

STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Michigan Court of Appeals
Wilder, P.J., and Cavanaugh and Kelly, JJ.

PEOPLE OF THE STATE OF MICHIGAN, Supreme Court No. 142031
Plaintiff-Appellant, Court of Appeals No. 291841
v Wayne Circuit Co No. 06-008116-FC
LINCOLN ANDERSON WATKINS,
Defendant-Appellee.

Appeal from the Michigan Court of Appeals
Servitto, P.J., and Gleicher and Shapiro, JJ.

PEOPLE OF THE STATE OF MICHIGAN, Supreme Court No. 142751
Plaintiffs-Appellant, Court of Appeals No. 298138
v Bay Circuit Court No. 09-10497-FH
RICHARD KENNETH PULLEN,
Defendants-Appellee.

BRIEF OF ATTORNEY GENERAL BILL SCHUETTE AS *AMICUS CURIAE*

ORAL ARGUMENT REQUESTED

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INTEREST AND STATEMENT OF POSITION OF AMICUS CURIAE

The Attorney General is the chief law enforcement officer for the State of Michigan. In recognition of this duty, the Court Rules provide that the Attorney General may file a brief as *amicus curiae* without seeking permission from this Court. MCR 7.306(D)(2).

The Legislature well understood that a sexual interest in children does not exist in ordinary people and, therefore, evidence of its existence in a defendant is extraordinarily relevant in certain cases. In recognition of its extraordinary relevance, the Legislature determined that evidence of prior crimes of sexual violence against children “is admissible” when a defendant is charged with criminal sexual conduct (CSC) involving a minor victim. This policy is consistent with 150 years of this Court’s caselaw holding that the general prohibition on the admission of propensity evidence does not apply to sex crimes. Thus, a defendant does not have a fundamental right to a trial free of propensity evidence because such evidence has long been held to be admissible in sex crimes trials. The Legislature’s determination that prior sex crimes against children are admissible, when relevant, in a subsequent CSC involving a minor victim is rationally related to the State’s interest in protecting children from sexual predators. Such evidence is particularly important given the private nature of the crime, the difficulties in detecting sex crimes, and the rarity of sexual interest in children.

Moreover, a defendant does not have a due process right to the application of MRE 403. Rather, that rule of evidence stands as one of many tools designed to protect the right to a fair trial. But it is not the only tool. Evidence of a prior sexual

crime must be both against a child and relevant in order to be admissible under MCL 768.27a. That is, there must be some sort of nexus between the prior act and the charged offense. Once across that threshold, the Legislature has rationally determined that the evidence is so highly probative due to the unique nature of sex crimes against children that it can never, as a matter of public policy, be substantially more prejudicial than probative. In addition, any “unfairness” that might result from the jury convicting a defendant based on that prior act is dispelled by the standard jury instruction that tells jurors it may not convict based on “bad man” evidence.

MCL 768.27a is constitutionally valid without requiring this Court to resort to writing in an application of MRE 403 that does not exist in the statute itself.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

In *Watkins*, this Court issued an order dated March 30, 2011 granting defendant's application for leave to appeal and ordered the parties to include the following among the issues to be briefed:

- (1) Whether MCL 768.27a conflicts with MRE 404(b) and, if it does,
- (2) whether the statute prevails over the court rule, see *McDougall v Schanz*, 461 Mich 15 (1999) and Const 1963, art 6, § 1 and § 5;
- (3) whether the omission of any reference to MRE 403 in MCL 768.27a (as compared to MCL 768.27b(1)), while mandating that evidence of other offenses "is admissible for any purpose for which it is relevant," would violate a defendant's due process right to a fair trial; and
- (4) whether MCL 768.27a interferes with the judicial power to ensure that a criminal defendant receives a fair trial, a power exclusively vested in the courts of this state under Const 1963, art 6, § 1.

The Attorney General agrees with the Wayne County Prosecutor's Office on questions 1, 2, and 4. Moreover, the Attorney General agrees with Wayne County to the extent that they argue that if MRE 403 applies, that the prior acts evidence was properly introduced in this case. This brief raises only the issues raised by question 3 where the opinion of the Attorney General diverges from that of the Wayne County Prosecutor's Office. The Attorney General respectfully submits that MCL 768.27a's plain language precludes a trial court from using MRE 403 to exclude prior acts evidence, and that such a scheme does not violate a defendant's due process right to a fair trial.

In *Pullen*, this Court entered an order dated March 30, 2011 granting the Bay County Prosecuting Attorney's office's application for leave to appeal and ordered the parties to include the following among the issues to be briefed:

(1) Whether the omission of any reference to MRE 403 in MCL 768.27a (as compared to MCL 768.27b(1)), while mandating that evidence of other offenses "is admissible for any purpose for which it is relevant," would violate a defendant's due process right to a fair trial; and

(2) Whether the Court should rule that evidence of other offenses described in MCL 768.27a is admissible only if it is not otherwise excluded under MRE 403.

The Attorney General agrees with the Bay County Prosecutor that the trial court erred in its application of MRE 403 in this case and that both the trial court and the Court of Appeals failed to properly analyze the acts offered under MRE 404(b). This brief will only address the issue of whether due process requires the application of MRE 403 to evidence admitted under MCL 768.27a.

INTRODUCTION

The Attorney General agrees with the Bay County Prosecutor that MCL 768.27a as written does not violate a defendant's right to due process. Therefore, this Court should apply the language of the statute as written and hold that evidence of a prior sex crime against a child is admissible, when relevant, where the defendant is charged with a subsequent CSC involving a child. The Legislature's decision to "balance" these prior acts in favor of admissibility in this subset of crimes is no less constitutionally valid than a balancing test performed by a trial judge.

MCL 768.27a does not require judicial amendment because it does not violate due process on its face, even if this Court correctly interprets the provision as excluding the application of MRE 403. First, a defendant does not have a due process right to a trial free of propensity evidence. Indeed, just the opposite is true – courts have routinely allowed propensity evidence in sex offense cases throughout the history of the republic. Likewise, the United States Supreme Court has not held that MRE 403, or its Federal equivalent, is constitutionally *required* to ensure a fair trial. Rather, the application of MRE 403 is simply one of several tools that can be used by a trial court to ensure a fundamentally fair trial.

Second, the provisions of MCL 768.27a are rationally related to the fundamental government purpose of protecting children against sexual predators. This evidence is particularly critical given the fact that such crimes are often unobserved, the victims are minors, and there is often a delay in reporting the offense.

Third, a defendant's right to a fair trial is protected by the traditional rules governing the admissibility of propensity evidence. Specifically, there must be a nexus between the prior offense and the charged offense. That is, the propensity evidence must be relevant to an element of the offense or for some other purpose, such as establishing the credibility of the victim, showing the defendant's manner of committing the crime, and so forth.

Accordingly, neither the State nor Federal constitutions require that this Court to rewrite MCL 768.27a so as to incorporate MRE 403 by reference. Since the language of the statute is unambiguous, the Legislature must have intended the meaning clearly expressed, and the statute must be enforced as written. To hold otherwise would require this Court to violate a fundamental canon of statutory interpretation and instead conclude that the Legislature's inclusion of MRE 403 in MCL 768.27b but not in MCL 768.27a is mere surplusage.

COUNTER-STATEMENT OF FACTS

Attorney General Schuette adopts the People's recitation of facts as accurate and complete in both cases.

ARGUMENT

I. **The plain language of MCL 768.27a states that evidence of a prior sex crime against a child “is admissible” is the subsequent prosecution of a sex crime against a minor “for any purpose for which it is relevant” without regard to MRE 403. Had the Legislature intended to retain the MRE 403 balancing test, they would have done so explicitly, as they did in enacting MCL 768.27b.**

A. Standard of Review

Questions of statutory interpretation are reviewed *de novo*. *Donajkowski v Alpena Power Co*, 460 Mich 243, 248; 596 NW2d 574 (1999).

B. Analysis

Fundamental canons of statutory interpretation require this Court to discern and give effect to the Legislature’s intent as expressed by the language of its statutes. *Garg v Macomb County Cmty Mental Health Servs*, 472 Mich 263, 281; 696 NW2d 646 (2005). This Court must consider “both the plain meaning of the critical word or phrase as well as its placement and purpose in the statutory scheme If the language of the statute is unambiguous, the Legislature must have intended the meaning clearly expressed, and the statute must be enforced as written.” *People v Gillis*, 474 Mich 105, 114-115; 712 NW2d 419 (2006).

Ordinarily, evidence of a defendant’s prior acts is admissible only under MRE 404(b). The Legislature codified the requirements of MRE 404(b) – that evidence of a defendant’s prior bad acts is only admissible to show motive, intent, lack of mistake, et al – under MCL 768.27, which states:

In any criminal case where the defendant’s motive, intent, the absence of, mistake or accident on his part, or the defendant’s scheme, plan or

system in doing an act, is material, any like acts or other acts of the defendant which may tend to show his motive, intent, the absence of, mistake or accident on his part, or the defendant's scheme, plan or system in doing the act, in question, may be proved, whether they are contemporaneous with or prior or subsequent thereto; notwithstanding that such proof may show or tend to show the commission of another or prior or subsequent crime by the defendant.

Subsequently, the Legislature determined that, to protect the public from crimes of sexual violence against children and domestic violence, it was necessary to allow in CSC cases involving minors and cases involving domestic-violence evidence that the defendant had committed offenses of the same type on other occasions. The latter statute, involving domestic violence, specifically states that it remains subject to judicial balancing under MRE 403. MCL 768.27b (allowing such evidence "if it is not otherwise excluded under Michigan rule of evidence 403."). The former statute, involving crimes of sexual violence against children, says nothing about MRE 403 or the balancing test that MRE 403 ordinarily requires:

Notwithstanding section 27, in a criminal case in which the defendant is accused of committing a listed offense against a minor, evidence that the defendant committed another listed offense against a minor is admissible and may be considered for its bearing on any matter to which it is relevant. If the prosecuting attorney intends to offer evidence under this section, the prosecuting attorney shall disclose the evidence to the defendant at least 15 days before the scheduled date of trial or at a later time as allowed by the court for good cause shown, including the statements of witnesses or a summary of the substance of any testimony that is expected to be offered.

The difference in the two statutes is striking, raising the question whether the Legislature acted intentionally when it omitted any mention of MRE 403 in allowing other acts evidence in cases involving sexual crimes against children. As explained below, the answer is yes.

1. **The language of the statute plainly states that MRE 403 does not apply to evidence introduced under MCL 768.27a.**

Former Justice Corrigan wrote that this Court “has promoted a disciplined approach that requires judges to begin, and normally end, their inquiry with the statutory text.” Maura D. Corrigan, *Textualism in Action: Judicial Restraint on the Michigan Supreme Court*, 8 *Tex Rev L & Pol* 261, 265 (2004). Under this Court’s disciplined approach; there is no such thing as a “happenstance in drafting” (Brief of the Wayne County Prosecutor, p 30). Rather, this Court assumes that the Legislature means what it says and interprets statutes as they are written. Thus, this Court should decline any invitation to look to “legislative history” or the “striking” similarity between MCL 768.27a and FRE 414. Because the language of the statutes in this case demonstrates that only one type of propensity evidence – evidence of prior domestic violence – is subject to MRE 403, no further judicial construction is needed or allowed for propensity evidence admitted under MCL 768.27a.

- a. **“Notwithstanding section 27.”**

The Wayne County Prosecutor suggests that applying MCL 768.27a’s language literally would require this Court to conclude that *no* other evidentiary qualifier applies to MCL 768.27a, including limitations on hearsay and statutory privileges. Not so. A statute can only abrogate a rule of evidence to the extent that the statute and the rule conflict. *McDougall v Schanz*, 461 Mich 15, 37; 597 NW2d 148 (1999). And the only Rules of Evidence that conflict with MCL 768.27a are

MRE 404(b) and MRE 403. Because *only* MRE 403 and MRE 404(b) are abrogated by the statute, the rest of the rules of evidence remain in force.

In adopting the exception for evidence of prior sex crimes against children, the Legislature used the term “notwithstanding section 27.” The word “notwithstanding” is defined as “not being opposed or prevented by” and modifies the phrase “section 27.” Random House Webster’s College Dictionary (2001), p 908. As noted above, the Legislature essentially codified the requirements of MRE 404(b) when it enacted MCL 768.27. Thus, the language of the introductory phrase stands for the proposition that evidence of a defendant’s prior crimes of sexual violence against children is not “opposed or prevented by” the general limitation on the use of propensity evidence set forth under both MCL 768.27 and its MRE 404(b) analogue. Thus, by enacting MCL 768.27a and 27b, the Legislature created two exceptions to MRE 404(b), and did so based on policy considerations.

But the Legislature also created a second conflict between its substantive rule of law and the rules of evidence in §27a. Section 27a states that evidence that the defendant committed another listed offense against a minor “is admissible” and may be considered for its bearing on any matter to which it is relevant. In contrast, the language of MRE 403 states that “although relevant, evidence may be excluded . . . [in certain circumstances].” In other words, there is an irreconcilable conflict between the statutory command that evidence of a defendant’s prior crimes of sexual violence against children “is admissible” if relevant; and the requirement of the Court Rule that relevant evidence may be excluded under certain

circumstances. Just as with the conflict between MCL 768.27a and MRE 404(b), the statute reflects a legislative policy choice regarding the enforcement of a statutory provision and, therefore, the statute prevails over the court rule. *Schanz*, 461 Mich at 37.

This point is confirmed by the Legislature's inclusion of a specific reference to MRE 403 when it enacted MCL 768.27b. Like its companion statute, MCL 768.27b addresses evidence ordinarily subject to MCL 768.27 and its MRE 404(b) analogue. But in stark contrast to MCL 768.27a, when the Legislature enacted MCL 768.27b, it determined that MRE 403 would still apply. To accept a contrary interpretation, this Court would have to conclude that the Legislature's reference to MRE 403 in MCL 768.27b was mere surplusage, and that the Legislature's omission of MRE 403 in MCL 768.27a was a mistake. Both conclusions violate cardinal rules of statutory interpretation. *Herald Co v Eastern Michigan Univ Bd of Regents*, 475 Mich 463, 470; 719 NW2d 19 (2006).

b. "Evidence that the defendant committed another listed offense against a minor *is admissible*."

Undefined statutory terms and phrases must be given their plain and ordinary meanings, and it is proper to consult a dictionary for definitions. *Donajkowski*, 460 Mich at 248-249. The operative language of §27a – "is admissible" – means that the Legislature has determined that evidence of prior sex crimes against children belongs within the class of evidence that can be admitted for any relevant purpose. The word "is" is the third person singular form of "be."

Random House Webster's College Dictionary (2001), p 701. The dictionary defined "be" in pertinent part as "used as a copula to connect the subject with its predicate adjective in order to describe, identify, or amplify the subject." Random House Webster's College Dictionary (2001), p 116. The subject of §27a is "evidence that the defendant committed another listed offense against a minor." The adjective "admissible" is a legal term, defined by Black's Law Dictionary as "capable of being legally admitted." Black's Law Dictionary (8th ed), p 50. Therefore, it is clear that the Legislature has opined that, for policy reasons, evidence of a defendant's prior sex crimes against children is "capable of being admitted" despite the ordinary restrictions on such evidence under MCL 768.27 and its MRE 404(b) analogue.

c. "May be considered for its bearing on any matter to which it is relevant."

The Legislature's declaration that evidence under MCL 768.27a can be used "for its bearing on any matter to which it is relevant" is not consistent with the rule that otherwise relevant evidence may be excluded under MRE 403 when it is "substantially more prejudicial than probative." Had the Legislature intended MRE 403 to still apply, it would have done so explicitly – as it did when it made evidence admissible under MCL 768.27b subject to MRE 403 balancing.

In other words, the Legislature was aware of MRE 403 and was aware of its potential impact on its new exceptions to the general prohibition on the use of propensity evidence. Both MCL 768.27a and 27b used the same operative language – *is admissible* – with the same general qualifier, i.e., that the evidence must be

relevant. But only MCL 768.27b states that evidence admitted under that statute is subject to exclusion under MRE 403. Thus, in that statute, the Legislature specifically provided that evidence of prior incidents of domestic violence offered in a trial involving domestic violence is subject to exclusion under MRE 403. By contrast, no such language appears in MCL 768.27a. “Courts cannot assume that the Legislature inadvertently omitted from one statute the language that it placed in another statute” *People v Monaco*, 474 Mich 48, 58; 710 NW2d 46 (2006), quoting *Farrington v Total Petroleum, Inc*, 442 Mich 201, 210; 501 NW2d 76 (1993). Had the Legislature intended a comparable restriction on evidence of prior crimes of sexual violence against children, it would have so specified.

In sum, there is no textual basis to support a conclusion that the Legislature meant for evidence under MCL 768.27a to be subject to MRE 403 balancing.

2. Legislative context supports the Attorney General’s argument that the Legislature intentionally omitted a reference to MRE 403.

Given the intentionally different language of MCL 768.27a and 27b, there is no need to look further for signs of legislative intent. But the legislative context in this case is illuminating, and it supports the plain-language interpretation the Attorney General advances.

It cannot be disputed that there is a “striking” similarity between MCL 768.27a and FRE 414. And while FRE 414 does not have an explicit reference to FRE 403, the federal courts that have considered the issue have all read in a FRE 403 component. Why not adopt a similar approach in Michigan? To begin, this

argument proves too much. FRE 414 was incorporated into the federal rules of evidence and, therefore, can be naturally read together with the other federal rules of evidence, including FRE 403. In contrast, MCL 768.27a is a *statutory* rule of evidence that specifically conflicts with a rule of evidence. And since MCL 768.27a governs an area of substantive (rather than procedural) law, the statute must control over all conflicting evidentiary rules. *Schanz*, 461 Mich at 30-31.

More important is what the Legislature chose *not* to incorporate from the language of FRE 414. FRE 414 states in pertinent part:

(a) In a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant's commission of another offense or offenses of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant.

(b) In a case in which the Government intends to offer evidence under this rule, the attorney for the Government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

(c) *This rule shall not be construed to limit the admission or consideration of evidence under any other rule.* [Emphasis supplied.]

The dictionary defines “consideration” as “a matter weighed or taken into account when formulating an opinion or plan.” Thus, the “strikingly” similar federal statute explicitly permitted federal courts to “weigh” evidence of prior child molestation “under any other rule” – including, one can safely assume, FRE 403.

But the Michigan Legislature *did not incorporate FRE 414(c)* when it adopted §27a. Thus, the one portion of FRE 414 that would give textual support to a claim that the Legislature intended that evidence admitted under §27a be subject to the

balancing test set forth by MRE 403 was specifically omitted from the Michigan statute by our Legislature. In other words, the legislative context refutes any argument that the Legislature's decision to omit MRE 403 was a mere happenstance in drafting.

The exact same conclusion applies when comparing MCL 768.27b (the domestic violence statute) to its California counterpart, Cal Evid Code § 1109, which states in relevant part:

in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other domestic violence is not made inadmissible by Section 1101 [the California equivalent of MRE 404(b)] if the evidence is not inadmissible pursuant to Section 352 [the California equivalent of MRE 403].

In copying this language, the Legislature scrupulously kept the reference to Section 352, California's version of MRE 403. Yet imputing a legislative intention to incorporate MRE 403 into MCL 768.27a (the child sexual-abuse statute) necessarily renders mere surplusage the Legislature's inclusion of MRE 403 in MCL 768.27b. Such an approach violates the fundamental canon of statutory interpretation that this Court will "interpret *every word*, phrase, and clause in a statute to avoid rendering any portion of the statute nugatory or surplusage." *Herald Co v Eastern Michigan Univ Bd of Regents*, 475 Mich 463, 470; 719 NW2d 19 (2006) (emphasis supplied).

In sum, the Legislature intentionally omitted FRE 414(c) when it incorporated the rest of FRE 414 into MCL 768.27a, but intentionally *included* the reference to California's MRE 403 equivalent when it adopted the language of Cal

Evid Code § 1109. To characterize such legislative drafting as unintentional or a mistake is antithetical to this Court's rules of statutory interpretation. This Court should instead simply apply the words of the statute as they are written.

II. MRE 403 is not required to render MCL 768.27a constitutional, because a defendant does not have a fundamental right to a trial free of propensity evidence, and because allowing that evidence is rationally related to the legitimate purpose of protecting children from sexually violent persons.

A. Standard of Review

The question whether MCL 768.27a violated defendant's due process rights is a constitutional question that this Court reviews *de novo*. *People v Wilder*, 485 Mich 35, 40; 780 NW2d 265 (2010).

B. Analysis

Due process does not require a court to apply the balancing test set forth by MRE 403 to evidence admitted under MCL 768.27a. To prevail on such a constitutional claim, a defendant must carry a heavy burden. This Court will presume a statute is constitutional and construe it as such unless the only proper construction renders the statute unconstitutional. *In re Treasurer of Wayne County for Foreclosure*, 478 Mich 1, 9; 732 NW2d 458 (2007). In the due process context, defendant must show that the Legislature's failure to include a MRE 403 reference in MCL 768.27a offends some principle of justice so rooted in the traditions and conscience of our country as to be ranked as fundamental. See *Montana v Egelhoff*, 518 US 37, 43–44, 116 SCt 2013, 135 LEd2d 361 (1996).¹ The United States Supreme Court has defined fundamental principles of justice as those "which lie at the base of our civil and political institutions" and which define "the community's

¹ The Due Process analysis under the Michigan and Federal Constitutions are coextensive. See *People v Cetlinksi*, 435 Mich 742, 759; 460 NW2d 534 (1990).

sense of fair play and decency.” *Patterson v New York*, 432 US 197, 201–202, 97 SCt 2319, 53 LEd2d 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 US 62, 70, 112 SCt 475, 116 LEd2d 385 (1991).

The provisions of MCL 768.27a are consistent with due process. First, there is no clearly established United States Supreme Court case that holds that there is a “fundamental right” to be free of propensity evidence. See *Estelle*, 502 US at 75, n 5 (“we express no opinion on whether a state law would violate the Due Process Clause if it permitted the use of “prior crimes” evidence to show propensity to commit a charged crime”). Indeed, as noted in the Bay County Prosecutor’s brief, courts have routinely allowed propensity evidence in sex offense cases throughout the history of the republic. Likewise, the United States Supreme Court has not held that MRE 403, or its Federal equivalent, is constitutionally *required* to ensure a fair trial. Rather, the application of MRE 403 is simply one of several tools that can be used by a trial court to ensure a fundamentally fair trial.

Second, the provisions of MCL 768.27a are rationally related to the fundamental government purpose of protecting children against sexual predators. This evidence is particularly critical given the fact that such crimes are often unobserved, the victims are minors, and there is often a delay in reporting the offense.

Third, a defendant's right to a fair trial is protected by the traditional rules governing the admissibility of propensity evidence. Specifically, there must be a nexus between the prior offense and the charged offense. That is, the propensity evidence must be relevant to an element of the offense or for some other purpose such as establishing the credibility of the victim, showing the defendant's manner of committing the crime, and so forth.

1. MCL 768.27a does not implicate any “fundamental rights.”

A defendant bears the burden to establish that the constitutional principles violated by MCL 768.27 are “so rooted in the traditions and consciousness of our people as to be ranked as fundamental.” *Patterson*, 432 US at 202. The primary guide to determine whether a principle is “fundamental” under the Due Process clause is to examine historical practice. *Egelhoff*, 518 US at 43-44.

a. There is no “fundamental right” to a trial free of propensity evidence.

Here, defendants cannot establish a fundamental right to be free of propensity evidence in a criminal sexual conduct trial. In fact, the opposite is true – the “traditions and consciousness of our people” actually *support* the admission of propensity evidence in criminal sexual conduct cases. This Court recognized over 150 years ago that the general prohibition against the admission of propensity evidence was relaxed “in cases where the offense consists of illicit intercourse between the sexes” *People v Jenness*, 5 Mich 305, 1858 WL 2321 (1858).

In *Jenness*, the defendant was convicted of engaging in incest with his niece.² At trial, the prosecutor offered evidence of other acts of sexual intercourse between Jenness and the victim as evidence to corroborate her testimony. Justice Christiancy noted in his opinion that several States had allowed prior-acts evidence in other sex crime cases to corroborate the testimony of the complaining witness. *Jenness*, 5 Mich at 324.³ Such evidence was held to be admissible because it constituted a “link in the chain of testimony, without which it would be impossible for the jury to properly appreciate the testimony in reference to [the charged offense].” *Jenness*, 5 Mich at 323. Moreover, the Court demonstrated that prior acts evidence is particularly probative in a sex crime prosecution, where the victim is ordinarily the only witness. The Court noted that other acts evidence in this regard tended “to throw light upon the transaction itself, explaining and rendering more natural and probable that which, without such explanation, might appear unnatural and improbable.” *Jenness*, 5 Mich at 324-325.

This Court reiterated its stance that propensity evidence was proper in sex crimes prosecutions over a century later in *People v DerMartzex*, 390 Mich 410; 213 NW2d 97 (1973). In *DerMartzex*, the defendant was convicted of assault with intent to commit rape of a 10-year-old girl who was living in his home during her summer

² The Court did not indicate the victim’s age in its opinion.

³ See also *Commonwealth v Merriam*, 31 Mass 518 (1833) (prior act of adultery admissible to corroborate the testimony of the witness); *New Hampshire v Wallace*, 9 NH 515 (1838) (evidence of prior adultery was admissible “as having a tendency to render it more probably that the act charged in the indictment was committed”); *Lawson and Swinney v Alabama*, 20 Ala 65 (1852) (evidence of “illicit intercourse” prior to the charged offense of living together in fornication).

vacation. At trial, the prosecutor offered evidence that Mr. DerMartzex touched the victim's "private spots" during the drive from her Toronto home to Detroit. In addition, the victim testified that DerMartzex sexually mistreated her during her stay in Detroit. This Court noted that that prior acts evidence is particularly relevant in sex crimes prosecutions, because there are almost never any corroborating witnesses:

The principal issue confronting a jury in most statutory rape cases, and particularly where the charged offense is Attempted statutory rape, is the credibility of the alleged victim. Limiting her testimony to the specific act charged and not allowing her to mention acts leading up to the assault would seriously undermine her credibility in the eyes of the jury. Common experience indicates that sexual intercourse and attempts thereat are most frequently the culmination of prior acts of sexual intimacy. [*DerMartzex*, 390 Mich at 414-415.]

Accordingly, this Court concluded that the prior acts evidence was properly admitted. Without such evidence, "the testimony of the victim concerning the seemingly isolated unsuccessful assault may well appear incredible."⁴

The exact same reasoning applies to a defendant's prior acts of sexual violence against other children. See, e.g., *Heuring v Florida*, 513 So2d 122 (1987) (incidents of prior sexual battery on another person are admissible to corroborate the victim's testimony). As our Legislature recognized, a sexual interest in children does not exist in ordinary people. Thus, just as was the case in *DerMartzex*, a seemingly isolated allegation of sexual abuse by a child may well seem to be

⁴ As will be discussed below, the Court also held that evidence of prior sexual offenses could be excluded if the trial court found that its probative value is outweighed by the risks of unfair prejudice. *DerMartzex*, 390 Mich at 415. However, this Court did not hold that the Constitution *required* such exclusion – but simply it was a matter for the discretion of the trial court.

incredible. However, the fact that the defendant has committed other acts of molestation against children lends meaning to the victim's testimony. See, e.g., *Connecticut v DeJesus*, 288 Conn 418, 468; 953 A2d 45 (2008) ("It is inherently improbable that a person whose prior acts show that he is in fact a rapist or child molester would have the bad luck to be later hit with a false accusation of committing the same type of crime or that a person would fortuitously be subject to multiple false accusations by a number of different victims"). This is particularly true where there is some nexus between the prior act and the charged act – that is that the prior act evidence must be *relevant to* the charged offense. The evidentiary standard set forth in MCL 768.27a is consistent with the principles underlying the admission of other acts evidence in sex crime cases for well over a century and a half. Accordingly, it cannot be said that a defendant has a "fundamental right" to a trial free of evidence of his prior acts of sexual violence. Indeed, the "history and traditions of our people" confirm that that such evidence may be admitted in a sex crimes trial.

b. There is no “fundamental right” to an application of MRE 403.

Nor can it be said that the federal constitution *requires* the application of MRE 403 to such evidence. In *DerMartzex*, this Court noted that trial courts generally have the power to exclude relevant evidence if the probative value is substantially outweighed by the risk of undue or unfair prejudice. *DerMartzex*, 390 Mich at 415 n 3. In fact, courts have long held that the trial court may exclude relevant evidence where the probative force of the evidence is substantially outweighed by the danger of prejudice. See, e.g., *New York v Cummins*, 209 NY 283; 103 NE 169 (1913). However, the early cases also make clear that the common-law predecessor to MRE 403 does not apply when the evidence in question “is indispensable for its legitimate purpose.” See, e.g., *Cummins*, 209 NY at 294, quoting 6 Wigmore on Evidence, 3rd ed., § 1864, pp. 489-491. And as explained above, the Legislature has determined – consistent with 150 years of this Court’s precedent – that evidence of prior sex crimes against children is “indispensable” for the legitimate purposes for which it is offered. Simply put, the history of MRE 403 and its common-law predecessor strongly suggests that its application was a matter for the trial court’s discretion and that there is a class of relevant evidence that is so probative that it will always be admissible no matter how prejudicial.

The Ninth Circuit came to the opposite conclusion in *United States v LeMay*, 260 F3d 1018, 1026 (CA 9, 2001). Under FRE 414, evidence of a prior sex crime against a minor is admissible in a case where the defendant is accused of a

subsequent offense of child molestation. In *LeMay*, the defendant challenged the admission of evidence under FRE 414 on due process grounds. The Ninth Circuit undertook its due process analysis by noting that courts have historically allowed propensity evidence to reach the jury in sex offense cases. *LeMay*, 260 F.3d at 1026; citing *Jenness*, 5 Mich at 319-320. Thus, the defendant's due process challenge could only succeed if the introduction of propensity evidence was so "fundamentally unfair" as to deny the defendant a fair trial. The Court noted that it had already held in a previous case that FRE 403 applied to the introduction of propensity evidence introduced under FRE 414. *Doe v Glanzer*, 232 F3d 1258, 1268 (CA 9, 2000). The court held that the trial court's ability to keep out evidence under FRE 403 provided an "adequate safeguard" to a defendant's constitutional right to a fair trial:

We conclude that there is nothing fundamentally unfair about the allowance of propensity evidence under Rule 414. As long as the protections of Rule 403 remain in place to ensure that potentially devastating evidence of little probative value will not reach the jury, the right to a fair trial remains adequately safeguarded. [*LeMay*, 260 F3d at 1026.]

However, the Ninth Circuit's conclusion that FRE 403 was a constitutional mandate is unconvincing for several reasons. First, the statement was *obiter dictum*, since that Court had previously held in *Glanzer* that FRE 403 was applicable to the introduction of other acts evidence under FRE 414.

Second, the Ninth Circuit's underlying analysis in *Glanzer* is not applicable in Michigan. As a preliminary matter, unlike the Michigan Rules of Evidence, the Federal Rules are statutory in nature. Therefore, it would not have been

inappropriate for a court to read FRE 403 and FRE 414 *in pari materia* and conclude that the evidence of prior crimes of sexual violence against children could be kept out if it were “substantially more prejudicial than probative.” In contrast, our Legislature in passing MCL 768.27a demonstrated an intent to *override* the rules of evidence. Moreover, *Glanzer* is fundamentally flawed because it based its conclusion that FRE 403 remained applicable on what it termed “legislative history” – the statement of one of the 435 members of the United States House of Representatives, who opined that “the general standards of the rules of evidence” such as FRE 403 still applied to the evidence covered by the new rules. This Court has rejected this type of “legislative history,” as inherently unreliable, noting that “the opinion of a single legislator is not necessarily equivalent to the intent of the entire Legislature at the time of enactment.” *Chmielewski v Xermac, Inc*, 457 Mich 593, 609 n 18; 580 NW2d 817 (1998).⁵

Third, the Ninth Circuit’s conclusion that FRE 403 is a rule of constitutional dimension has been soundly rejected in the context of evidence of a defendant’s prior criminal history offered for impeachment purposes under MRE 609 and similar state and federal rules. MRE 609 provides that evidence of a witness’s prior criminal history may be admitted for impeachment purposes under limited

⁵ The Attorney General fully agrees with the Wayne County Prosecutor that MCL 768.27a does not violate the separation of powers. Both the executive and legislative branches of government may act to ensure a fair trial. See e.g., *People v Evans*, 72 Mich 367, 383; 40 NW 473 (1888)(noting that it is the duty of prosecutors “as well as the duty of the court, to see that the accused had a fair and impartial trial”); *Wisconsin v Holmes*, 106 Wis 2d 31, 46; 315 NW2d 703 (1982)(holding that “[t]he legislature, in obedience to its duty to promote the public interest, may enact laws to assure a fair trial”).

circumstances. In a manner strikingly similar to the propensity evidence exceptions at issue, MRE 609 allows evidence of a prior criminal conviction: (1) for a crime containing an element dishonesty or false statement; or (2) for a crime punishable by one year imprisonment or more containing an element of theft and *the court further determines that the probative value of the evidence outweighs its prejudicial effect*. In *People v Allen*, this Court addressed the issue of whether a defendant was entitled to the protections of MRE 403 when the prosecutor sought to introduce evidence of his prior convictions for impeachment purposes. 429 Mich 558, 594; 420 NW2d 499 (1988). This Court soundly rejected this argument, holding that evidence of a defendant's prior crime was *inherently* more probative than prejudicial for impeachment purposes:

This bright-line rule is, in essence, based upon our view that impeachment through reference to crimes for which false statement or dishonesty is an element *is inherently more probative than prejudicial*. Therefore, defendants who are so impeached may not claim that such impeachment violates MRE 403. That rule requires that the probative value of the evidence be "substantially outweighed" by prejudice. Since *we find that as a matter of law prior convictions of crimes involving dishonesty or false statement are more probative than prejudicial, it obviously cannot be argued that the probative value is "substantially outweighed" by prejudice*.

This view has been accepted in every federal Court of Appeals which has addressed the question, and six federal circuits now bar exclusion of prior convictions involving dishonesty or false statement on FRE 403 grounds. *United States v Kuecker*, 740 F2d 496 (CA 7, 1984); *United States v Wong*, 703 F2d 65 (CA 3, 1983); *United States v Kiendra*, 663 F2d 65 (CA 1, 1981); *United States v Leyva*, 659 F2d 118 (CA 9, 1981); *United States v Coats*, 652 F2d 1002 (CA DC 1981); *United States v Toney*, 615 F2d 277 (CA 5, 1980). [*Allen*, 429 Mich at 594 n 16 (emphasis added).]

The Oregon Court of Appeals has described its version of MRE 609(1) in the same manner.⁶ *Oregon v Minnieweather*, 99 Ore App 166; 781 P2d 401 (1989). Specifically, the Oregon court held that OEC 609 represented a legislative determination that, as a matter of public policy, evidence of a prior crime involving dishonesty or a false statement is extraordinarily probative and there is no scenario where that probative value is substantially outweighed by the danger of unfair prejudice:

Instead of having a judge “balance” in the context of a specific case, the people, as legislators, have resolved the policy issues involved in the use of evidence of previous convictions and have established general rules for the courts to follow. For example, convictions over 15 years old and convictions for misdemeanors not involving false statements or dishonesty are now inadmissible, OEC 609, and a defendant may request a limiting instruction. OEC 105. *That decision by the people is no less constitutionally adequate than the balancing that trial judges performed before the 1986 amendment to OEC 609* [which took OEC 609 evidence out of the scope of OEC 403]. [*Minnieweather*, 99 Ore App at 168 (emphasis added).]

What *Allen*, *Minnieweather*, and “every federal Court of Appeals which has addressed the question” – including the Ninth Circuit – make clear is that MRE 403 and its state and federal equivalents are not inexorably tied to the due process right to a fair trial. If the *dictum* from the Ninth Circuit were correct, then the Legislature could *never* make a determination that evidence of a prior bad act is inherently more probative than prejudicial. Thus, the more precise statement of the law – one that is consistent with the actual holding in *LeMay* – is that a trial court’s ability to balance the probative nature under MRE 403 is one possible safeguard of

⁶ Oregon’s rules of evidence are statutory based. See O.R.S. § 40.010.

a defendant's right to a fair trial. In the federal context, because FRE 403 has been held to apply to propensity evidence, that fact alone renders FRE 414 constitutionally valid. But, under *Allen et al.*, the opposite is not necessarily true – that propensity evidence is admissible only when subject to a 403-type balancing test. Rather, where the Legislature has “resolved the policy issues involved in the use of evidence” and based on that resolution has determined that evidence of prior crimes of sexual violence against children “is inherently more probative than prejudicial” in a CSC case involving a minor, the question becomes whether other, non-403 based safeguards are sufficient to ensure that a defendant receives a fair trial. Essentially, the Legislature has declared that crimes of sexual violence against children are “signature crimes” and therefore are admissible for any relevant purpose.

Therefore, it cannot be said that the application of MRE 403 is a “fundamental right” under the due process clause.

2. Making prior crimes of sexual violence against children admissible when relevant is rationally related to a legitimate governmental purpose

Unless a statute impinges on the exercise of a fundamental right, the statute must be evaluated under the “rational basis” test. See *Phillips v Mirac, Inc*, 470 Mich 415, 435-436; 685 NW2d 174 (2004). Under this test, “courts will uphold legislation as long as that legislation is rationally related to a legitimate government purpose.” *Crego v Coleman*, 463 Mich 248, 259; 615 NW2d 218 (2000). This highly deferential standard of review requires a challenger to show that the

legislation is “arbitrary and wholly unrelated in a rational way to the objective of the statute.” *Crego*, 463 Mich at 259; quoting *Smith v Employment Security Comm*, 410 Mich 231, 271; 301 NW2d 285 (1981).

Criminal sexual conduct offenses – particularly those committed against children – are particularly difficult to detect, investigate, and prosecute. See, e.g., *Panel Discussion: Men, Women, and Rape*, 63 Fordham LR 125 (1994). Victims are often hesitant to report the crime due to some common psychological reactions suffered by rape victims – including self-blame, fear, and embarrassment. See *People v Petrella*, 424 Mich 221, 263-264; 380 NW2d 11 (1985); quoting Bode, *Fighting Back: How to Cope with the Medical, Emotional, and Legal Consequences of Rape*, (New York: Macmillan Publishing Co, 1978). These reactions are heightened when the victim is a child and the offender is an adult placed in a position of trust over them. Moreover, because of the nature of a sexual assault, the crimes are usually committed in private, with the victim as the only substantial witness. Finally, and not insubstantially, there is strong evidence to suggest that sex offenders are generally recidivists. See *People v Cooper*, 220 Mich App 368, 374; 559 NW2d 90 (1996).

The Legislature well understood that a sexual interest in children does not exist in ordinary people and, therefore, evidence of its existence in a defendant is extraordinarily relevant. Because of the unique nature of sex crime – particularly when committed against children – the State has a legitimate interest in creating a statutory scheme where high-probative evidence of prior sex crime against children

is admissible when the defendant is charged with a subsequent sex crime against a child. Moreover, because of both the uniquely private nature of sex crimes against children, and the probative value that a defendant falls within the small subset of persons who have sexual interest in children, the State has a legitimate interest in making this evidence admissible when it is relevant.

3. It is not “fundamentally unfair” to allow uniquely probative evidence of prior sex crimes against children to be admitted at trial, so long as there is some nexus between the prior act and the charged offense.

As noted above, MRE 403 is not a rule that is constitutionally required in order to ensure a defendant a fair trial. Rather, it is a tool that allows a trial court to exercise its discretion in refusing to admit a piece of evidence because it is too tenuous to the issues at trial. The Legislature has removed this “tool” by determining that, as a matter of policy, evidence of a prior sex crime against a child is presumed to be more probative than prejudicial. This is no more constitutionally problematic than the same “automatic” balancing that occurs when introducing impeachment evidence under MRE 609.

The “fairness” concern associated with the use of propensity evidence in general is that it creates a danger that “the jury will punish the defendant for offenses other than those charged, or at least that it will convict when unsure of guilt, because it is convinced that the defendant is a bad man deserving of punishment.” 2 Weinstein, Evidence, § 404, p 404-29, quoting *Procedural Protections of the Criminal Defendant -- A Reevaluation of the Privilege Against*

Self-incrimination and the Rule Excluding Evidence of Propensity to Commit Crime, 78 Harv L R 426, 436 (1964). Here, the limitations placed on the admission of prior acts evidence and its permissible uses are sufficient to mitigate the “danger” surrounding the use of propensity evidence, even without MRE 403, and ensure that a defendant receives a constitutionally adequate fair trial:

- First, the admissible “prior acts” evidence is limited only to prior sexual incidents involving children.
- Second, evidence of prior sex crimes against children must be admitted for a relevant purpose. That is, there must be some sort of nexus between the charged offense and the prior act. Thus, the prosecutor may not introduce a prior act simply to show that the defendant is a “bad man.”
- Third, the standard jury instructions ensure that the jury will only consider the prior acts evidence for a proper purpose. That is, the jury is instructed that it must not convict a defendant simply because he committed other crime or that he is a “bad man.” Rather, it can only consider the prior acts for their relevant purpose.
- Fourth, the trial court has the authority to grant either a defendant’s motion for a directed verdict on sufficiency grounds or a motion for a new trial on the grounds that a conviction was against the “great weight of the evidence.”

The statute does not give a prosecutor *carte blanche* to admit all evidence of a defendant’s bad character, but rather applies only to evidence of prior crimes of sexual violence against children. In other words, the statute does not permit a prosecutor to rove through a defendant’s past and introduce any and all instances of defendant’s other “bad acts,” character, or reputation. Rather, the unambiguous language of the statute limits § 27a to the defendant’s *sex offenses against children*, and it applies only when he is charged with committing another sex offense against

a child. No far-ranging attacks on the defendant's character can occur under MCL 768.27a. Moreover, the statute also requires pretrial notice of the offenses sought to be proved, assuring that the defendant will not unfairly be surprised or unprepared to rebut the proposed evidence.

Not only must the evidence admitted under MCL 768.27a relate to prior crimes of sexual violence against children, but it must also be *relevant* to the crime for which defendant is charged. Originally, the rule against "other acts" evidence applied only when it was offered to show that a defendant had a disposition to commit crimes. See *The Rule of Exclusion of Similar Facts Evidence: America*, 51 Harv L Rev 988, 1004-1005 (1938). For instance, in *Dowling v Mississippi*, the prosecutor introduced evidence that an overseer charged with the manslaughter of a slave had treated other slaves harshly. 1 Morr St Cas 280; 1846 WL 1617 (Miss Err App 1846). The Mississippi Court reversed his conviction, noting that defendant's character as a "cruel master" was not at issue and was otherwise unrelated to the killing. Even though both the prior act and the charged offense both dealt with the defendant's treatment of slaves, the court concluded that the harsh treatment was simply too attenuated to meet the general standards of relevance. Because it could only have been offered to show that the defendant was a "bad man," its admission deprived him of a fair trial.

Thus, there must be some nexus between the charged offense and the prior act that the prosecutor intends to offer under MCL 768.27a. For instance, a similarity between the charged offense and the prior act would be probative on the

issue of the victim's credibility. As noted above, due to the unique nature of sex crimes against children, it is overwhelmingly likely that the victim would also be the only witness and, therefore, the nature of a similar prior act would be extraordinarily probative. See *Jeness*, 5 Mich at 324-325; *DerMartzex*, 390 Mich at 414-415. Likewise, it is indisputable that a sexual attraction to children is abnormal and that it is simply not found in the ordinary person. So evidence that the defendant had sexually assaulted children of a similar age would be so probative that that it could *never* be unfair to admit the prior act. The Legislature's determination of this evidence's extraordinary probative value is consistent with the inherent difficulties in resolving crimes of sexual violence against children, because often the only evidence is the uncorroborated statement of a child – oftentimes a very young child. As a matter of public policy, the fact that a particular defendant is sexually attracted to children and has engaged in sexual conduct against a child in the past has been deemed critical evidence that a court must admit in order to protect the children of this State. Finally, evidence of prior acts will often be relevant to issues traditionally covered under MRE 404(b) – identity, motive, opportunity, intent, preparation, scheme, plan, or system in doing the sexual act, knowledge, or absence of mistake.

However, the evidence must still bear some relation to the charged offense. For example, if an adult defendant were charged with CSC for sexually penetrating a 5-year-old, evidence that when he was 15-years-old he engaged in sexual intercourse with his 15-year-old girlfriend (a violation of MCL 750.520d(1)(a)) would

not be admissible under MCL 768.27a. Such evidence would be so dissimilar to the charged offense that it would not serve the legitimate purpose of corroborating the child victim's testimony. Moreover, the difference in ages would undermine the public policy interest in protecting society from pedophiles. Finally, in such a circumstance the evidence would not be relevant to a traditional MRE 404(b) purpose. Simply put, there would not be any sort of relationship because there would not be any kind of nexus between the statutory rape conviction and the charged offense of sexually penetrating a 5-year-old. Therefore, the evidence would be excludable under the ordinary rules of relevance (which do not conflict with MCL 768.27a) and, therefore, defendant would be protected from the introduction of evidence simply to show that he is a "bad man."

But once it has been determined that the prior acts evidence is relevant, its admission is so probative that it cannot be said to deprive defendant of a fair trial. The overwhelming numbers of cases involving such evidence bear a striking similarity to the facts before this Court in the instant cases. In *Watkins*, defendant was charged with sexually penetrating a 12-year-old girl who babysat his children, lived next door, and to whom he had been a trusted adult. The prosecutor sought to introduce evidence that defendant had, on a prior occasion, sexually penetrated another teenage girl who babysat his children and who also viewed defendant as a trusted adult. In *Pullen*, defendant was charged with sexually assaulting his 12-year-old granddaughter. The prosecutor sought to introduce evidence that defendant had on a prior occasion sexually abused his 16-year-old daughter. The

prosecutor argued the details of the sexual abuse of the daughter bear a strong similarity to what this defendant did to the victim in this case.

Obviously, this kind of evidence is extraordinarily probative on traditional 404(b) grounds – such as identity, motive, plan or system of doing an act – that no reasonable court could find that its probative value was “substantially outweighed” by the danger or undue prejudice. Moreover, this evidence is extremely relevant because it tends to corroborate the testimony of what these defendants did to the victims. Therefore, it is not “fundamentally unfair” for the Legislature to decide as a matter of policy that such evidence is always more probative than prejudicial under circumstances where it is relevant. In fact, that Legislative determination “is no less constitutionally adequate than the balancing that trial judges performed [under MRE 403].” *Minnieweather*, 99 Ore App at 168.

Another tool that allows trial courts to ensure a defendant’s right to a constitutionally fair trial is to instruct the jury that evidence admitted under MCL 768.27a must be considered only for the limited purpose for which it is introduced. A jury is presumed to follow the trial court’s instructions. *People v Mette*, 243 Mich App 310, 330-331; 621 NW2d 713 (2000). In fact, former Chief Justice William Rehnquist described the presumption that juries follow their instructions to be a critical underpinning of our trial by jury system:

A crucial assumption underlying that system [of trial by jury] is that juries will follow the instructions given them by the trial judge. Were this not so, it would be pointless for a trial court to instruct a jury, and even more pointless for an appellate court to reverse a criminal conviction because the jury was improperly instructed. . . . [An] instruction directing the jury to consider a codefendant’s extrajudicial

statement only against its source has been found sufficient to avoid offending the confrontation right of the implicated defendant. [*Parker v Randolph*, 442 US 62, 73, 99 SCt 2132, 60 LEd2d 713 (1979) (opinion of Rehnquist, J.).]

The Michigan Criminal Jury instructions include a model instruction to be used when evidence of uncharged acts is offered in a CSC case involving a child. A modified version of the jury instruction already in place for evidence admitted under MCL 768.27a would provide adequate notice to the jury that it must not convict a defendant based on his prior acts alone – i.e., the very danger posed by the use of propensity evidence:

- (1) The prosecution has introduced evidence of claimed acts of sexual misconduct by the defendant with [a minor/minors] for which [he/she] is not on trial.
- (2) Before you may consider such alleged acts as evidence against the defendant, you must first find that the defendant actually committed those acts.
- (3) If you find that the defendant did commit those acts, you may consider them in deciding if the defendant committed the [offense/offenses] for which [he/she] is on trial.
- (4) *But you must not convict the defendant here solely because you think [he/she] is guilty of engaging in improper sexual conduct for which [he/she] is not on trial.* [CJI2d 5.8b (as modified).]

Finally, and as a last resort, if a trial court determines that the jury convicted defendant solely based on the fact that he was guilty of a prior crime of sexual violence against children, it has the authority either to grant a motion for a new trial on the basis that the verdict was against the great weight of the evidence or dismiss the jury's verdict on sufficiency grounds. In any case, the judiciary retains its authority to ensure that defendant receives a constitutionally adequate fair trial.

Accordingly, MCL 768.27a does not deprive a defendant of a fair trial, and, therefore, this Court may not, as Justice Cardozo opined, find that a constitutional violation has taken place because “another method may seem to [this Court’s] thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at bar.” *Snyder v Massachusetts*, 291 US 97, 105, 54 SCt 330, 78 LEd 674 (1934).

CONCLUSION AND RELIEF REQUESTED

When MCL 768.27a and 27b are set side by side, it is apparent that the Legislature intentionally excluded MRE 403 from MCL 768.27a's operation. It is inappropriate to ignore that intentional legislative decision, so the only remaining question is whether MCL 768.27a is constitutional if MRE 403 is not incorporated into the statute by judicial amendment. The answer is yes. There is no fundamental, constitutional right to exclude prior acts evidence, provided the evidence is relevant to the crime charged. And the Legislature's decision to allow evidence of prior sex crimes against children is rationally related to the legitimate government purpose of protecting children from sexual predators.

Accordingly, *Amicus Curiae* Attorney General Bill Schuette respectfully requests that this Court hold that admission of prior acts evidence under MCL 768.27a does not require MRE 403 balancing, and that MCL 768.27a does not violate a defendant's due process right to a fair trial.

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