NO. 104047-4

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

BILLY MILLER,

Petitioner.

STATE'S ANSWER TO PETITION FOR REVIEW

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A. ISSUE PRESENTED[1]

Did the Court of Appeals correctly conclude that sexual misconduct does not fall under ER 404(b) when it constitutes the *actus reus* of the charged crime?

B. STATEMENT OF THE CASE

The State relies on the facts previously discussed in the Brief of Respondent and the Court of Appeals' partially published opinion affirming Miller's conviction, *State v. Miller*, 33 Wn. App. 2d 560, 562 P.3d 1281 (2025).

C. ARGUMENT

"A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of

[1] The State rests on its briefing and the reasoning in the Court of Appeals' opinion to answer the other bases on which Miller seeks this Court's review.

the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court." RAP 13.4(b).

Miller asks this Court to accept review based on an alleged conflict between *Miller* and cases analyzing ER 404(b). Pet. for Rev. at 3. This Court should deny review because Miller is fundamentally mistaken in concluding that ER 404(b) applies to these facts. The Court of Appeals' reasoning is consistent with both longstanding practice and sound public policy.

ER 404(b) prohibits the admission of "other" acts "for the purpose of proving action in conformity therewith on a particular occasion." "Other" acts must, as a matter of common sense, be uncharged conduct as opposed to an element of the charged offense. In this case, however, Miller's sexual abuse of the victim constituted "acts within the charging period that could support any of the four charged counts of rape of a child in the first degree." *Miller*, 33 Wn. App. 2d at 565. These were

not "other" acts, but the *actus reus* of the crimes charged in the information.

Miller has not identified any Washington precedent applying ER 404(b) under these circumstances. He relies on *State v. Gresham*, 173 Wn.2d 405, 414, 269 P.3d 207 (2012), and *State v. Saltarelli*, 98 Wn.2d 358, 360, 655 P.2d 697 (1982), both of which involved the admission of sexual misconduct previously perpetrated against uncharged victims. Pet. for Rev. at 12, 21; *Gresham*, 173 Wn.2d at 415-18; *Saltarelli*, 98 Wn.2d at 360. This is a classic scenario in which ER 404(b) applies, but it is not one that occurred in Miller's case.

Contrary to Miller's position, this Court has observed that "evidence of other uncharged sexual misconduct may be admissible *as part of the crime itself* in appropriate cases." *State v. Crossguns*, 199 Wn.2d 282, 294, 505 P.3d 529 (2022) (emphasis added). This makes sense, as Washington courts have long recognized that resident child abuse cases often

involve long charging periods in which young victims will have difficulty recalling specific dates and times. *See generally State v. Hayes*, 81 Wn. App. 425, 435-38, 914 P.2d 788 (1996) (affirming four counts of child rape based on generic testimony that assaults occurred "at least 'four times' and some '[t]wo or three times a week' between July 1, 1990 and May 31, 1992").

Miller suggests that the State's evidence should be strictly limited by the number of counts—that is, if four counts are charged, only four acts can be described without implicating ER 404(b). Pet. for Rev. at 16. But if this were the rule there would be no need for *Petrich*[2] instructions, which are a well-established component of Washington trial practice. Instead, courts have long recognized that prosecutors may present evidence of multiple acts that could constitute the crime charged and the jury then determines which have been proven

[2] *State v. Petrich*, 101 Wn.2d 566, 683 P.2d 173 (1984).

beyond a reasonable doubt. *See generally In re Pers. Restraint of Mulamba*, 199 Wn.2d 488, 507, 508 P.3d 645 (2022).

Miller's proposed application of ER 404(b) would also be poor policy. The type of pre-trial election Miller presumably envisions will often be impractical in serial abuse cases, where "[t]o require [the victim] to pinpoint the exact dates of oft-repeated incidents of sexual contact would be contrary to reason." *Hayes*, 81 Wn. App. at 436 (internal quotation marks omitted). The more likely result, as the Court of Appeals predicted, would be for prosecutors to charge as many counts as possible to ensure all relevant evidence is admitted. *Miller*, 33 Wn. App. 2d at 566. This is an outcome that would not benefit anyone.

D. CONCLUSION

For all the foregoing reasons, this Court should deny Miller's petition for review.

I certify this document contains 796 words, excluding those portions exempt under RAP 18.17.

DATED this 6th day of May, 2025.

Respectfully submitted,

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