

**STATE OF TENNESSEE**

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April 10, 2004

Opinion No. 04-089

Constitutionality of Proposed House Bill 3186

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**QUESTION**

Whether House Bill 3186, which allows for evidence of a defendant's prior conviction for a sexual offense against a child under the age of thirteen (13) to be admitted, subject to the provisions of Tenn. R. Evid. 403, in a subsequent case involving a sexual offense against a child less than thirteen (13), is constitutional?

**OPINION**

House Bill 3186 is defensible under both the United States and Tennessee Constitutions.

**ANALYSIS**

Two potential constitutional questions are implicated by the proposed legislation: 1) violation of the separation of powers doctrine under Art. II, §2, of the Tennessee Constitution; and 2) violation of due process of law under the Fourteenth Amendment to the United States Constitution and Art. I, § 8, of the Tennessee Constitution.

*1. Separation of Powers.* Tenn. Const., Art II., § 2, provides that "[n]o person or persons belonging to one of these departments [Legislative, Executive and Judicial] shall exercise any of the powers properly belonging to either of the others, except in the cases herein directed or permitted." Though it has been long recognized that the General Assembly has the authority to enact rules of evidence, that power is not unlimited and must yield when it seeks to govern the practice and procedure of the courts. "Only the Supreme Court has the inherent power to promulgate rules governing the practice and procedure of the courts of this state." *State v. Mallard*, 40 S.W.3d 473, 480 (Tenn. 2001), citing *State v. Reid*, 981 S.W.2d 166, 170 (Tenn.1998) ("It is well settled that Tennessee courts have inherent power to make and enforce reasonable rules of procedure."); *see also* Tenn. Code Ann. §§ 16-3-401 and -402 (1994). This inherent power "exists by virtue of the establishment of a Court and not by largess of the legislature." *Haynes v. McKenzie Mem'l Hosp.*,

667 S.W.2d 497, 498 (Tenn. Ct. App.1984). Furthermore, as noted by the *Mallard* Court, “because the power to control the practice and procedure of the courts is inherent in the judiciary and necessary ‘to engage in the complete performance of the judicial function,’ this power cannot be constitutionally exercised by any other branch of government.” *Mallard*, 40 S.W.3d at 481 (internal citations omitted).

In deciding whether Tenn. Code Ann. § 39-17-424 violated separation of powers, the Tennessee Supreme Court in *Mallard* conducted a thorough analysis of both the singular powers of the judiciary and the legislature and their overlap. The Tennessee Supreme Court has acknowledged the existence of a certain amount of overlap among the three branches of government and the broad power of the General Assembly to establish rules of evidence in furtherance of its ability to enact substantive law. *Daughtery v. State*, 393 S.W.2d 739, 743 (1965). However, that broad ability to enact rules for use in the courts “must necessarily be confined to those areas that are appropriate to the exercise of that power.” *Mallard*, 40 S.W.3d at 481. The courts of this state have, from time to time, consented to the application of procedural or evidentiary rules promulgated by the legislature when legislative enactments (1) are reasonable and workable within the framework already adopted by the judiciary, and (2) work to supplement the rules already promulgated by the Supreme Court. *Id.*, citing *Newton v. Cox*, 878 S.W.2d 105, 112 (Tenn.1994) (upholding legislative regulation of attorneys when the regulation (1) did not “directly conflict with the Supreme Court’s authority,” and (2) was merely “designed to declare” public policy).

In concluding that Tenn. Code Ann. § 39-17-424 did not violate the separation of powers doctrine, the *Mallard* court noted that “the legislature can have no constitutional authority to enact rules, either of evidence or otherwise, that strike at the very heart of a court’s exercise of judicial power. Among these inherent judicial powers are the powers to hear facts, to decide the issues of fact made by the pleadings, and to decide the questions of law involved.” *Mallard*, 40 S.W.3d at 483 (internal citations omitted). As an essential corollary to these principles, the court noted that “any determination of what evidence is *relevant*, either logically or legally, to a fact at issue in litigation is a power that is entrusted solely to the care and exercise of the judiciary.” *Id.* citing *Opinion of the Justices*, 141 N.H. 562, 688 A.2d 1006, 1016 (1997). “Consequently, any legislative enactment that purports to remove the discretion of a trial judge in making determinations of logical or legal relevancy impairs the independent operation of the judicial branch of government, and no such measure can be permitted to stand.” *Mallard*, 40 S.W.3d at 483.

Initial questions of admissibility of evidence are governed by Tenn. R. Evid. 401 and 403, which require a trial court first to determine if proffered evidence is relevant. Only after a court finds that the evidence is relevant does the court then weigh the probative value of that evidence against the risk that the evidence will unfairly prejudice the trial. If, in the exercise of its discretion, the trial court finds that the probative value of evidence is *substantially* outweighed by its prejudicial effect, then the evidence may be excluded. Tenn. R. Evid. 403. As noted by the courts, Rule 403 is a rule of admissibility, and it places a heavy burden on the party seeking to exclude the evidence. *State v. James*, 81 S.W.3d 751, 757 (Tenn. 2002) (citations omitted).

However, under current law, the admission of prior convictions against an accused is governed by Tenn. R. Evid. 404, which provides several protective procedures that must be followed before "other acts" evidence is admissible. The theory underlying the Rule 404 requirements is that "the admission of other-acts evidence poses a substantial risk that a trier of fact may convict the accused for crimes other than those charged." *Id.* at 758 (citations omitted).

House Bill 3186 would have the admissibility of prior convictions of an accused who is on trial for a sexual offense against a child under the age of thirteen assessed under the more permissive standard of Rule 403, rather than the more rigorous standard of Rule 404(b). But the legislation does not propose to remove a judge's discretion to determine what evidence is logically or legally relevant to an ultimate fact of consequence. Instead, the legislation merely directs that such convictions may "be considered for . . . [their] bearing on any matter to which. . . [they] are relevant, *subject to the provisions of Rule 403. . . .*" (emphasis supplied). Rule 403, in turn, directs the trial court to determine the probative value of such evidence, *i.e.*, its relevance to an ultimate fact of consequence in the case, and, then, to balance the probative value assigned against the danger of unfair prejudice. Thus, because the legislation does not disturb the court's traditional authority to make relevancy determinations, it is defensible against a claim that it violates the separation of powers as interpreted by our Supreme Court in *Mallard*.

2. *Due Process.* The Constitution of the United States prevents the States from depriving "any person of life, liberty, or property, without due process of law. . . ." U.S. Const. Amend. 14, § 1. Likewise, Art. I, § 8 of the Tennessee Constitution states "that no man shall be taken or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers or the law of the land." The Tennessee Supreme Court has held that Art. I, § 8, of the Tennessee Constitution confers the same protections as the Federal Constitution. *Brown v. Campbell County Bd. of Education*, 915 S.W.2d 407, 413 (Tenn, 1995). The Tennessee Supreme Court has also held that the "law of the land" provision of Art. I, § 8, is synonymous with the "due process of law" provisions of the Fifth and Fourteenth Amendments to the United States Constitution. *Burford v. State*, 845 S.W.2d 204, 207 (Tenn. 1992).

In order to mount a successful due process attack against the proposed legislation, a defendant would be required to show that it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental. *See Montana v. Egelhoff*, 518 U.S. 37, 43-44, 116 S.Ct. 2013, 135 L.Ed.2d 361 (1996) (courts examine "historical practice" in evaluating due process claims); *Medina v. California*, 505 U.S. 437, 445, 112 S.Ct. 2572, 120 L.Ed.2d 353 (1992); *Dowling v. United States*, 493 U.S. 342, 353, 110 S.Ct. 668, 107 L.Ed.2d 708 (1990) (fundamental principles of justice are those "which lie at the base of our civil and political institutions" and which define "the community's sense of fair play and decency") (internal citations omitted); *Patterson v. New York*, 432 U.S. 197, 201-202, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977). The admission of relevant evidence will not offend due process unless the evidence is so prejudicial as to render the defendant's trial fundamentally unfair. *Estelle v. McGuire*, 502 U.S. 62, 70, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991); *Spencer v. Texas*, 385 U.S. 554, 562-564, 87 S.Ct. 648, 17 L.Ed.2d

606 (1967).<sup>1</sup>

Though the rule against the admission of propensity evidence, as set forth in Tenn. R. Evid. 404(b), is a fundamental principle of justice, long recognized as necessary to assure due process,<sup>2</sup> as the California Supreme Court noted in *People v. Falsetta*, 986 P.2d 182, 188 (Cal. 1999), “a long-standing practice does not necessarily reflect a *fundamental*, unalterable principle embodied in the Constitution.” The *Falsetta* court was faced with a due process challenge to legislation similar to that proposed by House Bill 3186, and in rejecting that challenge, the court noted that the California rule against the admission of propensity evidence had long been subject to far-ranging exceptions, much like the exceptions in Tennessee’s Rule 404(b). The court was unclear as to whether the rule against propensity evidence *in sexual abuse cases* was a fundamental historical principle of justice but determined that such a conclusion was not necessary if the challenged rule did not unduly offend those fundamental due process principles. *Id.* citing *Patterson v. New York*, 432 U.S. at 202.

The *Falsetta* court noted that the legislative history of the enactment of California’s rule allowing admission of propensity evidence in child sexual abuse cases indicated that sex crimes were usually committed in seclusion without third party witnesses or substantial corroborating evidence. Therefore, an ensuing trial often presented conflicting versions of the event and required the trier of fact to make difficult credibility determinations. The court recognized that evidence that a defendant committed other sex offenses was “at least circumstantially relevant to the issue of his disposition or propensity to commit these offenses” and that such evidence was objectionable “not because it has no appreciative probative value, *but because it has too much.*” *Id.* (emphasis in original) (citations omitted). However, the court determined that the California rule allowing this evidence did not violate due process because the trial court still maintained discretion to exclude propensity evidence under the California equivalent to Tenn. R. Evid. 403. That provision provided a safeguard, in the opinion of the court, “against the use of uncharged sex offenses in cases where the admission of such evidence could result in a fundamentally unfair trial” because such evidence is still subject to exclusion under the rules of evidence. *Id.* at 190.<sup>3</sup>

Likewise, House Bill 3186 provides that prior convictions for sexual abuse against a child under the age of thirteen must be subjected to the weighing process of Tenn. R. Evid. 403. Thus, the evidence cannot be used in cases where its probative value is substantially outweighed by the possibility that it will consume an undue amount of time, create a substantial danger of undue

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<sup>1</sup> *Estelle* expressly left open the question whether a state law permitting admission of propensity evidence would violate due process principles. 502 U.S. at 75, fn. 5; *see also Spencer v. Texas*, *supra*, 385 U.S. at 561.

<sup>2</sup> “The rule excluding evidence of criminal propensity is nearly three centuries old in the common law.” 1 Wigmore, Evidence § 194, pp. 646-647 (3d. ed. 1940).

<sup>3</sup> It should be noted that the California rule allowing this type of evidence provided for the admission of uncharged sexual misconduct, whereas House Bill 3186 provides for only the admission of prior convictions.

prejudice, confuse the issues or mislead the jury. Tenn. R. Evid. 403. House Bill 3186 is thus defensible against a due process challenge for the same reasons discussed by the California Supreme Court in *Falsetta*.

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