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A. ASSIGNMENTS OF ERROR

1. The trial court correctly refused to include RCW 10.58.090(6)(e) in her analysis of the admissibility of evidence of prior sexual misconduct.
2. Because the trial court did not issue her ruling on the admissibility of prior evidence of sexual misconduct under RCW 10.58.090, this Court should not consider the state's issue on cross appeal because to do so requires an impermissible advisory opinion..
3. This Court should not address constitutional issues that do not have any bearing on the appellant.
4. The trial court complied with RCW 10.58.090, by engaging in an in-depth ER 404(b) and 403 analysis.

Issues Presented in Respondent's Cross Appeal

1. Did the trial court err in refusing to include in her analysis of the admissibility of the evidence RCW 10.58.090(6)(e)?
2. Because the trial court did not issue her ruling on the admissibility of prior evidence of sexual misconduct under RCW 10.58.090, if Court considers the state's issue on cross

appeal will it be giving an impermissible advisory opinion?.

3. Courts should not engage in non-dispositive constitution issues.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The trial court made an oral ruling admitting evidence of prior sexual misconduct under ER 404(b) and ER 403. Later, the court entered written findings and conclusions after analyzing the admissibility of prior sexual misconduct under both 404(b) and as an advisory opinion RCW 10.98.090. CP 141. The trial court in its written findings “excluded RCW 10.98.090. § (6)(e) from its analyses of the admissibility of the prior misconduct evidence. CP 141. The state filed a cross appeal contending that the trial’s exclusion of § (6)(e) in its analysis of the admissibility of evidence under RCW 10.58.090(6) was error.

Trial Court’s Oral Ruling on Admissibility of
Prior Sex Offenses.

Having said that, the upshot is that regardless of whether I analyze the admissibility of the priors under the statute, or under 404(b), I believe that the case law and -- I have to say **for the record that I have largely analyzed the admissibility of this evidence under 404(b), and I will do an advisory analysis under 10.58 because I think I need to do that for the record.** That will be part of my written decision, but under 404(b), it is my belief that the incident that involved the younger of the two women is admissible

under common scheme or plan. I feel that the court is constrained by the DeVincentis case to admit that evidence. It is obvious to the court that admissibility of any prior acts from that one plea of guilty is going to be prejudicial to Mr. Romero's case. One cannot escape the prejudice that accrues, so I can tell you that I start out in my analysis of this issue with not admitting the evidence, and then I have to begin to analyze it under the criteria that I have been given by case law. Ordinarily, as we all know in this room, the case law used to require that lustful disposition cases which involve prior victims of similar acts was excluded unless it involved that particular victim. The DeVincentis case is the first case in this state which has expanded it to other victims of crime, and has expanded the analysis of common scheme or plan to other

victims of crime. Frankly, I have my own concerns about the admissibility of common scheme or plan evidence in a criminal trial involving a sex case. For the record, I would like to say that while I am admitting the evidence, I am troubled by it, and the reason for that is because I believe that sex cases present unique psychological factors. The Court of Appeals and the state Supreme Court have yet to introduce into their analysis what both the prosecution and the defense know about sex offenders in general, and that is that it is not true that if a person has committed a prior sex crime, that that means they are predisposed to committing a future sex crime just by virtue of that fact. Sex offenders fall into different categories depending on the nature of their particular psychological diagnosis. For example, pedophiles are -- a person who is diagnosed with pedophilia is a person who is someone who is attracted to children and has a deviant sexual arousal pattern toward children. A person who is not diagnosed with pedophilia would not be similarly inclined with adult victims or child victims. It's the target and the nature of the particular diagnosis that is the primary factor in the court's analysis. So, it is my -- And I am speaking not to the attorneys but more to the appellate court in this juncture. It is my belief that it's important for any court to be able to analyze admissibility of prior bad acts with an

understanding of how the psychology, the psychological diagnosis of this individual contributes. In this case, there are commonalities from the 13-year-old victim to this case, and those common features are the age range of the victim. No one could say whether this 13- or 14-year-old prior victim was post-pubescent. I had asked that question, but that's one answer that we don't know. Even if she was post-pubescent, it's probable that she was not yet fully developed as an adult female is developed in terms of breasts and that sort of thing. So the closeness in the age range of the two is a common feature. A 13- to 14-year-old versus 12-year-old can be very close in age. The fact that neither victim was biologically related to this defendant, but related by family, is a common feature. The method of the commission of the crime, the modus operandi if you will, is also a common feature. Now, that gave me pause as a judge as well, because when one considers how sex offenses are committed, there are a wide range of how people can commit sex offenses, but I think by and large it is my belief that sex offenses are largely committed in a situational capacity or opportunistic capacity by a person in their home or in the home of a victim through some sort of a family relationship or access relationship, and so I had to analyze that factor under, well, are 80 percent of the crimes committed in this way generally speaking, or are they -- is this somehow unique in this circumstance? So, while it is that Mr. Romero is alleged to have crept or gone into the victim's bedroom at night, that is not necessarily a commonality, or that's a common feature I think in a lot of sex offenses that are committed against child victims who occupy a familial relationship with the offender. I don't think that's a signature crime in and of itself, but it does share that common feature with the prior conviction. The other issue has to do with the manner in which the offending behavior was accomplished, and in this way there are similarities as well. The allegation is that Mr. Romero went into the child's bedroom at night and stood next to her bed and reached under the bedding and over the clothing to touch her private parts, and that is very similar in circumstance to the 13- and 14-year-old child. Also, this is

an opportunistic offense, meaning it is a crime of opportunity, and that is similar between these two offenses. Both victims -- and I say in the current case the alleged victim, and the prior conviction, these were people who were in his home and spending the night, thus presenting an opportunity to offend. Both are also vulnerable by virtue of their age, and I found that to be a commonality between the two. So we have similar age, similar manner of offending, opportunistic crime, and the age and the vulnerability of the victim kind of tie in. The dissimilarity just pretty much factors on the age of the victim, and if this 13- or 14-year-old was in fact post-pubescent, that would be a dissimilarity with the prior. But, given the DeVincentis case, and the fact that we actually had more common features between these two crimes than what were alleged in the DeVincentis case, I had to come down on admissibility in this particular case for that particular crime. Now, with the 23-year-old victim -- and you will have to forgive me because the names of the two I am not real good at yet, but for the 23-year-old victim, I felt that there were enough dissimilarities, plus the cumulative effect with a dissimilar crime I think would be unfairly prejudicial to the defendant in this particular case. I think the probative value of having a prior conviction to the state is effected whether the state gets one or two offenses in, especially in light of 10.58's stated purpose to get propensity evidence in front of a jury, but it's still important for the court to conduct the analysis of probative versus prejudicial or unfair prejudice on the record. With the 23-year-old victim, I think that there is a danger of unfair prejudice because there is a cumulative effect with respect to two of these offenses coming in, and so in looking at the cumulative effect, which I believe is inherently and dramatically prejudicial to the defendant, I believe that I have to even more so look at the qualities of the two crimes to determine whether they are common to the extent that they should be admitted. In the 23-year-old victim case, I think that the dissimilarities warrant exclusion. This is a -- the 23-year-old is a person is clearly a developed and fully developed or sexually mature female in terms of the physicality of the victim, and the allegation I believe in that

case involved -- I believe; you will have to correct me -- but I believe it involved an allegation of digital penetration, even though that's not what he pled guilty to. He didn't plead guilty to a rape, he pled guilty to indecent liberties, correct?

MS. MUTH: My recollection was that the digital penetration occurred with Carly.

THE COURT: The younger child.

MS. MUTH: With Stormy, the older child, it was touching on the breasts, but actual contact with the skin.

THE COURT: Right, so there was that dissimilarity I think in terms of the modus operandi. Thank you for that clarification, counsel. here is -- you know, touching over the clothes versus touching underneath the clothes I think presents a dramatic dissimilarity as well in the sense that there is a different feature involved for the purpose of sexual gratification, but I was largely looking at the fact that it was a fully developed adult female on that allegation as the dissimilar feature, and the touching underneath the clothing, skin-to-skin contact. So having said that, I will get the opinion to you with respect to the constitutionality of the statute. I would have come down the same way under the statutory analysis as well, just for the record.

(Emphasis added) RP 3-9. The trial court later filed an advisory written opinion. CP132-142. (Attached hereto as Exhibit A).

C. ARGUMENT IN REPLY

1. THE TRIAL COURT DID NOT ERR IN EXCLUDING RCW 10.98.090(6)(e) FROM ITS ANALYSIS OF THE ADMISSIBILITY OF PRIOR SEXUAL MISCONDUCT UNDER RCW 10.58.090.

The state complains in its cross appeal that this Court should consider the trial court's decision in favor of the state to admit evidence of prior sexual misconduct, over objection from Mr. Romero. The state wants this Court to engage in an unnecessary constitutional analysis of RCW 10.58.090(6)(e) that has no bearing on Mr. Romero. The trial court did not include RCW 10.58.090(6)(e) in her decision to admit evidence of prior sexual misconduct.

RP 3.

RCW 10.58.090(6)(e) provides:

(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:

...

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

The trial court's decision not to include RCW 10.58.090(6)(e) in her analysis of the admissibility of the prior evidence is irrelevant to Mr. Romero's case because the trial court admitted the evidence without this offending provision. The trial court in her oral opinion made clear that she was only giving an "advisory opinion" under RCW 10.58.090, but deciding the issue of admissibility under 404(b). "[F]or the record that I have largely

analyzed the admissibility of this evidence under 404(b), and I will do an advisory analysis under 10.58 because I think I need to do that for the record.” (Emphasis added) RP 3. The trial court’s written findings analyzed RCW 10.58.090 correctly but seemed advisory after her oral ruling. CP 132-142.

a. Advisory Opinion

The state now seeks an advisory or opinion from this Court on an issue that is not relevant to Mr. Romero. This is not permissible. “Appellate courts do not give advisory opinions.” State v. Maloney, 1 Wn. App. 1007, 465 P.2d 692, citing, State ex rel. O’Connell v. Kramer, 73 Wash.2d 85, 436 P.2d 786 (1968); Grill v. Meydenbauer Bay Yacht Club, 57 Wash.2d 800, 359 P.2d 1040 (1961).

b. Trial Court’s Opinion Correct Under Scherner

The trial court engaged in a 404(b) analysis and determined that the evidence of prior sexual misconduct with a person of similar age was admissible under common scheme or plan. RP 3. The trial court was rightly troubled by the admission of this evidence because “sex cases present unique psychological features”. RP 4. The trial court further articulated the problems with admitting prior sex offenses. Because the trial court’s ruling was advisory under RCW 10.58.090 and provided under ER 404(b), this Court

should decline to consider the state's cross-appeal.

The Court of Appeals and the state Supreme Court have yet to introduce into their analysis what both the prosecution and defense know about sex offenders in general, and that is that it is not true that if a person has committed a prior sex crime, that that means they are predisposed to committing a future sex crime just by virtue of that fact. Sex offenders fall into different categories depending on the nature of their different psychological diagnosis.

RP 4. The Court in State v. Scherner, 153 Wn. App. 621, 225 P.2d 248 (2009), did not address the trial courts concerns regarding the problems with treating all sex offenders as likely to re-offend. RP 3. The trial court analyzed the evidence under 404(b) and 403, therefore the analysis complied with Scherner and RCW 10.58.090. Thus regardless of the basis for the trial court's admission of the prior sexual misconduct evidence, the issue of rejecting RCW 10.58.090(6)(e) is not of any import to Mr. Romero and thus not properly before this Court. Rather the state desires an advisory opinion for future cases.

c. This Court Should Not Entertain
Non- Dispositive Constitutional Issues.

This Court should not entertain Respondent's cross appeal because it involves a constitutional question which was not dispositive in Mr. Romero's case. State v. Grabinski, 33 Wn.2d 603, 612, 206 P.2d 1022 (1949).

The state in its cross appeal expressly asked this court to rule on a

constitutional question that was not at issue for Mr. Romero, thus this Court following Grabinski, should decline to consider the state's cross-appeal. Cross Appeal at Page 24).

Unless a person's rights are directly involved, courts will postpone inquiry into constitutional questions which are separable from the issue then before the court until they are met upon the proposition directly at issue, unless the unconstitutional feature, if it exists, is of such character as to render the entire act void. *State v. Bowen & Co.*, 86 Wash. 23, 149 P. 330, Ann.Cas.1917B, 625

Grabinski, 33 Wn.2d at 612. The Trial court's finding RCW 10.58.090(6)(2) unconstitutional did not impact Mr. Romero's rights. And the state is not a person with constitutional rights "directly involved. State v. Moran, 88 Wn.2d 867, 568 P.2d 758 (1977). For this reason, the state's cross-appeal is not properly before this Court.

"Before one may attack the constitutionality of the statute he must have a sufficient direct interest in and be damaged by the statute sought to be attacked." Id. "There must be a 'personal stake in the outcome' such as to 'assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.' . . . Nor is the principle different where statutory issues are raised." Moran, 88 Wn.2d at 871, quoting, United States v.

SCRAP, 412 U.S. 669, 687 (93 S.Ct. 2405, 37 L.Ed.2d 254) (1973).

For this Court to consider the state's cross-appeal, it would have had to sustain some direct injury as the result of the challenged statute. "The injury or threat of injury must be both "real and immediate not "conjectural" or hypothetical." Moran, 88 Wn.2d at 871-872. The state has not sustained a direct or threatened injury.

d. On the Merits.

Alternatively, on the merits of the state's cross appeal, the trial court did not err. The Court in Scherner made clear that the reason RCW 10.58.090 was not unconstitutional was because of the retention of the required 404(b) and 403 analysis.

In any event, the statute expressly retains the function of the trial courts to balance probative value against prejudicial effect under the modified ER 403 test. Moreover, trial courts retain the ultimate power to decide whether to admit or exclude any proffered evidence. These safeguards should protect against admission of any evidence that could unconstitutionally affect the sufficiency of evidence to convict.

Scherner, 153 Wn. App. 642.

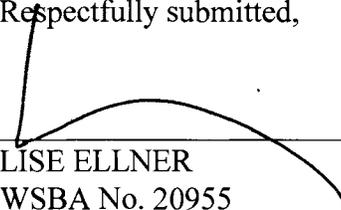
Herein, the trial court made her ruling on the admissibility of the prior misconduct by engaging in an in-depth ER 404(b) and 403 analysis; the trial court thus complied with Scherner

D. CONCLUSION

Mr. Romero respectfully requests this Court refuse to engage in the State's improper seeking of an advisory opinion or affirm the trial court's ruling under both ER 404(b) and ER 403, and RCW 10.58.090(6)(e).

DATED this 14th day of June 2010.

Respectfully submitted,



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Attorney for Appellant

I, Lise Ellner, a person over the age of 18 years of age, served the Kitsap County Prosecutor's Office 614 Division St, MS-35 Port Orchard, WA 98366 and Jason Romero DOC # 894014 WASHINGTON State Reform PO Box 777 Monroe, WA 98272 a true copy of the document to which this certificate is affixed, On June 14, 2010. Service was made by depositing in the mails of the United States of America, properly stamped and addressed.

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APPENDIX A

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DAVID W. PETERSON

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8 **SUPERIOR COURT OF THE STATE OF WASHINGTON**
9 **IN AND FOR KITSAP COUNTY**

10 STATE OF WASHINGTON,

11 Plaintiff,

No. 08-1-01319-5

12 v.

13 **Memorandum Opinion and Order on**
14 **Notice of Intent to Offer Evidence under**
15 **RCW 10.58.090**

16 JASON ROMERO,

17 Defendant.

18
19
20
21 The state seeks to admit Defendant's prior conviction for indecent liberties under
22 either RCW 10.58.090 or ER 404(b). The defense asks the Court to declare RCW
23 10.58.090 facially unconstitutional on the grounds it violates 1) the separation of powers
24 doctrine; 2) due process requirements; and 3) ex post facto provisions of the WA and
25 federal constitutions.

26 RCW 10.58.090 directs courts to admit evidence of a defendant's prior sex
27 offenses notwithstanding Washington ER 404(b) which prohibits evidence of other
28 crimes, wrongs or acts offered solely to prove a person's character. The statute provides
29 a list of factors to be considered by courts including whether propensity evidence is
30

Memorandum Opinion

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1 relevant, see ER 402, and more probative than prejudicial, see ER 403. RCW
2 10.58.090(6).

3 If the statute is not unconstitutional, Defendant argues in the alternative that a
4 proper weighing of the factors, whether done under RCW 10.58.090(6) or under the
5 Washington Rules of Evidence, compels the conclusion that Mr. Romero's prior
6 conviction for indecent liberties constitutes unfairly prejudicial evidence. Whether the
7 statute is constitutional presents an issue of first impression.

8
9 Analysis

10 **Separation of Powers**

11 The separation of powers doctrine exists to "prevent one branch of government
12 from aggrandizing itself or encroaching upon the 'fundamental functions' of another."
13 *State v. Moreno*, 147 Wn.2d 500, 505, 58 P.3d 265 (2002). The state constitution divides
14 the political power that is inherent in the people into legislative authority, executive
15 power, and judicial power. WA Const. art. I-IV. Each branch of government wields only
16 the power it is given. However, the branches are not "hermetically sealed," and the
17 doctrine permits the government, "a measure of flexibility and practicality." *Moreno* at
18 505. The test is whether the activity of one branch threatens the "independence or
19 integrity or invades the prerogatives of another, not whether two branches of government
20 engage in coinciding activities." *Carrick v. Locke*, 125 Wn.2d 129, 135 (1994).

21 ER 404(b) does not permit the admission of evidence to show a defendant's
22 character or propensity. The text of ER 404(b) provides:

23 Evidence of other crimes, wrongs, or acts is not admissible to prove the
24 character of a person in order to show action in conformity therewith. It
25 may, however, be admissible for other purposes, such as proof of motive,
26 opportunity, intent, preparation, plan, knowledge, identity, or absence of
27 mistake or accident.

28 In contrast, the relevant language in RCW 10.58.090 reads:

29 In a criminal action in which the defendant is accused of a sex offense,
30 evidence of the defendant's commission of another sex offense is
admissible, notwithstanding ER 404(b), if the evidence is not inadmissible
pursuant to ER 403.

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1
2 According to the plain language of RCW 10.58.090, courts must admit evidence of prior
3 sexual misconduct with other parties if the evidence is not unfairly prejudicial. It is clear
4 the Legislature intends to admit the evidence for the purpose of showing propensity. This
5 is precisely the kind of evidence forbidden by ER 404(b). Defendant argues that the
6 statute's language cannot be reconciled with ER 404, and therefore, the Legislature's
7 enactment of RCW 10.58.090 constitutes an unconstitutional usurpation of judicial rule-
8 making authority under the Washington Constitution.

9 Defendant goes on to argue that it is well established that a Washington rule of
10 evidence prevails over a statute purporting to overrule it. It is settled law that
11 responsibility over the administrative aspects of court-related functions is shared between
12 the legislative and judicial branches, *Wash. State Bar Ass'n v. State*, 125 Wash.2d 901,
13 908, 890 P.2d 1047 (1995). However, the primary source of authority underlying court
14 rules is not so clear cut. The WA Rules of Evidence do little to resolve this question.
15 The Rules simply reference their own authority to "govern proceedings in the courts of
16 the state of Washington." ER 101. The courts have also remained somewhat circumspect
17 on this matter.

18 In *State v. Ryan*, 103 Wn.2d 165, 691 P.2d 197 (1984) the Court seemingly
19 provided a definitive answer to the question of which branch of government has final
20 rulemaking authority. The *Ryan* Court addressed a separation of powers challenge to a
21 statutorily created hearsay exception. It found the exception to be procedural in nature
22 and noted in passing, "[S]tatutory enactments of evidentiary rules are subject to judicial
23 review, this court being the final arbiter of evidentiary rules." *Id.* at 178 (citing *Petrarca*
24 *v. Halligan*, 83 Wn.2d 773, 522 P.2d 827 (1974)). In spite of the broad language, the
25 Court did not reach the question of whether the judicial branch has the final word on
26 substantive court rules in addition to procedural rules. Instead, the court noted that
27 legislative enactment of the hearsay exception at issue was specifically contemplated by
28 the Rules of Evidence.

29 A separate line of Washington Supreme Court cases indicates that both courts and
30 the legislature have primary power to regulate the admissibility of evidence depending on
the characterization of the individual rule. The key distinction is whether an evidentiary

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1 rule is primarily substantive or procedural. *See, e.g., State v. Fields* 85 Wn.2d 126, 129
2 (1975) (“Substantive law is beyond the authority of the Washington Supreme Court.”).
3 In *State v. Smith*, 84 Wn.2d 498, 501, 527 P.2d 674 (1974), the Court reaffirmed the
4 scope of judicial authority, “[T]he promulgation of rules of procedure is an inherent
5 attribute of the Supreme Court and an integral part of the judicial process, such rules
6 cannot be abridged or modified by the legislature.” *Id.* at 502. This line of cases
7 acknowledging a division of power regarding the Rules of Evidence culminated in a 4-3-
8 2 decision in *City of Fircrest v. Jensen*, 158 Wn. 2d 384, 143 P.3d 776 (2006), *cert.*
9 *denied*, 549 U.S. 1254 (2007). A plurality of the Court put forward its framework for a
10 separation of powers analysis:

11 [The Supreme Court] is vested with judicial power from article IV of the
12 constitution and from the legislature under RCW 2.04.190.¹ The inherent
13 power of article IV includes the power to govern court procedures. The
14 delegated power of RCW 2.94.190 includes the power to adopt rules of
15 procedure. *State v. Fields* 85 Wn.2d 126, 129 (1975). In general, the
16 judiciary’s province is procedural and the legislature’s is substantive.
17 “Substantive law prescribes norms for societal conduct and punishments
18 for violations thereof. It thus creates, defines, and regulates primary
19 rights. In contrast, practice and procedure pertain to the essentially
20 mechanical operations of the courts by which substantive law, rights, and
21 remedies are effectuated.” *State v. Smith*, 84 Wn.2d 498, 501, 527 P.2d
22 674 (1974).

23 Accordingly, the Court asks whether RCW 10.58.090 constitutes a procedural or
24 substantive change to the Rules of Evidence. Given the dearth of Washington case law
25 characterizing evidentiary rules, the Court examines the policies adopted by other states
26 in deciding whether rules of evidence codify primary rights or pertain to the essentially
27 mechanical operation of the courts. The Court finds persuasive the distinction which has

28 _____
29 ¹ The text of RCW 2.04.190 reads:

30 The supreme court shall have the power to prescribe, from time to time, the forms of writs and all other process, the mode
and manner of framing and filing proceedings and pleadings; of giving notice and serving writs and process of all kinds; of
taking and obtaining evidence; of drawing up, entering and enrolling orders and judgments; and generally to regulate and
prescribe by rule the forms for and the kind and character of the entire pleading, practice and procedure to be used
[emphasis added] in all suits, actions, appeals and proceedings of whatever nature by the supreme court, superior courts,
and district courts of the state. In prescribing such rules the supreme court shall have regard to the simplification of the
system of pleading, practice and procedure in said courts to promote the speedy determination of litigation on the merits.

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1 been accepted in several states that a statute expanding the scope of permissible evidence,
2 as RCW 10.58.090 surely does, does not fall within the judiciary's inherent rulemaking
3 authority because it does not principally regulate the operation or administration of the
4 courts. *Horn v. State of Oklahoma*, 204 P.3d 777 (2009); 2000 L. Rev. Mich. St. U. Det.
5 C.L. 857, *McDougall v. Schanz: Distinguishing the Authorities of the Michigan*
6 *Legislature and the Michigan Supreme Court to Establish Rules of Evidence* (2000); 34
7 Stetson L. Rev. 109, *The Florida Evidence Code and the Separation of Powers Doctrine:*
8 *How to Distinguish Substance and Procedure Now That It Matters* (2004); 4 Crim. L.F.
9 307, *Prior Similar Acts in Prosecutions for Rape and Child Sex Abuse* (1993).

10 Ultimately, RCW 10.58.090 reflects the Legislature's policy decision that, in
11 certain cases, juries should have the opportunity to weigh a defendant's behavioral
12 history and view the facts of the case within the larger context provided by the
13 Defendant's personal history. States, in derogation of three centuries of common law
14 banning propensity evidence,² have increasingly admitted propensity evidence under the
15 rationale that sex offenses are often committed in secret and frequently result in trials
16 which are largely credibility contests. Imwinkelreid, *Uncharged Misconduct Evidence*,
17 2:25 (2008). Nevertheless, a legislature's choice is no less a policy choice because it is
18 disconcerting to trial courts or contrary to the choice originally made at common law.
19 Because RCW 10.58.090 is a substantive rule it does not violate the Constitution's Art.
20 IV §1.

21 **Analysis of RCW 10.58.090 as a Procedural Rule**

22 In recognition of the fact that this area of the law is not yet settled and the long
23 held common law position that ER 404(b) constitutes a "mode of practice or procedure,"
24 the Court conducts a supplementary analysis of RCW 10.58.090 as a procedural rule. It
25 is well-established that legislation which violates the separation of powers doctrine or
26 which conflicts with rules enacted under RCW 2.04.190 is void. *State v. Thorne*, 129
27 Wn.2d 736, 762, 921 P.2d 514 (1996). It is equally well-settled that statutes are both
28

29 ² "Hold, hold, what are you doing now? Are you going to arraign his whole life? How can he defend himself from charges of which
30 he has no notice? And how many issues are to be raised to perplex me and the jury? Away, away! That ought not to be; that is
nothing to the matter." Harrison's Trial, 12 How. St. Tr. 833, 874 (1692), cited in 1 Wigmore § 194.

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1 liberally construed with a view to affect their objects and that when a court rule and a
2 statute conflict, courts attempt to read the two enactments in such a way that they can be
3 harmonized. *WA State Bar Ass'n v. State*, 125 Wn. 2d 901, 909, 890 P.2d 1047
4 (1995)(citing *State v. Ryan*, 103 Wn.2d 165, 691 P.2d 197 (1984)). As discussed above,
5 when the rule falls within the procedural domain and the court is unable to harmonize the
6 court rule and the statute, "the court rule will prevail." *Id.*

7 If RCW 10.58.090 is a procedural rule and therefore does not trump ER 404(b), a
8 harmonization approach should attempt to reconcile the statute with the rule by
9 interpreting the admission of propensity evidence as a specific rule to be applied only
10 within the limited context of sex offense cases, while the ER 404(b) prohibition on
11 propensity evidence remains operative in the vast majority of cases. Unfortunately, the
12 canon of construction which directs courts to apply specific laws before giving credence
13 to more general laws cannot be easily grafted onto the language of these two enactments.
14 The plain language of RCW 10.58.090 does not lend itself to the interpretation that only
15 some portion of ER 404(b) is impinged by admitting evidence to prove the character of a
16 person in order to show action in conformity therewith. To hold that a statute could
17 abrogate a portion of the Court's inherent authority to make procedural rules would not
18 only undermine the primary purpose of ER 404(b) but effectively grant the Legislature
19 the power to overrule procedural Rules of Evidence piecemeal. If RCW 10.58.090 is a
20 procedural rule, it violates the separation of powers doctrine and is therefore void.

21 **Due Process**

22 Defendant argues that the prohibition on propensity evidence is a fundamental
23 historical principle of justice while the State contends that propensity evidence, even if
24 the two enactments are deemed to be in direct conflict, does not raise process issues of a
25 constitutional magnitude. *See Estelle v. McGuire*, 502 U.S. 62, 75 n. 5 (1991)(expressly
26 reserving the question of whether admission of propensity evidence violates the Due
27 Process Clause). As a historical matter, propensity evidence has not been admitted *solely*
28 for purposes of showing a person's character, but it is also true that many evidentiary
29 rules of longstanding have been changed without being held unconstitutional. *See, e.g.,*
30 *United States v. Enjady*, 134 F.3d 1427, 1432 (1998). Numerous federal courts have

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1 found the federal rule permitting propensity evidence, FRE 413, withstands due process
2 challenges. See *U.S. v. Dillon*, 532 F.3d 379, 387 (2008); *U.S. v. Benally*, 500 F.3d 1092
3 (10th Cir. 2007); *Hawpetoss*, 478 F.3d 823; *U.S. v. Seymour*, 468 F.3d 378, 385 (6th Cir.
4 2006); *U.S. V. LeMay*, 260 F.3d 1018, 1026 (9th Cir. 2001); *U.S. v. Castillo*, 140 F.2d
5 874, 879 (1998).

6 To date, each Federal Circuit Court of Appeals presented with the issue, including
7 the Ninth Circuit, has rejected every challenge to the constitutionality of Federal Rules of
8 Evidence 413 through 415 which provide for the admission and consideration of
9 uncharged sex offenses on any matter to which they are relevant and not more prejudicial
10 than probative. In *U.S. v. Castillo*, 140 F.2d at 879 (1998), the Court held in a child
11 molestation prosecution that a rule permitting admission of a defendant's other acts of
12 child molestation for purposes of demonstrating his character did not on its face violate
13 the Due Process Clause. The Court found that other evidentiary rules utilizing a case-by-
14 case approach adequately control the potential prejudicial effect. *Id.* at 879-882 ("The
15 third and most significant factor favoring Rule 414's [RCW 10.58.090's federal
16 equivalent] constitutionality is the existence of procedural protections in Rule 402 and, in
17 particular, Rule 403.") (citing *Huddleston v. United States*, 485 U.S. 681, 691 (1988)).

18 Given that RCW 10.58.090 mandates an ER 403 analysis contemporaneous with
19 the determination of admissibility, an abrogation of a rule prohibiting certain types of
20 evidence which might otherwise not be admissible does not appear to implicate any
21 "fundamental fairness" right of the Defendant recognized in the Due Process Clause
22 jurisprudence.

23 **Ex Post Facto**

24 Defendant asserts the statute is *ex post facto* on the ground that the law falls
25 within the fourth category of *ex post facto* laws first enumerated in *Calder v. Bull*, 3 U.S.
26 386 (1798), which applied to "every law that alters the legal rules of evidence and
27 receives less, or different, testimony than the law required at the time of the commission
28 of the offense, in order to convict the offender." Washington's prohibition is even clearer
29 than the federal standard, "[N]o bill of attainder, *ex post facto* law, or law impairing the
30 obligations of contract shall ever be passed." Wash. Const. Art. 1, § 23.

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1 Applying these standards to the present case, Mr. Romero argues that the change
2 from evidence of prior sex offenses which would be inadmissible under ER 404(b) to
3 admissible under RCW 10.58.090 is a substantive, not merely procedural change, and
4 that the amount of evidence required to support a conviction has been altered. The law
5 goes so far as to identify itself as a substantive change, see RCW 10.58.090 nt. 2, and
6 thus, it is argued, the law cannot be enforced because the State's introduction of prior bad
7 act evidence post-dates the alleged commission of the offense. However, federal and
8 state jurisprudence has limited the fourth category articulated in *Calder v. Bull* to legal
9 changes which alter the elements of the crime or the nature of the proof necessary to
10 obtain a conviction. *Carmell v. Texas*, 529 U.S. 513 (1999); see also *State v. Edwards*,
11 104 Wn.2d 63 (1985). Of course, the 'beyond a reasonable doubt' standard as to each
12 element required for a criminal conviction remains unchanged by RCW 10.58.090.
13 There is no indication that any evidence admitted pursuant to RCW 10.58.090 which
14 would not have been permitted by ER 404(b) would be sufficient, standing alone, to
15 convict Mr. Romero. The court in *State v. Clevenger*, 69 Wn.2d 136 (1966) stated as a
16 complete response to the claim of an *ex post facto* law in the context of a statute
17 removing the spousal privilege in criminal prosecutions:

18 "[A]lterations which do not increase the punishment nor change the
19 ingredients of the offence or the ultimate facts necessary to establish guilt,
20 but-leaving untouched the nature of the crime and the amount or degree of
21 proof essential to conviction-only remove existing restrictions upon the
22 competency of certain classes of persons as witnesses, relate to modes of
23 procedure only, in which no one can be said to have a vested right, and
24 which the state, upon grounds of public policy, may regulate at pleasure.
25 Such regulations of the mode in which the facts constituting guilt may be
26 placed before the jury can be made applicable to prosecutions or trials
27 thereafter had, without reference to the date of the commission of the
28 offence charged. *Id.* at 141-142; accord *State v. Slider*, 38 Wn.App. 689,
29 695 (1985).

30 The same inquiry has been mirrored at the federal level. In *Schroeder v. Tilton*, 493 F.3d
1083 (9th Cir. 2007) the defendant was accused of sex crimes committed in 1994. The
court admitted evidence of prior sex crimes under California Rule § 1108 which became
effective in 1996, after the crime was committed but before the defendant was brought to

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1 trial.³ The court held that California's enactment of § 1108, occupying the same statutory
2 niche as does RCW 10.58.090, did not speak to the sufficiency or quantum of the
3 evidence, merely the standard of admissibility. Only if a jury could rely solely on the
4 uncharged act to convict would the Constitution's Ex Post Facto Clause be implicated.

5
6 **RCW 10.58.090(6) Balancing Test**

7 The text of RCW 10.58.090(6) reads:

8 When evaluating whether evidence of the defendant's commission of
9 another sexual offense or offenses should be excluded pursuant to
10 Evidence Rule 403; the trial judge shall consider the following factors:

- 11 (a) The similarity of the prior acts to the acts charged;
12 (b) The closeness in time of the prior acts to the acts charged;
13 (c) The frequency of the prior acts;
14 (d) The presence or lack of intervening circumstances;
15 (e) The necessity of the evidence beyond the testimonies already
16 offered at trial;
17 (f) Whether the prior act was a criminal conviction;
18 (g) Whether the probative value is substantially outweighed by the
19 danger of unfair prejudice, confusion of the issues, or misleading
20 the jury, or by considerations of undue delay, waste of time, or
21 needless presentation of cumulative evidence; and
22 (h) Other facts and circumstances.

23 After finding RCW 10.58.090 constitutional in other respects, the Court conducted its
24 balancing test under RCW 10.58.090(6) on the record pursuant to *State v. Jackson*, 102
25 Wn.2d 689, 693 (1984). *Accord Benally*, 500 F.2d at 191 ("When the government seeks
26 to introduce Rule 413 or 414 evidence, the district court has an obligation to fully
27 evaluate the proffered ... evidence and make a clear record of the reasoning behind its
28 findings as to whether the evidence survives the Rule 403 balancing test."). Having done
29 so, the Court has concerns over one of the enumerated criteria: the meaning and weight to
30 be assigned evidence offered under § 6(e) – hereinafter, the "necessity clause" – is
unclear. The clause requires judges to evaluate "the necessity of the evidence beyond the

3 The relevant text of §1108 reads: (a) In a criminal action in which the defendant is accused of a sexual offense, evidence of the
defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not
inadmissible pursuant to Section 352.

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1 testimonies already offered at trial.” Thus far, no published case in Washington has
2 interpreted how the necessity clause is to be applied.

3 Defendant contends the clause violates due process because it conditions
4 evidentiary admissibility on the importance of the evidence to the State’s case. The State
5 argues prior sexual contacts with other victims are “certainly helpful and necessary to its
6 case,” but at the same time, the State contends that it does not rely solely on the necessity
7 clause hastening to add that a judge could reasonably find that the other factors to be
8 weighed in RCW 10.58.090(6) provide a sufficient basis to rule the evidence admissible.
9 According to the State then, the Court does not need to evaluate the merits of the case in
10 order to make a “necessity” determination nor does it need to reach the constitutionality
11 of the “necessity” clause. This Court does not agree.

12 By its own terms, the provision applies only when one party “needs” the
13 evidence, presumably for the purpose of shoring up a weak case. At first blush it appears
14 that this clause would have judges peak at the merits of the state’s case without also
15 looking at the merits of the defense’s case. There is Supreme Court precedent which
16 suggests that such one-sided clauses are “arbitrary” for purposes of procedural due
17 process. *Holmes v. South Carolina*, 547 U.S. 319, 331 (2006)(“By evaluating the
18 strength of only one party’s evidence, no logical conclusion can be reached regarding the
19 strength of contrary evidence offered by the other side to rebut or cast doubt.”).
20 Accordingly, the Court holds that RCW 10.58.090(6)(e) violates state and federal due
21 process standards.

22 When only portions of a statute are in conflict with a court rule other portions of
23 the same statute dealing with matters upon which the comparable rule is silent are not
24 overruled and remain in effect. *Malott v. Randall*, 11 Wn.App. 433, 438-9, 523 P.2d 439
25 (1974) *rev. denied* 84 Wn.2d 1010 (1974); *see also*, *State v. Anderson*, 81 Wn.2d 234,
26 236, 501 P.2d 184 (1972) (“An act of the legislature is not unconstitutional in its entirety
27 because one or more of its provisions is unconstitutional.”). Consequently, the Court
28 excludes only § 6(e) from its analysis pursuant to RCW 10.58.090(6). The Court reaches
29 the same conclusion as it would in conducting a traditional ER 404(b) analysis with the
30 caveat that the evidence could have been admitted for any purpose and not limited to
demonstrating that a crime had been committed under the common scheme or plan

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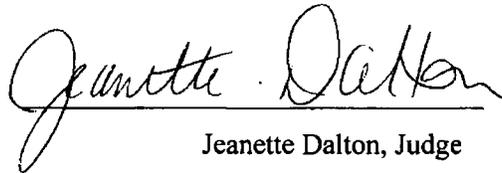
1 exception to ER404(b). *See State v. Devinentis*, 150 Wn.2d 11 (2003). In this case, the
2 State agreed to a limiting instruction.

3 After considering all of the statutory factors save one, the Court finds the
4 evidence of Mr. Romero's prior conviction to be admissible. The testimony of C.M.P.,
5 the younger of the two victims in Mr. Romero's prior offense, is more probative than
6 prejudicial as she was molested beginning at age 13. The alleged victim in the present
7 case, C.R.D., is similarly under-aged as she was approximately eight years old when the
8 Defendant is alleged to have begun molesting her. The testimony of S.M.P., the other
9 victim, who was 20 years old at the time of the offense, is excluded on the basis that her
10 testimony is less relevant and probative than that of her younger sister's as it relates to the
11 propensity of Mr. Romero to commit the particular crime for which he is accused.

12
13 It is hereby,

14 ORDERED that the evidence concerning Defendant Romero's prior conviction as
15 it relates to the younger victim of his prior offense is ADMITTED.

16
17 Dated: This 15th day of May, 2009.

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19 
20 Jeanette Dalton, Judge

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