUIREMENT OF AUTHENTICATION OR IDENTIFICATION

(a) General Provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) Illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

....

(10) *Methods Provided by Statute or Rule.* Any method of authentication or identification provided by statute or court rule.

Federal Rules of Evidence

Rule 413. Evidence of Similar Crimes in Sexual Assault Cases

(a) In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant.

(b) In a case in which the Government intends to offer evidence under this rule, the attorney for the Government 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.

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

(d) For purposes of this rule and Rule 415, "offense of sexual assault" means a crime under Federal law or the law of a State (as defined in section 513 of title 18, United States Code) that involved--

(1) any conduct proscribed by chapter 109A of title 18, United States Code;

(2) contact, without consent, between any part of the defendant's body or an object and the genitals or anus of another person;

(3) contact, without consent, between the genitals or anus of the defendant and any part of another person's body;

(4) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person; or

(5) an attempt or conspiracy to engage in conduct described in paragraphs (1)-(4).

Rule 414. Evidence of Similar Crimes in Child Molestation Cases

(a) In a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant's commission of another offense or offenses of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant.

(b) In a case in which the Government intends to offer evidence under this rule, the attorney for the Government 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.

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

(d) For purposes of this rule and Rule 415, "child" means a person below the age of fourteen, and "offense of child molestation" means a crime under Federal law or the law of a State (as defined in section 513 of title 18, United States Code) that involved--

(1) any conduct proscribed by chapter 109A of title 18, United States Code, that was committed in relation to a child;

(2) any conduct proscribed by chapter 110 of title 18, United States Code;

(3) contact between any part of the defendant's body or an object and the genitals or anus of a child;

(4) contact between the genitals or anus of the defendant and any part of the body of a child;

(5) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on a child; or

(6) an attempt or conspiracy to engage in conduct described in paragraphs (1)-(5).