

67194-4

67194-4

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON

2011 NOV 29 PM 4: 55

No. 67194-4-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

FREDERICK WILLIAMS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR WHATCOM COUNTY

The Honorable Ira Uhrig

APPELLANT'S OPENING BRIEF

OLIVER R. DAVIS
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR 1

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 2

C. STATEMENT OF THE CASE 3

 1. Procedural history. 3

 2. Trial evidence. 5

D. ARGUMENT 13

 1. THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING MR. WILLIAMS' 1991 CONVICTION PURSUANT TO RCW 10.58.090 AND ER 404(b). . 13

 a. The State failed to comply with the 15 day notice requirement of RCW 10.58.090(2). 13

 b. The prior act evidence of the 1991 conviction must be admissible under the categorical ER 403 factors of RCW 10.58.090(6)(a) through (h). 17

 c. Under RCW 10.58.090(1) and subsections (6)(a) - (h) the prior act evidence was inadmissible under ER 403 and the categorical factors, and the court abused its discretion. 18

 6(a) *The similarity of the prior acts to the acts charged*. 21

 6(b) *The closeness in time of the prior acts to the acts charged*. 26

 6(c) *The frequency of the prior acts*. 28

 6(d) *The presence or lack of intervening circumstances*. 28

 6(e) *The necessity of the evidence beyond the testimonies already offered at trial*. 30

6(f). <i>Whether the prior act was a criminal conviction.</i>	34
6(g). <i>Whether the probative value is substantially outweighed by the danger of unfair prejudice.</i>	34
c. <u>The trial court also abused its discretion in finding the 1991 rape admissible under the “common scheme and plan” exception to ER 404(b).</u>	35
d. <u>The error in admitting the 1991 evidence under RCW 10.58.90 requires reversal even if the prior bad act was properly admissible under ER 404(b).</u>	41
2. THE TRIAL DENIED SEVERANCE OF THE COUNTS AS TO THE DIFFERENT VICTIMS BASED IN PART ON AN ERRONEOUS APPLICATION OF RCW 10.58.090.	43
a. <u>Mr. Williams properly sought severance and requested separate trials of the counts as to E.W., and counts as to M.W.</u>	43
b. <u>The trial court abused its discretion in denying severance.</u>	45
c. <u>By its plain language, RCW 10.58.090 applies only to another crime or act that is a “prior act” precedent in time to commission of the charged offense.</u>	48
3. RCW 10.58.090 IS INVALID UNDER THE STATE AND FEDERAL CONSTITUTIONS.	50
a. <u>RCW 10.58.090 violates the separation of powers.</u>	51
b. <u>RCW 10.58.090 violates the State and Federal Constitutions prohibitions on <i>ex post facto</i> laws.</u>	53
4. THE STATE FAILED TO PROVE MR. WILLIAMS’ PRIOR CONVICTION TO THE JURY BEYOND A REASONABLE DOUBT.	58
E. CONCLUSION	60

TABLE OF AUTHORITIES

WASHINGTON CASES

State v. Aaron, 57 Wn. App. 277, 787 P.2d 949 (1990) 43

State v. Bokien, 14 Wash 403, 44 P. 889 (1896). 55

State v. Boland, 115 Wn.2d 571, 800 P.2d 1112 (1990). 58

State v. Brown, 132 Wn.2d 529, 940 P.2d 546 (1997). 31

State v. Bythrow, 114 Wn.2d 713, 790 P.2d 154 (1990). 45

State v. Coe, 101 Wn.2d 772, 684 P.2d 668 (1984) 23

State v. Dearbone, 125 Wn.2d 173, 883 P.2d 303 (1994). 17

State v. DeVincentis, 150 Wn .2d 11, 74 P.3d 119 (2003). 37,38,39

State v. Dow, ___ Wn. App. ___, ___, 253 P.3d 476 (2011) 42

State v. Engel, 166 Wn.2d 572, 210 P.3d 1007 (2009). 49

State v. Fields, 85 Wn.2d 126, 530 P.2d 284 (1975) 52

City of Fircrest v. Jensen, 158 Wn.2d 384, 143 P.3d 776 (2006) 51

State v. Foxhoven, 161 Wn.2d 168, 163 P.3d 786 (2007) 36

State v. Fugate, 26 P.3d 802 (2001). 57

State v. Gatalski, 40 Wn. App. 601, 699 P.2d 804 (1985) 46

State v. Gogolin, 45 Wn. App. 640, 727 P.2d 683 (1986). 37

State v. Gonzalez, 168 Wn.2d 256, 226 P.3d 131 (2010). . . . 49,50

State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980). 59

State v. Gresham, 153 Wn. App. 659, 223 P.3d 1194 (2009), review granted, 168 Wn.2d 1036 (2010) 51

<u>State v. Gunwall</u> , 106 Wn.2d 54, 720 P.2d 808 (1986)	57
<u>State v. Harris</u> , 36 Wn. App. 746, 677 P.2d 202 (1984).	47
<u>State v. Hawkins</u> , 157 Wn. App. 739, 238 P.3d 1226 (2010) . . .	33
<u>State v. Hennings</u> , 129 Wn.2d 512, 919 P.2d 580 (1996)	54
<u>State v. Hutchinson</u> , 135 Wn.2d 863, 959 P.2d 1061 (1998). . .	15
<u>State v. Johnson</u> , 40 Wn. App. 371, 699 P.2d 221 (1985)	43
<u>State v. Jones</u> , 93 Wn. App. 166, 968 P.2d 888 (1998)	44
<u>State v. Kalakosky</u> , 121 Wn.2d 525, 852 P.2d 1064 (1993)	46
<u>State v. Kelly</u> , 102 Wn.2d 188, 685 P.2d 564 (1984).	40
<u>State v. Kilgore</u> , 147 Wn.2d 288, 53 P.3d 974 (2002)	21,36
<u>State v. Krall</u> , 125 Wn.2d 146, 881 P.2d 1040 (1994)	29
<u>State v. Lynch</u> , 58 Wn. App. 83, 792 P.2d 167 (1990)	42
<u>State v. Moreno</u> , 147 Wn.2d 500, 58 P.3d 265 (2002)	51
<u>State v. Newbern</u> , 95 Wn. App. 277, 975 P.2d 1041 (1999)	42
<u>State v. Powell</u> , 126 Wn.2d 244, 893 P.2d 615 (1995)	19
<u>State v. Quismundo</u> , 164 Wn.2d 499, 192 P.3d 342 (2008).	29
<u>State v. Ra</u> , 144 Wn. App. 688, 175 P.3d 609 (2008).	36
<u>State v. Rafay</u> , 167 Wn.2d 644, 222 P.3d 86 (2009)	34
<u>State v. Roadhs</u> , 71 Wn.2d 705, 430 P.2d 586 (1967).	49
<u>State v. Russell</u> , 125 Wn.2d 24, 882 P.2d 747 (1994), <u>cert. denied</u> , 514 U.S. 1129, 115 S. Ct. 2004, 131 L. Ed. 2d 1005 (1995)	46
<u>State v. Russell</u> , 171 Wn.2d 118, 249 P.3d 604 (2011)	41,42

<u>State v. Saltarelli</u> , 98 Wn.2d 358, 655 P.2d 697 (1982) .	23,40,41,47
<u>State v. Saldano</u> , 36 Wn. App. 344, 675 P.2d 1231, <u>review denied</u> , 102 Wn.2d 1018 (1984)	52
<u>State v. Savaria</u> , 82 Wn. App. 832, 919 P.2d 1263 (1996)	42
<u>State v. Scherner</u> , 153 Wn. App. 621, 225 P.3d 248 (2009), <u>review granted</u> , 168 Wn.2d 1036 (2010).	20,29,51
<u>State v. Silva</u> , 107 Wn. App. 605, 27 P.3d 663 (2001).	57
<u>State v. Smith</u> , 106 Wn.2d 772, 725 P.2d 951 (1986).	39
<u>State v. Smith</u> , 74 Wn.2d 744, 446 P.2d 571 (1968).	46
<u>State v. Smith</u> , 84 Wn.2d 498, 527 P.2d 674 (1974).	52
<u>State v. Tomal</u> , 133 Wn.2d 98, 948 P.2d 833 (1997).	17
<u>Waples v. Yi</u> , 169 Wn.2d 152, 234 P.3d 187 (2010)	51
<u>State v. Ward</u> , 123 Wn.2d 488, 870 P.2d 295 (1994).	53
<u>State v. Watkins</u> , 53 Wn. App. 264, 766 P.2d 484 (1989)	47,50
 <u>CASES FROM OTHER STATE JURISDICTIONS</u>	
<u>North Carolina v. McKinney</u> , 430 S.E.2d 300 (N.C.App. 1993). .	38
 <u>WASHINGTON STATUTES AND COURT RULES</u>	
RCW 10.58.090	passim
RCW 2.04.190	52
Laws 2008, ch. 90, §1.	54
ER 101	52
ER 609	52
ER 105	41

CrR 4.4	44,45
CrR 4.7(h)(7)(i)	15
ER 404(b).	passim
ER 403.	passim

FEDERAL EVIDENCE RULES

Fed. R. Evid. 413	23
Fed. R. Evid. 414	23

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. 14.	59
U.S. Const. Art. I, § 10	53
U.S. Const. amend. 6	59
Wash. Const. Art. I, § 23.	53,55
Wash. Const. Art. IV, § 1	51,52

OTHER STATE CONSTITUTIONAL PROVISIONS

Or. Const. Art. I, § 21	56
Ind. Const. art. I, § 24	56

UNITED STATES SUPREME COURT CASES

<u>Apprendi v. New Jersey</u> , 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000)	59,60
<u>Blakely v. Washington</u> , 542 US. 296, 124. S.Ct. 2531, 159 L.Ed.2d 403 (2004)	59,60
<u>Calder v. Bull</u> , 3 Dall. 386, 1 L.Ed. 648 (1798)	56

<u>Carmell v. Texas</u> , 529 U.S. 513, 120 S.Ct. 1620, 146 L.Ed.2d 577 (1999).	56
<u>Collins v. Youngblood</u> , 497 U.S. 37, 110 S.Ct. 2715, 111 L.Ed.2d 30 (1990)	53,54
<u>United States v. Gaudin</u> , 515 U.S. 506, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995)	59
<u>Ring v. Arizona</u> , 536 U.S. 584, 122 S.Ct. 2428, 153 Ed.2d 556 (2002).	60
<u>Weaver v. Graham</u> , 450 U.S. 24, 101 S.Ct. 960, 964, 67 L.Ed.2d 17 (1981)	54
<u>In re Winship</u> , 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)	59
 <u>UNITED STATES COURT OF APPEALS CASES</u>	
<u>U.S. v. Gabe</u> , 237 F.3d 954 (8th Cir. 2001)	23,24
<u>United States v. Wasman</u> , 641 F.2d 326 (5th Cir.1981).	31
 <u>TREATISES AND LAW REVIEW ARTICLES</u>	
Blythe Chandler, <u>Balancing Interests Under Washington's Statute Governing the Admissibility of Extraneous Sex–Offense Evidence</u> , 84 Wash. L.Rev. 259 (2009).	35
Slough and Knightly, <u>Other Vices, Other Crimes</u> , 41 Iowa L. Rev. 325 (1956).	23
5 Karl B. Tegland, <u>Evidence Law and Practice</u> (5th ed.2007)	19
5 Karl B. Tegland, <u>Washington Practice, Evidence</u> (2d ed.1982) . . .	31
Robert Utter and Hugh Spitzer, <u>The Washington State Constitution, A Reference Guide</u> (2002).	56

A. ASSIGNMENTS OF ERROR

1. In Mr. Williams' trial on two sets of sex offense charges against two complainants, the trial court erred in admitting prior act evidence under RCW 10.58.090, where the evidence was inadmissible under the statute's mandated ER 403 factors.

2. The trial court erred in admitting prior act evidence under RCW 10.58.090 where the prosecutor failed to give the 15 days notice required by the statute.

3. The trial court erred in admitting prior act evidence under RCW 10.58.090 where the statute is unconstitutional.

4. The trial court erred in admitting prior bad act evidence under ER 404(b).

5. Reversal is required if the evidence was admissible under ER 404(b) but not RCW 10.58.090, where the court did not give a limiting instruction tailored to the restrictions of ER 404(b).

6. The trial court erred in denying severance of the counts against the two complainants, in part by erroneously ruling that evidence of the allegations was cross-admissible.

7. The trial court erred in imposing a "two-strikes" sentence where the prosecutor failed to prove the defendant's alleged prior offense to the jury, beyond a reasonable doubt.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. RCW 10.58.090 allows the introduction of propensity evidence only where the trial court conducts a rigorous ER 403 probity/prejudice balancing analysis before doing so, including consideration of mandatory factors set forth in the statute. Did the trial court abuse its discretion in admitting prior act evidence of the defendant's 1991 conviction for rape of a child under RCW 10.58.090, where the evidence was inadmissible under the statute's mandatory ER 403 factors?

2. Did the trial court abuse its discretion in admitting the 1991 prior act evidence under RCW 10.58.090, where the prosecutor failed to give the required 15 days notice of the evidence to be proffered, but instead, on the first day of trial, changed both its manner of introducing the evidence and the witnesses planned to proffer it?

3. Did the trial court err in admitting the 1991 prior act evidence under RCW 10.58.090, where the statute is unconstitutional as a violation of the separation of powers doctrine, and the prohibition against *ex post facto* laws?

4. Did the trial court abuse its discretion in admitting the 1991 prior bad act evidence under ER 404(b), where the trial court

failed to perform any of the four analytical steps required for admission under the Rule, and where the evidence in any event failed to meet the “common scheme” exception?

5. If the evidence was improperly admitted under RCW 10.58.090, but was admissible under ER 404(b), is reversal still required where the trial court did not give the jury an ER 404(b) limiting instruction precluding the jury from using the evidence for character and propensity reasoning?

6. Did the trial court abuse its discretion in denying severance of the two sets of counts as to the two complainants, where evidence of the charges was not cross-admissible, including because RCW 10.58.090 applies only to “prior” acts?

7. Did the trial court violate Mr. Williams’ Sixth and Fourteenth Amendment rights by imposing a sentence of Life Without Parole, where the State failed to prove the defendant’s alleged prior offense to a jury, beyond a reasonable doubt?

C. STATEMENT OF THE CASE

1. Procedural history. Prior to the present charges, in 1991, the defendant Fred Williams was convicted of first degree child rape of his 5-year old niece A.B, by entry of a plea of guilty and his factual admission to a single act of digital-vaginal

intercourse. Supp. CP ____, Sub # 124 (Trial Exhibit list, Exhibit 1 (judgment in 91-1-00274-9)). He was sentenced within the standard range. Exhibit 1; Exhibit 3 (1992 PSI, at p. 3).

Following incarceration, and extensive treatment at Twin Rivers Correctional Facility, Mr. Williams began living in a trailer on the same property as his brother Don¹ Williams along with Don's family, including his children, the present complainants E.W. and M.W. Supp. CP ____, Sub # 135; 3/16/11RP at 241, 251-56.

In October of 2009, in a cascading series of allegations that suspiciously suggested each child was mimicking another, a friend of M.W.'s (M.F.) revealed to M.W. that she had been sexually abused by her father. M.W. then told M.F. that she also had been abused, by her uncle Mr. Williams. M.F. immediately reported this allegation to their counselor at Blaine High School. CP 138-41. Following involvement of Child Protective Services (CPS) workers and Officer John Landis of the Blaine police, M.W.'s sister E.W. also said that she had been sexually abused by the defendant. CP 138-41.

Officer Landis arrested Mr. Williams and the present information was filed, with charging periods of 1999-2003 as to

¹ Don Williams will be referred to as "Don" or as the children's father, to avoid confusion with reference to the appellant Mr. Williams.

E.W., and 2006-2008 as to M.W., alleging multiple counts of rape and child molestation in the first and second degrees. CP 138-41.

Mr. Williams was found guilty following a jury trial held March 14-24, 2011. CP 41-43. At sentencing, the trial court imposed a “two-strikes” sentence of Life Without Possibility of Parole, based on Mr. Williams’ prior 1991 conviction. 5/16/11RP at 966-68; CP 23-40. Mr. Williams timely appealed. CP 4-22.

2. Trial evidence. The history of the complainants’ allegations against Mr. Williams, and their trial testimony, was marked by significant inconsistencies and troubling circumstances, a fact recognized by both the prosecutor and the trial court.

Blaine police officer John Landis interviewed E.W. and M.W. at Blaine High School on October 16, 2009, along with CPS workers. 3/22/11RP at 595-98. During the interviews, M.W. stated she had told both her father and her mother that Mr. Williams was having sex with her. 3/22/11RP at 625-26. M.W. also told Officer Landis that she did not remember the first time she had allegedly been abused by Mr. Williams, that the abuse occurred at her house, and she also described a touching of her chest (all of which the officer agreed was substantially different than M.W.’s trial testimony). 3/22/11RP at 627-28.

Based on the children's statements Officer Landis arrested Fred Williams at his trailer home and informed him the arrest was for child rape. 3/22/11RP at 601-03, 616-17. Mr. Williams told the officer that there was no way it was him, and that "he never leaves his trailer and hurts no one." 3/22/11RP at 616.²

Prior to the children's accusations, there were multiple investigations into E.W. and M.W.'s general family and living situation, and none of these indicated any abuse or concerns of abuse by the defendant. Linda Conroy, a Child Protective Services worker, investigated the Williams family's living situation in February of 2006. 3/22/11RP at 656. The Williams children had been staying with their paternal aunt during a period of housing transition, but after an incident in which E.W. was slapped and fought with her aunt, the Williams family very briefly resided with Fred Williams. 3/22/11RP at 656, 661-62. Ms. Conroy was also concerned because Mr. Williams was a registered sex offender. However, she conducted interviews with the Williams family members, including thorough and specific questioning of both E.W.

² At the police station, Mr. Williams apparently put his hands over his face, and asked the officer to shoot him. 3/22/11RP at 605-06. Officer Landis denied telling defense counsel that this reaction was a result of the fact that he had been confronting Mr. Williams and telling him he was morally sick, in order to get a reaction of getting him to talk. 3/22/11RP at 620, 642.

and M.W., who appeared to be open and frank about their circumstances. 3/22/11RP at 6563-67. E.W. indicated that Mr. Williams had not engaged in any improper behavior. 3/22/11RP at 664. M.W. also indicated that she was never alone with Mr. Williams. Ms. Conroy's discussions with law enforcement and the other family members confirmed that this appeared to be true. 3/22/11RP at 665-66.

In addition, Jacob Vohs, a social worker with DSHS, interviewed E.W. in December of 2001 based on a report to the Department that she was being harmed at home. 3/23/11RP at 833-34. In the course of his interview, E.W. indicated that this complaint was actually in reference to her father, and Mr. Vohs' investigation revealed no indications of abuse or physical harm by anyone else. 3/23/11RP at 834-35, 838-39. Both Ms. Conroy's and Mr. Vohs' investigation of the family and Mr. Williams' presence on the property occurred during or after the relevant charging periods.

Given the foregoing circumstances, the State felt it necessary to produce the trial testimony of Joan Gaasland-Smith, a social worker employed by the Whatcom County prosecuting attorney's office. Gaasland-Smith told the jury that victims of

sexual assault typically fail to “report,” delay reporting, or minimize their reporting of the extent of sexual abuse, for reasons such as fear of sexual embarrassment or concern for the impact on family unity. 3/21/11RP at 356, 362-63. In essence, Gaasland-Smith told the jury that any of a wide array of different patterns of “disclosure,” or non-disclosure, or partial disclosure by a child were consistent with the child having actually been criminally abused. 3/21/11RP at 363-64, 375-76.³

To explain away the parents’ firm testimony that Mr. Williams had not been in a position of access to the children, Gaasland-Smith also stated that parents commonly fail to recognize actual sexual abuse. 3/21/11RP at 366-67. Don Williams, the defendant’s brother, testified that he prohibited his daughters from ever being inside Mr. Williams’ trailer, or to even enter it without supervision. 3/16/11RP at 321-22.

Dr. John Yuille, a forensic psychologist, explained to the jury that the Blaine police department’s interviews of E.W. and M.W. were examples of precisely how such interviews should not be conducted. 3/23/11RP at 768-72. Dr. Yuille explained how leading

³ In addition to essentially testifying that the children could be telling the truth regardless of any concerns about their pattern of allegations, Gaasland-Smith also told the jury that the “underlying commonality” that results in rape and molestation is an abuser’s “sexual desire” for children. 3/21/11RP at 381.

questions and multiple interviews can result in persons, especially children, believing confidently in their memory that certain things occurred in the past, when in fact they did not occur. 3/23/11RP at 764-67.⁴

There was a significant concern that the children's allegations grew out of a friend telling one child that she had been abused, and that the other child then mimicked her sister's complaint. E.W. was initially interviewed because her sister had been told by a friend that she had been abused by her father; M.W. only then stated that she also had been abused, and the friend passed this information to the school counselor. 3/16/11RP at 284.

⁴ The trial court emphasized that its evidentiary ruling, allowing the defense to present Dr. Yuille's testimony, was based on the defense argument that it was warranted by the inconsistencies in the children's allegations, and that the court in most instances would not permit such testimony. 3/23/11RP at 690-754. The court summarized Dr. Yuille's testimony as bearing on the question of what interview techniques in child sex abuse cases are appropriate, and his opinion that the interviews in the present case had failed to meet professional standards. 3/23/11RP at 754. The court stated:

So, it is, in my opinion, the extraordinary case in which this type of testimony would be appropriate, it would be allowed. Um, but under the unique circumstances of this case and the facts presented, I will allow it, but I can't think of another case in recent memory where I would have done so.

3/23/11RP at 754-55.

M.W., the younger sister of E.W., testified she was molested by Mr. Williams, and it happened "more than once." 3/21/11RP at 389.⁵ 3/21/11RP at 389. She was positive the incidents happened only when her family was living at the F Street house, which was inconsistent with some of the prior allegations.⁶ 3/21/11RP at 389-90. The first incident occurred in her uncle's trailer, when they tried to order a movie from Netflix. 3/21/11RP at 392-93. Mr. Williams started taking off M.W.'s pants and shirt. 3/21/11RP at 396. M.W. alleged that the defendant unsuccessfully attempted penile-vaginal intercourse. 3/21/11RP at 397-99.

E.W. was questioned at school by Officer Landis in October of 2009 and stated she, just like her sister, had been sexually abused by her uncle Mr. Williams. 3/21/11RP at 495-96. (E.W.'s sister M.W. had made revelations around that time which were communicated through others to the school counselor, and that was when E.W. first ever spoke about the matter. 3/21/11RP at 496. After this meeting, E.W. also discussed her own claims of molestation with her friend S.N., who said in group counseling

⁵ M.W. was born on September 1, 1994. 3/21/11RP at 383.

⁶ The charging period as to M.W. was February 2006 to February 2008. CP 86-89.

sessions that she had been molested by her stepfather. 3/21/11RP at 496-99). E.W.'s account at trial began with the assertion that Mr. Williams would "hand us a dollar or 5 dollars" that she would lift up her shirt, and this led to the defendant kissing her breasts.

3/21/11RP at 502. This reference to being abused with another girl or person present was unexplained. Yet E.W. later testified that no one else ever knew what was going on, until her sister M.W. made her claims. 3/21/11RP at 522-23.

E.W. stated at trial that the molestation began when she was eight, when the family lived on Blaine Road, and specifically commenced a month after Mr. Williams moved into the trailer next to the family house. 3/21/11RP at 500-01. Don Williams had testified that the family lived in Birch Bay in 1999, and moved to Blaine Road in 2000. 3/21/11RP at 489. E.W. answered no when the prosecutor inquired whether the conduct hadn't begun earlier. 3/21/11RP at 501.

E.W. theorized that she had been eight years old, was looking for attention and the approval of adults. She also stated that her uncle's alleged conduct was such attention, so she accepted it. 3/21/11RP at 500. This activity lasted for several weeks, followed by Mr. Williams asking E.W. to take off her pants.

3/21/11RP at 502. E.W. stated that the defendant engaged in digital-vaginal intercourse, and also oral-vaginal contact.

3/21/11RP at 502. He also kissed her on the mouth. 3/21/11RP at 516-17.

E.W. was insistent that she never told her sister what she claimed was going on, but after M.W. claimed sexual abuse to the school counselor, E.W. became “furious.” 3/22/11RP at 539.

I ran home trying to get the information to ask my sister what happened.

3/22/11RP at 539.

Finally, in brief cross-examination, E.W. readily agreed that she told defense counsel in an interview several months prior to trial that it was impossible for her to give any kind of narrative report of her claimed abuse. She testified that her memory of these events – which occurred as long as almost a decade previously – was too poor. 3/22/11RP at 549.

D. ARGUMENT

1. THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING MR. WILLIAMS' 1991 CONVICTION PURSUANT TO RCW 10.58.090 AND ER 404(b).

a. The State failed to comply with the 15 day notice requirement of RCW 10.58.090(2).⁷ On the first day of trial, the deputy prosecutor, without any notice, indicated to the court and counsel that the State was completely changing the nature of the 1991 prior act evidence that it would be introducing, and the witnesses through whom it would be introduced. This violated the notice provision of RCW 10.58.090, and took defense counsel completely by surprise.

RCW 10.58.090 requires that the State give the defendant at least 15 days notice before admission of "prior act" evidence claimed to be admissible under the statute. Subsection (2) of the statute provides:

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

⁷ This error requires reversal even if the 1991 evidence was properly admitted under ER 404(b), which imposes no special notice requirement, because no ER 404(b) limiting instruction was given.

fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

RCW 10.58.090(2). In the weeks prior to trial, including by means of an email sent to defense counsel on Sunday, February 27, the prosecutor had represented that the evidence of the 1991 conviction, including associated documents such as the affidavit of probable cause and the pre-sentence inquiry (PSI), would be introduced at trial through John Belmat, the DOC officer from the 1991 sentencing, who prepared the PSI in 1992. 3/14/11RP at 77-78, 89-95.

However, on March 14, the first day of trial and the date on which the issue of RCW 10.58.090 admissibility was argued, the prosecutor announced he would instead have the defendant's brother Don Williams testify that he was in the courtroom at the 1991 sentencing, and that Mr. Williams had orally admitted to him what he had done to warrant the child rape conviction. 3/14/11RP at 112, 120-22. Mr. Williams objected that this new offer of proof utterly failed to satisfy the requirement of 15 days notice and that the State's newly revealed plan to admit the evidence through the defendant's brother was a surprise for which the defense had no time to prepare:

To get it through the brother is an absolute surprise to me. I don't quite get how you are going to do that, quite honestly, and I think the statute says you have to disclose how you are going to get the evidence in and the statements.

3/14/11RP at 126.

Mr. Williams argues that the trial court was required to exclude the evidence of the prior conviction under RCW 10.58.090(2). A similar rule, CrR 4.7(h)(7)(i), permits the superior court to exclude evidence that was not timely disclosed to the opposing party. See State v. Hutchinson, 135 Wn.2d 863, 881–83, 959 P.2d 1061 (1998). Before using exclusion as a sanction for a CrR 4.7 violation, the trial court must consider: (1) the effectiveness of less severe sanctions; (2) the impact of witness preclusion on the evidence at trial and the outcome of the case; (3) the extent to which the witness's testimony will surprise or prejudice the party; and (4) whether the violation was willful or in bad faith. Hutchinson, 135 Wn.2d at 882–83.

In the present case, the trial court did not rule, but admitted the evidence despite the defendant's repeated protestations that the State's evidence was a surprise for which counsel was unprepared. 3/14/11RP at 126, 133-34. Counsel argued:

I also have the right to know sort of in advance is the brother going to say what exactly the brother is going to say because it does come down to some degree of investigation, did they, in fact, have this conversation. . . . I mean, it's pretty straightforward that the witnesses need to be disclosed as well as a summary of the statements of any testimony expected to be offered.

3/14/11RP at 134. Additionally, the State's failure to disclose the nature of the evidence was in bad faith. The State affirmatively led the defense to believe that evidence of the prior conviction would be admitted through John Belmat, the DOC officer, so much so that counsel filed a motion to compel a summary of *that* witness's testimony. Supp. CP ____, Sub # 102 (defense motion to compel, February 28, 2011). Then, on the first day of trial, the State changed its manner of proving the prior conviction.

Certainly, there was no good cause shown for the late notice. Courts in other contexts have construed the term "good cause" to require a showing of some external impediment, that did not result from a self-created hardship, that would prevent a party from complying with statutory requirements. See, e.g., State v. Tomaj, 133 Wn.2d 985, 989, 948 P.2d 833 (1997). Inadvertence or attorney oversight is not "good cause." Tomaj, 133 Wn.2d at 989; State v. Dearbone, 125 Wn.2d 173, 883 P.2d 303 (1994).

Certainly, the prosecutor's apparently strategic decision to change the manner of proving the prior acts at trial was not "good cause."

Mr. Williams asks this Court to order suppression of the prior conviction evidence offered under RCW 10.58.090.

b. Evidence of the 1991 conviction must be admissible under the categorical ER 403 factors of RCW 10.58.090(6)(a) through (h). In 1991, Mr. Williams had been charged with three counts of rape of A.B. Supp. CP ____, Sub # 116 (Pre-trial exhibit list, Exhibits 1-4 (affidavit of probable cause, plea statement, PSI, and judgment in 91-1-00274-9). He was convicted following his entry of a guilty plea to one count under RCW 9A.44.073, premised on the following factual statement:

I put my finger inside of [A.B.]'s vagina, we were not married, she was less than 12 years of age, I was more than 48 mos. older.

Pre-trial Exhibit 2 (Statement of Defendant on Plea of Guilty, at p. 5). At trial, the State had Blaine police officer John Landis read the above statement to the jury, and Don Williams testified that Mr. Williams admitted the same facts to him, adding the fact that A.B.

was their niece.⁸ The jury was instructed that it could use the defendant's prior offense to find Mr. Williams guilty of the current charges. CP 53.

However, the trial court abused its discretion in finding that evidence of this prior act was admissible under RCW 10.58.090, in the face of ER 403 and the mandatory factors to be considered pursuant to subsections (6) (a) through (h) of the statute.

c. Under RCW 10.58.090(1) and subsections (6)(a) - (h) the prior act evidence was inadmissible under ER 403 and the categorical factors, and the court abused its discretion. In a criminal case in which the defendant is accused of a current sex offense, RCW 10.58.090 permits the trial court to admit evidence of the defendant's commission of "prior acts" that were also sex offenses, including uncharged conduct that would amount to a sex offense. RCW 10.58.090(1), (4), (5), (6).

⁸ At trial, Officer Landis identified the judgment and sentence and statement of defendant on plea of guilty from Mr. Williams' 1991 conviction. 3/22/11RP at 601-02; Supp. CP ____, Sub # 124 (Trial exhibit list, State's exhibits 1 and 2, not admitted). The officer read Mr. Williams' plea statement to the jury, in which Mr. Williams had written, "I put my finger inside [A. .]'s vagina. We were not married. She was less than 12 years of age. I was more than 48 months older." 3/22/11RP at 603. Don Williams ("Don"), the defendant's brother, was present in court at Fred Williams' 1992 sentencing hearing. Don also testified that Mr. Williams had admitted to him that he had engaged in digital-vaginal intercourse with A.B. 3/16/11RP at 251.

The statute permits admission of prior acts “notwithstanding Evidence Rule 404(b).” RCW 10.58.090(1). It thus dispenses with the Evidence Rules’ long-standing prohibition against proof of guilt by showing that the current offense was merely action in conformity with the defendant’s demonstrated bad character as shown by prior conduct. See ER 404(b).

However, RCW 10.58.090 does require that the evidence of the prior act must survive scrutiny under ER 403. RCW 10.58.090(1) (the evidence must not be “inadmissible pursuant to Evidence Rule 403”). Under ER 403, evidence must be excluded where “its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.” Evidence presents a danger of unfair prejudice where it is more likely to arouse an emotional response rather than facilitate a rational decision by the jury. State v. Powell, 126 Wn.2d 244, 264, 893 P.2d 615 (1995); 5 Karl B. Tegland, Evidence Law and Practice § 403.3, at 441-42 (5th ed.2007). Evidence presents a danger of confusion of the issues if the jury will likely overvalue it. 5 Tegland, supra, § 403.4.

Additionally, subsections 6(a) through (h) of the statute set forth categorically pertinent factors which the court is additionally

mandated to evaluate when performing the ER 403 balancing analysis. RCW 10.58.090(6); State v. Scherner, 153 Wn. App. 621, 658, 225 P.3d 248 (2009), review granted, 168 Wn.2d 1036 (2010).

In contrast to the comparable federal rules of evidence, the Washington Legislature included a specific directive in RCW 10.58.090 to address ER 403, and also listed this series of categorical ER 403 considerations as part of the Rule itself. See Fed. R. Evid. 413 (allowing propensity evidence in sexual assault cases), 414 (allowing propensity evidence in child molestation cases). The pertinent text of the Washington statute is as follows:

RCW 10.58.090. Sex Offenses--Admissibility

* * *

(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;
- (c) The frequency of the prior acts;
- (d) The presence or lack of intervening circumstances;
- (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.

RCW 10.58.090. Therefore, under the statute, a defendant's sole opportunity to exclude this typically devastating prior act evidence rests entirely on making an adequate showing why the evidence is inadmissible under an ER 403 analysis, including the mandatory considerations of subsections 6(a) – (h).

6(a) *The similarity of the prior acts to the acts charged.*

The only "prior act" from 1991 that was properly admissible under RCW 10.58.090 was the single incident supporting the one count of conviction, as it was narrowly described in the defendant's 1991 plea statement, and by the defendant's brother. This was the extent of the State's proffer, although the prosecutor relied upon other incidents, and other acts, in arguing that the statutory factors were satisfied.⁹

⁹ At the pre-trial hearing, the prosecutor argued that the 1991 conduct was admissible, based on the "similarity" of the prior acts, by relying on other alleged acts of sexual abuse of A.B. to which the defendant did not plead guilty, alleged acts toward additional persons that were not part of the 1991 charges, and on extensive factual descriptions of the prior conduct, which were described in the affidavit of probable cause and the pre-sentence inquiry associated with that conviction. 3/14/11RP at 153, 156. The trial court refused counsel's repeated requests to at least make some preliminary finding by a preponderance of the evidence as to what precisely the prior acts were that were being offered. 3/14/11RP at 139-40, 142-44, 152; see State v. Kilgore, 147 Wn.2d 288, 291-92, 53 P.3d 974 (2002) (before admitting evidence of prior bad acts under ER

In its ruling, the trial court stated that it agreed with the prosecutor's argument regarding the "similarity of the prior acts to the acts charged." 3/14/11RP at 152-53. Beyond that statement, the court did not perform its own substantive analysis but instead adopted the State's reasoning as to the factors. 3/14/11RP at 152-53.

However, the prior act as proffered for trial was not similar to the present charges, and this factor should have weighed in favor of exclusion under the ER 403 directive of RCW 10.58.090 and subsection (6) of the statute. It is important to note the vastly different role that "similarity" plays in RCW 10.58.090, under which the prior act was initially admitted, in comparison to ER 404(b).

Under ER 404(b), the "similarity" of a prior crime causes significant unfair prejudice in the form of a likelihood the jury will disregard any limiting instruction – such as one limiting the consideration of the prior bad act evidence to showing a "common scheme" -- and conclude the similar prior crime strongly tends to show that the defendant has a propensity to, and therefore did,

404(b), the trial court must complete four analytical steps including finding by a preponderance of the evidence that the prior acts occurred). The trial court then simply adopted the prosecutor's argument that the prior acts were admissible under the statute, limiting its own analysis to a brief comment that it agreed the defendant's prior conduct was similar. 3/14/11RP at 152-53.

commit the charged offense. Slough and Knightly, Other Vices, Other Crimes, 41 Iowa L. Rev. 325, 333-34 (1956). The Washington courts have recognized that, in general, evidence of prior sex offenses is particularly prejudicial. See State v. Coe, 101 Wn.2d 772, 780–81, 684 P.2d 668 (1984); State v. Saltarelli, 98 Wn.2d 358, 364-65, 655 P.2d 697 (1982).

However, under Fed. R. Evid. 414, one of the two federal evidence rules comparable to RCW 10.58.090, the fact of “similarity” weighs *in favor* of admissibility, which makes sense given that both the federal rule and the Washington statute by their central design remove the proscription against propensity reasoning. See U.S. v. Gabe, 237 F.3d 954, 960 (8th Cir. 2001) (where prior act was “so similar” to current allegation, it was therefore not “inflammatory” so as to be inadmissible under case law requirement to assess the evidence under the five categorical probity/prejudice factors).¹⁰ Likewise under RCW 10.58.090.

¹⁰ Federal Rules of Evidence 413 and 414, which authorize admission of propensity evidence in sexual assault and child molestation prosecutions, do not include a probity/prejudice weighing test as an express step in determining admissibility. However, a number of federal circuits have imposed a requirement that evidence admitted under Rule 413 or 414 must be assessed under a Rule 403 balancing analysis that should include consideration of five non-exclusive factors: similarity of the conduct, proximity in time, frequency of the prior acts, the presence or lack of intervening circumstances, and whether the evidence is necessary. See e.g., United States v. LeMay, 260 F.3d 1018, 1028 (9th Cir.2001); United States v. Guardia, 135 F.3d 1326, 1331 (10th Cir.1998). The

In the present case, the prior act was *not* meaningfully similar to the current charges. The prosecutor stated that the 1991 offense was similar to both of the two current sets of allegations (as to E.W. and M.W.) because the complainants as a whole were all “family members” as nieces of the defendant; the defendant engaged in “rubbing” and digital-vaginal intercourse; the conduct was “[o]ften” in the complainants’ “home itself as opposed to some other location;” “some of these instances occurred on a couch,” and in one of the current allegations, some sort of conduct “occurred underneath a blanket in the family home.” 3/14/11RP at 116-17.

But none of this factual detail was present in the State’s limited offer of proof as to the prior act, and if propensity is the relevance basis for the evidence under RCW 10.58.090, the proffer and the trial evidence must be the same. As noted, the prosecutor’s offer of proof, and the evidence as admitted at trial, was limited to the defendant’s brief plea statement, and his similar admission to his brother. The facts employed by the prosecutor to convince the trial court of “similarity” were gleaned from various documents, such as the 1991 affidavit of probable cause, and the

Washington statute incorporates an ER 403 analysis, including mandated considerations under that rule, into the evidence statute itself.

1991 PSI. But on the first day of trial, the prosecutor had abandoned his plan to prove the prior act by introducing all of these documents through DOC officer Belmat.

Because the new statute (in contrast to ER 404(b)) is based on an *endorsement* of propensity reasoning, the *probity* and lack of *unfair* prejudice of any RCW 10.58.090 evidence, for the fact-finder, rests in its factual similarity, if any, to the alleged facts of the currently charged crimes. Therefore, the question for the trial court is whether the offer of proof of the trial evidence shows an adequate similarity of the prior acts to the current charges. U.S. v. Gabe, 237 F.3d at 960. The prosecutor's argument below, that unproffered, "background" facts regarding the prior act should be evaluated for purposes of analyzing the similarity factor, was erroneous under RCW 10.58.090.

Also as noted, the trial court refused the repeated defense requests that it make findings, by a preponderance of the evidence, as to the precise nature of the proof offered of the prior acts. The defense therefore found itself at a loss as to how to successfully contend that the prior act was not similar to the present charges. Given the State's offer of proof, and the court's refusal to make any preliminary findings about particular acts, the 1991 evidence for

assessment under the RCW 10.58.090 factors was the brief plea statement and Don Williams' testimony about his brother's admission. That evidence consisted of an admission of one act, without any of the detail the prosecutor contended rendered the prior act evidence and the current charges "similar" for purposes of subsection 6(a).

This factor therefore weighed squarely in favor of exclusion – under the specific criteria of the new statute, the prior act was not so similar as to warrant its admission.

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

The prior act was 20 years prior to trial. However, according to the prosecutor, if the court "discounted" the defendant's incarceration for the 1991 crime, the acts against E.W. in February 1999 to February 2003 occurred "[w]ithin 1 to 2 years of his release" on the 1991 conviction; then, within a short three years after the end of that first set of allegations, the defendant victimized M.W., during a charging period beginning September 2006.

3/14/11RP at 117-18.

However, nothing in RCW 10.58.090 indicates that the recency of the prior acts is to be assessed by "excluding" a period

of incarceration, absence from the county, etc. And certainly, of course, individuals can commit crimes in prison and during periods of community supervision. When properly analyzed pursuant to the plain language of the statute, the prior act was many years distant from the current charges.

The defendant's only opportunity to exclude prior act evidence under this new statute rests on careful analysis of the probity/prejudice factors in subsections (6)(a) – (h), and the State must not be permitted to permute the meaning of those criteria in whatever way that best suits its goal of successfully introducing the propensity evidence. The trial court's ruling as to the recency factor of subsection 6(b), which was simply an adoption of the State's argument, was erroneous and an abuse of discretion.¹¹

The defendant's imprisonment for the prior act should properly be considered a factor that weighs in favor of *exclusion* under the prejudice/probity balancing analysis. The defendant's payment of his debt to society for the prior act, and his serving of

¹¹ As will be seen, the trial court simply adopted the State's argument as to this and all of the RCW 10.58.090 factors when it came to analysis of the cross-admissibility of the two sets of charged acts against the respective complainants under that statute, for purposes of severance. That argument consisted of the prosecutor simply stating that his prior analysis of the statute's factors applied in the same way to the question of cross-admissibility. But the 1991 crime cannot be recent in regard to the 1999-2008 allegations, and at the same time the 1999-2003 allegations be "recent" to the 2006-2008 allegations, unless the "recency" factor of RCW 10.58.090 is absolutely meaningless.

the full period of imposed punishment for the crime, should tend to weigh against later use of the fact of conviction as a means of proving him guilty of a new charge.

6(c). The frequency of the prior acts.

The prosecutor stated that the 1991 conviction involved occurrence of the act of “touching” of the victim’s vagina three times, and an additional admission to touching the victim “on her vagina.” 3/14/11RP at 118. However, none of these facts are present in the State’s offer of proof or the evidence actually admitted at trial – they were only in the various 1991 documents that the State told the defense and the court it had suddenly decided (on the first day of trial) to *not* introduce. Supp. CP ____, Sub # 116 (Pre-trial exhibit list, exhibits 1-4). Only one 1991 act was proffered, the act admitted in the plea statement and to the defendant’s brother. There was no “frequency” of prior acts, and the court’s adoption of the State’s argument on this point was an abuse of discretion.

6(d). The presence or lack of intervening circumstances.

The prosecutor simply skipped this factor. As to subsection 6(d), the prosecutor stated, “I’m not sure that anything really goes

one way or the other on that,” and offered no analysis. 3/14/11RP at 118. Since the trial court adopted the prosecutor’s entire argument under RCW 10.58.090 as its own ruling, the court failed to address a mandatory factor as well. See 3/14/11RP at 152-53.

This is not what the rule requires. When applying RCW 10.58.090, “the trial court must consider all of the factors when conducting its ER 403 balancing test.” State v. Scherner, 153 Wn. App. at 658; see also State v. Krall, 125 Wn.2d 146, 148, 881 P.2d 1040 (1994) (the word “shall” in a statute imposes a mandatory requirement). The trial court’s failure to address subsection 6(d) was an abuse of discretion, because a failure to apply the required legal standard is an application of “the wrong legal standard.” See State v. Quismundo, 164 Wn.2d 499, 504, 192 P.3d 342 (2008).

Furthermore, factor 6(d) weighed heavily in favor of exclusion of the 1991 evidence. This is not a case in which there was no evidence of intervening circumstances such as seeking counseling or treatment. Although “intervening circumstances” is not defined in RCW 10.58.090, a non-Alford plea of guilty to the prior act, and in particular, treatment thereafter and before the current allegations, would be a prime example of circumstances

that render evidence of the past conduct more prejudicial and far less probative.

Here, based on the recommendations of DOC which indicated Mr. Williams would be eligible for the sex offender program at Twin Rivers if he was given a sentence of incarceration of less than 96 months, the trial court imposed 90 months. Exhibit 3 (1992 PSI, at p. 3). Before his release from incarceration Mr. Williams entered the SOTP (Sexual Offender Treatment Program) at Twin Rivers, followed by two years of supervised release, and thereafter the Department of Corrections (DOC) determined that he was at a low to moderate risk to re-offend. Supp. CP ____, Sub # 135; 3/16/11RP at 241, 251-56.

Mr. Williams' plea, and his treatment after the prior offense and before the current allegations, undermined any probative value of the 1991 evidence. The trial court's failure to analyze this factor, where it weighed in favor of exclusion, was an abuse of discretion.

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

In analyzing this factor, the deputy prosecutor stated simply that the 1991 evidence was "very probative as to [Mr. Williams'] design to rape and/or molest children." 3/14/11RP at 118-19.

This analysis, which the trial court adopted, utilized the wrong legal standard. Certainly, the probity of evidence is pertinent, in general, to ER 403 analysis. However, ER 403 by its plain language involves a balancing or “weighing” process. State v. Brown, 132 Wn.2d 529, 571, 940 P.2d 546 (1997).

It has always been true that under ER 403, evidence may be more or less appropriate for exclusion depending on the party's relative need for the evidence in question. 5 Karl B. Tegland, Washington Practice, Evidence § 105 (2d ed.1982); See United States v. Wasman, 641 F.2d 326, 329-30 (5th Cir.1981).

Furthermore, subsection 6(e) is a specific consideration categorically required to be part of the trial court's analysis, and the factor *expressly* requires that the trial court consider the other trial evidence. Here, where the State was able to muster significant corroborating evidence of E.W.'s and M.W.'s allegations, from a variety of sources, the prosecutor's "need" for the 1991 rape evidence was relatively, and dramatically less.

Mr. Williams disputes that the trial evidence was either persuasive or strong, as to the commission of abuse, or the claimed frequency of the alleged conduct to support the plethora of counts. The inconsistency of the children's reported claims, and the

concern that the children claimed abuse simply at the prompting of first, a friend who revealed abuse and then a sister who in turn claimed she was also abused, among other factors, rendered the present case a close one. The inconsistency in the children's claims was further demonstrated by the trial court's ruling admitting the testimony of Dr. Yuille explaining how children come to present untrue claims as their own. 3/23/11RP at 768-72.

However, there was other evidence at trial, beyond the children's allegations, which the prosecutor contended demonstrated they had been abused. First, of course, Mr. Williams was charged with multiple counts involving different complainants, claiming sexual abuse in different, non-overlapping charging periods. When these charges were alleged in a single information and tried together, regardless of any instruction to consider the counts separately, the State's evidence on one set of counts tended to suggest, to a lay jury, that Mr. Williams was guilty on the other set of counts. The joined trial itself showed the absence of any necessity for evidence that Mr. Williams had been convicted in 1991.

The complainants' father Don Williams described the behavior of both E.W. and M.W. in the several months prior to their

allegations, wherein each girl would leave the room and go upstairs when the defendant visited. 3/16/11RP at 294-95. Don Williams also testified that in the spring of 2009, he arrived home to find the defendant and M.W. sitting on the couch watching television with “a blanket draped over them.” 3/16/11RP at 296. E.W. and her mother, Theresa Williams, testified that E.W. told her mother that Mr. Williams had engaged in “unwanted physical contact” with her. 3/22/11RP at 537-38. This apparently consisted of Mr. Williams touching her legs. 3/22/11RP at 567, 574-76.

Regardless of whether this evidence indeed demonstrated abuse, this was a case in which the State had more than in the typical case to proffer to the jury, beyond the bare complaints of the children. The "necessity" factor weighed strongly in favor of exclusion, and the trial court failed to properly apply it, instead adopting the prosecutor's argument which simplistically equated factor (6)(e) with the mere question of probity. This analysis was an abuse of discretion because it was not the legal standard mandated by the statute. State v. Hawkins, 157 Wn. App. 739, 752, 238 P.3d 1226 (2010) (despite deference accorded trial court's admission of evidence, discretion is abused where court applies

"wrong legal standard" in making evidentiary ruling) (citing State v. Rafay, 167 Wn.2d 644, 655, 222 P.3d 86 (2009)).

6(f). Whether the prior act was a criminal conviction.

This factor was shown; however, it is counterweighed by the fact that the defendant entered a plea of guilty, admitting the act, and by the fact that the court sentenced Mr. Williams to a particular term qualifying him for treatment, which Mr. Williams received.

6(g). Whether the probative value is substantially outweighed by the danger of unfair prejudice.

In arguing this factor, the prosecutor again referred to other acts mentioned in the 1992 pre-sentence report, which were not proffered for trial, but which the State contended were nonetheless proper considerations in the court's evidentiary analysis under 10.58.090. 3/14/11RP at 153, 156. But if RCW 10.58.090 is premised on showing propensity, the trial evidence must demonstrate to the jury what makes the prior act so probative of that propensity, and if that factual detail is not present in the admissible evidence the State proffers, it is not a proper basis to decide that the trial evidence may be admitted.

In sum, as one commentator has persuasively argued, the Washington Legislature's inclusion of ER 403 analysis, along with

its express enumeration of ER 403 factors as part of the rule itself, indicates that the probity/prejudice balancing process must be conducted with particular rigor before admitting propensity evidence under RCW 10.58.090. Blythe Chandler, Balancing Interests Under Washington's Statute Governing the Admissibility of Extraneous Sex-Offense Evidence, 84 Wash. L.Rev. 259, 270-77 (2009). Here, the trial court did not apply the statute with rigor. Overall, the factors of RCW 10.58.090 weighed squarely in favor of excluding the prior act evidence, and the trial court abused its discretion.

d. The trial court also abused its discretion in finding the 1991 rape admissible under the “common scheme and plan” exception to ER 404(b). The court also found the 1991 conviction admissible because the evidence did “meet the ER 404(b) standard.” 3/14/11RP at 153. This was the court’s sole statement on the issue and apparently represented a wholesale adoption of the prosecutor’s ER 404(b) argument, that the “common scheme” exception applied. See 3/14/11RP at 141-42.¹²

But the common scheme exception did not apply.

¹² The State also contended that the 1991 rape satisfied the ER 404(b) exception for proof of the defendant’s “design” to sexually abuse his minor female relatives. See 3/14/11RP at 140-41. This was nothing more than an alternative description of the prosecutor’s “common scheme” contention, rather than an independent ER 404(b) exception.

First, the appellant's ability to obtain appellate review of the trial court's ruling is severely hampered by the trial court's failure to conduct any of the analysis required before admitting ER 404(b) evidence. See State v. Kilgore, 147 Wn.2d 288, 291–92, 53 P.3d 974 (2002). Before admitting evidence of prior bad acts under ER 404(b), the trial court must complete four analytical steps including finding by a preponderance of the evidence that the prior acts occurred, identify the purpose for which the evidence is sought to be introduced, determine whether the evidence is relevant to prove an element of the crime charged, and weigh the probative value against the prejudicial effect. State v. Foxhoven, 161 Wn.2d 168, 174–75, 163 P.3d 786 (2007); see also State v. Ra, 144 Wn. App. 688, 701, 175 P.3d 609 (2008).

The trial court refused to conduct even the first of these steps, despite repeated requests. 3/14/11RP at 139-40, 142-44, 152. Although the nature of the evidence became clear at trial, this is no substitute for pre-admission analysis of the four factors, on the record, as required by the case law. After making the RCW 10.58.090 argument, during which the prosecutor stated the 1991 evidence was also admissible under the ER 404(b) exception for "common scheme or plan," the prosecutor simply stated in a

conclusory fashion that the evidence was also admissible under ER 404(b). 3/14/11RP at 115, 120, 141-42. The trial court then adopted the prosecutor's argument that the prior acts were admissible under ER 404(b), without any of its own analysis. 3/14/11RP at 152-53.

It is true that where the trial court fails to conduct the above four-step ER 404(b) analysis on the record, the Court of Appeals, if the record is sufficient, can do that analysis itself, and may then find that such analysis was not an abuse of discretion. State v. Gogolin, 45 Wn. App. 640, 645-46, 727 P.2d 683 (1986). However, this Court should refuse to conduct all four of the ER 404(b) steps itself, for the first time on review.

Furthermore, the record is not sufficient to find "common scheme," because the other act and the charged crime must be "naturally explained as individual manifestations of a general plan." State v. DeVincentis, 150 Wn.2d 11, 21, 74 P.3d 119 (2003). Here, the defendant abused an extended family member 20 years ago, and then allegedly abused family members according to the current charges. Although this passage of time between 1991 and 1999/2006 is not in itself a decisive reason for exclusion, DeVincentis, at 13, it "erodes the commonality between acts and

makes the probability of an ongoing plan more tenuous.” North Carolina v. McKinney, 430 S.E.2d 300, 304 (N.C.App. 1993).

Sexual abuse is frequently of family members. Nothing in the evidence – and certainly nothing whatsoever in the State’s proffer prior to trial -- showed that the defendant had some particular predilection for abusing relatives or family members. If the defendant committed these acts, which he vigorously disputes, there was nothing in the State’s factual claims to show they were committed for any other reason other than the fact that the complainants were accessible to him. This cannot be enough.

For common scheme, the similarity between the prior act and the charged acts must be clearly more than coincidental; instead, it must show the charged conduct was another manifestation of a particular plan. DeVincentis, 150 Wn .2d 21. But there was not even such a similarity in this case *in the first place*.

This is not a case where the accused used particular methods demonstrated by the prior act to again succeed at abuse years later, again implementing that same plan. This is not a case where the prosecutor showed that a jury would likely conclude that the prior act was committed by such a similar means that it could

not be a mistake that it was committed in such a similar way in the current allegations. Absent such a showing, the evidence was not admissible.

As the DeVincentis Court said, “caution is required in applying the common scheme or plan exception.” DeVincentis, 150 Wn.2d at 13. Caution is required because this exception to ER 404(b) is not very different than propensity reasoning. At best, the State’s theory of “common scheme” was merely a rubric under which it convinced the trial court (already having admitted the evidence under RCW 10.58.090) to admit the evidence with not even a pretense to analyzing the proffer on the record under the four ER 404(b) steps.

In close cases of admissibility, prior act evidence should be excluded even where the court has conducted all four analytical steps, and it should have been excluded here. State v. Smith, 106 Wn.2d 772, 776, 725 P.2d 951 (1986).

The evidence of Mr. Williams’ offense 20 years ago, followed by imprisonment and treatment, should have been excluded by the trial court following proper analysis under ER 403.

Evidence of a defendant's prior conviction is devastating to any hope of fair consideration of the evidence in a case such as

this one, with significant inconsistencies in the State's proof, because "such evidence has a great capacity to arouse [unfair] prejudice." State v. Kelly, 102 Wn.2d 188, 199, 685 P.2d 564 (1984). In the context of ER 404(b), as opposed to the new evidence statute, propensity prejudice is "unfair" prejudice. And the Supreme Court has recognized that the potential for that sort of unfair prejudice is particularly high in sex abuse cases, such as this one:

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.

(Citation omitted). Saltarelli, 98 Wn.2d at 362. Absent sufficient similarity, the jury in Mr. Williams' trial was likely to treat the prior conviction in the foregoing manner. It should have therefore been excluded by the trial court. Mr. Williams' trial should have turned on the question whether the children's claims, in the circumstances in which they were made, and their testimony along with the testimony of other trial witnesses, proved the allegations beyond a reasonable doubt.

e. The error in admitting the 1991 evidence under RCW 10.58.90 requires reversal even if the prior bad act was properly admissible under ER 404(b). The trial court gave the jury an instruction regarding its use of the evidence of the defendant's prior 1991 rape conviction, stating that the jury was entitled to use the evidence for any matter as to which it was relevant. CP 53 (court's jury instruction no. 6). This instruction was crafted with RCW 10.58.090 in mind, and was consistent with that statute's endorsement of the use of prior acts for propensity reasoning.

Although the 1991 conviction was also admitted under the ER 404(b) exception for "common plan," the trial court did not issue the standard ER 404(b) instruction which would have limited the jury's use of the evidence to that matter, and would thus have precluded propensity use of the evidence by the jury. See, e.g., State v. Russell, 171 Wn.2d 118, 121, 249 P.3d 604 (2011); ER 105 (when "evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted," the court if requested shall restrict the evidence to its proper scope and instruct the jury accordingly). Specifically, the court would have been required to instruct the jury

in a way that made clear that the prior bad act evidence could not be utilized for propensity purposes. See. e.g., Russell, supra; State v. Savaria, 82 Wn. App. 832, 842, 919 P.2d 1263 (1996); State v. Newbern, 95 Wn. App. 277, 295–96, 975 P.2d 1041, review denied, 138 Wn.2d 1018 (1999); State v. Lynch, 58 Wn. App. 83, 88, 792 P.2d 167 (1990); see also State v. Dow, ___ Wn. App. ___, ___, 253 P.3d 476 (Wn. App. Div. 2, June 21, 2011) ("The potentially prejudicial nature of prior conviction evidence makes limiting instructions critically important").

However, the existing instructional schema was correct, given the fact that the 1991 evidence was also admitted under RCW 10.58.090, which allows such evidence to be considered for propensity purposes. A limiting instruction appropriate to ER 404(b) would have been in direct conflict with RCW 10.58.090 and would have contradicted the instruction the court gave for purposes of that statute.

Therefore, if this Court reverses the trial court's admission of the 1991 evidence under RCW 10.58.090 – either for the prosecutor's violation of the statute's 15 day notice requirement, or for substantive reasons -- reversal is required. Even if this Court conducts the four-part ER 404(b) analysis that the trial court failed

to conduct and approves of that analysis under an abuse of discretion standard, to affirm Mr. Williams' convictions in such circumstances would be to affirm verdicts of guilty in the face of devastating ER 404(b) evidence that was unaccompanied by a proper ER 404(b) limiting instruction. See also State v. Aaron, 57 Wn. App. 277, 281, 787 P.2d 949 (1990) (holding that it is critical "to stress to the jury that the testimony was admitted only for a limited purpose and may not be considered as evidence of the defendant's guilt"); State v. Johnson, 40 Wn. App. 371, 377, 699 P.2d 221 (1985) (such caution to the jury is both "proper and necessary").

2. THE TRIAL DENIED SEVERANCE OF THE COUNTS AS TO THE DIFFERENT VICTIMS BASED IN PART ON AN ERRONEOUS APPLICATION OF RCW 10.58.090.

a. Mr. Williams properly sought severance and requested separate trials of the set of counts as to E.W., and the set of counts as to M.W. On the first day of trial, after the court heard evidentiary motions, Mr. Williams sought severance of the counts against E.W., and the counts against M.W., and asked

that each set of counts be prosecuted in a separate trial.¹³
3/14/11RP at 161. Mr. Williams' argument for severance rested on the fact that the defendant's jury could not be expected to ignore the "sheer aggregate" of evidence relating to each set of charges, and would be unable to render a fair determination on each set of counts in a joined trial. 3/14/11RP at 164. In particular, Mr. Williams argued that under RCW 10.58.090 and ER 404(b), the evidence of each set of allegations would not be cross-admissible. 3/14/11RP at 161-64.

The trial court denied severance, first ruling that the complainants were both sisters and that the sets of counts were therefore proper to be tried together. 3/14/11RP at 167-68. The court notably discounted any countervailing concerns for judicial economy, stating that this concern did not weigh against severance, because the court was willing to hold separate trials:

And I understand the argument of judicial economy but if I thought it was important to sever, it wouldn't bother me that much. I would figure another trial is another trial. We do trials every week, anyway, so what's another trial.

¹³ Unlike pretrial severance motions, severance motions made during trial need not be raised again during trial to preserve the issue for appeal. CrR 4.4(a) (1), (2); State v. Jones, 93 Wn. App. 166, 171 n. 2, 968 P.2d 888 (1998).

3/14/11RP at 168.

With regard to the question of cross-admissibility, the prosecutor stated that his “same analysis” as to RCW 10.58.090 and ER 404(b) in the context of the admissibility of the 1991 conviction in the trial of the current charges, applied equally to the question of cross-admissibility of the current 1999-2003 allegations and the current 2006-2008 allegations. 3/14/11RP at 165. The prosecutor stated:

I don't know that this needs to be addressed at any length. The same analysis of 404(b) and RCW 10.58.090, I believe that the evidence would be cross-admissible for each victim.

3/14/11RP at 165. The trial court agreed, and stated simply it was denying severance “for the reasons set forth already talking about 403, or 404(b) and 10.58.090.” 3/14/11RP at 168.

b. The trial court abused its discretion in denying severance. The trial court's order denying severance was error under the “manifest abuse of discretion” standard in the circumstances of this case. See State v. Bythrow, 114 Wn.2d 713, 718, 790 P.2d 154 (1990). CrR 4.4(b) requires severance if “the court determines that severance will promote a fair determination of the defendant's guilt or innocence of each offense.” CrR 4.4(b).

The essential issue in determining if severance is required is whether a single trial of multiple counts "unduly embarrasses or prejudices" the defendant. State v. Smith, 74 Wn.2d 744, 754-55, 446 P.2d 571 (1968). Here, Mr. Williams would be and was prejudiced by a single trial because evidence of the crimes was likely to accumulate and harm his right to fair resolution of each count. State v. Russell, 125 Wn.2d 24, 62-63, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129 (1995); State v. Kalakosky, 121 Wn.2d 525, 537, 852 P.2d 1064 (1993).

This risk of evidentiary accumulation was particularly a danger where the sets of counts pertaining to E.W. and M.W. had distinct, rather than overlapping, charging periods. The unfair prejudice identified by defense counsel in the form of the jury being unable to ignore the "sheer aggregate" of evidence and keep the counts separate is prejudice that may exist in a joined trial even if the joinder of the counts was otherwise technically proper. State v. Gatalaki, 40 Wn. App. 601, 606, 699 P.2d 804, review denied, 104 Wn.2d 1019 (1985).

Furthermore, where the sets of crimes charged were both sexual in nature, the joinder of like charges was particularly prejudicial. See State v. Saltarelli, 98 Wn.2d at 363. This prejudice

exists even when the jury is instructed to consider the crimes separately. State v. Harris, 36 Wn. App. 746, 750, 677 P.2d 202 (1984).

Most importantly, the two sets of counts would not be cross-admissible. For counts to be cross-admissible in a joined trial, they must both pass muster, *each as to the other*, under the applicable rules of evidence. See State v. Watkins, 53 Wn. App. 264, 270, 766 P.2d 484 (1989) (ER 404(b) is the appropriate evidentiary standard when addressing cross-admissibility of counts in the context of the issue of joined or separate trials).

The prosecutor argued that the same analysis of closeness in time, intervening circumstances, and necessity, that it advanced under RCW 10.58.090 as to the single-count 1991 conviction 8 to 17 years previously, also applied in the same manner to the cross-admissibility of the 1999-2003 and the 2006-2008 counts, which were 3 years apart. See 3/14/11RP at 165. The trial court agreed. 3/14/11RP at 168.

On the face of it, that assertion, which the trial court adopted, cannot be correct, unless the “recency” factor and other factors in RCW 10.58.090(6)(a) are meaningless. The 1991 conviction

cannot be “recent” as to the current charges, and the current sets of charges also be recent as to each other.

Furthermore, the “same analysis” as to “intervening circumstances” cannot apply to the 1991 act and the two sets of current charges. At a minimum, either the trial court’s analysis under RCW 10.58.090 as to the prior 1991 offense was in conflict with the criteria of the ER 403 factors in 6(a)-(h), or the analysis as to the 1999-2003 and 2006-2008 factors was in conflict with the statute’s standards, or the statutory factors mean nothing.

c. By its plain language, RCW 10.58.090¹⁴ applies only to another offense or act that is a “prior act” precedent in time to commission of the charged offense. By its plain and unambiguous language, RCW 10.58.090 is a grant of authority to the trial court to allow into evidence another offense(s) or acts committed by the accused only where such other offenses are “prior acts,” i.e., acts that were committed prior to the charged offense(s).

The appellate courts review questions of statutory interpretation de novo, with the goal of effectuating the legislature's

¹⁴ For the same reasons as previously argued, the question of cross-admissibility rests solely on evaluation of the evidence under RCW 10.58.090.

intent. State v. Gonzalez, 168 Wn.2d 256, 263, 226 P.3d 131 (2010). The first step in interpreting a statute is to examine its plain language. Gonzalez, 168 Wn.2d at 263. A statute's plain meaning is to be discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole. State v. Engel, 166 Wn.2d 572, 578, 210 P.3d 1007 (2009).

RCW 10.58.090 uses the term “prior acts” repeatedly in that portion of the statute that sets forth the criteria for evaluating whether “another offense” is admissible following analysis under the categorical ER 403 criteria. The statute’s use of the term “another [sex] offense” in other provisions is completely consistent with its application only to “prior acts.” A well-established principle of statutory interpretation is that specific words modify and restrict the meaning of general words when they occur in a sequence. State v. Roadhs, 71 Wn.2d 705, 708, 430 P.2d 586 (1967). Thus the use of the term “prior acts” modifies the term “another offense” and restricts the operation of the statute to authorization solely of the admission of “prior acts” – i.e., acts precedent to the charged crime. The statute is unambiguous, based on its plain meaning, and the inquiry is at an end. Gonzalez, 168 Wn.2d at 263.

Assuming, *arguendo*, that the Legislature did think it was enacting an evidence statute that applied to allow evidence of subsequent conduct, that body's failure to have done so is a consequence of its usurpation of what is traditionally a function of the judiciary, and a function requiring the particular expertise residing in the latter entity. If the Legislature desires that RCW 10.38.090 should apply to "subsequent" acts, it shall have to amend the statute.

Because the charges as to E.W. allegedly occurred in the period 1999-2003, and the charges as to M.W. allegedly occurred in a period 2006-2008, any evidence of the latter allegations would be inadmissible under RCW 10.58.090 in a trial of the charges as to E.W. Therefore, the allegations were not cross-admissible, State v. Watkins, *supra*, and severance was required.

3. RCW 10.58.090 IS INVALID UNDER THE STATE AND FEDERAL CONSTITUTIONS.

Mr. Williams' arguments in favor of exclusion of the evidence of the 1991 prior act, and challenging the trial court's ruling denying severance of the counts as to E.W. and M.W., are also supported by the constitutional invalidity of RCW 10.58.090.

The Washington Supreme Court is presently considering the constitutionality of RCW 10.58.090. This Court found these statutes constitutional in Scherner, supra, and State v. Gresham, 153 Wn. App. 659, 223 P.3d 1194 (2009), review granted, 168 Wn.2d 1036 (2010), both of which are being reviewed by the Supreme Court.¹⁵ In order to preserve these issues, Mr. Williams joins in the constitutional challenges to the statute raised by the petitioners in those cases.

a. RCW 10.58.090 violates the separation of powers. “If ‘the activity of one branch threatens the independence or integrity or invades the prerogatives of another,’ it violates the separation of powers.” Waples v. Yi, 169 Wn.2d 152, 158, 234 P.3d 187 (2010) (quoting City of Fircrest v. Jensen, 158 Wn.2d 384, 394, 143 P.3d 776 (2006) and State v. Moreno, 147 Wn.2d 500, 505-06, 58 P.3d 265 (2002)). The Supreme Court has an inherent power to govern court procedures, stemming from Article IV of the state constitution. Const. Art. IV, § 1; Jensen, 158 Wn.2d at 394; State v. Fields, 85 Wn.2d 126, 129, 530 P.2d 284 (1975). The Court's authority over

¹⁵ State v. Scherner, 153 Wn. App. 621, 225 P.3d 248 (2009), review granted, 168 Wn.2d 1036 (2010); State v. Gresham, 153 Wn. App. 659, 223 P.3d 1194 (2009), review granted, 168 Wn.2d 1036 (2010). These cases were argued on March 17, 2011. Decisions are pending.

matters of procedure contrasts with the Legislature's authority over matters of substance. Fields, 85 Wn.2d at 129; State v. Smith, 84 Wn.2d 498, 501, 527 P.2d 674 (1974). Rules of evidence are rules of procedure that fall under that inherent authority.¹⁶

The Court's authority to govern the admissibility of evidence in Washington trials is embodied in the Rules of Evidence themselves. 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"). 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. See e.g., State v. Saldano, 36 Wn. App. 344, 346, 675 P.2d 1231, review denied, 102 Wn.2d 1018 (1984) (holding that ER 609 supersedes a conflicting statute allowing broader admission of an accused's prior convictions).

RCW 10.58.090 violates the separation of powers because it conflicts with ER 404(b), which *precludes* a court from admitting evidence of a person's character "in order to show action in

¹⁶ 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").

conformity therewith.” The statute’s purpose is to limit a court’s discretion in admitting such evidence without a legitimate purpose.

RCW 10.58.090 also allows the State to rely upon inflammatory evidence of a defendant’s past misconduct, which would otherwise be inadmissible, in order to convict him of a current offense. The statute effectively alters the standard of proof required for conviction, and it should be construed as violating the separation of powers.

b. RCW 10.58.090 violates the State and Federal Constitutions prohibitions on ex post facto laws. Article I, section 10 of the United States Constitution and article I, section 23 of the Washington Constitution, the *ex post facto* clauses, forbid the State from enacting any law that imposes punishment for an act that was not punishable when committed, or increases the quantum of punishment annexed when the crime was committed. Collins v. Youngblood, 497 U.S. 37, 42, 110 S.Ct. 2715, 111 L.Ed.2d 30 (1990); State v. Ward, 123 Wn.2d 488, 496, 870 P.2d 295 (1994).

A law violates the ex post facto clause if it: (1) is substantive, as opposed to merely procedural; (2) is retrospective (applies to events which occurred before its enactment); and (3) disadvantages the person affected by it.

State v. Hennings, 129 Wn.2d 512, 525, 919 P.2d 580 (1996) (citing Weaver v. Graham, 450 U.S. 24, 29, 101 S.Ct. 960, 964, 67 L.Ed.2d 17 (1981)); Collins, 497 U.S. at 45. RCW 10.58.090 violates the state and federal ex post facto prohibitions.

The Legislature has stated that RCW 10.58.090 is substantive in nature. Laws 2008, ch. 90, §1. RCW 10.58.090 does not merely define the procedure by which a case is adjudicated, but rather, redefines the bounds of relevancy for sex offenses. Thus, the Legislature appropriately recognized the substantive reach of the statute.

With regard to the question of the statute specifically targeting and disadvantaging Mr. Williams, RCW 10.58.090 substantially disadvantaged him in the present trial. RCW 10.58.090 allows evidence which was only admissible for a more limited purpose under ER 404(b) to be admitted for any purpose whatever. In this case, the State proffered the evidence in this case as bald propensity evidence; evidence that because Mr. Williams had sexually abused A.B., he must have committed the rapes of E.W. and M.W. as charged in this case. Washington courts have long excluded this class of evidence precisely because that sort of conclusory logic was unreliable, irrelevant, and overly

prejudicial. See State v. Bokien, 14 Wash 403, 414, 44 P. 889 (1896). Under the test enunciated in Hennings, application of RCW 10.58.090 to offenses committed prior to its enactment, such as Mr. Williams', violates the *ex post facto* clause of the United States Constitution.

Importantly, RCW 10.58.090 violates the greater protections of Article I, section 23. Article I, 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." The Washington Constitution provides: "[n]o bill of attainder, ex post facto law, or law impairing the obligations of contracts shall ever be passed." Wash. Const. Art. I, § 23.

Under Calder v. Bull, 3 Dall. 386, 390-91, 1 L.Ed. 648 (1798), while retroactive changes in the type of evidence which is admissible are barred, the Supreme Court has concluded that "[o]rdinary" rules of evidence do not implicate *ex post facto* concerns because they do not alter the standard of proof in a case. Carmell v. Texas, 529 U.S. 513, 533 n.23, 120 S.Ct. 1620, 146 L.Ed.2d 577 (1999).

However, the comparable Washington clause is textually different from the federal clause and mirrors the provisions of the

Oregon and Indiana Constitutions. Compare Const. Art. I, § 23; Or. Const. Art. I, § 21; Ind. Const. art. I, § 24. Indeed, the Declaration of Rights, of which Article I, section 23 is a part, “was largely based upon W. Lair Hill’s proposed constitution and its model, the Oregon Constitution.” Robert Utter and Hugh Spitzer, The Washington State Constitution, A Reference Guide, p 9 (2002).

Applying an analysis similar to that set forth in State v. Gunwall,¹⁷ the Oregon Supreme Court has determined the *ex post facto* protections of the Oregon Constitution are broader than the protections which the United States Supreme Court has recognized in the federal constitution. State v. Fugate, 26 P.3d 802, 813 (Or. 2001). The Oregon court interpreted the Oregon provisions as “forbid[ding] *ex post facto* laws of the kind that fall within the fourth category in . . . Calder” – that is, “laws that alter the rules of evidence in a one-sided way that makes conviction of the defendant more likely.” (Emphasis added.) Fugate, 26 P.3d at 813.

By adopting the different language of the Oregon and Indiana Constitutions, logically, the framers of the Washington Constitution did not intend Article I, section 23 to be interpreted identically to the federal Bill of Rights. State v. Silva, 107 Wn. App.

¹⁷ State v. Gunwall, 106 Wn.2d 54, 61-62, 720 P.2d 808 (1986).

605, 619, 27 P.3d 663 (2001). Aside from the textual differences and differences in the common-law and constitutional history, 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. Gunwall, 106 Wn.2d at 61. That fundamental difference generally favors a more protective interpretation of the Washington provision. So too does the fact that regulation of criminal trials is a matter of particular state concern. State v. Boland, 115 Wn.2d 571, 576, 800 P.2d 1112 (1990).

Under this analysis, RCW 10.58.090 unquestionably alters the rules of evidence in a manner that makes convictions easier, and the statute therefore violates Article I, section 23.

4. THE STATE FAILED TO PROVE MR. WILLIAMS' PRIOR CONVICTION TO THE JURY BEYOND A REASONABLE DOUBT.

The sentencing court did not empanel a jury to find, and instead on its own, found by a preponderance of the evidence that Mr. Williams had a prior conviction for first degree child rape under the "two-strike" statute. Mr. Williams' sentence as a persistent offender therefore violated his Sixth and Fourteenth Amendment rights to due process, and to a jury trial, and must be vacated.

Due process requires that a jury find beyond a reasonable doubt any fact that increases a defendant's maximum possible sentence. The due process clause of the United States Constitution ensures that a person will not suffer a loss of liberty without due process of law. U.S. Const. amend. 14. The Sixth Amendment also provides the defendant with a right to trial by jury. U.S. Const. amends. 6, 14. Thus, it is axiomatic that a criminal defendant has the right to a jury trial and may only be convicted if the government proves every element of the crime beyond a reasonable doubt. Blakely v. Washington, 542 U.S. 296, 300-01, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004); Apprendi v. New Jersey, 530 U.S. 466, 476-77, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); United States v. Gaudin, 515 U.S. 506, 510, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995); In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); State v. Green, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980).

The constitutional rights to due process and a jury trial "indisputably entitle a criminal defendant to 'a jury determination that [he] is guilty of every element of the crime beyond a reasonable doubt.'" Apprendi, 530 U.S. at 476-77 (quoting Gaudin, 515 U.S. at 510).

In recent cases, the United States Supreme Court has recognized that this principle applies not just to the essential elements of the charged offense, but also extends to facts labeled “sentencing factors” if the facts increase the maximum penalty faced by the defendant. In Blakely, the Court held that an exceptional sentence imposed under Washington’s Sentencing Reform Act (SRA) was unconstitutional because it permitted the judge to impose a sentence over the standard sentence range based upon facts that were not found by the jury beyond a reasonable doubt. Blakely, 124 S.Ct. at 2537. Likewise, the Court found Arizona’s death penalty scheme unconstitutional because a defendant could receive the death penalty based upon aggravating factors found by a judge by a preponderance of the evidence. Ring v. Arizona, 536 U.S. 584, 609, 122 S.Ct. 2428, 153 Ed.2d 556 (2002). And in Apprendi, the Court found New Jersey’s “hate crime” legislation unconstitutional because it permitted the court to give a sentence above the statutory maximum after making a factual finding by the preponderance of the evidence. Apprendi, 530 U.S. at 492-93.

In these cases, the Court rejected arbitrary distinctions between sentencing factors and elements of the crime. The Ring

Court pointed out the dispositive question is one of substance, not form. “If a State makes an increase in defendant’s authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt.” 536 U.S. at 602 (citing Apprendi, 530 U.S. at 482-83). Thus, a judge may only impose punishment based upon the jury verdict or guilty plea, not additional findings. Blakely, 124 S.Ct. at 2537. Mr. Williams sentence must be reversed.

E. CONCLUSION

For the reasons stated, Mr. Williams respectfully requests that this Court reverse his convictions..

DATED this 21 day of November 2011.

Respectfully submitted,



OLIVER R. DAVIS (WSBA 24560)
Washington Appellate Project – 90152
Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	NO. 67194-4-I
)	
FREDERICK WILLIAMS, JR.,)	
)	
APPELLANT.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 29TH DAY OF NOVEMBER, 2011, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

- | | | | |
|------|---|-------------------|---|
| [X] | JEFFREY SAWYER, DPA
WHATCOM COUNTY PROSECUTOR'S OFFICE
311 GRAND AVENUE
BELLINGHAM, WA 98225 | ()
()
() | (X) U.S. MAIL
HAND DELIVERY
_____ |
| [X] | FREDERICK WILLIAMS, JR
994205
WASHINGTON CORRECTIONS CENTER
PO BOX 900
SHELTON, WA 98584 | (X)
()
() | U.S. MAIL
HAND DELIVERY
_____ |

SIGNED IN SEATTLE, WASHINGTON THIS 29TH DAY OF NOVEMBER, 2011.

X _____ 