

No. 36398~~X~~-4-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

IN RE THE PERSONAL RESTRAINT PETITION OF

JERRY BROCK

THURSTON COUNTY SUPERIOR COURT

The Honorable Chris Wickham, Judge
Cause No. 95-1-402-8

BRIEF OF RESPONDENT

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STATE OF WASHINGTON
BY [Signature]

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COURT OF APPEALS
DIVISION II

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether Brock's CrR 7.8 Motion is barred as a successive collateral attack without good cause.
2. Whether the phrase "Most Serious Offense" as used in Initiative 593, the Persistent Offender Accountability Act, is ambiguous and therefore is subject to judicial interpretation.
3. Whether the ballot title for Initiative 593, the Persistent Offender Accountability Act, provided the constitutionally required notice that the subject of that Initiative was the sentencing of persistent offenders, and provided general notice regarding the type of offenses that could result in persistent offender status, and therefore whether the inclusion of promoting prostitution in the first degree as a "Most Serious Offense" was within the scope of this ballot title.

B. STATEMENT OF THE CASE

Brock was convicted at trial of the crime of first-degree child molestation. [Appendix A, at 1] At his sentencing on November 3, 1995, the court determined that the crime of child molestation in the first degree is a most serious offense pursuant to RCW 9.94A.030(21) (as in effect at the time Brock's crime was committed). [Appendix A] Brock was determined to have a prior 1980 conviction for promoting prostitution in the first degree and a 1991 conviction for burglary in the first degree. [Appendix A] Both of those prior convictions also constituted most serious offenses under RCW 9.94A.030(21) (as in effect at the time Brock's crime was committed). Therefore, Brock was determined to be a persistent offender pursuant to RCW

9.94A.030(25), and was therefore ordered to serve a life sentence without the possibility of early release, based upon RCW 9.94A.120(4) (as in effect at the time Brock's crime was committed). [Appendix B]

Brock filed a direct appeal to his conviction and sentence. [Appendix B] In Court of Appeals Cause No. 20096-1-II, an unpublished opinion was issued in regard to that appeal. It was noted that Brock had challenged the constitutionality of the Persistent Offender Accountability Act ("POAA"), but without argument or citation to authority. [Appendix B] His challenge was found to be without merit based on three Washington Supreme Court cases finding the POAA to be constitutionally valid. State v. Manussier, 129 Wn.2d 652, 921 P.2d 473 (1996); State v. Rivers, 129 Wn.2d 697, 921 P.2d 495 (1996); and State v. Thorne, 129 Wn.2d 736, 921 P.2d 514 (1996). A mandate was issued by the Court of Appeals on August 27, 1997, causing his conviction to become final. [Appendix B]

In December, 2000, Brock filed a personal restraint petition in Court of Appeals Cause No. 26933-3-II. He claimed his prior conviction of first-degree burglary was invalid and therefore should not have been used as a basis for persistent offender status. He also contended that his prior convictions could not make him a persistent offender unless those priors were charged in the Information and

proved to a jury beyond a reasonable doubt, relying upon Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

The Court of Appeals dismissed this petition because it was filed more than one year after the judgment became final, and therefore was in violation of RCW 10.73.090. However, the court also noted that Brock's claims in the petition were without merit. [Appendix C]

Brock then sought discretionary review in the Washington Supreme Court in Cause 71584-0. The Commissioner of that court denied review, ruling that the petition had been properly dismissed as untimely. The Commissioner also found that the State Supreme Court had already ruled contrary to the defendant's Apprendi argument in State v. Wheeler, 145 Wn.2d 116, 34 P.3d 799 (2001). [Appendix D]

A Certificate of Finality was issued by the Court of Appeals in reference to that petition on May 15, 2002. [Appendix D]

Brock has now filed a motion to vacate his sentence pursuant to CrR 7.8. He argues that the subject set forth in the ballot title of Initiative 593, the Persistent Offender Accountability Act, as passed by the voters in 1993, is the imposition of a life sentence on those convicted of "violent" offenses on three occasions, even though the ballot title referred to those convicted of "most serious offenses" on three occasions. Relying on that premise, he then argues that the

inclusion of promoting prostitution in the first degree as a most serious offense is outside the scope of the title of this Initiative, and therefore violates the requirement of Article I, Section 19 of the Washington State Constitution that the subject matter of the legislation be limited to that which is expressed in the title. Brock therefore contends his life sentence should be vacated. [See Brock's Motion to Vacate Sentence]

C. **ARGUMENT**

1. **Brock's CrR 7.8 Motion is barred as a successive collateral attack without good cause.**

A collateral attack upon a judgment and sentence pursuant to CrR 7.8 is subject to both RCW 10.73.090 and RCW 10.73.140. CrR 7.8(b); State v. Brand, 120 Wn.2d 365, 370, 842 P.2d 470 (1992). Under RCW 10.73.090, a CrR 7.8 motion generally must be brought within one year after the judgment becomes final. However, an exception exists for a claim that the sentence is unconstitutional on its face. RCW 10.73.090(1) A judgment and sentence is constitutionally invalid on its face when an infirmity of constitutional magnitude is evident from the face of the document without further elaboration. In re Personal Restraint of Stoudmire, 141 Wn.2d 342, 353, 5 P.3d 1240 (2000). Brock's motion to vacate his sentence in this case presents a purely legal issue. The face of the judgment and sentence evidences

that Brock's sentence as a persistent offender was based, in part, on his prior conviction for promoting prostitution in the first degree.

[Appendix A] Therefore, if he is correct in arguing that the sentencing court was barred by Article II, section 19 of the Washington State Constitution from treating the crime of promoting prostitution in the first degree as a basis for a persistent offender sentence, the judgment and sentence would be invalid on its face. Consequently, Brock's motion would not be barred by RCW 10.73.090.

However, Brock not only filed a direct appeal while represented by counsel, but also thereafter submitted a personal restraint petition to the Court of Appeals. In both instances, he challenged the legitimacy of his sentence as a persistent offender. In neither instance did he make the argument against his persistent offender status which he has made in the present CrR 7.8 motion.

RCW 10.73.140 states as follows, in pertinent part:

If a person has previously filed a petition for personal restraint, the court of appeals will not consider the petition unless the person certifies that he or she has not filed a previous petition on similar grounds, and shows good cause why the petitioner did not raise the new grounds in the previous petition.

While the passage quoted above in RCW 10.73.140 refers to the court of appeals and a successive personal restraint petition, the statute also

bars consideration by the superior court of a CrR 7.8 motion that is successive to a prior petition unless good cause is shown. Brand, *supra*, at 369-370.

In the present instance, Brock has not made any showing of good cause to justify his failure to previously assert the claim he now makes. Therefore, consideration of his motion is procedurally barred pursuant to RCW 10.73.140. Even if it were not so barred, the Persistent Offender Accountability Act, Initiative 593, unambiguously identified promoting prostitution in the first degree as a most serious offense, and the ballot title of that Initiative, including the use of the phrase “most serious offense,” provided the notice of the Initiative’s subject matter required by Article II, Section 19, of the Washington State Constitution, and therefore Brock’s claim is without merit. The argument in support of this latter basis for denial of his motion is set forth below.

2. The phrase “Most Serious Offense” as used in Initiative 593, the Persistent Offender Accountability Act, is not ambiguous and therefore is not subject to judicial interpretation.

An initiative is subject to standard rules of statutory construction. Western Petroleum Importers, Inc. v. Friedt, 127 Wn.2d 420, 423, 899 P.2d 792 (1995). Consequently, when the language of an initiative is unambiguous and capable of being understood

according to its ordinary sense and meaning, the initiative is not subject to judicial interpretation. Id. at 423-424. The language of the initiative is to be read as the average informed lay voter would read it. Id. at 424. The intent of an initiative must be determined by construing it in its entirety, not piecemeal, and interpreting each provision in the context of the whole enactment. State v. Thorne, 129 Wn.2d 736, 763, 921 P.2d 514 (1996).

In his motion to vacate, Brock claims that the phrase “most serious offense” in Initiative 593, the Persistent Offender Accountability Act (hereinafter referred to as “POAA”), is ambiguous. He argues that it could reasonably be interpreted to be limited only to violent offenses, or in the alternative, to have a broader meaning. [See Brock’s Motion to Vacate POAA Sentence at 35] He therefore argues that the court should resort to judicial interpretation in order to define this phrase, and refers specifically to the arguments presented in support of the Initiative in the Voter’s Pamphlet. However, as shown below, there is nothing ambiguous about the use of the phrase “most serious offense” in the POAA, and it is clearly intended to be a broader category of offenses than that characterized by the term “violent offenses.”

In making his argument, Brock never defines what he considers to be included in the term “violent offense.” However, the POAA was intended to amend the Sentencing Reform Act, Chapter 9.94A RCW. At the time the POAA was enacted by the voters, the Sentencing Reform Act categorized certain offenses as “violent” in RCW 9.94A.030(34). Therefore, if the phrase “most serious offenses” is to be compared to the term “violent offenses” as of the enactment of the POAA, the only appropriate version of “violent offenses” to utilize would be that which existed at that time in the pertinent statute. At that time, the Sentencing Reform Act defined “violent offenses” as follows:

(34) “Violent Offense” means:

- (a) Any of the following felonies, as now existing or hereafter amended: Any felony defined under any law as a class A felony or an attempt to commit a class A felony, criminal solicitation of or criminal conspiracy to commit a class A felony, manslaughter in the first degree, manslaughter in the second degree, indecent liberties if committed by forcible compulsion, kidnapping in the second degree, arson in the second degree, assault in the second degree, assault of a child in the second degree, extortion in the first degree, robbery in the second degree, vehicular assault, and vehicular homicide, when proximately caused by the driving of any vehicle by any person while under the influence of intoxicating liquor or any drug as defined by RCW 46.61.502, or by the operation of any vehicle in a reckless manner;
- (b) Any conviction for a felony offense in effect at any time prior to July 1, 1976, that is comparable to a felony

classified as a violent offense in (a) of this subsection;
and

- (c) Any federal or out-of-state conviction for an offense that under the laws of this state would be a felony classified as a violent offense under (a) or (b) of this subsection.

RCW 9.94A.030(34)

Initiative 593 was put before the voters in 1993. The ballot title of the Initiative stated as follows:

Shall criminals who are convicted of “most serious offenses” on three occasions be sentenced to life in prison without parole?

[Appendix B to Brock’s Motion] Thus, while the phrase “violent offenses” already existed in the Sentencing Reform Act, it was not used anywhere in the ballot title. Instead, a new phrase, “most serious offenses” was utilized. By its very wording, that new phrase referred to offenses which had the potential to impose the greatest harm upon those who were victimized. However, the phrase did not restrict the relevant harm to only physical injury.

This plain meaning of the new phrase used in the ballot title was confirmed by the Attorney General’s explanation of the Initiative in the Voter’s Pamphlet. That explanation included the following:

... This initiative would create a new category of “persistent offenders” consisting of persons who have been convicted three or more times of “most serious crimes.” The initiative specifies which crimes will be

defined as “most serious crimes” (section 3 of the Initiative), essentially consisting of all class A felonies and all class B felonies involving harm or threats of harm to persons.

[Appendix B to Brock’s Motion] The Attorney General’s explanation of the Initiative never used the phrase “violent offenses.” Instead, it directed voters to the section of the Initiative which specifically listed which crimes constituted most serious offenses, and explained that these were the more serious felonies, designated as class A or class B, which involved harm or the threat of harm to other persons. The harm referred to was not limited to physical injury. It should be noted that, at that time, the Sentencing Reform Act defined the term “victim” as follows:

“Victim” means any person who has sustained emotional, psychological, physical, or financial injury to person or property as a direct result of the crime charged.

RCW 9.94A.030(33) Brock would have this Court find that the term “serious” in the phrase “most serious offenses,” as used in Initiative 593, was necessarily limited to violent offenses. But the Sentencing Reform Act recognized that harm, and therefore serious harm, could extend beyond physical injury.

Section 3 of the Initiative amended RCW 9.94A.030 to add a definition of the term “most serious offense.” That definition stated as follows:

“Most serious offense” means any of the following felonies or a felony attempt to commit any of the following felonies, as now existing or hereafter amended:

- (a) Any felony defined under any law as a class A felony or a criminal solicitation of or criminal conspiracy to commit a class A felony;
- (b) Assault in the second degree;
- (c) Assault of a child in the second degree;
- (d) Child molestation in the second degree;
- (e) Controlled substance homicide;
- (f) Extortion in the first degree;
- (g) Incest when committed against a child under age fourteen;
- (h) Indecent liberties;
- (i) Kidnapping in the second degree;
- (j) Leading organized crime;
- (k) Manslaughter in the first degree;
- (l) Manslaughter in the second degree;
- (m) Promoting prostitution in the first degree;
- (n) Rape in the third degree;
- (o) Robbery in the second degree;
- (p) Sexual exploitation;
- (q) Vehicular assault;
- (r) Vehicular homicide, when proximately caused by the driving of any vehicle by any person while under the influence of intoxicating liquor or any drug as defined by RCW 46.61.502, or by the operation of any vehicle in a reckless manner;
- (s) Any other class B felony offense with a finding of sexual motivation, as “sexual motivation” is defined under this section;
- (t) Any other felony with a deadly weapon verdict under RCW 9.94A.125;

(u) Any felony offense in effect at any time prior to the effective date of this section, that is comparable to a most serious offense under this subsection, or any federal or out-of-state conviction for an offense that under the laws of this state would be a felony classified as a most serious offense under this subsection.

Initiative 593, § 3 as codified in RCW 9.94A.030(29).

A comparison of the definition for “most serious offenses” with that for “violent offenses” shows that the serious harm or injury that is the focus of the former includes, but also extends beyond, the infliction or threat of physical injury. This is certainly consistent with the choice to define “persistent offenders” as those who were convicted on three separate occasions of at least three “most serious offenses,” a category distinct from the already existing category of “violent offenses.” Those offenses present in the definition for “most serious offenses,” but not in the definition for “violent offenses” include: child molestation in the second degree; incest upon a child under the age of fourteen; indecent liberties when not committed by forcible compulsion; leading organized crime; promoting prostitution in the first degree; rape in the third degree; sexual exploitation of a minor; any non-violent class B felony with a finding of sexual motivation; and any non-violent felony with a deadly weapon verdict.

Thus, there is nothing ambiguous about the phrase “most serious offenses” as used in the POAA. The phrase was clearly defined in the Initiative, and was clearly made a category separate from that of violent offenses. As the Washington Supreme Court has noted:

. . . The Persistent Offender Accountability Act defines what crimes will be considered to be “most serious,” defines the exact characteristics of a “persistent offender,” and mandates a sentence of life imprisonment for all persistent offenders. Ordinary people can understand what conduct will give rise to a finding that an offender is subject to sentencing under the Persistent Offender Accountability Act.

Thorne, 129 Wn.2d at 770. Furthermore, the Washington Supreme Court has ruled that the list of offenses included in the POAA’s definition of “most serious offenses” constitutes a reasonable identification of those felony offenders who present a significant threat of harm to others.

. . . And while the offenses included in the enumerated list of crimes in RCW 9.94A.030(21) [now sub. (29)] may be at least debatable, they nevertheless comprise an arguably rational, and not arbitrary, attempt to define a particular group of recidivists who pose a significant threat to the legitimate state goal of public safety.

State v. Manussier, 129 Wn.2d 652, 674, 921 P.2d 473 (1996)

The reasonableness of including the crime of promoting prostitution in the first degree in the category of most serious offenses

is apparent upon consideration of the alternative elements of that offense. That crime is defined as follows:

- (1) A person is guilty of promoting prostitution in the first degree if he knowingly:
 - (a) Advances prostitution by compelling a person by threat or force to engage in prostitution or profits from prostitution which results from such threat or force; or
 - (b) Advances or profits from prostitution of a person less than eighteen years old.

RCW 9A.88.070(1). Thus, the harm addressed by the first subsection consists of an act of prostitution compelled by the use of a threat or by force. It is hard to imagine that anyone would fail to acknowledge this as serious harm. The second subsection concerns the crime of promoting prostitution by a minor. The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance. State v. Farmer, 116 Wn.2d 414, 422, 805 P.2d 200 (1991). Thus, this second alternative of promoting prostitution in the first degree also reasonably constitutes a “most serious offense.”

3. The ballot title for Initiative 593, the Persistent Offender Accountability Act, provided the constitutionally required notice that the subject of that Initiative was the sentencing of persistent offenders, and provided general notice regarding the type of offenses that could result in persistent offender status, and therefore the inclusion of promoting prostitution in the first degree as a “Most Serious Offense” was within the scope of this ballot title.

Article II, section 19 of the Washington State Constitution states as follows: “No bill shall embrace more than one subject, and that shall be expressed in the title.” This constitutional provision applies to initiatives enacted by the voters. Washington Fed’n of State Employees v. State, 127 Wn.2d 544, 551-554, 901 P.2d 1028 (1995). The provision sets forth two distinct requirements: first, the initiative must not embrace more than one subject; second, the initiative can only have a subject which is addressed in the title. City of Fircrest v. Jensen, 158 Wn.2d 384, 389-390, 143 P.3d 776 (2006) The purpose of the second requirement is to provide, by means of the title, a general notice to legislators and the public of what is contained in the proposed legislation. State v. Broadaway, 133 Wn.2d 118, 124, 942 P.2d 363 (1997) In the case of an initiative, the second requirement pertains to the ballot title. Washington Fed’n, 127 Wn.2d at 555

Article II, section 19 is to be liberally construed in favor of an initiative’s constitutionality. Id. at 555 When the words of a title can be given two interpretations, one which renders the initiative unconstitutional and the other which renders it constitutional, the court must adopt the constitutional interpretation. Id. at 556 The burden is on the challenger to establish the unconstitutionality of an initiative beyond a reasonable doubt. City of Fircrest, 158 Wn.2d at 390

The ballot title of Initiative 593 (POAA) states as follows:
“Shall criminals who are convicted of ‘most serious offenses’ on three occasions be sentenced to life in prison without parole?” Thorne, 129 Wn.2d at 757 The subject of Initiative 593 is the sentencing of persistent offenders, and that subject is set forth by the Initiative’s ballot title. Thorne, 129 Wn.2d at 758 Consequently, any provision of Initiative 593 which relates to that subject is valid under Article II, section 19. Id. at 758. A defendant’s conviction for a most serious offense on at least three separate occasions is what results in the status of persistent offender. Thus, the listing of promoting prostitution in the first degree as a most serious offense relates to the subject of persistent offenders and is therefore valid under Article II, section 19.

The ballot title need not be an index to the contents of the initiative, nor must it provide details of the measure. The title satisfies Article II, section 19, if it gives sufficient notice to lead to an inquiry into the body of the act for such details, or indicates to an inquiring mind the scope and purpose of the initiative. Pierce County v. State, 150 Wn.2d 422, 436, 78 P.3d 640 (2003) Despite the Washington Supreme Court’s recognition in State v. Thorne, *supra*, that the sentencing of persistent offenders is the subject of Initiative 593, and despite the court’s ruling in Thorne that the Initiative’s ballot title

adequately addresses that subject, and therefore all provisions of the Initiative relating to that subject are within the scope of that ballot title, Brock attempts a tortured argument to contend that the provision regarding promoting prostitution in the first degree is actually outside the scope of Initiative 593's ballot title. He argues that the average voter would interpret the phrase "most serious offense" to refer only to violent offenses, and therefore the scope of the phrase "most serious offenses" in the ballot title must be limited to violent offenses, despite the obvious contrary intent of the Initiative. Consequently, according to this argument, any crime listed as a most serious offense in the Initiative is outside the scope of the title if it is not a violent offense.

Brock cites Amalgamated Transit Union Local 587 v. State, 142 Wn.2d 183, 11 P.3d 762 (2000) in support of his argument. In Amalgamated Transit, the Washington Supreme Court considered the constitutionality of Initiative 695, for which the ballot title read: "Shall voter approval be required for any tax increase, license tab fees be \$30 per year for motor vehicles, and existing vehicle taxes be repealed." That initiative had a definition of the term "tax" which was broader than the common understanding of that term, in that the definition included certain fees and charges not traditionally considered to be taxes. Amalgamated Transit, 142 Wn.2d at 192-193 The Washington

Supreme Court held that the ballot title of this initiative violated Article II, section 19 of the Washington State Constitution because it did not give notice of the unusual meaning given to the common term “taxes.” The Court applied the rule that the words in a ballot title must be considered in their common and ordinary meanings, and a different or unusual meaning of such words cannot be used in the body of the legislation without providing notice in the title of such special meaning. Consequently, the section of the initiative containing that expansive application of the term “taxes” was held to be outside the scope of the initiative’s ballot title. Id. at 225-228.

Similarly, in DeCano v. State, 7 Wn.2d 613, 110 P.2d 627 (1941), legislation was enacted which was titled “AN ACT relating to the rights and disabilities of aliens with respect to lands, and amending” DeCano, 7 Wn.2d at 623. This statute amended a prior law which contained a definition of the term “alien.” However, the amendatory act contained a more expansive definition of that term, but nothing in the title provided notice of that broader definition. Furthermore, this broader definition went beyond the common use of the term “alien.” Id. at 624. Consequently, the Washington Supreme Court held that the statute violated Article II, section 19 of the Washington State Constitution because its title did not provide notice that the provisions

of the statute extended to persons who would not have been included in the former statutory definition of “aliens.” Id. at 630-631.

In Petroleum Lease Properties Company v. Huse, 195 Wash. 254, 80 P.2d 774 (1938), the title of an enacted piece of legislation was “AN ACT providing for the regulation and supervision of the issuance and sale of securities to prevent fraud in the sale thereof, amending....” Petroleum Lease Properties, 195 Wash. at 257. Previously, legislation had been enacted which included a definition of the term “security.” In that earlier definition of “security,” there was no reference to oil or gas leases. However, within the body of the new legislation, the term “security” was amended to include both oil and gas leases. The new, broader definition of the term also went beyond the commonly understood meaning of “security.” Id. at 257-258. Because the title of the new legislation used the same term, “securities,” but now with a different meaning, and provided no notice of that broader meaning in the title, the legislation was held to have violated Article II, section 19 of the state constitution to the extent that it purported to bring oil and gas leases within the securities act. Id. at 261.

In Swedish Hospital v. Dep’t of Labor and Industries, 26 Wn.2d 819, 176 P.2d 429 (1947), legislation was enacted with the title “An Act giving workmen’s compensation benefits to persons engaged

in hazardous and extra hazardous occupations in charitable institutions.” Swedish Hospital, 26 Wn.2d at 822 In the body of the legislation, its provisions were also made applicable to non-profit institutions. Washington law in existence at the time this statute was enacted made a substantial distinction between charitable institutions and non-profit institutions. Therefore, the use of the phrase “charitable institutions” in the title did not give sufficient notice that the statute applied to both types of entities. Consequently, the statute violated Article II, section 19 of the state constitution because the title did not provide sufficient notice of the statute’s subject matter. Swedish Hospital, 26 Wn.2d at 830-833

In each of these cases, the title of the legislation used a word or phrase which had a pre-existing, commonly understood meaning, but applied a broader meaning to that word or phrase without notice. However, the use of the phrase “most serious offenses” in the ballot title for Initiative 593 is readily distinguishable. The phrase “most serious offenses” had not previously been used in the Sentencing Reform Act or in related criminal statutes. The words composing that phrase indicated, by common understanding, a category of crimes involving the potential for serious harm upon those victimized, not necessarily limited to the use of physical force or the infliction of

physical injury, and such indication was accurate. It was not constitutionally required that the phrase convey precisely which crimes were included. As previously noted, Article II, section 19 simply required that the title give sufficient notice to voters to lead to an inquiry into the body of the Initiative without misleading voters as to the scope of the measure. Pierce County v. State, 150 Wn.2d at 436. Further notice was then provided by the description of the Initiative in the Voter's Pamphlet, which stated that those crimes constituting most serious offenses were listed in section 3 of the Initiative, and essentially consisted of all class A and class B felonies involving harm or threats of harm to persons.

The Sentencing Reform Act already identified a category of crimes as "violent offenses." RCW 9.94A.030(34) (as in effect at the time Initiative 593 was enacted by voters). However, Initiative 593 used a different phrase to characterize the applicable crimes for the status of "persistent offender." The word "violent" was not used anywhere in the ballot title. This alone provided notice that the category of "most serious offenses" was not identical to that of "violent offenses."

Had the ballot title for Initiative 593 used the phrase "violent offenses" to characterize those crimes that could result in persistent

offender status, but then broadened the definition of what a violent offense was for purposes of that Initiative without providing notice, the result could very well have been a constitutional infirmity of the sort Brock now claims to exist, similar to Amalgamated Transit and the other cases discussed above. However, that was not done in Initiative 593.

The sole support Brock relies upon to argue that voters would have understood “most serious offenses” to be limited to violent crimes is the wording in arguments presented by proponents of the Initiative in the Voter’s Pamphlet and in other publications. However, no authority is cited for the proposition that such advocacy can render a ballot title unconstitutional if that ballot title itself provides the requisite constitutional notice. Furthermore, while the advocates for the Initiative chose to focus on the measure’s potential impact on violent offenders, those opposed made the argument that the Initiative included a broader range of offenses than proponents were acknowledging. Thus, the debate as a whole, as set forth in the Voter’s Pamphlet, would have directed an average voter with an inquiring mind to seek the details of what the Initiative proposed to be those offenses which presented the greatest potential for harm to others, as characterized by the phrase “most serious offenses.”

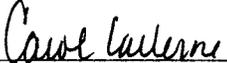
As noted by the Washington Supreme Court, Initiative 593 presented an “arguably rational, and not arbitrary,” definition of those offenses which pose a significant threat to the legitimate state goal of public safety. State v. Manussier, 129 Wn.2d at 674. The phrase “most serious offenses” in the ballot title provided the required general notice of such content. Therefore, the identification of promoting prostitution in the first degree as a most serious offense was within the scope of the title of this Initiative.

The use of Brock’s prior conviction for that crime in determining he was a persistent offender was a proper application of the Persistent Offender Accountability Act. Given the rule that a ballot title must be liberally construed in support of its constitutionality, and Brock’s heavy burden to prove the measure unconstitutional beyond a reasonable doubt, that burden has not been met in this instance.

D. CONCLUSION

For the reasons stated above, the State respectfully requests that Brock’s Motion to Vacate POAA Sentence Pursuant to CrR 7.8, as brought in this Personal Restraint Petition, be DENIED.

Respectfully submitted this 14th of September, 2007.



Carol La Verne, WSBA# 19229
Attorney for Respondent

APPENDIX A

SUPERIOR COURT OF WASHINGTON
COUNTY OF THURSTON

74K 306171ED
WICE 171ED

FILED
SUPERIOR COURT
THURSTON COUNTY, WASH.

STATE OF WASHINGTON, Plaintiff,

No 95-1-402

vs
JERRY L. BROCK
Defendant.

JUDGMENT AND SENTENCE (JS)

- Prison
 Jail One Year or Less
 First Time Offender
 Special Sexual Offender Sentencing Alternative
 Special Drug Offender Sentencing Alternative

SID: WA11230537
If no SID, use DOB

95 NOV 3 10:23

I. HEARING BY [Signature] DEPUTY

1.1 A sentencing hearing was held and the defendant, the defendant's lawyer and the (deputy) prosecuting attorney were present.

II. FINDINGS

There being no reason why judgment should not be pronounced, the Court FINDS.

2.1 CURRENT OFFENSE(S). The defendant was found guilty on 7/12/95
(Date)
by plea jury-verdict bench trial of.

COUNT	CRIME	RCW	DATE OF CRIME
I	CHILD MOLESTATION FIRST DEGREE	9A.44.083	3/27/95

as charged in the (_____ Amended) Information.

- Additional current offenses are attached in Appendix 2 1
- A special verdict/finding for use of firearm was returned on Count(s) _____ RCW 9 94A 125, 310
- A special verdict/finding for use of deadly weapon other than a firearm was returned on Count(s) _____ RCW 9.94A.125, 310
- A special verdict/finding of sexual motivation was returned on Count(s) _____ RCW 9 94A.127
- A special verdict/finding for Violation of the Uniform Controlled Substances Act was returned on Count(s) _____ RCW 69.50 401 and RCW 69 50 435, taking place in a school, school bus, within 1000 feet of the perimeter of a school grounds or within 1000 feet of a school bus route stop designated by the school district, or in a public park, in a public transit vehicle, or in a public transit stop shelter.
- The defendant was convicted of vehicular homicide which was proximately caused by a person driving a vehicle while under the influence of intoxicating liquor or drug or by the operation of a vehicle in a reckless manner and is therefore a violent offense. RCW 9.94A.030
- Current offenses encompassing the same criminal conduct and counting as one crime in determining the offender score are (RCW 9 94A.400)

MICROFILMED

JUDGMENT AND SENTENCE (Felony)
(RCW 9.94A.110, .120)(WPF CR 84.0400 (7/95))

Page 1 of 10

JASS

95-9-3221-7

81

THURSTON COUNTY 200325 (010000)9042

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3/19/79

Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number).

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MICROFILMED

2.2 CRIMINAL HISTORY: Prior convictions constituting criminal history for purposes of calculating the offender score are (RCW 9 94A.360)

CRIME	DATE OF SENTENCE	SENTENCING COURT (County & State)	DATE OF CRIME	A or I Adult, Juv.	TYPE OF CRIME
1 STATUTORY RAPE 3°	1/29/80	Pierce/WA	7/13/79	A	
2 PROMOTE PROSTIT 1°	2/13/80	Pierce/WA	11/15/79	A	
3 VUCSA - Delivery	2/13/80	Pierce/WA	11/15/79	A	
4 VUCSA - Poss Cocaine	6/14/89	King/WA	9/11/88	A	
5 Theft 1°	11/23/88	King/WA	10/4/88	A	

- Additional criminal history is attached in Appendix 2.2
- The defendant committed a current offense while on community placement (adds one point to score). RCW 9 94A.360
- The court finds that the following prior convictions are one offense for purposes of determining the offender score (RCW 9.94A.360)

2.3 SENTENCING DATA

COUNT NO	OFFENDER SCORE	SERIOUSNESS LEVEL	STANDARD RANGE (not including enhancements)	Plus Enhancement for Firearm (F), other deadly weapon finding (D) or VUCSA (V) in a protected zone	Total STANDARD RANGE (including enhancements)	MAXIMUM TERM
I		X	Persistent offender			LIFE

Additional current offense sentencing data is attached in Appendix 2.3.

2.4 EXCEPTIONAL SENTENCE Substantial and compelling reasons exist which justify an exceptional sentence

above within below the standard range for Count(s) _____ Findings of fact and conclusions of law are attached in Appendix 2.4 The Prosecuting Attorney did did not recommend a similar sentence.

2.5 ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS The court has considered the total amount owing, the defendant's past, present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9 94A.142

The following extraordinary circumstances exist that make restitution inappropriate (RCW 9 94A.142).

2.6 For violent offenses, most serious offenses, or armed offenders recommended sentencing agreements or plea agreements are attached as follows: _____

~~CONFIDENTIAL~~
III JUDGMENT WICEORRENEU

3.1 The defendant is GUILTY of the Counts and Charges listed in Paragraph 2 1 and Appendix 2 1

3.2 The Court DISMISSES Counts _____

3.3 The defendant is found NOT GUILTY of Counts _____

IV. SENTENCE AND ORDER

IT IS ORDERED

4 1 Defendant shall pay to the Clerk of this Court

<u>CLASS CODE</u>	\$ _____	Restitution to _____	
RTN/RJN	\$ _____	Restitution to _____	
	\$ _____	Restitution to _____	(Name and Address—address may be withheld and provided confidentially to Clerk's Office).
PCV	\$ <u>100.00</u>	Victim assessment	RCW 7 68.035
CRC	\$ _____	Court costs, including	RCW 9 94A 030, 9 94A 120, 10.01.160, 10 46.190
		Criminal filing fee \$ _____	FRC
		Witness costs \$ _____	WFR
		Sheriff service fees \$ _____	SFR/SFS/SFW/WRF
		Jury demand fee \$ _____	JFR
		Other \$ _____	
PUB	\$ _____	Fees for court appointed attorney	RCW 9 94A.030
WFR	\$ _____	Court appointed defense expert and other defense costs	RCW 9 94A.030
FCM	\$ _____	Fine RCW 9A.20.021, <input type="checkbox"/> VUCSA additional fine deferred due to indigency	RCW 69.50.430
CDF/LDV/PCD	\$ _____	Drug enforcement fund of _____	RCW 9.94A.030
NTF/SAD/SDI	\$ _____	Crime lab fee <input type="checkbox"/> deferred due to indigency	RCW 43.43.690
CLF	\$ _____	Extradition costs	RCW 9.94A.120
EXT	\$ _____	Emergency response costs (Vehicular Assault, Vehicular Homicide only, \$1000 maximum)	RCW 38 52.430
	\$ _____	Other costs for _____	
	\$ <u>100.00</u>	TOTAL	RCW 9 94A.145

The above total does not include all restitution or other legal financial obligations, which may be set by later order of the court. An agreed restitution order may be entered. RCW 9 94A.142 A restitution hearing:
 shall be set by the prosecutor
 is scheduled for _____

RESTITUTION Schedule attached, Appendix 4 1

Restitution ordered above shall be paid jointly and severally with:
NAME of other defendant CAUSE NUMBER (Victim name) (Amount-\$)

The Department of Corrections may immediately issue a Notice of Payroll Deduction. RCW 9 94A.200010

THUCOU001000617200325101000019043

RJN

WEC 27 230000

All payments shall be made in accordance with the policies of the clerk and on a schedule established by the Department of Corrections, commencing immediately, unless the court specifically sets forth the rate here Not less than

\$ _____ per month commencing _____ RCW 9 94A.145

[] In addition to the other costs imposed herein the Court finds that the defendant has the means to pay for the cost of incarceration and is ordered to pay such costs at the statutory rate. RCW 9.94A.145

[] The defendant shall pay the costs of services to collect unpaid legal financial obligations. RCW 36.18.190

The financial obligations imposed in this judgment shall bear interest from the date of the Judgment until payment in full, at the rate applicable to civil judgments. RCW 10.82.090. An award of costs on appeal against the defendant may be added to the total legal financial obligations. RCW 10.73

4.2 HIV TESTING The Health Department or designee shall test and counsel the defendant for HIV as soon as possible and the defendant shall fully cooperate in the testing RCW 70.24.340

DNA TESTING The defendant shall have a blood sample drawn for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing The appropriate agency, the county or Department of Corrections, shall be responsible for obtaining the sample prior to the defendant's release from confinement. RCW 43.43.754

4.3 The defendant shall not use, own, or possess firearms or ammunition while under the supervision of the Department of Corrections RCW 9 94A.120

4.4 The defendant shall not have contact with REGINA L. RUSH, DOB 10/29/83 (name, DOB) *and her family* including, but not limited to, personal, verbal, telephonic, written or contact through a third party for LIFE of *defendant* years (not to exceed the maximum statutory sentence). Domestic Violence Protection Order or Anti-Harassment Order is attached as Appendix 4.4.

4.5 OTHER: _____

- 5.1 COLLATERAL ATTACK ON JUDGMENT. Any petition or motion for collateral attack on this judgment and sentence, including but not limited to any personal restraint petition, state habeas corpus petition, motion to vacate judgment, motion to withdraw guilty plea, motion for new trial or motion to arrest judgment, must be filed within one year of the final judgment in this matter, except as provided for in RCW 10.73.100. RCW 10.73.090
- 5.2 LENGTH OF SUPERVISION. The defendant shall remain under the court's jurisdiction and the supervision of the Department of Corrections for a period up to ten years from the date of sentence or release from confinement, whichever is longer, to assure payment of all legal financial obligations. RCW 9.94A.145
- 5.3 NOTICE OF INCOME-WITHHOLDING ACTION. If the court has not ordered an immediate notice of payroll deduction in Section 4.1, you are notified that the Department of Corrections may issue a notice of payroll deduction without notice to you if you are more than 30 days past due in monthly payments in an amount equal to or greater than the amount payable for one month. RCW 9.94A.200010. Other income-withholding action under RCW 9.94A may be taken without further notice. RCW 9.94A.200030
- 5.4 RESSTITUTION HEARING.
[] Defendant waives any right to be present at any restitution hearing (sign initials): _____
- 5.5 Any violation of this Judgment and Sentence is punishable by up to 60 days of confinement per violation. RCW 9.94A.200

Cross off if not applicable:

- 5.6 FIREARMS. You may not own, use or possess any firearm unless your right to do so is restored by a court of record. (The court clerk shall forward a copy of the defendant's driver's license, identacard, or comparable identification, to the Department of Licensing along with the date of conviction or commitment). RCW 9.41.040, 9.41.047
- 5.7 SEX OFFENDER REGISTRATION. RCW 9A.44.130, 10.01.200. Because this crime involves a sex offense, you are required to register with the sheriff of the county of the state of Washington where you reside. You must register immediately upon being sentenced unless you are in custody, in which case you must register within 24 hours of your release.
If you leave the state following your sentencing or release from custody but later move back to Washington, you must register within 30 days after moving to this state or within 24 hours after doing so if you are under the jurisdiction of this state's Department of Corrections.
If you change your residence within a county, you must send written notice of your change of residence to the sheriff within 10 days of moving. If you change your residence to a new county within this state, you must register with the sheriff of the new county and you must give written notice of your change of address to the sheriff of the county where last registered, both within 10 days of moving. If you move out of Washington state, you must also send written notice within 10 days of moving to the county sheriff with whom you last registered in Washington state.

5.8 OTHER: _____

DONE in Open Court and in the presence of the defendant this date November 3, 1995

Jean E. Meyn
Deputy Prosecuting Attorney
WSBA # 15990
Print name. JEAN E. MEYN

John Sinclair
Attorney for Defendant
WSBA # 9660
Print name JOHN SINCLAIR

W. T. H. C. P. A.
JUDGE- Print name. McPherson
James C. Buck
Defendant

Translator signature/Print name: _____
I am a certified interpreter of, or the court has found me otherwise qualified to interpret, the _____ language, which the defendant understands I translated this Judgment and Sentence for the defendant into that language

THUC000100001720025101000019045

~~WICBOLE WED~~
~~WICBOLE WED~~
WICBOLE WED

CAUSE NUMBER of this case: 95-1-402-8

I, _____, Clerk of this Court, certify that the foregoing is a full, true and correct copy of the Judgment and Sentence in the above-entitled action, now on record in this office

WITNESS my hand and seal of the said Superior Court affixed this date _____

Clerk of said County and State, by _____, Deputy Clerk

IDENTIFICATION OF DEFENDANT

SID No. WA11230537 Date of Birth 7/8/59
(If no SID take fingerprint card for State Patrol)

FBI No. 26651T5 Local ID No _____

PCN No _____ Other _____

Alias name, SSN, DOB: _____

Race Ethnicity Sex:
 Asian/Pacific Islander Black/African-American Caucasian Hispanic Male
 Native American Other _____ Non-Hispanic Female

FINGERPRINTS I attest that I saw the same defendant who appeared in Court on this document affix his or her fingerprints

and signature thereto Clerk of the Court: *Raymond M. ...*, Deputy Clerk. Dated: 11-03-95

DEFENDANT'S SIGNATURE: *A. ...*

Left four fingers taken simultaneously

Left Thumb

Right Thumb

Right four fingers taken simultaneously



SUPERIOR COURT OF WASHINGTON
COUNTY OF

STATE OF WASHINGTON, Plaintiff,

No 95-1-402-8

vs.
JERRY L. BROCK
Defendant.

**ADDITIONAL CURRENT OFFENSES, CRIMINAL
HISTORY AND CURRENT OFFENSE SENTENCING DATA
APPENDIX 2.1, 2.2 and 2.3, JUDGMENT AND SENTENCE
(APX)**

2.1 The additional current offenses of defendant are as follows:

COUNT	CRIME	RCW	DATE OF CRIME

2.2 The defendant has the following prior criminal convictions (RCW 9.94A.100).

#	CRIME	DATE OF SENTENCE	SENTENCING COURT (County & State)	DATE OF CRIME	Adol Adult, Juv.	TYPE OF CRIME
6	BURGLARY 1°	5/24/91	King/WA	4/1/91	A	

2.3 The additional current offense sentencing data is as follows

COUNT NO.	OFFENDER SCORE	SERIOUSNESS LEVEL	STANDARD RANGE (not including enhancements)	Plus Enhancement for Firearm (F), or other deadly weapon finding (D) or VUCSA (V) in a zone	Total STANDARD RANGE (including enhancements)	MAXIMUM TERM

[] See additional sheets for more current offenses, criminal history and current offense sentencing data

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THUCVJ010001720032510160019046

SUPERIOR COURT OF WASHINGTON
COUNTY OF THURSTON

STATE OF WASHINGTON, Plaintiff,

vs
JERRY L. BROCK
Defendant.

No 95-1-402-8

ORDER FOR PROTECTION FROM CIVIL HARASSMENT
(UNLAWFUL HARASSMENT) (ORAH)

APPENDIX 4.4. JUDGMENT AND SENTENCE

This Order for Protection from Civil Harassment (Unlawful Harassment) is entered as an appendix to the Judgment and Sentence. The victim protected by this order is REGINA L. RUSH, DOB 10/29/83

Any willful disobedience of the above provisions of this order with actual notice of its terms shall subject the Defendant to criminal penalties. Willful disobedience of this order may also subject the Defendant to being found in contempt of court.

I. FINDINGS

1.1 Based upon the Information, testimony, if any, and case record, the court finds that the Defendant committed unlawful harassment based on the following:

- Current contact between the Defendant and above-named victim was initiated by the Defendant only
[] by both the Defendant and the above-named victim.
- The Defendant has been given clear notice that all further contact with the above-named victim is unwanted.
- [] The Defendant's course of conduct appears designed to alarm, annoy or harass the above-named victim.
- [] The Defendant is not acting pursuant to any statutory authority
- The Defendant's course of conduct unreasonably interferes with the above-named victim's privacy.
- [] The Defendant's course of conduct creates an intimidating, hostile, or offensive living environment for the above-named victim.
- [] Contact by the Defendant with the above-named victim, or the victim's family, has not been limited in any manner by any previous court order.
- [] Other:

1.2 The court further finds that good cause has been shown to enter an Anti-Harassment Order.

II. ORDER

IT IS ORDERED THAT

2.1 The Defendant is RESTRAINED from:

- making any attempts to contact the above-named victim.
- making any attempts to keep the above-named victim under surveillance
- going within 100 yards (distance) of the above-named victim's residence and workplace, and school
- [] other: _____

THURSTON COUNTY 1000017206325101000019047

MICROFILMED

It is further ordered that the Clerk of the Court shall forward a copy of this order (Appendix 4 4) on or before the next judicial day to _____ County Sheriff's Office Police Department where the above-named victim lives, which shall enter it in a computer-based criminal intelligence system available in this state used by law enforcement to list outstanding warrants

THIS ORDER FOR PROTECTION EXPIRES ON is in effect for the LIFE of Defendant

Done in Open Court in the presence of the Defendant this date: November 5, 1995

W. Thomas McPhee

JUDGE Print name:

Wm. THOMAS MCPHEE

Jean E. Meyn

Deputy Prosecuting Attorney
WSBA # 115990
Print name: JEAN E. MEYN

John Sinclair

Attorney for Defendant
WSBA # 9660
Print name: JOHN SINCLAIR

Joseph C. Beck

Defendant

A completed law enforcement information sheet must be attached for identification purposes by the police or sheriff

MICROFILMED

APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

JERRY L. BROCK,

Appellant.

No. 20096-1-II

UNPUBLISHED OPINION
MAY 09 1997

Filed: _____

ARMSTRONG, J. -- Jerry Brock appeals his life sentence under the Persistent Offender Accountability Act following his conviction in Thurston County Superior Court of first degree child molestation, RCW 9A.44.083. Brock contends that the Persistent Offender Act, codified at RCW 9.94A.120(4), is unconstitutional. He further assigns error to the trial court's use of a prior first degree burglary conviction in classifying Brock as a persistent offender. We affirm.

THURSTON COUNTY SUPERIOR COURT
FILED MAY 10 1997
CLERK OF COURT
1000 1/2 N. GARDNER ST.
TACOMA, WA 98401
PHONE (206) 861-1900

20096-1-II

Brock first challenges the constitutionality of the Persistent Offender Act. He does not provide any citations or argument supporting this contention. Instead, he states that he wishes merely to preserve his right to redress should the Act ever be declared unconstitutional. However, the Washington Supreme Court has recently held that this Act is constitutionally valid. *State v. Manussier*, 129 Wn.2d 652, 921 P.2d 473 (1996); *State v. Rivers*, 129 Wn.2d 697, 921 P.2d 495 (1996); *State v. Thorne*, 129 Wn.2d 736, 921 P.2d 514 (1996). Therefore, Brock's challenge to the validity of the Act is without merit.

Brock next challenges the trial court's use of Brock's first degree burglary conviction in its determination that he was a persistent offender. In 1991 Brock was charged by amended information with first degree burglary, to which he pled guilty. Brock contends that the information was constitutionally defective because it did not contain all the statutory elements of the crime. He argues that the conviction is therefore invalid and should not be counted as a "strike" in his criminal history.

First degree burglary is when "with intent to commit a crime against a person or property therein," a person "enters or remains unlawfully in a building" and in the course of entering, remaining, or leaving, the person is armed with a deadly weapon or assaults a person therein. RCW 9A.52.020(1). The amended information charging Brock with first degree burglary read as follows: "That said defendant(s), Jerry Lee Brock, . . . did knowingly enter the residence [of victim] . . . without [victim's] permission, and while therein, did assault [victim] contrary to RCW 9A.52.020 . . ." The primary issue is whether the State's failure to list the element of "intent to commit a crime . . . therein" renders the information unconstitutionally defective.

20096-1-II

Washington courts apply a liberal construction in favor of the validity of charging documents where the challenge to its sufficiency is raised after a verdict. *See State v. Kjorsvik*, 117 Wn.2d 93, 105, 812 P.2d 86 (1991). The two-prong test used to determine validity of the charging documents looks at (1) whether the “necessary facts appear in any form, or by fair construction can they be found, in the charging document”; and if so, (2) was the defendant “nonetheless actually prejudiced by the inartful language.” *Kjorsvik*, 117 Wn.2d at 105-06.

Regarding the first prong, Washington courts have held that the failure to list the element of intent is not necessarily fatal. When the charge includes assault, the element of intent can reasonably be inferred, and failure to specifically list intent does not render the instrument defective. *State v. Dukowitz*, 62 Wn. App. 418, 424, 814 P.2d 234 (1991) (a document charging assault can be “fairly construed” as having stated the element of intent); *State v. Davis*, 119 Wn.2d 657, 663, 835 P.2d 1039 (1992) (assault adequately conveys the notion of intent); *State v. Chaten*, 84 Wn. App. 85, 87, 925 P.2d 631 (1996) (a charging document asserting assault reasonably includes the element of intent). Here, the information alleged that Brock committed an assault against his victim. Because assault implies the element of intent, Brock was on notice that intent to commit a crime, either upon entry or after entry, was an element of the charge.

We next consider whether Brock was prejudiced by the wording of the information. The amended information was filed as a result of a plea agreement. Brock had agreed to plead guilty to first degree burglary, reduced from a charge of second degree rape. All elements of the crime, including intent, were listed on the first page of Brock’s statement of defendant on plea of guilty. He also made a written statement describing, in his own words, his assault on the victim. His statement clearly indicates that the assault was intentional. Finally, Brock was not forced to present

20096-1-II

a defense based on the faulty information. These facts are sufficient to convince us that Brock was not prejudiced by the wording of the information.

We find that Brock's conviction for first degree burglary is valid. Accordingly, the trial court did not err in using the conviction in its determination that Brock was a persistent offender.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

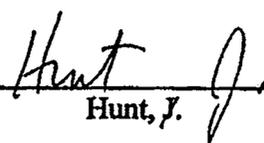


Armstrong, J.

We concur:



Houghton, C.J.



Hunt, J.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,
Respondent,
v.
JERRY L. BROCK,
Appellant.

No. 20096-1-II

MANDATE

Thurston County Cause No.
95-1-00402-8

FILED
SUPERIOR COURT
THURSTON COUNTY, WASH.

97 SEP -2 AM 9: 14

BETTY J. GOULD, CLERK

BY DEPUTY

The State of Washington to: The Superior Court of the State of Washington
in and for Thurston County

This is to certify that the opinion of the Court of Appeals of the State of Washington, Division II, filed on May 9, 1997 became the decision terminating review of this court of the above entitled case on June 10, 1997. Accordingly, this cause is mandated to the Superior Court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.



IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Tacoma, this 27th day of August, 1997.

[Signature]
Clerk of the Court of Appeals,
State of Washington, Div. II

Indeterminate Sentence Review Board

John M. Jones
Thurston Co. Deputy Pros. Atty.
2000 Lakeridge Drive SW
Olympia, WA. 98502

Robert Mason Quillian
Attorney at Law
2633-A Parkmont Lane SW
Olympia, WA. 98502

Wm. Thomas McPhee
Thurston County Superior Court Judge
2000 Lakeridge Drive SW
Olympia, WA. 98502

THURSTON COUNTY 100017200325101000019008

95-9-3221-7

105

APPENDIX
C

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In re the
Personal Restraint Petition of

JERRY LEE BROCK,

Petitioner.

No. 26933-3-II

ORDER DISMISSING PETITION

FILED
COURT OF APPEALS
DIVISION II
01 AUG 20 PM 4:24
STATE OF WASHINGTON
BY [Signature] BERRY

Jerry Lee Brock seeks relief from personal restraint imposed following his 1995 conviction of first degree child molestation. He received a life sentence under the Persistent Offender Accountability Act, RCW 9.94A.120(4). Brock claims that his restraint is unlawful because (1) his 1991 first degree burglary conviction, based on his guilty plea, was facially invalid, (2) this prior conviction should not have been used in the 1995 proceedings to classify him as a persistent offender, and (3) his prior convictions were not proved beyond a reasonable doubt, as required by *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).

This petition must be dismissed without reaching the merits. Under RCW 10.73.090(1), a petition or motion for collateral attack on a judgment and sentence must be filed no later than one year after the conviction becomes final. Brock's 1995 conviction became final on August 27, 1997, when the mandate issued on his appeal. Thus, when Brock filed this petition on December 28, 2000, the one-year time limit had lapsed.

Claims (1) and (2) are related and rest on the contention that his 1991 burglary conviction was invalid. This court heard and determined this issue on direct appeal. *State v. Brock*, No. 20096-1-II (Wash. Ct. App. May 9, 1997) (unpub). On appeal, Brock challenged the validity of the 1991 conviction; he contended that the amended information was constitutionally defective because it omitted the intent element, e.g., "intent to commit a crime . . . therein," for first degree burglary. *Id.*, slip op. at 2. Rejecting his argument, this court held that the amended information sufficiently apprised Brock of all the elements of first degree burglary and this conviction was properly considered in the 1995 proceedings to find that he was a persistent offender. *Id.*, at 4.

Brock attempts to relitigate the validity of the 1991 conviction. He now asserts that the prosecutor "altered" the Statement of Defendant to Plea of Guilty by adding the language: "with intent to commit a crime against a person or the property therein" without his knowledge when he signed the statement. Personal Restraint Petition at 8. Because this court considered on direct appeal the validity of the 1991 conviction, this issue will not be reexamined unless Brock shows that the ends of justice would be served by reconsideration. *See In re Personal Restraint of Lord*, 123 Wn.2d 296, 303, 868 P.2d 835 (1994). Simply revising a previously rejected legal argument does not create a new claim or good cause for revisiting the original claim. *Lord*, 123 Wn.2d at 329. Therefore, Brock's assertions of different facts and theory in his argument that the 1991 conviction was invalid cannot renew the issue unless he shows the interests of justice require reconsideration. Brock fails to make such a showing.

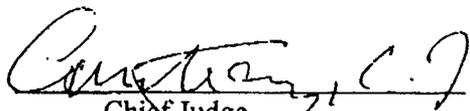
In claim (3), Brock argues that the prior convictions used to determine his persistent offender status should have been charged in the information and considered by

a jury using the "beyond a reasonable doubt" standard, relying on the United States Supreme Court decision in *Apprendi v. New Jersey, supra*. But *Apprendi* is inapposite to his argument. *Apprendi* declared the general rule that any fact, other than a prior conviction, which is used to increase a sentence beyond the statutorily prescribed maximum for the crime must be pleaded and proven beyond a reasonable doubt. 120 S. Ct. at 2358. Because the *Apprendi* court explicitly excepted "the fact of a prior conviction" from this rule, it does not support Brock's claim that the State had to prove the prior convictions beyond a reasonable doubt. *Apprendi*, 120 S. Ct. at 2362-63. See also *State v. Holgren*, 106 Wn. App. 477, 482-83, 23 P.3d 1132 (2001) (rejected defendant's argument that *Apprendi* required prior convictions be proved beyond a reasonable doubt).

Brock's petition is time-barred under RCW 10.73.090(1). Accordingly, it is hereby

ORDERED that this petition is dismissed under RAP 16.11(b).

DATED this 20 day of August, 2001.


Chief Judge

cc: Jerry Lee Brock
Thurston County Clerk
County Cause No. 95-1-402-8
Edward G. Holm
Steven C. Sherman

APPENDIX "D"

THE SUPREME COURT OF WASHINGTON

In re the Personal Restraint
Petition of

JERRY LEE BROCK,

Petitioner.

CLERM
02 JAN 2 4 0 15
STATE COURT
CLERK

NO. 71584-0

RULING DENYING REVIEW

Jerry Lee Brock was convicted in 1995 of first-degree child molestation, and was thereafter sentenced as a persistent offender to life imprisonment without possibility of parole. His conviction was affirmed on appeal, and his judgment and sentence became final on August 27, 1997. In December 2000, Mr. Brock filed a personal restraint petition in Division Two of the Court of Appeals. The Chief Judge dismissed the petition as time barred. Mr. Brock now seeks this court's discretionary review. RAP 16.14(c); RAP 13.5.

The Chief Judge properly dismissed the petition as untimely. Mr. Brock acknowledges that his petition was not based solely on the statutory exceptions to the one-year time limit listed in RCW 10.73.100. *See In re Stoudmire*, 141 Wn.2d 342, 349, 5 P.3d 1240 (2000). But he argues that his judgment and sentence is invalid on its face and thus exempt from the time limit pursuant to RCW 10.73.090(1). *See Stoudmire* at 351. Specifically, Mr. Brock asserts that a 1991 burglary conviction was invalid (and thus not properly considered in determining his persistent offender status) because his statement on plea of guilty was altered, without his knowledge, to add the necessary element of intent to commit a crime in the building entered. But

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a judgment and sentence is facially invalid only if infirmities of a constitutional nature appear without further elaboration. *Stoudmire* at 353. The portion of the 1991 plea statement describing the elements of the crime does contain an insertion of the intent element, but there is nothing on the face of the document to suggest that the insertion was made without Mr. Brock's knowledge.¹ His 1995 judgment and sentence is therefore not facially invalid.

Relying on *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), Mr. Brock also argues that the prior convictions the trial court relied on to impose a life term had to be pleaded in the information and proven to a jury beyond a reasonable doubt. But this court recently held that *Apprendi* does not extend to proof of prior convictions for purposes of Washington's persistent offender statute. *State v. Wheeler*, __ Wn.2d __, 34 P.3d 799 (2001).

The motion for discretionary review is therefore denied.


COMMISSIONER

January 2, 2002

¹ On direct appeal, the Court of Appeals considered and rejected Mr. Brock's argument that the 1991 conviction was invalid because the information failed to adequately state the element of intent.

San

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TIME _____

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

In re the Personal Restraint Petition of:

JERRY LEE BROCK

No. 26933-3-II

CERTIFICATE OF FINALITY

Thurston County

Superior Court No. 95-1-00402-8

THE STATE OF WASHINGTON TO: The Superior Court of the State of Washington in and
for Thurston County.

This is to certify that the decision of the Court of Appeals of the State of Washington,
Division II, filed on August 20, 2001, became final on February 2, 2002.

IN TESTIMONY WHEREOF, I have hereunto set my
hand and affixed the seal of said Court at Tacoma, this
15 day of May, 2002.



David C. Ponzoha
Clerk of the Court of Appeals,
State of Washington, Division II



