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## ARGUMENT

### **I. RESPONDENT HAS NOT ADDRESSED MR. WALKER'S DUE PROCESS ARGUMENT.**

Respondent fails to address Mr. Walker's due process argument regarding the erroneous admission of propensity evidence at trial. Brief of Respondent, pp. 6-20. Failure to argue an issue may be treated as a concession. *See, e.g., In re Pullman*, 167 Wn.2d 205, 212 n.4, 218 P.3d 913 (2009). Accordingly, Mr. Walker stands on the argument set forth in his Opening Brief. *See* Appellant's Opening Brief, pp. 7-9.

His conviction must be reversed, and the case remanded for a new trial, with instructions to exclude propensity evidence. U.S. Const. Amend. XIV; *Garceau v. Woodford*, 275 F.3d 769, 775 (9th Cir. 2001), *reversed on other grounds at* 538 U.S. 202, 123 S. Ct. 1398, 155 L. Ed. 2d 363 (2003).

### **II. MR. WALKER'S CONVICTION WAS OBTAINED IN VIOLATION OF THE STATE AND FEDERAL EX POST FACTO CLAUSES.**

#### **A. Retroactive application of RCW 10.58.090 violates the federal *ex post facto* clause.**

A statute violates the federal *ex post facto* clause if it is substantive (rather than merely procedural), is retrospective, and disadvantages the person affected by it. *Weaver v. Graham*, 450 U.S. 24, 29, 101 S.Ct. 960,

964, 67 L.Ed.2d 17 (1981). RCW 10.58.090 meets these three requirements.

First, the legislature has declared that RCW 10.58.090 is substantive. Laws 2008, ch. 90, §1. This declaration is an appropriate characterization, since the statute redefines the bounds of relevancy for sex offense prosecutions. More evidence is admissible under the new law than was permitted previously.

Second, the statute by its own terms applies retrospectively. Laws 2008, ch. 90 § 3. It was applied retroactively in this case: Mr. Walker's alleged crime and prior misconduct both occurred prior to the statute's 2008 enactment. CP 1-2.

Third, the statute substantially disadvantaged Mr. Walker, by allowing the admission of propensity evidence for the jury's consideration as substantive proof of guilt. RCW 10.58.090. Such evidence would have been excluded under longstanding rules excluding propensity evidence. *See State v. Bokien*, 14 Wn. 403, 414, 44 P. 889 (1896).

Because the statute is substantive, retrospective, and disadvantages the accused person, it violates the federal *ex post facto* clause. U.S. Const. Article I, Section 10; *Weaver, supra*. Respondent does not dispute that the statute is retrospective and disadvantageous to the accused, but argues that it should be classified as procedural rather than substantive. Brief of

Respondent, pp. 7-10. But Respondent's argument does not address the legislative declaration that the statute is substantive rather than procedural. Laws 2008, ch. 90, §1.

Furthermore, as a practical matter, RCW 10.58.090 reduces the quantity of evidence needed to secure a conviction. By allowing the jury to consider propensity evidence as substantive proof of guilt, the statute encourages jurors to vote guilty even where direct evidence of the charged crime is weak. For these reasons, the statute must be considered substantive, rather than merely procedural. Its application in this case violates the federal *ex post facto* clause. *Weaver, supra*.

B. Retroactive application of RCW 10.58.090 also violates the greater protections provided by Wash. Const. Article I, Section 23.

Wash. Const. Article I, Section 23 provides greater protections than its federal counterpart. *See* Appellant's Opening Brief, pp. 13-22, citing *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986). *Gunwall* analysis suggests that the state constitution prohibits retroactive application of any evidence rule allowing the prosecution to introduce evidence that would previously have been excluded. *See* Appellant's Opening Brief, pp. 13-22. Because RCW 10.58.090 fits this description, it violates the state *ex post facto* clause when applied retroactively. Respondent erroneously suggests that Mr. Walker "concedes that Washington's *ex post facto* clause is no more

protective than its federal counterpart.” Brief of Respondent, p. 11. In fact, Mr. Walker provided a lengthy *Gunwall* analysis, arguing for a more protective standard under the state constitution. See Appellant’s Opening Brief, pp. 13-22.

RCW 10.58.090 alters the rules of evidence in a one-sided fashion. It favors the prosecution, by allowing conviction based on propensity evidence. Because such evidence was previously inadmissible, retroactive application of RCW 10.58.090 violates the state *ex post facto* clause, Wash. Const. Article I, Section 23. See Appellant’s Opening Brief, pp. 13-22.

C. Division I’s *ex post facto* analysis in *Gresham* and *Scherner* is flawed.

Two recent Division I cases permit the retroactive application of RCW 10.58.090. *State v. Gresham*, 153 Wn.App. 659, 223 P.3d 1194 (2009); *State v. Scherner*, 153 Wn.App. 621, 225 P.3d 248 (2009). Division II should not follow those decisions, for the reasons outlined in Appellant’s Opening Brief and elsewhere in this Reply Brief.

In addition, *Scherner* can be distinguished from Mr. Walker’s case. In *Scherner*, the trial court specifically instructed the jury that evidence of prior sexual misconduct was not, by itself, sufficient to prove the charged crime:

In a criminal case in which the defendant is accused of an offense of sexual assault or child molestation, evidence of the defendant's commission of another offense or offenses of sexual assault or child molestation is admissible and may be considered for its bearing on any matter to which it is relevant. However, evidence of a prior offense on its own is not sufficient to prove the defendant guilty of any crime charged in the Information. Bear in mind as you consider this evidence that at all times the State has the burden of proving that the defendant committed each of the elements of each offense charged in the Information. I remind you that the defendant is not on trial for any act, conduct, or offense not charged in the Information.

*Scherner*, at 639. No such instruction was provided in this case. In this case, unlike in *Scherner*, the jury was permitted to convict Mr. Walker using propensity evidence in place of direct evidence to establish any or all of the elements. The absence of an appropriate instruction in this case distinguishes *Scherner*, and requires reversal.

D. The introduction of propensity evidence through RCW 10.58.090 prejudiced Mr. Walker and requires reversal.

Respondent has made no effort to argue that the error was harmless. Brief of Respondent, pp. 7-10. Mr. Walker's conviction rests, in part, on propensity evidence introduced under RCW 10.58.090 in violation of the state and federal prohibition against *ex post facto* laws.<sup>1</sup>

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<sup>1</sup> Although the trial court purported to find the evidence admissible under an exception to ER 404(b), the court did not give an instruction limiting the jury's consideration of the evidence. See *State v. Russell*, \_\_\_ Wn.App. \_\_\_, \_\_\_, 225 P.3d 478, 483 (2010) (where evidence is admitted under ER 404(b), the court bears responsibility for giving a limiting instruction).

The trial judge himself noted the singular importance of the evidence in the context of this case. RP (4/8/09) 28. Accordingly, the conviction must be reversed and the case remanded for a new trial, with instructions to exclude propensity evidence that would otherwise be admissible under the statute. *Weaver, supra*.

**III. RCW 10.58.090 VIOLATES THE CONSTITUTIONAL SEPARATION OF POWERS.**

A. RCW 10.58.090 is a legislative encroachment on judicial power.

The separation of powers doctrine is implicit in the state constitution. *Carrick v. Locke*, 125 Wn.2d 129, 882 P.2d 173 (1994). Each branch of government wields only the power it is given. *State v. Moreno*, 147 Wn.2d. 500, 505, 58 P.3d 265 (2002). A violation of the doctrine occurs whenever one branch of government threatens the independence or integrity or invades the prerogatives of another. *Carrick*, at 135.

The Supreme Court has sole authority to govern court procedures. *City of Fircrest v. Jensen*, 158 Wn.2d 384, 394, 143 P.3d 776 (2006). When a court rule and a statute conflict in a procedural arena, the court rule prevails. *State v. W.W.*, 76 Wn.App. 754, 758, 887 P.2d 914 (1995).

If RCW 10.58.090 is a procedural rule,<sup>2</sup> it violates the constitutional separation of powers because it conflicts with ER 404(b). *Id.* Under the statute, evidence of prior sexual misconduct is admissible as substantive evidence for any purpose, including as propensity evidence. ER 404(b), on the other hand, specifically excludes propensity evidence. ER 404(b). Indeed, the statute itself includes language declaring the evidence “admissible, notwithstanding Evidence Rule 404(b)...”

Respondent erroneously claims that the two provisions can be harmonized. Brief of Respondent, pp. 17-18. This is incorrect; the two provisions are in direct conflict. The trial court’s ability to exclude evidence using another evidence rule (such as ER 403) is irrelevant. *See* Brief of Respondent, p. 18. The problem is not that the statute mandates admission in all cases. Rather, the problem is that evidence that must be excluded under ER 404(b) may now be admitted under the statute. In other words, the legislature has overruled an evidence rule (ER 404(b)) adopted by the judicial branch.<sup>3</sup>

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<sup>2</sup> The legislature intended RCW 10.58.090 to be substantive. Laws 2008, ch. 90, §1. If it is substantive, retroactive application violates the *ex post facto* clauses, as argued above.

<sup>3</sup> Respondent implicitly recognizes this by pointing out that a trial court may still exclude evidence “under ER 403 and, *with the exception of ER 404(b)*, other rules of evidence.” Brief of Respondent, p. 18 (emphasis added).

The examples analyzed by Respondent are different from the statute at issue here. Brief of Respondent, pp. 16-18, *citing Fircrest, supra, and State v. Ryan*, 103 Wn.2d 165, 691 P.2d 1987 (1984). The statutes in both *Ryan* and *Fircrest* placed no restrictions on a trial court's ability to exclude evidence under existing rules of evidence. Here, by contrast, the legislature has explicitly prohibited courts from excluding certain evidence under ER 404(b). Where evidence falls within the statute, a trial court may not apply ER 404(b) to exclude it or to admit it solely for a limited purpose.

Because the statute prevents trial courts from applying ER 404(b), it violates the separation of powers and is void. *State v. Thorne*, 129 Wn.2d 736, 762, 921 P.2d 514 (1996). Accordingly, Mr. Walker's conviction must be reversed and the case remanded for a new trial.

B. Division I's separation of powers analysis in *Gresham* and *Scherner* is flawed.

In *Scherner*, Division I found no separation of powers violation. *Scherner, supra*. The court reasoned that the statute simply "expands the nonexclusive list of 'other purposes' for which evidence of 'other crimes, wrongs, or acts' may be admitted" under ER 404(b). *Scherner*, at 645. This is nonsensical. ER 404(b) excludes propensity evidence, but permits admission for other limited purposes. Admission of propensity evidence

under the statute is not admission for “other purposes.” Although the opinion twice refers to expanding the nonexclusive list of “other purposes,” Division I never clarifies what “other purpose” (beyond proof of criminal propensity) such evidence addresses. *See Scherner*, at 645, 646.

Division I also reasoned (in both *Scherner* and *Gresham*) that a trial court’s authority is not diminished because trial judges can still exclude evidence under ER 403 and other evidence rules. *See Scherner*, at 648; *Gresham*, at 669-670. As outlined above, this is incorrect. The trial court’s authority is diminished, because the statute prohibits trial judges from excluding propensity evidence under ER 404(b). The effect of the statute is to nullify ER 404(b) for certain prosecutions.

Division I’s reasoning is flawed. Division II should not follow *Gresham* and *Scherner*. RCW 10.58.090 is unconstitutional because violates the constitutional separation of powers. Accordingly, Mr. Walker’s conviction must be reversed.

**IV. AN ERROR IN SENTENCING REQUIRES THAT THE CASE BE REMANDED FOR RESENTENCING.**

Respondent correctly points out that Mr. Walker was improperly sentenced to an indeterminate sentence under RCW 9.94A.712. Mr.

Walker joins the state's request that his sentence be vacated and the case remanded for resentencing. Brief of Respondent, p. 20.

**CONCLUSION**

For the foregoing reasons, Mr. Walker's conviction must be reversed. The case must be remanded to the superior court with instructions to exclude propensity evidence.

If the conviction is not reversed, the sentence must be vacated and the case remanded for sentencing within the standard range.

Respectfully submitted on April 13, 2010.

**BACKLUND AND MISTRY**

  
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I certify that I mailed a copy of Appellant's Reply Brief to:

BY [Signature]  
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Noel Walker, DOC #282015  
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and to:

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And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on April 13, 2010.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on April 13, 2010.

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