No. 84148-9 (consolidated with No. 84150-1)

J.M. JOHNSON, J. (concurring in part and dissenting in part)—The State of Washington charged petitioner Michael Tyrone Gresham with "three counts of child molestation in the first degree and one count of attempted child molestation in the first degree for repeatedly molesting an eight-year-old girl from 1998 to 2002." *State v. Gresham*, 153 Wn. App. 659, 663, 223 P.3d 1194 (2009). A jury found Gresham guilty on all four charges. *Id*. The eight-year-old victim in the present case was young J.L. Majority at 7.

Unfortunately, J.L. was not Gresham's first child victim. Prior to the repeated molestation of J.L., Gresham was convicted of molesting *another* nine-year-old girl. *Gresham*, 153 Wn. App. at 663. Today, the majority reverses Gresham's convictions for molesting J.L. because the jury learned of Gresham's sexual abuse of the other child victim. This result is legally

incorrect and ultimately, unjust.

The majority opinion holds that RCW 10.58.090, which allows evidence of a defendant's prior sexual offenses in a criminal prosecution for another sexual offense, violates the separation of powers doctrine. Ironically, the majority concludes that it is *the legislature* that has failed to respect the sovereignty of its sister-branches of government. I disagree. In this case, the shoe is on the other foot.

I would hold that RCW 10.58.090 is constitutional. There is no irreconcilable conflict between RCW 10.58.090 and ER 404(b) and thus, the statute does not infringe on the power of the judiciary. By striking down RCW 10.58.090, the majority opinion preserves an overly rigid interpretation of ER 404(b) at the expense of the victims of sexual abuse. Moreover, the majority opinion reaches paradoxical results in the present cases, finding the admission of mere *accusations* against Roger Alan Scherner harmless while reversing Gresham's child molestation convictions due to the admission of his prior *conviction*. I concur in the majority opinion's affirmation of Scherner's convictions. However, with respect to the majority's judgment that RCW 10.58.090 violates the constitution and its reversal of Gresham's child

molestation convictions, I respectfully but strongly dissent.

RCW 10.58.090 does not violate the separation of powers doctrine. The separation of powers is not a one-way street; it requires courts to respect the considered judgments of the legislature as it requires the legislature to respect the judgments of this court. Only where there is an *irreconcilable conflict* between our procedural rules and a rule promulgated by the legislature will we strike the legislative enactment down. *City of Fircrest v. Jensen*, 158 Wn.2d 384, 394, 143 P.3d 776 (2006). "'The question to be asked is not whether two branches of government engage in coinciding activities, but rather whether the activity of one branch threatens the independence or integrity or invades the prerogatives of another.'" *Id*. (internal quotation marks omitted) (quoting *State v. Moreno*, 147 Wn.2d 500, 505-06, 58 P.3d 265 (2002)).

RCW 10.58.090 does not threaten judicial independence or integrity and does not preclude us from effectively administering justice in Washington's courts. Other jurisdictions across the country routinely administer justice through provisions substantially similar to both RCW 10.58.090 and ER 404(b). Both the federal courts and military courts-martial

have similar provisions. *See* Fed. R. Evid. 404(b); Fed. R. Evid. 413-14; Mil. R. Evid. 404(b); Mil. R. Evid. 413-14. Additionally, at least one-fifth of state jurisdictions also allow for a propensity inference in sexual offense cases. *See* 1 Edward J. Imwinkelried, Uncharged Misconduct Evidence §§ 2:23, 4:15 (rev. ed. 2009).

Washington law *already* allows for a propensity inference in cases involving sexual misconduct. In its careful exposition of ER 404(b), the majority correctly notes that the general rule "is a categorical bar to admission of evidence for the purpose of proving a person's character and showing that the person acted in conformity with that character." Majority at 11. Likewise, the majority accurately states that the illustrative list of other purposes for which a party may offer evidence of prior bad acts in the second sentence of ER 404(b) is not a list of "'exceptions.'" *Id*. at 23.

However, the majority incorrectly concludes that there are "no exceptions" to ER 404(b). *Id*. at 22. This is not accurate. This court already recognizes the "lustful disposition" exception, notwithstanding ER 404(b), in cases involving sexual misconduct. *State v. Ferguson*, 100 Wn.2d 131, 133-34, 667 P.2d 68 (1983) ("This court has often invoked an *exception* in similar

cases to permit evidence of collateral sexual misconduct when it shows a lustful disposition directed toward the offended female." (emphasis added)). If prior sexual assaults against the same victim are probative and relevant evidence, it is hard to see why the same rationale does not apply to similar prior sexual assaults against third parties. 1 Imwinkelried, *supra*, at § 4:15, at 4-89 to -90 ("If there is no qualitative difference between [sexual misconduct against the same victim and against a third party] and the uncharged misconduct doctrine does not bar the former, it is difficult to defend an absolute exclusion of misconduct involving third parties."). We can harmonize RCW 10.58.090 and ER 404(b) by viewing the statute as an additional legislatively created exception.

The majority tries to distinguish the lustful disposition exception in a footnote. Majority at 23 n.4. The majority opinion argues that when admitting lustful disposition evidence, the purpose of the prior sexual offenses is "not to demonstrate the defendant's character but to demonstrate the nature of the defendant's relationship with and feelings toward the victim." *Id*.

This is inaccurate. A "disposition" is by definition a description of "[t]emperament or character." Black's Law Dictionary 539 (9th ed. 2009).

Under the lustful disposition exception, the court admits evidence of the defendant's prior sexual misconduct affecting the victim "'for the purpose of showing the lustful inclination of the defendant toward the offended female, which in turn makes it more probable that the defendant committed the offense charged.'" *State v. Ray*, 116 Wn.2d 531, 547, 806 P.2d 1220 (1991) (quoting *Ferguson*, 100 Wn.2d at 134). A propensity inference by any other name is still a propensity inference – whether directed to the same victim or to third parties.

Intellectual honesty demands that we recognize lustful disposition evidence for what it is: a propensity inference that, based upon the defendant's past sexual abuse of the victim, he is more likely to have committed the charged sexual offense against the same victim. *See* 1 Imwinkelried, *supra*, at § 4:14, at 4-76 ("In some jurisdictions, intellectual honesty triumphed, and the courts eventually acknowledged that they were fashioning a special exception [in sexual offense cases] to the norm prohibiting the use of the defendant's disposition as circumstantial proof of conduct."); *see also* 5 Karl B. Tegland, Washington Practice: Evidence Law and Practice § 404.26, at 581 (5th ed. 2007) ("The courts have seldom

articulated any way of reconciling the traditional lustful-disposition rule with Rule 404(b), but the traditional rule is so ingrained that it is unlikely to change.").

The legislature has found that allowing the propensity inference in sexual offense cases though court application of RCW 10.58.090 serves important policy goals. Highly probative circumstantial evidence may be considered in cases in which direct evidence rarely exists. Sexual offenders commit their crimes in secret and with an eye toward avoiding detection. Often there is *no* physical evidence of the sexual abuse and *no* third party witnesses. The consequence is that sexual offense cases routinely involve a competition between two lines of conflicting testimony: the victim's word against the defendant's. This problem is further exacerbated when the victim is a child whose testimony may be impeached due to the victim's tender age and the effects of victimization. Under such circumstances, the jury should not be restricted to decide the case without evidence that the defendant stands previously convicted of sexually assaulting other children.

It is well established from studies around the country that sexual offenders are repetitious in their predatory conduct, demonstrating very high

rates of recidivism. Social scientific studies now confirm empirically what most citizens know by common sense. A person who sexually assaulted others in the past is more likely to reoffend in the future than an individual who lacks such a history. *See* Ellen H. Meilaender, Note, *Revisiting Indiana's Rule of Evidence 404(b) and the* Lannan *Decision in Light of Federal Rules of Evidence 413-415*, 75 Ind. L.J. 1103, 1116 (2000) ("[R]esearch supports the conclusion that, 'contrary to the impression yielded by the general literature, [sex] offenders are serious recidivists,' although much of their recidivism goes undetected." (second alteration in original) (quoting A. Nicholas Groth et al., *Undetected Recidivism Among Rapists and Child Molesters*, 28 Crime & Delinq. 450, 456 (1982))). Moreover, these empirical studies likely *underestimate* the level of recidivism among sex offenders. *Id*. (citing Lita Furby et al., *Sex Offender Recidivism: A Review*, 105 Psychol. Bull. 3, 4, 27 (1989); Groth et al., *supra*, at 456; Joseph J. Romero & Linda Meyer Williams, *Recidivism Among Convicted Sex Offenders: A 10-Year Followup Study*, 49 Fed. Probation 58, 63-64 (1985)).

To recognize the importance of providing the jury with information of a defendant's past sexual offenses, consider Gresham. Between December

1998 and September 2003, young J.L. stayed at Gresham's house on a monthly basis. Majority at 7. While staying at the home, Gresham repeatedly molested J.L., fondling her and sexually touching her. *Id*. The final act of molestation occurred in J.L.'s own home when Gresham, acting as a baby-sitter, snuck into her room and fondled her in her bed. *Id*. at 7-8. Like many child victims, J.L. did not reveal the molestation until much time had passed. *Id*. at 8. The criminal investigation occurred several years later. *Id*.

Due to the secretive nature of Gresham's molestation, there was little evidence of his crime. The jury heard J.L. testify that Gresham molested her, heard her parents testify that Gresham had the opportunity to commit the crimes, and heard a detective discuss the investigation. *Id*. at 27-28. The majority concludes that hearing this evidence alone, a jury might not have convicted Gresham of the charged offenses. *Id*. at 28.

However, that is not the only evidence that the jury heard in Gresham's case. The jury also based its decision on the fact that Gresham pleaded guilty to sexually molesting *another* young girl over a period of four years. *Id*. at 8. In a justice system aimed at discerning truth, it is hard to understand why the

jury should be deprived of such obviously probative and crucial information before rendering its verdict.

Of course, the decision as to when evidence of prior sexual offenses *should* be admitted in sexual offense trials will continue to remain a hotly debated issue. Important policy concerns weigh heavily on both sides. These matters were heard and presumably considered by the legislature and the governor when adopting this law. It is the constitutional role of the legislature to fully consider the policy adopted in RCW 10.58.090. Our decision in this case should be to respect that legislative decision that is actually supported by both scientific evidence and common sense. As Justice Holmes once noted:

> I think the proper course is to recognize that a state legislature can do whatever it sees fit to do unless it is restrained by some express prohibition in the Constitution of the United States or of the State, and that Courts should be careful not to extend such prohibitions beyond their obvious meaning by reading into them conceptions of public policy that the particular Court may happen to entertain.

Tyson & Brother-United Theatre Ticket Offices, Inc. v. Banton, 273 U.S. 418, 446, 47 S. Ct. 426, 71 L. Ed. 718 (1927) (Holmes, J., dissenting) *overruled in part on other grounds by Olsen v. State of Nebraska ex rel.*

Western Reference & Bond Ass'n, 313 U.S. 236, 61 S. Ct. 862, 85 L. Ed. 1305 (1941).

Conclusion

I would hold that RCW 10.58.090 is a constitutional exercise of legislative power. This court has long allowed propensity inferences in sexual offense cases where prior acts against the same victim were involved, notwithstanding ER 404(b). There is no reason to believe that the legislature's and the governor's determination that the same should apply to similar sexual violations against third parties somehow invades the integrity and independence of the judiciary. Such a legislative determination accords with another important principle of our state constitution: protecting the rights of unusually vulnerable victims. *See* Wash. Const. art. I, § 35.

Apparently, the only solution acceptable to the majority is for this court to consider and adopt changes that parallel the provisions of Fed. R. Evid. 413-14 for adoption into the Washington Rules of Evidence. We should do so and incorporate the legislative record for RCW 10.58.090 as part of our record.

The separation of powers doctrine imposes an obligation on *this court*

to respect the considered judgments of the legislature and the governor. Whether courts should admit evidence of prior sexual offenses in sexual offense trials is a contested matter that is amenable to legislative solutions reached after full fact-finding, discussion, and debate at legislative hearings. Based on separation of powers principles I am compelled to the opposite conclusion of the majority. I concur in the majority's affirmation of Scherner's convictions. With respect to its reversal of Gresham's child molestation convictions, I respectfully but strongly dissent.

AUTHOR:

Justice James M. Johnson

WE CONCUR: