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COURT OF APPEALS NO. 62862-3-I

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL TYRONE GRESHAM,

Appellant.

BRIEF OF AMICUS CURIAE, THE WASHINGTON ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

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A. INTRODUCTION

In the summer of 2007, Lamin Darboe stood trial for several counts of rape in the second degree in King County Superior Court. Mr. Darboe, a nursing assistant, was accused of repeatedly sexually assaulting a paralyzed, mute woman in his care who could only communicate through a keyboard. The jury was unable to reach a verdict and a mistrial was declared. Afterwards, the prosecutor informed the jurors that Mr. Darboe had been previously accused of other acts of sexual misconduct against women in his care. In a Seattle Post-Intelligencer article describing the trial, one juror expressed frustration that she had not heard that evidence, as it had been excluded under ER 404(b). See Appendix (Tracy Johnson, "Jury split on rape of stroke victim," Seattle Post-Intelligencer, accessed at www.seattlepi.com/local/322085_darboe03.htm on August 24, 2009).

The following winter, during the 2008 Washington Legislative Session, prosecutors sought to change the law to permit jurors to hear evidence of prior sexual misconduct, whether a conviction or a mere allegation, in sex offense prosecutions. The result was SSB 6933. Unlike ER 404(b), which requires that the state identify a purpose for introducing the prior misconduct, this statute would permit the prosecutors to

introduce prior acts of misconduct simply to show propensity. Furthermore, the statute would be limited to sex crime prosecutions.

Much like its model, Federal Rules of Evidence 413-415, SSB 6933 was met with controversy and vigorous opposition, and much of that opposition was reserved for the process by which the new rule was being made. Melanie McAlenan testified on behalf of the Board of Judicial Administration that "a matter of this type of substance should be properly before the Court Rulemaking Committee as opposed to the Legislature." See Testimony of Melanie McAlenan, Senate Judiciary Committee, February 8, 2008, 12:30 PM (accessed at www.tvw.org/media/mediaplayer.cfm?evid=2008020086&TYPE=A&CFID=2283259&CFTOKEN=10911899&bhcp=1 on August 24, 2009). She further noted that Chief Justice Gerry Alexander had hoped to testify on behalf of BJA but was unable to appear because of a scheduling conflict. Finally, she stated that the Superior Court Judges' Association opposed the bill and the District and Municipal Court Judges' Association had signed in with concerns (and not in opposition) simply because they would not hear sex cases, but shared the other judges organizations' concerns about the rulemaking procedure. Defense attorney groups also opposed the bill on similar grounds and additionally pointed out that it would be

"the kiss of death" for fairness in sex crime prosecutions. The bill passed, and is now codified at RCW 10.58.090.

In this amicus curiae brief, WACDL provides historical context on the ban on propensity evidence to support appellant's argument that RCW 10.58.090 directly conflicts with ER 404(b). RCW 10.58.090, by permitting the state to introduce additional acts of sexual misconduct without identifying a particular purpose for that evidence, overturns a rule that dates back to the Star Chamber. This court should find RCW 10.58.090 unconstitutional, reverse Mr. Gresham's conviction, and remand for a new trial.

B. ARGUMENT

1. WHETHER RCW 10.58.090 DIRECTLY CONFLICTS WITH THE BAN ON PROPENSITY EVIDENCE CODIFIED IN ER 404(B), THE CULMINATION OF THREE CENTURIES' WORTH OF ANGLO-AMERICAN JURISPRUDENCE BANNING THE INTRODUCTION OF PROPENSITY EVIDENCE, IS A SUBSTANTIAL QUESTION OF PUBLIC INTEREST THAT MERITS REVIEW BY THE WASHINGTON SUPREME COURT.

> Hold, hold, what are you doing now? Are you going to arraign his whole life? How can he defend himself from charges of which 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 I Wigmore § 194.

Courts have excluded propensity evidence in trials for over three centuries. Imwinkelried, Uncharged Misconduct Evidence, 2:25 (2008). The ban, which has its roots in Restoration England, ultimately resulted in Evidence Rule 404(b), which proscribes the introduction of the defendant's prior bad acts unless the proponent can tie the evidence to an enumerated purpose. RCW 10.58.090, by contrast, expressly permits the introduction of misconduct evidence in a narrow class of criminal prosecutions for the sole purpose of showing propensity, and dispenses with the requirement that the proponent identify a specific use for the evidence. To demonstrate a violation of the separation of powers doctrine, Mr. Gresham must make two showings: first, he must establish that RCW 10.58.090 is a rule of procedure, and second, he must show that the statute directly conflicts with another court rule. Amicus submits that the history underlying the ban on misconduct evidence firmly establishes a stark and irreconcilable conflict between the statute and ER 404(b). WACDL urges this court to find RCW 10.58.090 unconstitutional and restore the propensity ban to the status it has held in Anglo-American jurisprudence for over four hundred years

a. The historical development of the propensity ban shows quick and wide acceptance of the notion that a defendant's trial should be limited to the instant charge.

The ban on propensity evidence was a reaction to the abuses of the Star Chamber in 16th century England. The "routine" practice of admitting propensity evidence, according to a leading treatise on evidence, "reached its zenith during the era of the Star Chamber. The view was wholly in accord with the Chamber's inquisitorial philosophy and procedures." Imwinkelried, Uncharged Misconduct Evidence, 2:25 (2008).

The evidentiary rules governing misconduct were revised during the Restoration. Id. In 1695, Parliament passed the Treason Act, which provided that the defendant could be tried only for the crime with which he or she is charged. Id. This Act, according to Imwinkelried, "helped spur the emergence of the character rule, prohibiting the prosecution from attacking the defendant's character unless the defendant places character in issue." Id. This general rule officially became law in 1810 in Rex v. Cole, which held that character evidence could not be used as circumstantial proof of the defendant's conduct. Id.

American courts more or less paralleled the English courts in the development of the propensity ban. As Professor Julius Stone writes in a seminal article tracing the lineage of propensity case law in American courts, "[a]s there was in England, so in America there is a pervading belief among judges and text writers, which has scarcely been questioned since it arose about 1850, that in the beginning the law said: 'Let no

similar facts be admitted,' and no similar facts were admitted." Julius Stone, "The Rule of Exclusion of Similar Fact Evidence: America," 51 Harv. L. Rev. 988, 989 (1938).

Courts have recognized the inherent unfairness of permitting introduction of misconduct evidence for centuries. RCW 10.58.090 violates that sense of fairness that firmly underlies this prohibition.

b. History also bears out that if a court is to admit misconduct evidence, the proponent must specify a carefully-delineated use for the evidence.

Additionally, a review on the development of 404(b) shows that the need to identify the specific relevance of the otherwise-inadmissible misconduct evidence has an equally long pedigree. Originally, the main theory for exclusion of propensity evidence was that it was irrelevant. Id. at 997 (citing State v. Odel, 3 Brevard 552 (S.C. 1816), Keith v. Taylor, 3 Vt. 153 (1830)). Admissibility depended upon whether the evidence was, in any way, "relevant to a fact in issue otherwise than by merely showing propensity?" Stone, 51 Harv. L. Rev at 1004. As stated in Walker v. Commonwealth:

> ...there is no reason why the criminality of such intimate and connected circumstances should exclude them more than other facts apparently innocent...but if the circumstances have no intimate connection with the main fact; if they constitute no link in the chain of evidence; then, supposing them innocent, their admission, to be sure, may do no harm, yet they ought to be excluded, because they are irrelevant; but if they denote other guilt, they are

> not only irrelevant, but they do injury, because they have a tendency to prejudice the minds of the jury; for this additional reason they ought to be excluded.

I Leigh 574 (Va. 1829), cited in Stone, 51 Harv. L. Rev. at 997-98.

By the late nineteenth century, although much confusion existed about whether the rule regarding propensity evidence was inclusionary or exclusionary—i.e., did the courts include the propensity evidence, so long as the proponent advanced a logical relevance theory other than character evidence, or did the courts exclude the evidence if it did not fit into one of the exceptions to the propensity ban?—one facet was clear: the proponent of the evidence had to identify a reason, other than propensity, to admit it. Both American and English courts during this time relied upon the exclusionary rule and others relied upon the inclusionary rule. Id. at 1004-05. In American jurisprudence, the advent of Federal Rule of Evidence 404(b) firmly established the inclusionary/theory of logical relevance approach to propensity evidence as the prevailing view in American courts. Id. at 2:31.

Regardless of whether one adopts the exclusionary or inclusionary approach, both views always required that the proponent advance a theory behind the introduction of the evidence that did not simply fall under the general category of "propensity."

c. Washington, like its counterparts, has also historically required that the person introducing the misconduct evidence identify a theory of relevance.

The development of the propensity ban in Washington reveals no deviation from English and American common law. Washington was an adherent to the exclusionary approach, and like its counterparts, required that the person seeking to admit misconduct evidence identify its relevancy. In 1896 (in what appears to be the earliest statement of this rule), in a prosecution for a worthless check, the Washington Supreme Court held that it was error to admit evidence that the defendant had previously drawn bad checks on that account: "[w]e are, of course, aware that there are exceptions to the general rule that it is not competent to show the commission of another distinct crime by the defendant for the purpose of proving that he is guilty of the crime charged." State v. Bokien, 14 Wash. 403, 414, 44 P. 889 (1896).

With the adoption of the Federal Rules of Evidence in Washington on April 2, 1979, ER 404(b) codified the common law on propensity evidence, firmly establishing the ban on using evidence of other crimes to prove character, but permitting that evidence to be introduced for other purposes enumerated in the rule. See Tegland, Washington Practice Series: Evidence Law and Practice, § 404.1 (2008).

d. The long, well-established history of the ban on propensity evidence is proof that RCW 10.58.090,

> which regulates matters of court procedure, cannot be harmonized with ER 404(b), a validly-promulgated court rule, and must be declared unconstitutional.

As recently as September 17, 2009, the Washington Supreme Court has affirmed that laws that regulate court procedural matters violate the doctrine of separation of powers. "When the activity of one branch of government invades the prerogatives of another, there is a violation of the doctrine of separation of powers." Putnam v. Wenatchee Valley Medical Center, 166 Wn.2d 974, 980, 216 P.3d 374 (2009). There, the court agreed with petitioner's argument that a law which changed the medical malpractice pleading requirements "encroach[ed] on the judiciary's power to set court rules." Id. at 980-81. In describing the application of the separation of powers doctrine, the court explained:

> Some fundamental functions are within the inherent power of the judicial branch, including the power to promulgate rules for its practice. If a statute appears to conflict with a court rule, this court will first attempt to harmonize them and give effect to both, but if they cannot be harmonized, the court rule will prevail in procedural matters.

Id. at 980-81 (internal citations omitted).

Because this statute pertains to court procedure—regulation of the admission of evidence—this court must then determine if (1) there is a conflict and (2) whether the conflict can be reconciled. Indeed, the appellate court in Mr. Gresham's case acknowledged that there was an

"apparent" conflict between ER 404(b) and RCW 10.58.090 because of "the absence of any language in the statute limiting the purposes for which past acts evidence may be admitted, while ER 404(b) limits use of past acts evidence for specific purposes only...." 2009 WL 4931789 at *3.

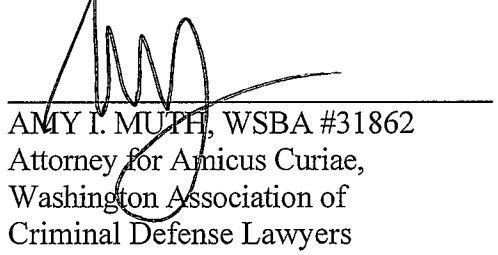
RCW 10.58.090 and ER 404(b) represent fundamentally different views about whether juries may consider misconduct evidence for the sole purpose of propensity. This procedural statute cannot be harmonized with ER 404(b), and must be struck down as unconstitutional.

C. CONCLUSION

For the foregoing reasons, amicus curiae urges this court to rule that RCW 10.58.090 is unconstitutional, reverse Mr. Gresham's conviction, and remand for a new trial.

DATED this 19th day of March, 2010.

RHODES & MERYHEW



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APPENDIX

Jury split on rape of stroke victim

Nursing assistant case a mistrial

Last updated July 2, 2007 9:23 p.m. PT

By TRACY JOHNSON
P-I REPORTER

A King County jury could not agree Monday on whether a Seattle nursing assistant raped a mute and paralyzed stroke victim last year, leading to a mistrial.

Prosecutors must now decide whether to retry Lamin Darboe, a 40-year-old man who has been accused -- but never convicted -- of rape and other sexual misconduct several other times in recent years.

Jury forewoman Stephanie Muth said jurors were split roughly 8-4 on three of the second-degree rape charges, with most leaning toward a guilty verdict. However, they voted 11-1 to find him not guilty of a fourth charge.

She said some jurors were troubled by inconsistencies in statements made by the alleged victim, a woman who cannot speak and gave her emotional testimony last week in writing.

"I thought that the victim's testimony was quite consistent, given her inability to communicate," said Muth, who said she voted to convict Darboe on all counts.

But other jurors didn't think there was enough evidence. At least one juror who voted to acquit Darboe was upset to learn afterward that it wasn't the first time he'd been accused.

"I didn't make the wrong decision based on the evidence, but it does hurt me to know that he has victimized before," said the juror, Linda, who declined to give her last name.

She said it also bothered her to see a smile spread across Darboe's face when Superior Court Judge Greg Canova declared a mistrial.

Darboe is accused of repeatedly raping and sexually abusing the patient at Kindred Hospital, a Northgate-area long-term care facility, in late June and early July of last year.

Prosecutors say the woman, then 31, was unable to resist or call for help. At the time, the mother of four could communicate only by moving her head. The allegations came to light when her friend asked her about Darboe and she began crying.

Darboe's attorney, Gene Piculell, said the woman has given conflicting accounts of what happened. He said the jurors were "obviously reasonable individuals, and they saw significant problems with the evidence."

The jury was troubled that the woman reported that a nurse interrupted one attack, yet that nurse was never found, Muth said.

Prosecutors plan to review the case and decide whether to bring a second trial against Darboe, said Deputy Prosecutor Lisa Johnson, who leads her office's Special Assault Unit.

"We certainly respect the jury's decision," she said. "It's disappointing that they didn't conclude, but we understand these cases are difficult."

In recent years, Darboe also was accused of sexually harassing two patients at Swedish Medical Center and sexually touching one.

Outside the hospital setting, he has been accused of raping two other women, although Snohomish County prosecutors didn't pursue charges in one case after Darboe said it was consensual. A jury acquitted him in the other case.

Darboe remains in King County Jail on $250,000 bail.

P-I reporter Tracy Johnson can be reached at 206-467-5942 or tracyjohnson@seattlepi.com.

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CERTIFICATE OF SERVICE

I certify that on the ____ day of _____, 2010, a true and correct copy of the foregoing PETITION FOR REVIEW in State of Washington v. Michael Tyrone Gresham was served upon the following individuals by depositing same in the United States Mail, first class, postage prepaid:

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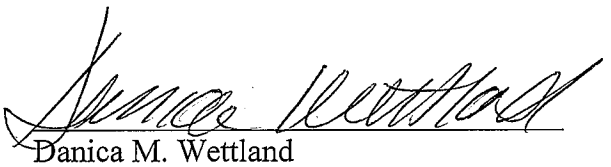

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