IN THE DISTRICT COURT FOR KING COUNTY

SOUTH DIVISION, KENT COURTHOUSE

IN AND FOR THE STATE OF WASHINGTON

State of Washington,
Plaintiff,

vs.

Todd Martin,
Brian Gregory,
Michael Malnatti,
Linda Elija
et. al.

Nos. C0543610
C05437418
CQ 32735KC
C0543715

DECISION OF THE COURT
ON THE MOTION OF DEFENSE
TO FIND SHB3055
UNCONSTITUTIONAL, AND
SUPPRESS THE BAC TESTS

The Court sitting en banc Judge J. Eiler, Judge V. Seitz, and Judge Pro Tem R. McSeveney, having considered the defense motions and all the briefs submitted by all counsel, and having heard the oral arguments, the Court makes the following analysis and rulings:

The defendants move the Court to suppress the DUI test evidence because Substitute House Bill 3055 (SHB3055) is void in that it:

1) violates Article II section 19 of the Washington State Constitution;
2) violates the separation of powers doctrine;
3) provides for a mandatory rebuttable presumption in a criminal case in violation of the rights guaranteed the accused in a criminal case by the Washington State and United States Constitutions.

I. Does SHB 3055 Violate Article II, Section 19?

Substitute House Bill 3055 (SHB3055) was enacted by the Legislature in the 2004 session and became effective June 10, 2004. The title is "AN ACT Relating to the admissibility of DUI tests" and is attached to this decision as Appendix A for reference. The legislative purpose is clearly stated in Section One:

> Sec.1. The legislature finds that previous attempts to curtail the incidence of driving while intoxicated have been inadequate. The legislature further finds that property loss, injury, and death caused by drinking drivers continue at unacceptable levels. This act is intended to convey the seriousness with which the legislature views this problem. To that end the legislature seeks to ensure swift and certain consequences for those who drink and drive.
>
> To accomplish this goal, the legislature adopts standards governing the admissibility of tests of a person's blood or breath. The standards will provide a degree of uniformity that is currently lacking, and will reduce the delays caused by challenges to various breath test instrument components and maintenance procedure. Such challenges, while allowed, will no longer go to admissibility of test results. Instead, such challenges are to be considered by the finder of fact in deciding what weight to place upon an admitted blood or breath test result.

Section Two reenacts and amends RCW 46.20.308 "Implied Consent – Test Refusal – Procedures". Section Three reenacts and amends RCW 46.20.3101 "Implied consent – License sanctions, length of". Section Four amends RCW46.61.506 "Persons under influence of intoxicating liquor or drug – Evidence – Tests – Information concerning tests".

The defendants challenge SHB 3055 as a violation of Washington State Constitution Article II section 19. The Court begins its analysis with the premise a party challenging a statute's constitutionality bears the heavy burden of establishing its unconstitutionality beyond a reasonable doubt. Amalgamated Transit Union Local 587 v. State, 142 Wn.2d 183, 205, 11 P.3d 762, 27 P.3d 608 (2000); Citizens for Responsible Wildlife Management v. State, 149 Wn.2d 622, 631, 71 P.3d 644 (2003); State ex. rel. Heavey, 138 Wn.2d 800. 808, 982 P.2d 61 (1999); Gerberding v. Munro, 134 Wn.2d 188, 196, 949 P.2d 1366 (1998).

Article II section 19 of the Washington State Constitution provides: "[n]o bill shall embrace more than one subject, and that shall be expressed in the title."

> There are two distinct prohibitions in article II, section 19. *See Patrice v. Murphy* 136 Wn.2d 845, 852, 966 P.2d 127 (1998). The first is that no bill shall embrace more than one subject. The purpose of this prohibition is to prevent logrolling or pushing legislation through by attaching to it other legislation. *Power, Inc. v. Huntley*, 39 Wn.2d 191, 198, 235 P.2d 173 (1951); *see also State v. Broadaway*, 133 Wn.2d 118, 124, 942 P.2d 363 (1997); *State v. Thorne*, 129 Wn.2d 736, 757, 921 P.2d 514 (1996); *Flanders v. Morris*, 88 Wn.2d 183, 187 558 P.2d 769 (1977). The second prohibition is that no bill shall have a subject which is not expressed in the title. The purpose of this prohibition is to notify members of the

> Legislature and the public of the subject matter of the measure. *Power*, 39 Wn.2d at 198; *see also Broadaway*, 133 Wn.2d at 124; *Thorne*, 129 Wn.2d at 757; *Flanders*, 88 Wn.2d at 187.

Amalgamated, 142 Wn.2d at 207.

Violations of either of these two distinct prohibitions will render SHB 3055 unconstitutional. This Court finds violations of both prohibitions rendering this bill unconstitutional as our analysis will demonstrate.

A. Single Subject Rule

In determining whether SHB 3055 contains more than one subject in violation of Article II section 19, the Court begins its analysis with the bill's title "AN ACT Relating to admissibility of DUI tests". The Court agrees with the Callahan brief at p.9:

> Following the title are amendatory references that are not part of the title. These references to sections of the RCW do not state a subject; the title relevant to the Article II, Section 19 inquiry is "the word, phrase, or phrases following 'AN ACT Relating to . . .' and preceding the first semicolon." State v. Thomas, 103 Wn.App. 800, 14 P.3d 854 (2000) (citing Fray v. Spokane County, 134 Wn2d 637, 654-55, 952 P.2d 601 (1998).

The prosecution urges the Court to adopt the position that the title of an amendatory act is sufficient when the title identifies and purports to amend the original act RCW 46.61.506 in Title 46 "An Act Relating to vehicles . . . ." Belancsik v. Overlake Memorial Hospital, 80 Wn.2d 111 (1971); Water District No. 105 v. State, 79 Wn.2d 337 (1971). The reasoning in this short line of cases not addressing sufficiency of the title of an amendatory act if the new amendments are within the purview of the *original* act, has not been followed by the Washington State Supreme Court after the Belancsik case. And this Court declines to follow that reasoning now; rather we will follow the consistent precedent in the Supreme Court cases from 1973 to the present day. Wash. State Sch. Dir. Ass'n et al. v. Dept. of Labor and Industries, 82 Wn.2d 367 (1973); Flanders v. Morris, 88 Wn.2d 183 (1977); Wash. Educ. Ass'n v. State, 97 Wn.2d 899 (1982); Scott v. Cascade Structures, 100 Wn.2d 537 (1983); Daviscourt v. Peistrup, 40 Wn.app 433 (1985); State Fin. Comm.. v. O'Brien, 105 Wn.2d 78 (1986); State v. Thorne, 129 Wn.2d 736 (1996); Charron v. Miyahara, 90 Wn.App 324 (1998); Patrice v. Murphy, 136 Wn.2d 845 (1998); Fray v. Spokane County, 134 Wn.2d 637 (1998); State v. Thomas, 103 Wn.App 800 (2001); Bennett v. State, 117 Wn.App. 483 (2003); Retired Pub. Emp. Council of Wash. V. Charles, 148 Wn.2d 602 (2003).

Therefore, the title of an act consists of the words used in the title and it does not include amendatory references with RCW citations.

The next question is whether the title of SHB 3055 is a general or restrictive title. "The Legislature may, if it chooses, adopt a very broad and comprehensive title in a bill, in which case great liberality will be indulged to hold that any subject reasonably germane to such title may be embraced within the body of the bill." DeCano v. State,7 Wn.2d 613, 627 (1941). "There is no violation of Article II Section 19 even if a general subject contains several incidental subjects or subdivisions." Amalgamated at 207 citing Washington Federation of State Employees v. State, 127 Wn.2d 544, 901 P.2d 1028 (1995).

In contrast, a restrictive title is more narrow and specific; the Callahan brief covers the issue thoroughly and we will not repeat the analysis here. The Court could list all the general and restrictive title cases, but it will not because it would not be enlightening or helpful in discussing whether SHB 3055 title is general or restrictive. It has been a judicial challenge to discern an analysis, theme, trend or serendipity for the reasons our courts have decided the distinction between general and restrictive titles in legislative enactments. With great respect to both branches of our state government, this Court can discern that the Legislature has a much improved track record of writing general titles in the past four decades which has been recognized and upheld as general titles by the Supreme Court. This Court finds "AN ACT Relating to admissibility of DUI tests" is sufficiently broad and comprehensive to be a general title for any subject reasonably germane to the subject of DUI tests admissibility to be included in SHB 3055.

The analysis continues to consider whether there is rational unity. "Whether a general title is used, all that is required is rational unity between the general subject and the incidental subjects." Amalgamated at 209; Wash. Fed'n at 556. The Court in Amalgamated found that the test of rational unity was where a voter/legislator was forced to vote for the whole bill despite the disapproval of an unrelated section.

> In deciding whether a measure contains a single subject, however, the constitutional inquiry is founded on the question whether a measure is drafted in such a way that those voting on it nay be required to vote for something of which the voter disapproves in order to obtain approval of an unrelated law. Wash. Fed'n, 127 Wn.2d at 552; Wash.Toll Bridge Auth. V. State, 49 Wn.2d 520, 525, 304 P.2d 676 (1956). Thus, regardless of what is in the *Voters Pamphlet* or the history of the initiative, the rational relationship Inquiry centers on what is in the measure itself, i.e., whether the measure contains unrelated laws.

Amalgamated at 213.

> We conclude that this single subject issue is controlled by Wash. Toll Bridge Auth. v. State, 49 Wn.2d 520, 309 P.2d 676 (1956), relied upon by the Cities, Amalgamated Transit, and Amicus League of Women Voters. In that case, a new act

> was passed which provided procedures for establishing and financing toll roads, and also provided specifically for a toll road from Tacoma to Everett. The title included both of these purposes. The court held this was a general title and adequately expressed the subjects in the act. *Id.* At 523. However, the court held that the two were not germane to each other because one purpose of the act was to provide for a specific road which was subject to accomplishment and not continuing in nature, while the second purpose did not pertain to any specific road but was continuing in effect. The act was unconstitutional because it contained two subjects in both the title and the body. Wash. Toll Bridge Auth., 49 Wn.2d at 524.

Amalgamated at 216.

> We conclude that I-695 has a general title. However, There is no rational unity between the subjects of I-695. Similar to the act in Wash. Toll Bridge Auth. v. State, I-695 also has two purposes: to specifically set license tab fees at $30 and to provide a continuing method of approving all future tax increases. Further, neither subject is necessary to implement the other. I-695 violates the single-subject requirement of article II, section 19 because both its title and the body of the act include two subjects: repeal of the MVET and a voter approval requirement for taxes.

Amalgamated at 217.

In the case at bar, the State itself admits to more than one subject in the bill: "The 2004 amendments themselves include topics such as the blood test relating to a DUI arrest, license suspension arising from a DUI arrest, the Implied Consent Warnings read as part of a DUI arrest, and procedural changes regarding the arrest of citizens under twenty-one for DUI. Laws of 2004, Ch.68." State's Response at page 10. The State seeks to save this flaw in the single subject rule by reference to the amendments to RCW 46.61.506, 46.20.308 and 46.20.3101 language **as part of the title**. The attempt fails in light of our ruling that references to sections of RCW are not the title; the words are the title. We agree with the State that there are several different subjects in SHB 3055, some of which are reasonably germane to the subject of the admissibility of DUI tests and several subjects that have a different purpose, and neither subject is necessary to implement the other. Amalgamated, at 217. Even the King County District Court in Bellevue v. Patrick Gosthnian, C#BC 137862 and Lubmir Cinek, C#BC 136654, (Jan. 21, 2005) upholding SHB 3055 admits to two subjects: "The stated purpose and title of SHB 3055, which encompasses both breath test issues and implied consent warning issues with a rational unity, fall within the purview of previously-enacted statutes dealing with the admissibility of DUI tests." Bellevue at page 2. The Bellevue Court relied upon

Belancsik reasoning which we have previously discussed and decline to follow for reasons stated above.

SHB 3055 Sections 2 and 3 are amendments and reenactments to laws that deal with implied consent warnings and license sanctions: RCW 46.20.308 "Implied Consent – Test Refusal – Procedures" and RCW 46.20.3101 "Implied Consent – License sanctions – length of". Neither Section 2 or 3 have a rational unity with the title "AN ACT Relating to admissibility of DUI tests" or RCW 46.61.506 "Persons under influence of intoxicating liquor or drug – Evidence – Tests – Information concerning tests", or the purposes stated in Section 1 "[s]tandards governing the admissibility of tests of a person's blood or breath . . . challenges are to be considered by the finder of fact in deciding what weight to place upon the admitted blood or breath test result. . . .

The Court adopts and applies the Amalgamated reasoning to conclude there is no rational unity between Sections One and Four, and Sections Two and Three; Sec. 2 and 3 are not reasonably germane to Sec. 1 and 4 which are germane to the title, and they are not necessary to implement the two other sections. Therefore SHB 3055 violates the single subject rule and is in violation of Article II Section 19.

B. Subject – in – title Rule

In determining whether SHB 3055 contains a subject which is not contained in its title in violation of Article II Section19, the Court begins this analysis with the purpose of this requirement, which is the provisions of notice to legislators and the public of the contents of the bill. "The title of the act complies with Article II Section 19 if it gives notice which would lead an inquiry into the body of the act or indicates the scope and purpose of the law to an inquiring mind." Amalgamated at 217 citing Wash. Fed'n, 127 Wn.2d at 555, YMCA v. State, 62 Wn.2d 504, 506 (1963), Treffy v. Taylor, 67 Wn.2d 487, 491 (1965).

Based upon the Court's analysis above which held that Sections 1 and 4 relate to the admissibility of DUI tests, and Sections 2 and 3 relate to implied consent warnings and license sanctions, it is apparent that these two subjects are not expressed in the title "AN ACT Relating to the admissibility of DUI tests". However, the Court should address the possibility that the term "DUI tests" could have been given a special meaning or definition in the Act itself thus allowing that term to encompass implied consent warnings and license sanctions for SHB 3055 purposes only. Our State Supreme Court has definitively addressed this possibility.

> It follows that the trial court's holding that I-695 violates the subject-in-title rule of article II, section 19 must be affirmed. In Decano v. State, 7 Wn.2d 613, 110 P.2d 627 (1941), this court addressed an amendatory act which was titled "AN ACT relating to the rights and disabilities of aliens with respect to land, and amending . . . ." *Id.* At 623. However, the body of the act specifically defined "alien" in a way "which brings within its

> purview a whole new class of persons who are not in fact aliens in common understanding . . . ." *Id.* At 624. The court applied the rule that " '[w]ords in a title must be taken in their common and ordinary meanings, and the legislature cannot in the body of an act impose another or unusual meaning upon a term use in the title without disclosing such special meaning therein.' " *Id.* At 626 (quoting 59 C.J. 810). The court held that the act violates article II, section 19.
>
> This court applied the same rule in *Petroleum Lease Properties Co.,* 195 Wash. 254. There, the title of the act was "AN ACT providing for the regulation and supervision of the issuance and sale of securities to prevent fraud in the sale thereof, amending . . . ." *Id.* At 257. In the body of this amendatory act the term "securities" was defined to include oil and gas leases. The court said: "The title gives no notice that there is to be embodied in the amendment the regulation of any matter not embraced within the meaning of the word 'security' as that term is commonly understood and defined by standard dictionaries, as well as by the original securities act itself. That a gas or oil lease is not a 'security' as ordinarily understood, or as defined in the original act, is self-evident." *Id.* at 258.

Amalgamated at 226.

> As in *Decano* and *Petroleum Lease Properties*, we affirm the trial court's holding that I-695 violates the subject-in-title rule of article II, section 19 on the basis that the ballot title of I-695 states "[s]hall voter approval be required for any *tax* increase" without any indication in the title that "tax" has a meaning broader than its common meaning. Nothing about this ballot title gives any notice that would indicate to the voters that the contents of the initiative would include voter approval for charges other than taxes or suggest inquiry into the act be made to learn the broad meaning of "tax."

Amalgamated at 227.

This Court adopts the Amalgamated analysis and holds that the admissibility of DUI tests does not commonly and ordinarily mean implied consent warnings and license sanctions; The Legislature did not give the terms another unusual meaning and did not disclose such a meaning. This intentional omission is evidenced by the stated purpose of the Act in Section 1 referring to blood and breath tests and no mention of implied consent warnings and license sanctions. Therefore, SHB 3055 violates the subject-in-title rule and is in violation of Article II section 19.

C. Void or Severable

Violation of either the single subject rule or the subject-in-title rule contained in Article II section 19 is sufficient to render SHB 3055 unconstitutional. Patrice at 852. Where laws are enacted in violation of Article II Sec. 19, courts will not hesitate to declare them void." Wash. Toll Bridge Auth., at 24, Fray, at 654-55.

The Legislature in this case did not append a savings clause to SHB 3055, and the Court presumes that it did not intend to save a portion[s] of the Act if other portions were found invalid. The Court presumes it intended for the entire act to stand or fail as a whole, there being no savings severability clause. Therefore, the Court finds SHB 3055 is void in its entirety.

II. Does SHB 3055 Violate the Separation of Powers Doctrine?

A. Introduction: Judicial Independence and Separation of Powers

There are generally two categories of judicial independence. The first, decisional independence pertains to a judge's ability to render decisions free from political or popular influence based solely upon the individual facts and applicable law. The second, institutional independence, involves the separation of the judicial branch from the executive and legislative branches of the government.

> For courts to effectively maintain their independence as a separate branch of local government, they must have the power to do all things that are reasonably necessary for the proper administration of their office within the scope of their jurisdiction. Zylstra v. Piva, 85 Wn.2d 743, 754 (1975). This includes the power to control decision making, the adjudicatory process and ancillary functions subordinate to the decision making process. *Id.* at 755

By implication then, the constitutional provisions in Washington vesting judicial power in the courts carry with them the authority necessary to the exercise of that power, including rule making and judicial administration. *Id.* at 755.

The separation of powers doctrine then, allows for some interplay between the branches of government. Spokane County v. State, 136 Wn.2d 663, 672 (1998). However, the spirit of reciprocity and interdependence requires that if checks by one branch undermine the operation of another branch or undermine the rule of law, which all branches are committed to maintain, those checks are improper and destructive exercises of the authority. In Re Juvenile Director, 87 Wn.2d 232, 243 (1976).

Thus, the purpose of the separation of powers doctrine is "to preserve the efficient and expeditious administration of Justice and protect it from being impaired or

destroyed." Commonwealth ex rel Carroll v. Tate, 442 Pa. 45, 53 (1971) *cert. denied* 402 U.S. 974 (1971), *as cited in* In Re Juvenile Director, 87 Wn.2d 232,245 (1976).

The test to determine whether a separation of powers violation has occurred is whether the activity of one branch threatens the independence or integrity or invades the prerogatives of another. Zylstra v. Piva, 85 Wn.2d 743, 750 (1975). If it does, then the damage caused by a separation of powers violation accrues directly to the branch invaded. Commodity Futures Trading Comm'n. v. Schur, 478 U.S. 833, 851 (1986), *as cited in* Carrie v. Locke, 125 Wn.2d 129, 136 (1994).

B. Supreme Court Authority

All judicial power of the state has been vested in the Supreme Court and the various other courts designated in the constitution. Const. art. 4, SS 1. State v. Fields, 85 Wn. 2d 126, 129 (1975). Also, apart from any existing statutory authority, the Supreme Court has inherent authority to govern court procedures. Id. At 129.

The case of The Washington State Bar Association v. State of Washington, 125 Wn.2d 901 (1995), illustrates a separation of powers violation and the rule making authority inherent in the Supreme Court. In that case, the legislature had passed a statute making collective bargaining mandatory for bar association employees. The statute directly conflicted with court rule GR 12, which gave the Bar Association discretion as to whether or not to bargain collectively with its employees. In striking down the statute, the Supreme Court held "legislation which directly and unavoidably conflicts with a rule of court governing Bar Association powers and responsibilities is unconstitutional as it violates the separation of powers doctrine: Such legislation is therefore void." *Id.* at 906. The court stated further:

> The ultimate power to regulate court-related functions including the administration of Bar Associations, belongs exclusively to this court . . . when a court rule and statute conflict . . . if they cannot be harmonized, the court rule will prevail and . . . once this court has adopted a rule concerning a matter related to the exercise of its inherent power to control the bar, the Legislature may not therefore reverse or override the court's rule.
> *Id.* at 909.

The Supreme Court then has specific authority to proscribe "...the manner of taking and obtaining evidence..." RCW 2.04.190. The Supreme Court has exercised this prerogative by adoption of the rules of evidence that give the judge the authority to interpret the rules in a way that avoids unjust results or differential treatment. Petrarca v. Halligan, 83 Wn. 2d 773 (1974).

B. Analysis in Regard to SHB 3055

In State v. Pavelich, 153 Wash. 379 (1929) the Court establishes that the rules of evidence are substantive law and that the Legislature has the authority to enact rules of evidence. However, Pavelich continues by saying at p. 383,

> "[A]lthough the distinction between procedure and substantive law is not always well understood and is sometimes vague and indistinct, substantive law is well defined [citation omitted], as that part of, the law which creates, defines and regulates rights as opposed to adjective or remedial law, which prescribes the method of enforcing rights, or of obtaining redress for their invasion. It is difficult, therefore, to draw the line in any particular case, beyond which legislative power, over remedy and procedure, cannot pass without touching upon the substantial rights of the parties affected, as it is impossible to fix that boundary by any general condition

In this case we feel that line has been crossed. SHB 3055 crosses the boundary of ER 104 (a), ER 401, ER 402 and ER 403 and inserts the Legislature in controlling matters not of regulation but rather to the Constitutional Right to a fair trial. Opinion of the Justices of the State of New Hampshire on the Request of the Senate No. 96-280 (1997) at p. 10, attached to our ruling as Appendix B, states the crux of our opinion:

> A just verdict is a result of a fair trial, the right to which is a substantive right grounded in our constitution, not in statutory enactments. The protection of constitutional rights is a core function of the judiciary [citation omitted] on the court is "imposed the high and solemn duty of protecting" those rights which the constitution has placed beyond legislative control. ... Giving deference to the legislature would, in this instance, abolish the rule's purpose and interfere with the judiciary's sound discretion in determining to what extent the rule serves its function in the circumstances of a particular case.

We find that SHB 3055 would restrict the court's exercise of ER 104(a) as to the relevancy of evidence conditioned upon fact, by eliminating the very determination that the offered evidence is sufficient to support the finding. We find SHB 3055 would restrict the court's exercise of ER 401, 402 and 403 as to any finding of initial relevance, or, more importantly, to the crucial balancing of probative value as to whether it is outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury.

The core function of the judiciary is to balance the relevant evidence to support the truth while balancing the defendant's right to due process and a fair trial. SHB 3055 seeks to eliminate a function which is both a core function and a uniquely judicial function and therefore, we find that SBH 3055 violates the separation of powers doctrine.

Further, we find that under Washington State Bar Association, *supra.*, that the Supreme Court has exercised its inherent power to control its rule making authority thus "the Legislature may not …reverse or override the court's rule."

III. Does SB 3055 create a mandatory rebuttable presumption in violation of a defendant's Constitutional Rights?

Having found that SB 3055 is constitutionally prohibited on the two foregoing issues the court therefore finds there is no reason to reach an opinion of the Constitutionality of this remaining issue.

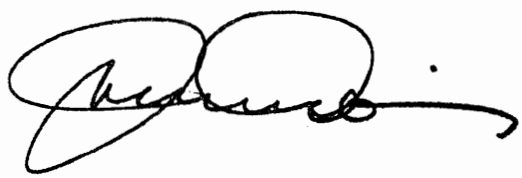
IV. CONCLUSION

For the reasons stated above, the Court holds SHB 3055 to be unconstitutional, and the breath tests in each of the cases are suppressed. The Court makes no determination that the criminal charges against the defendants should be dismissed because the State is unable to proceed without a breath test result; there are no facts before this Court upon which to make any such determination at this time.

This 1st day of March, 2005.

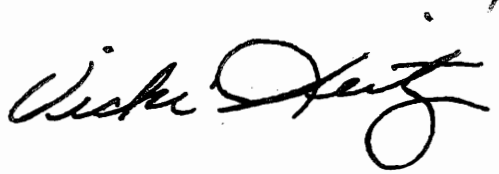
The King County District Court, South Division, Kent Courthouse, sitting en banc.

Judge Judith Eiler



Judge Pro Tem Robert McSeveney

Judge Vicki Seitz



APPENDIX A

SUBSTITUTE HOUSE BILL 3055

CERTIFICATION OF ENROLLMENT

SUBSTITUTE HOUSE BILL 3055

Chapter 68, Laws of 2004

58th Legislature
2004 Regular Session

DUI TEST ADMISSIBILITY

EFFECTIVE DATE: 6/10/04
Passed by the House February 12, 2004 Yeas 93 Nays 0

FRANK CHOPP Speaker of the House of Representatives

Passed by the Senate March 2, 2004 Yeas 48 Nays 0

BRAD OWEN President of the Senate

CERTIFICATE

I, Richard Nafziger, Chief Clerk of the House of Representatives of the State of Washington, do hereby certify that the attached is SUBSTITUTE HOUSE BILL 3055 as passed by the House of Representatives and the Senate on the dates hereon set forth.

RICHARD NAFZIGER Chief Clerk
Approved March 22, 2004.

GARY F. LOCKE Governor of the State of Washington
FILED March 22, 2004 - 5:14 p.m.

Secretary of State
State of Washington

SUBSTITUTE HOUSE BILL 3055

Passed Legislature - 2004 Regular Session

State of Washington 58th Legislature 2004 Regular Session

By House Committee on Judiciary (originally sponsored by Representatives Holmquist, Carrell and O'Brien)

READ FIRST TIME 02/06/04.

AN ACT Relating to admissibility of DUI tests; amending RCW 46.61.506; reenacting and amending RCW 46.20.308 and 46.20.3101; and creating a new section.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

{+ NEW SECTION. +} Sec. 1. The legislature finds that previous attempts to curtail the incidence of driving while intoxicated have been inadequate. The legislature further finds that property loss, injury, and death caused by drinking drivers continue at unacceptable levels. This act is intended to convey the seriousness with which the legislature views this problem. To that end the legislature seeks to ensure swift and certain consequences for those who drink and drive.

To accomplish this goal, the legislature adopts standards governing the admissibility of tests of a person's blood or breath. These standards will provide a degree of uniformity that is currently lacking, and will reduce the delays caused by challenges to various breath test instrument components and maintenance procedures. Such challenges, while allowed, will no longer go to admissibility of test results. Instead, such challenges are to be considered by the finder of fact in deciding what weight to place upon an admitted blood or breath test result.

The legislature's authority to adopt standards governing the admissibility of evidence involving alcohol is well established by the Washington Supreme Court. See generally State v. Long, 113 Wn.2d 266, 778 P.2d 1027 (1989); State v. Sears, 4 Wn.2d 200, 215, 103 P.2d 337 (1940) (the legislature has the power to enact laws which create rules of evidence); State v. Pavelich, 153 Wash. 379, 279 P. 1102 (1929) ("rules of evidence are substantive law").

Sec. 2. RCW 46.20.308 and 1999 c 331 s 2 and 1999 c 274 s 2 are each reenacted and amended to read as follows:

(1) Any person who operates a motor vehicle within this state is deemed to have given consent, subject to the provisions of RCW 46.61.506, to a test or tests of his or her

breath or blood for the purpose of determining the alcohol concentration or presence of any drug in his or her breath or blood if arrested for any offense where, at the time of the arrest, the arresting officer has reasonable grounds to believe the person had been driving or was in actual physical control of a motor vehicle while under the influence of intoxicating liquor or any drug or was in violation of RCW 46.61.503. {+ Neither consent nor this section precludes a police officer from obtaining a search warrant for a person's breath or blood. +}

(2) The test or tests of breath shall be administered at the direction of a law enforcement officer having reasonable grounds to believe the person to have been driving or in actual physical control of a motor vehicle within this state while under the influence of intoxicating liquor or any drug or the person to have been driving or in actual physical control of a motor vehicle while having alcohol in a concentration in violation of RCW 46.61.503 in his or her system and being under the age of twenty-one. However, in those instances where the person is incapable due to physical injury, physical incapacity, or other physical limitation, of providing a breath sample or where the person is being treated in a hospital, clinic, doctor's office, emergency medical vehicle, ambulance, or other similar facility (({- in which a breath testing instrument is not present -})) or where the officer has reasonable grounds to believe that the person is under the influence of a drug, a blood test shall be administered by a qualified person as provided in RCW 46.61.506(({- (4) -})) {+ (5) +}. The officer shall inform the person of his or her right to refuse the breath or blood test, and of his or her right to have additional tests administered by any qualified person of his or her choosing as provided in RCW 46.61.506. (({- The officer shall warn the driver that:

(a) His or her license, permit, or privilege to drive will be revoked or denied if he or she refuses to submit to the test;

(b) His or her license, permit, or privilege to drive will be suspended, revoked, or denied if the test is administered and the test indicates the alcohol concentration of the person's breath or blood is 0.08 or more, in the case of a person age twenty-one or over, or in violation of RCW 46.61.502, 46.61.503, or 46.61.504 in the case of a person under age twenty-one; and

(c) His or her refusal to take the test may be used in a criminal trial. - })) {+ The officer shall warn the driver, in substantially the followinglanguage, that:

(a) If the driver refuses to take the test, the driver's license, permit, or privilege to drive will be revoked or denied for at least one year; and

(b) If the driver refuses to take the test, the driver will not be eligible for an occupational permit; and

(c) If the driver refuses to take the test, the driver's refusal to take the test may be used in a criminal trial; and

(d) If the driver submits to the test and the test is administered, the driver's license, permit, or privilege to drive will be suspended, revoked, or denied for at least ninety days if the driver is age twenty-one or over and the test indicates the alcohol concentration of the driver's breath or blood is 0.08 or more, or if the driver is under age twenty-one and the test indicates the alcohol concentration of the driver's breath or blood is 0.02 or more, or if the driver is under age twenty-one and the driver is in violation of RCW 46.61.502 or 46.61.504. +}

(3) Except as provided in this section, the test administered shall be of the breath only. If an individual is unconscious or is under arrest for the crime of vehicular homicide as provided in RCW 46.61.520 or vehicular assault as provided in RCW 46.61.522, or if an individual is under arrest for the crime of driving while under the influence of intoxicating liquor or drugs as provided in RCW 46.61.502, which arrest results from an accident in which there has been serious bodily injury to another person, a breath or blood test may be administered without the consent of the individual so arrested.

(4) Any person who is dead, unconscious, or who is otherwise in a condition rendering him or her incapable of refusal, shall be deemed not to have withdrawn the consent provided by subsection (1) of this section and the test or tests may be administered, subject to the provisions of RCW 46.61.506, and the person shall be deemed to have received the warnings required under subsection (2) of this section.

(5) If, following his or her arrest and receipt of warnings under subsection (2) of this section, the person arrested refuses upon the request of a law enforcement officer to submit to a test or tests of his or her breath or blood, no test shall be given except as authorized under subsection (3) or (4) of this section.

(6) If, after arrest and after the other applicable conditions and requirements of this section have been satisfied, a test or tests of the person's blood or breath is administered and the test results indicate that the alcohol concentration of the person's breath or blood is 0.08 or more if the person is age twenty-one or over, or (({- is in violation of RCW 46.61.502, 46.61.503, or 46.61.504 -})) {+ 0.02 or more +} if the person is under the age of twenty-one, or the person refuses to submit to a test, the arresting officer or other law enforcement officer at whose direction any test has been given, or the department, where applicable, if the arrest results in a test of the person's blood, shall:

(a) Serve notice in writing on the person on behalf of the department of its intention to suspend, revoke, or deny the person's license, permit, or privilege to drive as required by subsection (7) of this section;

(b) Serve notice in writing on the person on behalf of the department of his or her right to a hearing, specifying the steps he or she must take to obtain a hearing as provided by subsection (8) of this section;

(c) Mark the person's Washington state driver's license or permit to drive, if any, in a manner authorized by the department;

(d) Serve notice in writing that the marked license or permit, if any, is a temporary license that is valid for sixty days from the date of arrest or from the date notice has been given in the event notice is given by the department following a blood test, or until the suspension, revocation, or denial of the person's license, permit, or privilege to drive is sustained at a hearing pursuant to subsection (8) of this section, whichever occurs first. No temporary license is valid to any greater degree than the license or permit that it replaces; and

(e) Immediately notify the department of the arrest and transmit to the department within seventy-two hours, except as delayed as the result of a blood test, a sworn report or report under a declaration authorized by RCW 9A.72.085 that states:

(i) That the officer had reasonable grounds to believe the arrested person had been driving or was in actual physical control of a motor vehicle within this state while

under the influence of intoxicating liquor or drugs, or both, or was under the age of twenty-one years and had been driving or was in actual physical control of a motor vehicle while having an alcohol concentration in violation of RCW 46.61.503;

(ii) That after receipt of the warnings required by subsection (2) of this section the person refused to submit to a test of his or her blood or breath, or a test was administered and the results indicated that the alcohol concentration of the person's breath or blood was 0.08 or more if the person is age twenty-one or over, or was (({- in violation of RCW 46.61.502, 46.61.503, or 46.61.504 -})) {+ 0.02 or more +} if the person is under the age of twenty-one; and

(iii) Any other information that the director may require by rule.

(7) The department of licensing, upon the receipt of a sworn report or report under a declaration authorized by RCW 9A.72.085 under subsection (6)(e) of this section, shall suspend, revoke, or deny the person's license, permit, or privilege to drive or any nonresident operating privilege, as provided in RCW 46.20.3101, such suspension, revocation, or denial to be effective beginning sixty days from the date of arrest or from the date notice has been given in the event notice is given by the department following a blood test, or when sustained at a hearing pursuant to subsection (8) of this section, whichever occurs first.

(8) A person receiving notification under subsection (6)(b) of this section may, within thirty days after the notice has been given, request in writing a formal hearing before the department. The person shall pay a fee of one hundred dollars as part of the request. If the request is mailed, it must be postmarked within thirty days after receipt of the notification. Upon timely receipt of such a request for a formal hearing, including receipt of the required one hundred dollar fee, the department shall afford the person an opportunity for a hearing. The department may waive the required one hundred dollar fee if the person is an indigent as defined in RCW 10.101.010. Except as otherwise provided in this section, the hearing is subject to and shall be scheduled and conducted in accordance with RCW 46.20.329 and 46.20.332. The hearing shall be conducted in the county of the arrest, except that all or part of the hearing may, at the discretion of the department, be conducted by telephone or other electronic means. The hearing shall be held within sixty days following the arrest or following the date notice has been given in the event notice is given by the department following a blood test, unless otherwise agreed to by the department and the person, in which case the action by the department shall be stayed, and any valid temporary license marked under subsection (6)(c) of this section extended, if the person is otherwise eligible for licensing. For the purposes of this section, the scope of the hearing shall cover the issues of whether a law enforcement officer had reasonable grounds to believe the person had been driving or was in actual physical control of a motor vehicle within this state while under the influence of intoxicating liquor or any drug or had been driving or was in actual physical control of a motor vehicle within this state while having alcohol in his or her system in a concentration (({- in violation of RCW 46.61.503 and -})) {+ of 0.02 or more if the person +} was under the age of twenty-one, whether the person was placed under arrest, and (a) whether the person refused to submit to the test or tests upon request of the officer after having been informed that such refusal would result in the revocation of the person's license, permit, or privilege to drive, or (b) if a test or tests were administered, whether the applicable requirements of this section were satisfied before the administration of the

test or tests, whether the person submitted to the test or tests, or whether a test was administered without express consent as permitted under this section, and whether the test or tests indicated that the alcohol concentration of the person's breath or blood was 0.08 or more if the person was age twenty-one or over at the time of the arrest, or (({- was in violation of RCW 46.61.502, 46.61.503, or 46.61.504 - })) {+ 0.02 or more +} if the person was under the age of twenty-one at the time of the arrest. The sworn report or report under a declaration authorized by RCW 9A.72.085 submitted by a law enforcement officer is prima facie evidence that the officer had reasonable grounds to believe the person had been driving or was in actual physical control of a motor vehicle within this state while under the influence of intoxicating liquor or drugs, or both, or the person had been driving or was in actual physical control of a motor vehicle within this state while having alcohol in his or her system in a concentration (({- in violation of RCW 46.61.503 -})) {+ of 0.02 or more +} and was under the age of twenty-one and that the officer complied with the requirements of this section.

A hearing officer shall conduct the hearing, may issue subpoenas for the attendance of witnesses and the production of documents, and shall administer oaths to witnesses. The hearing officer shall not issue a subpoena for the attendance of a witness at the request of the person unless the request is accompanied by the fee required by RCW 5.56.010 for a witness in district court. The sworn report or report under a declaration authorized by RCW 9A.72.085 of the law enforcement officer and any other evidence accompanying the report shall be admissible without further evidentiary foundation and the certifications authorized by the criminal rules for courts of limited jurisdiction shall be admissible without further evidentiary foundation. The person may be represented by counsel, may question witnesses, may present evidence, and may testify. The department shall order that the suspension, revocation, or denial either be rescinded or sustained.

(9) If the suspension, revocation, or denial is sustained after such a hearing, the person whose license, privilege, or permit is suspended, revoked, or denied has the right to file a petition in the superior court of the county of arrest to review the final order of revocation by the department in the same manner as an appeal from a decision of a court of limited jurisdiction. Notice of appeal must be filed within thirty days after the date the final order is served or the right to appeal is waived. Notwithstanding RCW 46.20.334, RALJ 1.1, or other statutes or rules referencing de novo review, the appeal shall be limited to a review of the record of the administrative hearing. The appellant must pay the costs associated with obtaining the record of the hearing before the hearing officer. The filing of the appeal does not stay the effective date of the suspension, revocation, or denial. A petition filed under this subsection must include the petitioner's grounds for requesting review. Upon granting petitioner's request for review, the court shall review the department's final order of suspension, revocation, or denial as expeditiously as possible. The review must be limited to a determination of whether the department has committed any errors of law. The superior court shall accept those factual determinations supported by substantial evidence in the record: (a) That were expressly made by the department; or (b) that may reasonably be inferred from the final order of the department. The superior court may reverse, affirm, or modify the decision of the department or remand the case back to the department for further proceedings. The decision of the superior court must be in writing and filed in the clerk's office with the other papers in the

case. The court shall state the reasons for the decision. If judicial relief is sought for a stay or other temporary remedy from the department's action, the court shall not grant such relief unless the court finds that the appellant is likely to prevail in the appeal and that without a stay the appellant will suffer irreparable injury. If the court stays the suspension, revocation, or denial it may impose conditions on such stay.

(10) If a person whose driver's license, permit, or privilege to drive has been or will be suspended, revoked, or denied under subsection (7) of this section, other than as a result of a breath or blood test refusal, and who has not committed an offense for which he or she was granted a deferred prosecution under chapter 10.05 RCW, petitions a court for a deferred prosecution on criminal charges arising out of the arrest for which action has been or will be taken under subsection (7) of this section, the court may direct the department to stay any actual or proposed suspension, revocation, or denial for at least forty-five days but not more than ninety days. If the court stays the suspension, revocation, or denial, it may impose conditions on such stay. If the person is otherwise eligible for licensing, the department shall issue a temporary license, or extend any valid temporary license marked under subsection (6) of this section, for the period of the stay. If a deferred prosecution treatment plan is not recommended in the report made under RCW 10.05.050, or if treatment is rejected by the court, or if the person declines to accept an offered treatment plan, or if the person violates any condition imposed by the court, then the court shall immediately direct the department to cancel the stay and any temporary marked license or extension of a temporary license issued under this subsection.

A suspension, revocation, or denial imposed under this section, other than as a result of a breath or blood test refusal, shall be stayed if the person is accepted for deferred prosecution as provided in chapter 10.05 RCW for the incident upon which the suspension, revocation, or denial is based. If the deferred prosecution is terminated, the stay shall be lifted and the suspension, revocation, or denial reinstated. If the deferred prosecution is completed, the stay shall be lifted and the suspension, revocation, or denial canceled.

(11) When it has been finally determined under the procedures of this section that a nonresident's privilege to operate a motor vehicle in this state has been suspended, revoked, or denied, the department shall give information in writing of the action taken to the motor vehicle administrator of the state of the person's residence and of any state in which he or she has a license.

Sec. 3. RCW 46.20.3101 and 1998 c 213 s 2, 1998 c 209 s 2, and 1998 c 207 s 8 are each reenacted and amended to read as follows:

Pursuant to RCW 46.20.308, the department shall suspend, revoke, or deny the arrested person's license, permit, or privilege to drive as follows:

(1) In the case of a person who has refused a test or tests:

(a) For a first refusal within seven years, where there has not been a previous incident within seven years that resulted in administrative action under this section, revocation or denial for one year;

(b) For a second or subsequent refusal within seven years, or for a first refusal where there has been one or more previous incidents within seven years that have resulted in administrative action under this section, revocation or denial for two years or

until the person reaches age twenty-one, whichever is longer. A revocation imposed under this subsection (1)(b) shall run consecutively to the period of any suspension, revocation, or denial imposed pursuant to a criminal conviction arising out of the same incident.

(2) In the case of an incident where a person has submitted to or been administered a test or tests indicating that the alcohol concentration of the person's breath or blood was 0.08 or more:

(a) For a first incident within seven years, where there has not been a previous incident within seven years that resulted in administrative action under this section, suspension for ninety days;

(b) For a second or subsequent incident within seven years, revocation or denial for two years.

(3) In the case of an incident where a person under age twenty-one has submitted to or been administered a test or tests indicating that the alcohol concentration of the person's breath or blood was (({- in violation of RCW 46.61.502, 46.61.503, or 46.61.504 -})) {+ 0.02 or more +}:

(a) For a first incident within seven years, suspension or denial for ninety days;

(b) For a second or subsequent incident within seven years, revocation or denial for one year or until the person reaches age twenty-one, whichever is longer.

Sec. 4. RCW 46.61.506 and 1998 c 213 s 6 are each amended to read as follows:

(1) Upon the trial of any civil or criminal action or proceeding arising out of acts alleged to have been committed by any person while driving or in actual physical control of a vehicle while under the influence of intoxicating liquor or any drug, if the person's alcohol concentration is less than 0.08, it is evidence that may be considered with other competent evidence in determining whether the person was under the influence of intoxicating liquor or any drug.

(2) The breath analysis shall be based upon grams of alcohol per two hundred ten liters of breath. The foregoing provisions of this section shall not be construed as limiting the introduction of any other competent evidence bearing upon the question whether the person was under the influence of intoxicating liquor or any drug.

(3) Analysis of the person's blood or breath to be considered valid under the provisions of this section or RCW 46.61.502 or 46.61.504 shall have been performed according to methods approved by the state toxicologist and by an individual possessing a valid permit issued by the state toxicologist for this purpose. The state toxicologist is directed to approve satisfactory techniques or methods, to supervise the examination of individuals to ascertain their qualifications and competence to conduct such analyses, and to issue permits which shall be subject to termination or revocation at the discretion of the state toxicologist.

(4){+ (a) A breath test performed by any instrument approved by the state toxicologist shall be admissible at trial or in an administrative proceeding if the prosecution or department produces prima facie evidence of the following:

(i) The person who performed the test was authorized to perform such test by the state toxicologist;

(ii) The person being tested did not vomit or have anything to eat, drink, or smoke for at least fifteen minutes prior to administration of the test;

(iii) The person being tested did not have any foreign substances, not to include dental work, fixed or removable, in his or her mouth at the beginning of the fifteen-minute observation period;

(iv) Prior to the start of the test, the temperature of the simulator solution as measured by a thermometer approved of by the state toxicologist was thirty-four degrees centigrade plus or minus 0.3 degrees centigrade;

(v) The internal standard test resulted in the message "verified";

(vi) The two breath samples agree to within plus or minus ten percent of their mean to be determined by the method approved by the state toxicologist;

(vii) The simulator external standard result did lie between .072 to .088 inclusive; and

(viii) All blank tests gave results of .000.

(b) For purposes of this section, "prima facie evidence" is evidence of sufficient circumstances that would support a logical and reasonable inference of the facts sought to be proved. In assessing whether there is sufficient evidence of the foundational facts, the court or administrative tribunal is to assume the truth of the prosecution's or department's evidence and all reasonable inferences from it in a light most favorable to the prosecution or department.

(c) Nothing in this section shall be deemed to prevent the subject of the test from challenging the reliability or accuracy of the test, the reliability or functioning of the instrument, or any maintenance procedures. Such challenges, however, shall not preclude the +} {+ admissibility of the test once the prosecution or department has made a prima facie showing of the requirements contained in (a) of this subsection. Instead, such challenges may be considered by the trier of fact in determining what weight to give to the test result.

(5) +} When a blood test is administered under the provisions of RCW 46.20.308, the withdrawal of blood for the purpose of determining its alcoholic or drug content may be performed only by a physician, a registered nurse, (({- or a qualified technician -})) {+ a licensed practical nurse, a nursing assistant as defined in chapter 18.88A RCW, a physician assistant as defined in chapter 18.71A RCW, a first responder as defined in chapter 18.73 RCW, an emergency medical technician as defined in chapter 18.73 RCW, a health care assistant as defined in chapter 18.135 RCW, or any technician trained in withdrawing blood +}. This limitation shall not apply to the taking of breath specimens.

(({- (5) -})) {+ (6) +} The person tested may have a physician, or a qualified technician, chemist, registered nurse, or other qualified person of his or her own choosing administer one or more tests in addition to any administered at the direction of a law enforcement officer. {+ The test will be admissible if the person establishes the general acceptability of the testing technique or method. +} The failure or inability to obtain an additional test by a person shall not preclude the admission of evidence relating to the test or tests taken at the direction of a law enforcement officer.

(({- (6) -})) {+ (7) +} Upon the request of the person who shall submit to a test or tests at the request of a law enforcement officer, full information concerning the test or tests shall be made available to him or her or his or her attorney.

Passed by the House February 12, 2004.
Passed by the Senate March 2, 2004.
Approved by the Governor March 22, 2004.
Filed in Office of Secretary of State March 22, 2004.

APPENDIX B

OPINION OF THE JUSTICES OF THE STATE OF NEW HAMSHIRE ON THE REQUEST OF THE SENATE No. 96 – 280 (1997)

Opinion of the Justices

THE SUPREME COURT OF NEW HAMPSHIRE

Request of the Senate

No. 96-280

OPINION OF THE JUSTICES

(Prior Sexual Assault Evidence)

January 24, 1997

The following request of the senate for an opinion of the justices was adopted on April 18, 1996, and filed with the supreme court on April 26, 1996:

"Whereas, there is pending in the senate, HB 1549, `An act relative to the admissibility of a prior sexual assault into evidence in certain prosecutions' as amended by the house; and

"Whereas, the senate has adopted an amendment to HB 1549 (document #5798L); and

"Whereas, RSA 632-A:6 as proposed by HB 1549, as amended, would, in criminal prosecutions for offenses set forth in RSA 632-A, for incest and endangering the welfare of a child or incompetent in violation of RSA 639, and for attempts and conspiracies to commit those crimes, and in civil suits for sexual assault, establish a rebuttable presumption that evidence of any other sexual assault committed by the defendant is admissible and may be considered for any relevant purpose other than showing the defendant's character; and

"Whereas, RSA 632-A:6 as proposed by HB 1549, as amended, would, in cases where there is evidence of other sexual assaults by the defendant against the same victim, establish a rebuttable presumption that such evidence is admissible to show the defendant's motive or intent, the [context] of the assault in question, and the relationship of the parties; and

"Whereas, RSA 632-A:6 as proposed by HB 1549, as amended, would, in cases where there is evidence of other sexual assaults by the defendant against different victims, establish a rebuttable presumption that such evidence is admissible to show the defendant's motive and intent; and

"Whereas, RSA 632-A:6 as proposed by HB 1549 as amended would prohibit the exclusion of the evidence unless the trial court finds that the probative value of such evidence is substantially outweighed by the danger of unfair prejudice to the defendant; and

"Whereas, doubt has arisen as to the constitutionality of the provisions of said bill as

amended; and

"Whereas, it is important that the question of the constitutionality of said provisions should be settled in advance of its enactment; now, therefore, be it

"Resolved by the Senate;

"That the Justices of the Supreme Court be respectfully requested to give their opinion on the following questions of law:

1. Would enactment of HB 1549, as amended, result in encroachment by the legislative branch of the state government upon the constitutional function of the judicial branch in violation of Part I, Article 37 of the New Hampshire Constitution?

2. Would enactment of HB 1549, as amended, violate Part 2, Article 73-a of the New Hampshire Constitution which gives the chief justice of the supreme court the authority to make rules governing the practice and procedure to be followed in all courts?

3. Would any other provision of the New Hampshire Constitution be violated by the enactment of HB 1549, as amended?

"That the clerk of the senate transmit copies of this resolution and HB 1549, as amended, to the Justices of the New Hampshire Supreme Court."

On June 5, 1996, this court received an amended request from the senate substituting different questions of law. The following resolution SR 6, as amended, requesting an opinion of the justices, was adopted by the senate on May 31, 1996, and filed with the supreme court on June 5, 1996:

"Whereas, the senate, on April 18, 1996, adopted Senate Resolution 3 requesting an opinion of the justices concerning the constitutionality of HB 1549 and, having reconsidered the questions of law posed in that resolution, has found it advisable to substitute different questions of law; and

"Whereas, there is pending in the senate, HB 1549, `An Act relative to the admissibility of a prior sexual assault into evidence in certain prosecutions' as amended by the house; and

"Whereas, the senate has adopted an amendment to HB 1549 (document #5798L); and

"Whereas, RSA 632-A:6 as proposed by HB 1549, as amended, would, in criminal prosecutions for offenses set forth in RSA 632-A, for incest and endangering the welfare of a child or incompetent in violation of RSA 639, and for attempts and conspiracies to commit those crimes, and in civil suits for sexual assault, establish a rebuttable presumption that evidence of any other sexual assault committed by the defendant is admissible and may be considered for any relevant purpose other than showing the defendant's character; and

"Whereas, RSA 632-A:6 as proposed by HB 1549, as amended, would, in cases where there is

evidence of other sexual assaults by the defendant against the same victim, establish a rebuttable presumption that such evidence is admissible to show the defendant's motive or intent, the context of the assault in question, and the relationship of the parties; and

"Whereas, RSA 632-A:6 as proposed by HB 1549, as amended, would, in cases where there is evidence of other sexual assaults by the defendant against different victims, establish a rebuttable presumption that such evidence is admissible to show the defendant's motive and intent; and

"Whereas, RSA 632-A:6 as proposed by HB 1549 as amended would prohibit the exclusion of the evidence unless the trial court finds that the probative value of such evidence is substantially outweighed by the danger of unfair prejudice to the defendant; and

"Whereas, numerous statutes already in effect address the admissibility of various types of evidence in judicial proceedings; now, therefore, be it

"Resolved by the Senate;

"That the questions of law submitted in Senate Resolution 3 adopted by the senate April 18, 1996, be withdrawn from the Justices of the Supreme Court; and

"That the Justices of the Supreme Court be respectfully requested to give their opinion on the following questions of law;

1. Would enactment of HB 1549, as amended, violate Part I, Article 37 of the New Hampshire Constitution?

2. Would enactment of HB 1549, as amended, violate Part II, Article 73-a of the New Hampshire Constitution?

"That the clerk of the senate transmit copies of this resolution and HB 1549, as amended, to the Justices of the New Hampshire Supreme Court."

The following response is respectfully returned:

To the Honorable Senate:

The undersigned justices of the supreme court now submit the following reply to your amended opinion request of May 31, 1996. Following our receipt of your initial resolution, we invited interested parties to file memoranda with the court on or before June 17, 1996. That deadline was extended to June 28, 1996, following our receipt of your amended resolution.

HB 1549 (the bill), as amended, proposes to amend RSA chapter 632-A (1996 & Supp. 1996) by inserting after paragraph IV in section 6 a new paragraph to read:

> V.(a) In criminal prosecutions for offenses set forth in RSA 632-A, for incest and endangering the welfare of a child or incompetent in violation of RSA 639, and for

attempts and conspiracies to commit those crimes, and in civil suits for sexual assault, there shall be a rebuttable presumption that evidence of any other sexual assault committed by the defendant is admissible and may be considered for any relevant purpose other than showing the defendant's character. In cases where there is evidence of other sexual assaults by the defendant against the same victim, there shall be a rebuttable presumption that such evidence is admissible to show the defendant's motive, intent, the context of the assault in question, and the relationship of the parties. In cases where there is evidence of other sexual assaults by the defendant against different victims, there shall be [a] rebuttable presumption that such evidence is admissible to show the defendant's motive and intent. The evidence shall not be excluded unless the trial court finds that the probative value of such evidence is substantially outweighed by the danger of unfair prejudice to the defendant.

(b) As used in subparagraph (a), the term "motive" includes a desire to engage in sexual activity with a certain victim or type of victim, or a desire to control or harm others through sexual assault.

(c) The purposes for which evidence of other sexual assaults may be admitted are not limited to those identified in subparagraph (a). Such evidence continues to be admissible for any relevant purpose except character. The fact that it may also be relevant to character does not render it inadmissible if it is relevant for some other purpose.

The bill has a statement of purpose which reads as follows:

I. The public has a strong interest in assuring that persons who commit violent sexual assaults, like those who commit other crimes, are brought to justice. However, sexual assaults present unique problems of proof. They are often committed in the absence of eyewitnesses, and there is little or no corroborating physical evidence, particularly if the victim delays reporting of the assault. The prosecution frequently rests exclusively on the victim's testimony, and the jury's decision is dependent on its assessment of the relative credibility of the victim and the defendant. The victims are often children whose credibility readily can be attacked in the absence of substantial corroboration. Additionally, unlike other criminal offenses, the alleged consent of the victim is frequently at issue in sexual assault prosecutions.

II. Sexual assaults are also unique in that they are frequently not isolated events, but are part of a pattern of sexual assaults by the assailant against the same or other victims. Offenders frequently target and assault multiple victims. In cases in which an assailant has committed repeated sexual assaults against the same victim, an individual assault is often integrally related to the others and cannot fully or fairly be understood by a jury outside of the context in which it occurred. In such cases, the fact that the victim has been subjected to other assaults by the defendant may explain, for example, the victim's reaction to the assault in question, including his or her failure to resist the assault or to delay in reporting it.

> In cases in which a defendant is alleged to have sexually assaulted a child, evidence that he or she has sexually assaulted other children is generally probative to show a motive to commit the assault in question, since the defendant is attracted to children. In cases in which an assailant has committed sexual assaults against different adult victims, evidence of the other assaults is often generally probative of a motive to commit the assault at issue.
>
> III. Given the egregious nature of the crime of sexual assault and the peculiarities attendant to its proof, there is a compelling public interest in admitting all relevant evidence that will illumine the credibility of the alleged victim, while assuring a fair trial for the defendant. In most prosecutions or civil suits arising from sexual assaults, evidence of other sexual assaults committed by the defendant is highly relevant. Therefore, its admission will advance the truth-seeking function of the trial. By strengthening the legal system's tools for bringing the perpetrators of these crimes to justice, this reform will better protect the public from crimes of sexual violence.

A legislative declaration of purpose is ordinarily accepted as a part of the act. Opinion of the Justices, 88 N.H. 484, 490, 190 A. 425, 429 (1937).

Your first question asks whether enactment of the bill would "violate Part I, Article 37 of the New Hampshire Constitution." We answer in the affirmative.

> Part I, article 37 of our State Constitution provides:
>
> In the government of this state, the three essential powers thereof, to wit, the legislative, executive, and judicial, ought to be kept as separate from, and independent of, each other, as the nature of a free government will admit, or as is consistent with that chain of connection that binds the whole fabric of the constitution in one indissoluble bond of union and amity.

Beginning with volume one of the New Hampshire Reports, this court undertook its duty of defining the scope of the separation of powers clause as between the legislative and judicial branches of government. See Merrill v. Sherburne & al., 1 N.H. 199 (1818). In Merrill, we reviewed the pertinent articles of our State Constitution and concluded that nothing therein mandated a conclusion other than that the general court is excluded from the exercise of "judicial powers." Id. at 206-08. The question before us today is whether the legislature's promulgation of the proposed statute falls within the exercise of "judicial powers." See id. at 208.

Separation of powers is an integral part of our governmental system of checks and balances: each branch of government acts as a check on the other, protecting the sovereignty and freedom of those governed by preventing the tyranny of any one branch of the government being supreme. See Opinion of the Justices, 110 N.H. 359, 362, 266 A.2d 823, 825-26 (1970). The separation of powers doctrine complements the notion of checks and balances by institutionalizing a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of another. Cf. Attorney-General v. Morin, 93 N.H. 40, 46, 35 A.2d

513, 516 (1943) (referring to purpose of article 37 in the minds of its framers as to protect executive and judicial branches of State government from legislative encroachment rather than to circumscribe within strict limits the functions of the court). Despite the explicit constitutional language concerning the separation of powers in our State, we have always recognized that the doctrine does not require an absolute division of powers, but a cooperative accommodation among the three branches of government. See Opinion of the Justices, 121 N.H. 552, 556, 431 A.2d 783, 785-86 (1981) (some overlapping of power of each branch must exist); Opinion of the Justices, 113 N.H. 287, 290, 306 A.2d 55, 57 (1973) (article 37 does not require the erection of impenetrable barriers between the branches of government); Cloutier v. State Milk Control Board, 92 N.H. 199, 203, 28 A.2d 554, 557 (1942) (State Constitution contemplates some overlapping and duality as a matter of practice and essential expediency). However, if the legislature could overrule the courts in some of their essential operations, the judiciary "instead of being one of the three coordinate branches of the state government, would [be] rendered subservient to the Legislature in a fashion never contemplated by any." Winberry v. Salisbury, 74 A.2d 406, 410 (N.J.), cert. denied, 340 U.S. 877 (1950). "[T]he judiciary would in every respect cease to be a check on the legislature, if the legislature could at pleasure revise or alter any of the judgments of the judiciary." Merrill, 1 N.H. at 210. Because the purpose of the system of checks and balances is to prevent one branch of government from dominating another, evaluation of whether the separation of powers principle would be violated requires us to consider whether the proposed legislation would prevent the judiciary from accomplishing its constitutionally assigned functions. See Opinion of the Justices, 113 N.H. at 290, 306 A.2d at 57 ("[T]he three departments must move in concert without improper encroachments by one branch upon the functions of another."); cf. State v. LaFrance, 124 N.H. 171, 176, 471 A.2d 340, 342 (1983) ("No branch of State government can lawfully perform any act which violates the State Constitution.").

The bill, as amended, would affect the function of New Hampshire Rule of Evidence 404(b), a rule adopted by this court to "govern proceedings in the courts of the State of New Hampshire." N.H. R. Ev. 101. Rule 404(b) provides the standard for admission of evidence of crimes, wrongs or acts, other than those crimes, wrongs or acts charged, in the trial of matters in the courts of this State.

This court has consistently recognized that "[a]s a separate and coequal branch of government, the judiciary is constitutionally authorized to promulgate its own rules." Petition of Burling, 139 N.H. 266, 271, 651 A.2d 940, 943 (1994); see N.H. CONST. pt. I, art. 37; N.H. CONST. pt. II, art. 73-a; In re Proposed Rules of Civil Procedure, 139 N.H. 512, 513, 659 A.2d 420, 420 (1995) (supreme court's supervisory and rulemaking authority over courts in State derives primarily from State Constitution and from common law); LaFrance, 124 N.H. at 180, 471 A.2d at 345 (court's authority to adopt rules of practice and procedure is of ancient origin); Nassif Realty Corp. v. National Fire Ins. Co., 107 N.H. 267, 268, 220 A.2d 748, 749 (1966) (rulemaking power of supreme court as court of general jurisdiction is broad and comprehensive).

> The inherent rule-making authority of courts of general jurisdiction in this state to prescribe rules of practice and rules to regulate their proceedings "as justice may require" has an ancient lineage supported by consistent custom, recognized by statute and enforced by numerous judicial precedents. The matter has been

> succinctly summarized by a careful legal historian in the following language: Thus the rule-making power was firmly established over three hundred years ago. A statute in 1701 confirmed the ancient power which has never been lost.

Garabedian v. William Company, 106 N.H. 156, 157, 207 A.2d 425, 426 (1965) (quotation and citations omitted). Our judicial power has always included the power to prescribe procedural rules for the conduct of litigation in this State's courts. In addition, this court's inherent power to promulgate procedural rules has been endorsed with constitutional authority. See N.H. CONST. pt. II, art. 73-a.

> [T]he rule-making process is an inherent judicial power existing independently of legislative authority. In addition, part II, article 73-a of the New Hampshire Constitution, which granted to the supreme court the power to make rules regulating the administration of all courts of the State, makes clear that the judiciary has the authority to promulgate and administer rules concerning practice and procedure in the courtroom.

LaFrance, 124 N.H. at 180, 471 A.2d at 345.

Rules of evidence, in most instances, relate only to practice and procedure. To say, however, that a rule exists and that conflicting legislation would violate the separation of powers doctrine is not a sufficient analysis. Under the separation of powers doctrine, the legislature has a limited appropriate role to act on court rules; the basic analysis applied to determine whether legislative action is appropriate on judicial rules involves the distinction between substance and procedure. See State v. Currington, 700 P.2d 942, 944 (Idaho 1985) (procedure pertains to "essentially mechanical operations of the courts by which substantive law, rights, and remedies are effectuated"); State ex rel. Collins v. Seidel, 691 P.2d 678, 681 (Ariz. 1984); Ammerman v. Hubbard Broadcasting, Inc., 551 P.2d 1354, 1357 (N.M. 1976) (rules of evidence "designed to accomplish a just determination of rights and duties granted and imposed by the substantive law are traditionally considered to be . . . procedural law"); see generally 1 Wigmore on Evidence 7, at 462-65 n.1 (1983); Morgan, Rules of Evidence - Substantive or Procedural?, 10 Vand. L. Rev. 467 (1957). However, the distinction between procedure, a subject under the exclusive jurisdiction of the courts, and substance, a legitimate subject of legislative action, "is not always well understood, and is sometimes vague and indistinct." State v. Pavelich, 279 P. 1102, 1104 (Wash. 1929); see In re Florida Evidence Code, 372 So. 2d 1369 (Fla. 1979).

A variety of tests have evolved as methods of classifying something as substance or procedure. One test, derived from the United States Supreme Court's decision in Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938), and its progeny, "looks to whether a person's in-court conduct or out-of-court conduct has been changed." Comment, Rules of Evidence: An Exercise of Constitutional Power by the Michigan Supreme Court, IV Det. C.L. Rev. 1063, 1080 (1980) [hereinafter Rules of Evidence]. "The rule is substantive if the rule affects or regulates primary, out-of-court activities of people as a direct result of promoting social policies which the state deems important." Id.

A second test "asks whether there exists a general public policy concerning a particular issue."

Id. at 1081. "The test . . . is whether a given rule of evidence is a device with which to promote the adequate, simple, prompt and inexpensive administration of justice in the conduct of a trial or whether the rule, having nothing to do with procedure, is grounded upon a declaration of a general public policy." Riedl, To What Extent May Courts Under the Rule-Making Power Prescribe Rules of Evidence?, 26 A.B.A.J. 601, 604 (1940). This test, however, has been criticized.

> Clearly, matters of public policy enacted as laws by the legislature involving substantive rights as distinguished from matters of procedure will always be controlling, subject to constitutional restraints. However, it is not sufficient to say simply that we will defer to legislative enactment on all "matters of public policy"; in fact, all enactments of the General Assembly become matters of "public policy."
>
> Therefore, even though a particular legislative enactment, procedural in nature, may serve to enhance or advance an acknowledged public policy issue, if the legislatively enacted procedure conflicts with a procedure established by the judicial branch, then in all such cases the judicially established procedure should prevail unless and until it is changed or modified by the judicial branch.

State v. Sypult, 800 S.W.2d 402, 407 (Ark. 1990) (Turner, J., concurring).

A third test, characterized as "the most popular test to distinguish substance and procedure," defines "the rights and duties which people live by as substantive, whereas procedure defines the method by which those rights are enforced." Rules of Evidence, supra at 1082.

> A definition which distinguishes substantive from procedural law on the basis that the former relates to rights and duties, while the latter refers to the means and methods by which those rights and duties are to be protected and enforced through the courts would appear to be both a liberal and practical criterion, and one which lends to a conclusion that rules of evidence are included within "procedure."

Stein, To What Extent May Courts Under the Rule-Making Power Prescribe Rules of Evidence?, 26 A.B.A.J. 639, 644 (1940). We accept this test as providing the most useful framework for distinguishing between substance and procedure. Substantive laws are "those laws which have for their purpose to determine the rights and duties of the individual and to regulate his conduct and relation with the government and other individuals." Riedl, supra at 605 n.31. Procedural laws are "those laws which have for their purpose . . . to prescribe machinery and methods to be employed in enforcing these positive provisions." Riedl, supra at 605 n.31. "[T]here is a critical difference between the rights of an individual and the method by which an individual's right will be presented in a court of law." Rules of Evidence, supra at 1078.

The location of a matter of substance within a scheme of rules of procedure or rules of evidence does not immunize it from legislative change. For example, where the legislature purports to create presumptions that govern the admission and weight of evidence, and these presumptions are integral to the definition of the crime or cause of action to be tried, the governing presumptions fairly may be considered substantive, and therefore constitutionally

appropriate for legislative action. See RSA 259:18, I (1993) (rebuttable presumption that person selling five or more vehicles in twelve-month period is "dealer" for bond requirement purposes); RSA 265:60 (1993) (prima facie lawful or unlawful speed for operating motor vehicles); RSA 281-A:17 (Supp. 1996) (rebuttable presumption that heart or lung disease in firefighter is occupationally related for workers' compensation purposes); RSA 292-B:6 (1987) (rebuttable presumption that appropriation of more than seven per cent of market value of assets from appreciation to operating funds is imprudence of governing board of eleemosynary institution); RSA 357-D:3, VII(a) (1995) (presumption that three attempts to repair a motor vehicle problem within warranty period is "reasonable" number triggering replacement or rescission remedies).

The legislature also may affect procedure, even when there is no tie to matters of substance, when it acts within its expressly delegated constitutional powers to create and allocate jurisdiction within, and among, the courts. See N.H. CONST. pt. II, art. 4 (power to establish courts); N.H. CONST. pt. II, art. 72-a; N.H. CONST. pt. II, art. 76 (allocation of jurisdiction on marriage, divorce, alimony, and appeals from probate judges); N.H. CONST. pt. II, art. 77 (allocation of jurisdiction to justices of the peace and to police courts); N.H. CONST. pt. II, art. 80 (legislative control over manner of exercise of jurisdiction by probate court in some matters); N.H. CONST. pt. I, art. 20 (legislative power to deny jury trial in admiralty). The legislature has regularly exercised these constitutional powers. See RSA 491:8-a (1983) (creation of summary judgment jurisdiction in superior court); RSA 502-A:27-c (1983) (district court); RSA 547:11-f (1996) (probate court); RSA 491:22 (Supp. 1996) (creation of declaratory judgment jurisdiction in the superior court); RSA 547:11-b (Supp. 1996) (creation of declaratory judgment jurisdiction in probate court); RSA 491:22-a (1983) (allocation of burden of proof in some instances under created jurisdiction).

The legislature has acted in some instances where, it could be argued, it has gone beyond its legislative function and crossed into areas that remain the exclusive domain of the judiciary. See RSA 382-A:2-202 (1994) (limitation of parol evidence); RSA 356:4-e (1995) (application of preclusive effect in anti-trust proceedings); RSA 632-A:6, III-a (Supp. 1996) (manner of dress of victim inadmissible to show consent). Although these enactments arguably may interfere with the judiciary's authority over procedural matters, we may apply them as a matter of comity when they are consistent with judicial functions and policies and when no constitutional challenge is made to them. See Petition of Breau, 132 N.H. 351, 359, 565 A.2d 1044, 1049 (1989) ("obligation of comity is consistent with judicial discretion to decline any recognition of foreign governmental acts that would violate strong public policy of this State or leave its courts unable to render complete justice"); cf. Opinion of the Justices (Certain Evidence in Sexual Assault Cases), 140 N.H. 22, 26-27, 662 A.2d 294, 296-97 (1995) (declining to opine on constitutionality of evidence rule under doctrine of separation of powers where question not raised in request); State v. Howard, 121 N.H. 53, 58-59, 426 A.2d 457,

460-61 (1981) (statute construed in such a way as to not violate constitution).

The proposed bill brings New Hampshire Rule of Evidence 404(b) directly into issue. It does not purport to define the crimes or torts to which it is addressed but seeks to control the use of collateral matters in the fair trial of those crimes or torts. Rule 404(b) is a prime example of an internal procedural rule designed to effectuate a constitutional right. The purpose of Rule

404(b) is to increase the probability of a just verdict. See State v. Cote, 108 N.H. 290, 297, 235 A.2d 111, 116 (1967), cert. denied, 390 U.S. 1025 (1968) (use of prior convictions to show nothing more than a disposition to commit the crime charged would violate due process). A just verdict is a result of a fair trial, the right to which is a substantive right grounded in our constitution, not in statutory enactments. The protection of constitutional rights is a core function of the judiciary. See Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 625 (1819) (on the court is "imposed the high and solemn duty of protecting" those rights which the constitution has placed beyond legislative control). Rule 404(b) is simply a procedural means by which the fair trial right is secured. Giving deference to the legislature would, in this instance, abolish the rule's purpose and interfere with the judiciary's sound discretion in determining to what extent the rule serves its function in the circumstances of a particular case.

Rule 404(b) provides:

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

"As we have long held and continue to maintain, evidence of prior wrongs is inadmissible to prove a disposition to commit such acts." State v. Trempe, 140 N.H. 95, 99, 663 A.2d 620, 622 (1995). "The purpose of Rule 404(b) in a criminal trial is to ensure that the defendant is tried on the merits of the crime as charged and to prevent a conviction based on evidence of other crimes or wrongs." State v. Bassett, 139 N.H. 493, 496, 659 A.2d 891, 894 (1995). "Evidence of other wrongs is inherently prejudicial, and increases the likelihood that a jury will decide the case on an improper basis. The concern that a defendant might be convicted because of his character is the gravamen of Rule 404(b)." State v. McGlew, 139 N.H. 505, 509, 658 A.2d 1191, 1195 (1995) (citation omitted).

Rule 404(b) directly incorporates principles developed by the common law.

> Over one hundred years ago, this court stated an evidentiary rule that was well-settled even then: evidence of a defendant's prior bad acts is not permitted to show in a prisoner a tendency or disposition to commit the crime with which he or she is charged. This principle has not lost any strength in the succeeding years and forms the foundation for our present Rule 404(b).

State v. Blackey, 137 N.H. 91, 96, 623 A.2d 1331, 1334 (1993) (quotations, brackets and citation omitted). Prior to the adoption of Rule 404(b), this court followed a set of principles designed to ensure the proper use of other crimes evidence.

> Evidence of prior crimes, while inadmissible to prove the defendant's bad character or disposition to commit the crime for which he is indicted, may be offered to prove an element of the crime or to show, inter alia, the defendant's motive, intent or knowledge. In resolving the question of admissibility, the judge must determine that the evidence is relevant for a purpose other than showing the character or

> disposition of the defendant, that the proof that the acts in question were committed by the defendant is clear, and that the probative value of the evidence outweighs the danger of prejudice to the defendant.

State v. Hood, 127 N.H. 478, 480, 503 A.2d 781, 783 (1985) (citations, quotation, and brackets omitted); see State v. Barker, 117 N.H. 543, 546, 374 A.2d 1179, 1180 (1977). A similar three-pronged test is applied to cases decided under Rule 404(b). See State v. Trainor, 130 N.H. 371, 375, 540 A.2d 1236, 1239 (1988); N.H. R. Ev. 403. Rule 404(b) applies equally to cases involving sexual assaults and other crimes. Compare State v. Kirsch, 139 N.H. 647, 653, 662 A.2d 937, 942 (1995) (sexual assault) with State v. Newcomb, 140 N.H. 72, 74, 663 A.2d 613, 615 (1995) (murder) and State v. Richardson, 138 N.H. 162, 165, 635 A.2d 1361, 1364 (1993) (simple assault, theft, criminal threatening).

Before admitting prior crimes evidence, the trial court must determine its relevance. Richardson, 138 N.H. at 166, 635 A.2d at 1364. The rules of evidence define relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.H. R. Ev. 401. An initial determination of relevance rests within the sound discretion of the trial court. See N.H. R. Ev. 104(a) (preliminary questions concerning the admissibility of evidence shall be determined by the court). "To meet the relevancy requirement, the other bad acts evidence must have some direct bearing on an issue actually in dispute, and there must be a clear connection between the particular evidentiary purpose, as articulated to the trial court, and the other bad acts." Kirsch, 139 N.H. at 654, 662 A.2d at 942 (quotations, citation, and brackets omitted). "The party offering evidence bears the burden to make an offer of proof to show the relevance of the evidence offered." McGlew, 139 N.H. at 509, 658 A.2d at 1195.

The proposed bill differs in significant respects from Rule 404(b). The bill establishes a rebuttable presumption in criminal prosecutions for sexual assault and related offenses as defined in RSA chapter 632-A, for incest and endangering the welfare of a child or incompetent, for attempts and conspiracies to commit those crimes, and in civil suits for sexual assault, that certain evidence is admissible. The bill sets out three categories of presumptively admissible evidence in the enumerated civil and criminal sexual assault cases. First, evidence of any other sexual assault committed by the defendant is admissible and may be considered for any relevant purpose other than showing the defendant's character. Second, evidence of other sexual assaults by the defendant against the same victim is admissible to show the defendant's motive, intent, the context of the assault in question, and the relationship of the parties. Third, evidence of other sexual assaults by the defendant against different victims is admissible to show the defendant's motive and intent.

The proposed legislation would restrict the trial court's exercise of discretion in making an initial determination that the offered evidence is relevant. The proposed bill creates a rebuttable presumption that mandates that the offered evidence "shall" be admissible, thereby leaving to the trial court only the determination whether "the probative value of such evidence is substantially outweighed by the danger of unfair prejudice to the defendant." Also, by creating a rebuttable presumption, the bill would place the burden of going forward, in all instances, on the defendant to disprove the relevancy of the offered evidence. We have often

held, in both criminal and civil cases, that the proponent of evidence has the burden of demonstrating its admissibility. See, e.g., State v. Chaisson, 123 N.H. 17, 29, 458 A.2d 95, 102 (1983); Winslow v. Dietlin, 100 N.H. 147, 149, 121 A.2d 573, 575 (1956); Panagoulis v. Company, 95 N.H. 524, 525, 68 A.2d 672, 673 (1949).

Prior sexual assault conduct may or may not be relevant, and the question whether it is relevant cannot be reduced to a legislative formula. To do so eliminates the inherent discretion of the judiciary as exercised on a case-by-case basis. Cf. State v. Clemente, 353 A.2d 723, 731 (Conn. 1974) (statute requiring production of prior statements of witnesses unduly infringes upon the court by prohibiting its exercise of discretion and inherent power to control discovery).

Rule 404(b) goes to the heart of the judicial function; it strikes a balance between the search for evidence that furthers the truth-finding process and the accused's right to due process. See State v. Skidmore, 138 N.H. 201, 202, 636 A.2d 64, 65 (1993); Cote, 108 N.H. at 297, 235 A.2d at 116. Due process is a substantive right grounded in the constitution, and Rule 404(b) is a method by which the right is enforced. See Skidmore, 138 N.H. at 202, 636 A.2d at 65. The constitution vests this court with the responsibility of maintaining and refining this balance.

> "Powers judicial," "judiciary powers," and "judicatories" are all phrases used in the constitution: and though not particularly defined, are still so used to designate with clearness, that department of government, which it was intended should interpret and administer the laws. On general principles therefore, those enquiries, deliberations, orders and decrees, which are peculiar to such a department, must in their nature be judicial acts. Nor can they be both judicial and legislative; because a marked difference exists between the employments of judicial and legislative tribunals.

Merrill, 1 N.H. at 203-04. A court's constitutional function to independently decide controversies is impaired if it must depend on, or is limited by, another branch of government in determining and evaluating the facts of the controversies it must adjudicate. See United States v. Klein, 80 U.S. (13 Wall.) 128, 146 (1871). In essence the bill before us usurps the judicial function of making relevancy determinations by creating a rebuttable presumption in favor of admissibility without regard for the particular facts or circumstances of a case.

Because the proposed bill directly conflicts with Rule 404(b), a rule concerning a uniquely judicial function, the separation of powers doctrine is violated. The legislature has no more right to break down the rules prescribed by this court to assure fundamental due process in criminal and civil trials than the court has to prescribe the mode and manner in which the legislature shall perform its legislative duties. See Epstein v. State, 128 N.E. 353, 353 (Ind. 1920); Opinion of the Justices, 86 N.H. 597, 601, 166 A.2d 640, 646 (1933) (part II, article 4, the power of the general court to establish courts, does not authorize the legislature to take from the judicial department a power recognized as an essential attribute of judicial tribunals).

We answer your first question, whether enactment of the bill, as amended, would violate part I, article 37 of the State Constitution, in the affirmative. We find it unnecessary, therefore, to

address your second question, whether the bill would violate part II, article 73-a of the State Constitution.

David A. Brock

William R. Johnson

W. Stephen Thayer, III

Sherman D. Horton, Jr.

John T. Broderick, Jr.

January 24, 1997

Jeffrey R. Howard, attorney general (Cynthia L. White, assistant attorney general, on the memorandum), filed a memorandum in support of negative answers to the questions presented.

James E. Duggan, chief appellate defender, of Concord, filed a memorandum in support of affirmative answers to the questions presented.

Douglas & Douglas, of Concord (Charles G. Douglas, III on the memorandum), filed a memorandum on behalf of the New Hampshire House Committee on Corrections and Criminal Justice in support of negative answers to the questions presented.

Charles R. Johnson, of Claremont, filed a memorandum in support of negative answers to the questions presented.

Hank Amsden, of Concord, filed a memorandum in support of a negative answer to question two.