

NO. 36398-4-II

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

In re the Personal Restraint of:

JERRY BROCK,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Wm. Thomas McPhee, Judge

SUPPLEMENTAL OPENING BRIEF OF PETITIONER

CASEY GRANNIS
Attorney for Petitioner

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

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TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u>	1
<u>Issue Pertaining to Assignments of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
C. <u>ARGUMENT</u>	4
1. BROCK'S CLAIM IS PROPERLY BEFORE THIS COURT AND SHOULD BE ADDRESSED ON THE MERITS BECAUSE IT IS NOT PROCEDURALLY BARRED.	4
a. <u>Brock's Petition is Not Barred By RCW 10.73.090.</u>	4
b. <u>Brock's Direct Appeal Does Not Bar Consideration Of The Present Petition.</u>	5
c. <u>RAP 16.4(d) And RCW 10.73.140 Provide No Barrier To Considering Brock's Petition On Its Merits.</u>	7
2. THE BALLOT TITLE OF INITIATIVE 593 VIOLATES THE SUBJECT IN TITLE REQUIREMENT OF ARTICLE II, SECTION 19.	11
a. <u>The Persistent Offender Accountability Act Includes First Degree Promoting Prostitution As A Most Serious Offense.</u>	12

TABLE OF CONTENTS (CONT'D)

	Page
b. <u>The Ballot Title Of I-593 Is Restrictive And Thus Provisions That Are Not Fairly Within The Title Are Invalid.</u>	14
c. <u>The Commonly Understood Meaning Of The Term "Most Serious Offenses" In The Ballot Title Differs From The Technical Definition Applied To That Term In The Body Of The Act.</u>	18
d. <u>This Court Should Vacate The Persistent Offender Sentence.</u>	27
D. <u>CONCLUSION</u>	28

TABLE OF AUTHORITIES

	Page
 <u>WASHINGTON CASES</u>	
<u>Amalgamated Transit Union Local 587 v. State,</u> 142 Wn.2d 183, 11 P.3d 762 (2000)	14-17, 19, 23, 25, 26
<u>Ballot Title for Initiative 333 v. Gorton,</u> 88 Wn.2d 192, 558 P.2d 248 (1977)	18
<u>Batey v. State. Employment Sec. Dept.,</u> 137 Wn. App. 506, 154 P.3d 266 (2007)	16, 17
<u>Citizens for Responsible Wildlife Management v. State,</u> 149 Wn.2d 622, 71 P.3d 644 (2003)	16, 17
<u>DeCano v. State,</u> 7 Wn.2d 613, 110 P.2d 627 (1941)	22, 24, 25
<u>In re Electric Lightwave, Inc.,</u> 123 Wn.2d 530, 869 P.2d 1045 (1994)	15
<u>In re Pers. Restraint of Carle,</u> 93 Wn.2d 31, 604 P.2d 1293 (1980)	27
<u>In re Pers. Restraint of Davis,</u> 152 Wn.2d 647, 101 P.3d 1 (2004)	5
<u>In re Pers. Restraint of Gentry,</u> 137 Wn.2d 378, 972 P.2d 1250 (1999)	5
<u>In re Pers. Restraint of Goodwin,</u> 146 Wn.2d 861, 50 P.3d 618 (2002)	4

TABLE OF AUTHORITIES (CONT'D)

Page

WASHINGTON CASES (CONT'D)

<u>In re Pers. Restraint of Greening</u> , 141 Wn.2d 687, 9 P.3d 206 (2000)	6
<u>In re Pers. Restraint of Hinton</u> , 152 Wn.2d 853, 100 P.3d 801 (2004)	27
<u>In re Pers. Restraint of Jeffries</u> , 114 Wn.2d 485, 789 P.2d 731 (1990)	9
<u>In re Pers. Restraint of Johnson</u> , 131 Wn.2d 558, 933 P.2d 1019 (1997)	7
<u>In re Pers. Restraint of Perkins</u> , 143 Wn.2d 261, 19 P.3d 1027 (2001)	9-11
<u>In re Pers. Restraint of Rice</u> , 118 Wn.2d 876, 828 P.2d 1086 (1992)	9, 10
<u>In re Pers. Restraint of Stoudmire</u> , 141 Wn.2d 342, 5 P.3d 1240 (2000)	10
<u>In re Pers. Restraint of Taylor</u> , 105 Wn.2d 683, 717 P.2d 755 (1986)	6
<u>In re Pers. Restraint of Turay</u> , 153 Wn.2d 44, 101 P.3d 854 (2004)	9
<u>In re Pers. Restraint of VanDelft</u> , 158 Wn.2d 731, 147 P.3d 573 (2006)	7, 8

TABLE OF AUTHORITIES (CONT'D)

	Page
 <u>WASHINGTON CASES (CONT'D)</u>	
<u>In re Pers. Restraint of Vazquez,</u> 108 Wn. App. 307, 31 P.3d 16 (2001)	8, 9
<u>Kucera v. State,</u> 140 Wn.2d 200, 995 P.2d 63 (2000)	15
<u>Patrice v. Murphy,</u> 136 Wn.2d 845, 966 P.2d 1271 (1998)	14, 26
<u>Petroleum Lease Properties Co. v. Huse,</u> 195 Wn. 254, 80 P.2d 774 (1938)	24, 25
<u>State ex rel. Port of Seattle v.</u> <u>Department of Public Service,</u> 1 Wn.2d 102, 95 P.2d 1007 (1939)	25
<u>State ex rel. Washington Toll</u> <u>Bridge Authority v. Yelle,</u> 32 Wn.2d 13, 200 P.2d 467 (1948)	16
<u>State v. Brand,</u> 120 Wn.2d 365, 842 P.2d 470 (1992)	11
<u>State v. Broadaway,</u> 133 Wn.2d 118, 942 P.2d 363 (1997)	17
<u>State v. Thorne,</u> 129 Wn.2d 736, 921 P.2d 514 (1996)	12, 15, 17, 20

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>WASHINGTON CASES (CONT'D)</u>	
<u>Swedish Hosp. v. Dep't of Labor & Indus.</u> , 26 Wn.2d 819, 176 P.2d 429 (1947)	23, 25
<u>Washington State Grange v. Locke</u> , 153 Wn.2d 475, 105 P.3d 9 (2005)	18-20, 22
<u>RULES, STATUTES AND OTHERS</u>	
CrR 7.8	3
CrR 7.8(c)(2)	3
Former RCW 9.94A.030(21)	1
Former RCW 9A.88.070	13, 22
Initiative 593	1, 3, 11, 12, 14, 15, 17, 18, 20-22, 25
Initiative 695	23
Laws 2007, ch. 368, § 13	13
Laws of 1975 (1st ex.s. ch. 260, § 9A.88.070)	13
Laws of 1994 (ch. 1, § 2)	2
Laws of 1994 (ch. 1, § 3)	12

TABLE OF AUTHORITIES (CONT'D)

Page

RULES, STATUTES AND OTHERS (CONT'D)

Laws of 1994 (ch. 261, § 16)	1
Persistent Offender Accountability Act (POAA)	2, 3, 5, 6, 11, 13, 15, 19, 26
RAP 16.4(d)	7-10
RCW 9.94A.030	12
RCW 9.94A.030(21)	2, 19
RCW 9.94A.030(21)(m)	13, 19
RCW 9.94A.030(22)	13
RCW 9.94A.030(25)	2, 12
RCW 9.94A.030(29)	13
RCW 9.94A.030(35)	13
RCW 9.94A.120(4)	2, 12
RCW 9.94A.360	12
RCW 9A.88.070(a)	13
RCW 9A.88.070(b)	13
RCW 10.73.090	4

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>RULES, STATUTES AND OTHERS (CONT'D)</u>	
RCW 10.73.090(1)	3, 4, 8
RCW 10.73.140	7-11
Wash. Const. art. II, § 19	1-3, 5, 6, 8, 11, 14-17, 22-26
Webster's Third New International Dictionary (1993)	18

A. ASSIGNMENTS OF ERROR

1. The ballot title of Initiative 593 violated article II, section 19 of the Washington Constitution.
2. The court erred in sentencing petitioner as a persistent offender.

Issue Pertaining to Assignments of Error

One of petitioner's strike offenses under the Persistent Offender Accountability Act, as enacted by Initiative 593, was for first degree promoting prostitution. Must petitioner's sentence as a persistent offender be vacated because the ballot title of Initiative 593 violated the "subject in title" requirement of article II, section 19 insofar as it failed to give fair notice that first degree promoting prostitution was among the "most serious offenses" as that term is defined in the body of the act?

B. STATEMENT OF THE CASE

In 1995, petitioner Jerry Brock was convicted of first degree child molestation, which the sentencing court found to be a "most serious offense" under former RCW 9.94A.030(21).¹ CP 4, 125-26, 129. The court also found Brock had prior convictions for first degree promoting prostitution and first degree burglary, both of which constituted "most

¹ Laws of 1994 (ch. 261, § 16) was in effect at the time of Brock's molestation offense on March 27, 1995. CP 3, 125.

serious" offenses under RCW 9.94A.030(21). CP 126, 129, 132. The court determined Brock was a "persistent offender" under the Persistent Offender Accountability Act (POAA) and sentenced him to a lifetime of confinement without the possibility of parole. RCW 9.94A.030(25); RCW 9.94A.120(4).² CP 129.

Brock filed a direct appeal under Court of Appeals number 20096-1-II. CP 261-64. The Court of Appeals noted Brock challenged the constitutionality of the POAA, but without argument or citation to authority. CP 262. Instead, he "merely wished to preserve his right to redress should the ACT ever be declared constitutional." CP 262. The Court of Appeals rejected the argument, such as it was. CP 262. The Court of Appeals issued a mandate for the direct appeal on August 27, 1997. CP 265. Brock's direct appeal did not raise the issue of whether the POAA violated article II, section 19 of the Washington Constitution.³ CP 261-64.

² Laws of 1994 (ch. 1, § 2) was in effect at the time of Brock's molestation offense.

³ Trial counsel's motion to the trial court challenged the POAA as unconstitutional on a number of grounds, none of which involved article II, section 19 of the Washington Constitution. CP 5-90.

In December 2000, Brock filed a pro se personal restraint petition (PRP) under Court of Appeals number 26933-3-II.⁴ The PRP raised two issues: (1) whether his prior conviction for first degree burglary was invalid and therefore could not be used as a basis for a persistent offender sentence; and (2) whether his prior convictions could not be used as the basis for his persistent offender sentence because those convictions were not alleged in the information and proved to a jury beyond a reasonable doubt. CP 267-69. The Court of Appeals held "[t]his petition must be dismissed without reaching the merits" because it violated the one-year time limit under RCW 10.73.090(1). CP 267. The Supreme Court denied Brock's motion for discretionary review. CP 270-71.

On January 3, 2007, Brock filed a pro se motion to vacate his sentence pursuant to CrR 7.8. CP 141-221. In his motion, Brock argued the ballot title for Initiative 593, which enacted the POAA, was unconstitutional under article II, section 19 because it violated the "subject in title" requirement. CP 141-42.

The Court of Appeals transferred Brock's CrR 7.8 motion to the Court of Appeals for consideration as a PRP pursuant to CrR 7.8(c)(2).

⁴ CP 267-69. ACORDS case information shows his pro se status. The ACORDS printout is attached as Appendix B (available at <https://acord-web.courts.wa.gov/AcordsWeb/login.jsp>; accessed April 24, 2008).

CP 277-78. After initial consideration, the Acting Chief Judge of this Court determined the issues raised in "this timely petition" were not frivolous. See "Order Referring Petition to Panel, Appointing Counsel, and Setting Briefing Schedule," attached as Appendix A. This Court accordingly appointed appellate counsel to assist Brock with his claim.

C. ARGUMENT

1. BROCK'S CLAIM IS PROPERLY BEFORE THIS COURT AND SHOULD BE ADDRESSED ON THE MERITS BECAUSE IT IS NOT PROCEDURALLY BARRED.

This Court has initially considered Brock's petition and deemed it timely. Appendix A. The State in its response brief, however, argues the petition should not be considered on its merits. Brief of Respondent (BOR) at 4-6. Brock therefore responds to the State's argument as set forth below.

- a. Brock's Petition is Not Barred By RCW 10.73.090.

RCW 10.73.090(1) provides "No petition or motion for collateral attack on a judgment and sentence in a criminal case may be filed more than one year after the judgment becomes final if the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction."

A defendant may challenge his sentence, despite the one-year bar of RCW 10.73.090, if he can show his judgment and sentence is invalid on its face. In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 866, 50

P.3d 618 (2002). A judgment and sentence is invalid on its face if the invalidity is evident without further elaboration. Id.

Brock's petition argues his persistent offender sentence is invalid because article II, section 19 barred the sentencing court from treating the crime of first degree promoting prostitution as one of the three strikes needed to impose a persistent offender sentence. If the POAA is unconstitutional insofar as it includes promoting first degree prostitution as a "most serious offense," then the infirmity in the judgment of sentence is evident on its face. The State concedes this point. BOR at 5.

b. Brock's Direct Appeal Does Not Bar Consideration Of The Present Petition.

Appellate courts will ordinarily decline to review issues raised in a PRP that were previously raised and rejected on direct review. In re Pers. Restraint of Gentry, 137 Wn.2d 378, 388, 972 P.2d 1250 (1999). An issue is considered raised and rejected on direct appeal only if the same ground presented in the petition was determined adversely to the petitioner on appeal and the prior determination was on the merits. In re Pers. Restraint of Davis, 152 Wn.2d 647, 671 n.14, 101 P.3d 1 (2004). "[T]he mere fact that an issue was raised on appeal does not automatically bar review in a PRP. Rather, a court should dismiss a PRP only if the prior appeal was denied on the same ground and the ends of justice would not

be served by reaching the merits of the subsequent PRP." In re Pers. Restraint of Taylor, 105 Wn.2d 683, 688, 717 P.2d 755 (1986). "Ground" means "a distinct legal basis for granting relief." *Id.* "Should doubts arise in particular cases as to whether two grounds are different or the same, they should be resolved in favor of the applicant." *Id.*

Brock challenged the constitutionality of the POAA on direct appeal, but did not "raise" the issue within the meaning of the rule limiting collateral attack because he barely articulated the claim and cited no legal authority. CP 262; see In re Pers. Restraint of Greening, 141 Wn.2d 687, 699-700, 9 P.3d 206 (2000) (petitioner's attempt to raise issue in previous PRP failed because he barely articulated the claim and cited no legal authority; such a claim was insufficient to command judicial consideration and did not bar subsequent petition).

Regardless, Brock's direct appeal did not raise the issue of whether the POAA violated article II, section 19. CP 261-63. The present petition raises that distinct legal theory. The "same ground" bar is therefore inapplicable to this case.

c. RAP 16.4(d) And RCW 10.73.140 Provide No Barrier To Considering Brock's Petition On Its Merits.

"Both RAP 16.4(d) and RCW 10.73.140, albeit by different language, limit successive personal restraint petitions." In re Pers. Restraint of Johnson, 131 Wn.2d 558, 564, 933 P.2d 1019 (1997). RCW 10.73.140 provides "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." RAP 16.4(d) states "[n]o more than one petition for similar relief on behalf of the same petitioner will be entertained without good cause shown."

Under either RCW 10.73.140 or RAP 16.4(d), a successive petition for similar relief or on similar grounds must be dismissed absent good cause shown.⁵ In re Pers. Restraint of VanDelft, 158 Wn.2d 731, 737, 147 P.3d 573 (2006). "[T]his is true only where the relevant issue was previously heard and determined on the merits." Id. at 738.

⁵ The phrase "similar relief" under RAP 16.4(d) relates to the grounds for the relief, rather than the type of relief sought. Johnson, 131 Wn.2d at 564.

Brock's current PRP raises violation of article II, section 19 as a ground for relief for the first time. His first PRP did not raise the issue. CP 267-69. The "similar grounds" bar under RCW 10.73.140 and RAP 16.4(d) is therefore inapplicable to this case.

Moreover, this Court held Brock's first petition "must be dismissed without reaching the merits" because it violated the one-year time limit under RCW 10.73.090(1). CP 267. Lack of adjudication on the merits is an additional reason why the "similar grounds" bar does not apply. VanDelft, 158 Wn.2d at 738.

RCW 10.73.140 and RAP 16.4(d), both of which are applicable to the Court of Appeals, present a different procedural bar when the subsequent petition raises a new issue. In re Pers. Restraint of Vazquez, 108 Wn. App. 307, 311, 31 P.3d 16 (2001). Under RCW 10.73.140, "a new issue cannot be raised in a successive petition to the Court of Appeals without a showing of good cause for the failure to raise the issue earlier." VanDelft, 158 Wn.2d at 738.

There is no definitive definition of what constitutes "good cause" under RCW 10.73.140. It has been said in a case where the petitioner was represented by counsel in a previous petition that he "can demonstrate good cause if he can show that there was an external objective impediment

preventing him from raising the issues, rather than a self-created hardship." Vazquez, 108 Wn. App. at 315.

For further guidance on what constitutes good cause to raise a new issue in a subsequent petition, consideration of the abuse of writ doctrine provides useful guidance. The abuse of writ doctrine is part of the RAP 16.4(d) analysis. In re Pers. Restraint of Rice, 118 Wn.2d 876, 885, 828 P.2d 1086 (1992). "A prisoner's second or subsequent personal restraint petition that raises a new issue for the first time will not be considered if raising that issue constitutes an abuse of the writ." In re Pers. Restraint of Turay, 153 Wn.2d 44, 48, 101 P.3d 854 (2004). The abuse of writ doctrine states "if the petitioner was represented by counsel throughout postconviction proceedings, it is an abuse of the writ for him or her to raise, in a successive petition, a new issue that was available but not relied upon in a prior petition." In re Pers. Restraint of Jeffries, 114 Wn.2d 485, 492, 789 P.2d 731 (1990) (citation and internal quotation marks omitted).

The abuse of writ doctrine applies only where the petitioner has been represented by counsel throughout postconviction proceedings. In re Pers. Restraint of Perkins, 143 Wn.2d 261, 265 n.5, 19 P.3d 1027 (2001). Because RCW 10.73.140 does not apply to the Supreme Court, the abuse of writ doctrine is the only direct bar to the raising of new issues in

successive petitions in the Supreme Court. Id.; In re Pers. Restraint of Stoudmire, 141 Wn.2d 342, 351-52, 5 P.3d 1240 (2000).

The abuse of writ employed in the Supreme Court to limit collateral attack is the counterpart to lack of good cause in the Court of Appeals for failing to previously raise the issue under RCW 10.73.140. The Supreme Court has noted the good cause requirement under RCW 10.73.140 is consistent with the abuse of writ analysis. Rice, 118 Wn.2d at 885 n.1. Both seek to prevent abuse of the collateral review process by limiting review of a new issue raised in a successive petition to situations where there is a good enough reason to warrant review.

There is no abuse of writ unless counsel was appointed throughout post-conviction proceedings. Perkins, 143 Wn.2d at 265 n.5. It follows good cause in failing to raise the issue in a previous petition is shown under RCW 10.73.140 where the previous petition was filed pro se.

Brock filed his first PRP pro se. See appendix B. The present petition is therefore not barred by the good cause requirement of RCW 10.73.140 or abuse of writ doctrine under RAP 16.4(d).

In balancing the competing interests of finality and the need to remedy prejudicial error, the appellate courts "limit collateral review, but not so rigidly as 'to prevent the consideration of serious and potentially

valid claims.'" State v. Brand, 120 Wn.2d 365, 368-69, 842 P.2d 470 (1992) (citation omitted). This Court should review Brock's claim on its merits because his constitutional challenge to the POAA is undoubtedly serious and potentially valid, as indicated by the fact that this Court assigned appellate counsel to assist Brock with his claim.

In the event this Court determines Brock's petition is barred by RCW 10.73.140 for lack of good cause to raise a new ground for relief, this Court must transfer the petition to the Supreme Court rather than dismiss it. Perkins, 143 Wn.2d at 266-67.

2. THE BALLOT TITLE OF INITIATIVE 593 VIOLATES THE SUBJECT IN TITLE REQUIREMENT OF ARTICLE II, SECTION 19.

The ballot title of Initiative 593 (I-593) states: "Shall criminals who are convicted of 'most serious offenses' on three occasions be sentenced to life in prison without parole?" CP 201. The ballot title violated article II, section 19 of the Washington Constitution because it did not give fair notice to voters that advancing or profiting from prostitution of a minor, which is a form of first degree promoting prostitution, qualified as a "most serious offense."

- a. The Persistent Offender Accountability Act Includes First Degree Promoting Prostitution As A Most Serious Offense.

I-593, legislatively titled "The Persistent Offender Accountability Act," added a new section to the Sentencing Reform Act that required trial courts to sentence "persistent offenders" to life imprisonment without the possibility of parole. RCW 9.94A.120(4); State v. Thorne, 129 Wn.2d 736, 746, 921 P.2d 514 (1996). Commonly known as the "three strikes and you're out law,"⁶ the enactment defined "persistent offender" as an offender who:

(a) Has been convicted in this state of any felony considered a most serious offense; and (b) Has, before the commission of the offense under (a) of this subsection, been convicted as an offender on at least two separate occasions, whether in this state or elsewhere, of felonies that under the laws of this state would be considered most serious offenses and would be included in the offender score under RCW 9.94A.360; provided that of the two or more previous convictions, at least one conviction must have occurred before the commission of any of the other most serious offenses for which the offender was previously convicted.

RCW 9.94A.030(25).⁷

⁶ Thorne, 129 Wn.2d at 746.

⁷ Laws of 1994 (ch. 1, § 3), as passed by I-593. The later amendment to RCW 9.94A.030, which was in effect at the time of Brock's molestation offense, did not change any of the relevant definitions at issue in this case.

The POAA defined "most serious offense" to include first degree promoting prostitution. RCW 9.94A.030(21)(m). The act listed a number of offenses that qualified as a "violent offense." RCW 9.94A.030(35). The enactment further defined "serious violent offense" as a subcategory of "violent offense." RCW 9.94A.030(29). Promoting prostitution is not a "violent offense." RCW 9.94A.030(22).

The trial court determined Brock's previous conviction for first degree promoting prostitution was a "most serious offense" under the POAA. CP 125-26, 129. Former RCW 9A.88.070, the statute in effect at the time of Brock's promoting prostitution offense, provides a person is guilty of first degree promoting prostitution 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.⁸

The judgment and sentence in this case does not specify whether Brock was convicted of violating RCW 9A.88.070(a) or (b). CP 125-35. The State, in its responses to Brock's pro se motion to vacate his sentence,

⁸ Laws of 1975 (1st ex.s. ch. 260, § 9A.88.070). RCW 9A.88.070 was amended in 2007 to read "A person is guilty of promoting prostitution in the first degree if he or she knowingly 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." (Laws 2007, ch. 368, § 13).

nowhere indicates under which alternative means Brock was convicted. BOR at 1-23; CP 232-71. In his "Objection to State's Motion To Transfer Defense Motion To Court Of Appeals," Brock requested an evidentiary or reference hearing to determine under which alternative means he was convicted. CP 276.

b. The Ballot Title Of I-593 Is Restrictive And Thus Provisions That Are Not Fairly Within The Title Are Invalid.

Article II, section 19 provides "[n]o bill shall embrace more than one subject, and that shall be expressed in the title." This prohibition, which applies to initiatives, generally requires a title to "give notice to the general public and, most especially, to parties whose rights and liabilities are affected by the bill." Patrice v. Murphy, 136 Wn.2d 845, 854, 966 P.2d 1271 (1998); Amalgamated Transit Union Local 587 v. State, 142 Wn.2d 183, 206, 11 P.3d 762 (2000).

Article II, section 19 contains two distinct prohibitions. Amalgamated, 142 Wn.2d at 207. The first prohibition is that "no bill shall embrace more than one subject." Id. The purpose of this prohibition is to prevent logrolling or pushing legislation through by attaching it to other legislation. Id. The second prohibition is that "no bill shall have a subject which is

not expressed in its title." *Id.* "The purpose of this requirement is to notify those voting on the measure of its contents." *Id.* at 192.

The issue in this case is whether the ballot title of I-593 violated the "subject in title" rule in failing to notify the public that the POAA covered non-violent offenses such as advancing or profiting from the prostitution of a minor, which is an alternative means of committing first degree promoting prostitution. This is an issue of first impression.

The Supreme Court in *Thorne* held I-593 did not violate article II, section 19, but the only issue was whether the title contained more than one subject. *Thorne*, 129 Wn.2d at 757-58. The Court did not decide the case in relation to the "subject in title" prohibition. Cases that fail to specifically raise or decide an issue are not controlling authority and have no precedential value in relation to that issue. *Kucera v. State*, 140 Wn.2d 200, 220, 995 P.2d 63 (2000); *In re Electric Lightwave, Inc.*, 123 Wn.2d 530, 541, 869 P.2d 1045 (1994). *Thorne* does not control here.

Statutes enacted through the initiative process are presumed constitutional, but an unconstitutional provision must fall if argument and research show no reasonable doubt the provision violates the constitution. *Amalgamated*, 142 Wn.2d at 205. While legislation should be construed to preserve its constitutionality where possible, a court "should

not strain to interpret [a] statute as constitutional: a plain reading must make the interpretation reasonable." Id. at 225. When laws are enacted in violation of article II, section 19, "the courts will not hesitate to declare them void" to avoid "the taint of at least suspicion of unfairness." State ex rel. Washington Toll Bridge Authority v. Yelle, 32 Wn.2d 13, 24, 200 P.2d 467 (1948).

The title to a bill need not be an index to its contents or give the details contained in the bill. Amalgamated, 142 Wn.2d at 217. To decide whether a title gives adequate notice, however, "there is a distinction between the effect of a broad, general title and that of a narrow, restricted one." Washington Toll Bridge, 32 Wn.2d at 26; Batey v. State Employment Sec. Dept., 137 Wn. App. 506, 512, 154 P.3d 266 (2007).

Where a title is general, "any subject reasonably germane to such title may be embraced within the body of the bill." Citizens for Responsible Wildlife Management v. State, 149 Wn.2d 622, 633, 71 P.3d 644 (2003) (citation omitted). The courts give general titles a liberal construction, in which case a few well-chosen words suggestive of the general subject, rather than an elaborate statement of the subject, suffices to pass constitutional muster. Washington Toll Bridge, 32 Wn.2d at 26.

Restrictive titles are not given the same liberal construction and will be more carefully scrutinized. Wildlife Management, 149 Wn.2d at 633; Batey, 137 Wn. App. at 512. A restrictive title "expressly limits the scope of the act to that expressed in the title." State v. Broadaway, 133 Wn.2d 118, 127, 942 P.2d 363 (1997).

The ballot title of I-593 is restrictive because "it refers only to criminals who have committed serious offenses on three occasions." Thorne, 129 Wn.2d at 757-58. "If the title of the bill is restrictive, provisions which are not fairly within such restricted title will not be given force." Wildlife Management, 149 Wn.2d at 635. The courts more readily find a title violates article II, section 19 when the title is restrictive. Amalgamated, 142 Wn.2d at 211.

Where, as here, the people enact legislation through an initiative, Article II, section 19 applies to an initiative's ballot title, not its legislative title. Id. at 211-12. "[I]t is the ballot title with which voters are faced in the voting booth." Id. at 212.

A ballot title violates article II, section 19 if it fails to give "notice which would lead to an inquiry into the body of the act or indicates the scope and purpose of the law to an inquiring mind." Amalgamated, 142 Wn.2d at 217. This requirement is of particular importance in the context

of an initiative because voters will often not reach the text of a measure or the explanatory statement, but may instead cast their votes based upon the ballot title. Id. "Thus, the outcome of the vote may be affected by the tenor of the ballot title." Ballot Title for Initiative 333 v. Gorton, 88 Wn.2d 192, 198, 558 P.2d 248 (1977).

c. The Commonly Understood Meaning Of The Term "Most Serious Offenses" In The Ballot Title Differs From The Technical Definition Applied To That Term In The Body Of The Act.

The ballot title of I-593 states: "Shall criminals who are convicted of 'most serious offenses' on three occasions be sentenced to life in prison without parole?" CP 201. "[T]he title is construed with reference to the language used in the title." Washington State Grange v. Locke, 153 Wn.2d 475, 493, 105 P.3d 9 (2005) (citation omitted). In determining whether a "subject in title" violation has occurred, terms used in the title are given their commonly understood, traditional meaning. Id. at 495. Dictionaries may be consulted for this purpose. Id. at 495-96.

The term at issue here is "most serious offenses." The word "most" means "to the greatest or highest degree." Webster's Third New International Dictionary 1474 (1993). The word "serious" means "grave" as opposed to trifling. Id. at 2073.

After ascertaining the ordinary meaning of a term in the title, the next step is to compare the title to the text of the enactment to determine whether a subject in title violation exists. Grange, 153 Wn.2d at 495. "The text of the bill is only relevant insofar as we must examine the contents of the bill in order to discern whether its subject is adequately reflected in the title." Id. Examination of the body of the act is necessary to determine whether the term used in the title corresponds with the term as defined by the act. Amalgamated, 142 Wn.2d at 217-18, 225-26; Grange, 153 Wn.2d at 495. Definition of a term within the act indicates the term does not have its ordinary or traditional meaning because if it did, there would be no need for the act to define it. Amalgamated, 142 Wn.2d at 220-21.

The body of the POAA defines "most serious offense" by listing several categories of offenses as well as 17 specific offenses. RCW 9.94A.030(21). First degree promoting prostitution is one of those specific offenses. RCW 9.94A.030(21)(m).

First degree promoting prostitution is undoubtedly a serious offense. But advancing or profiting from the prostitution of a minor is not a "most serious offense" as that phrase is commonly understood because it cannot

fairly be considered among the gravest offenses. That distinction belongs to violent offenses.

The reviewing court measures the sufficiency of a title by considering the meaning that the title would convey to the typical voter. Grange, 153 Wn.2d at 492. In commenting that many other states have enacted similar "three strikes" legislation, the Supreme Court recognized "[t]he reason underlying the enactment of so many recidivist laws appears to be the *heightened fear of increased violent crime* and the public outrage caused by such crime." Thorne, 129 Wn.2d at 748-49 (emphasis added).

76 percent of voters supported I-593. Id. at 746. Statements in support of an initiative contained in the official voters pamphlet may be considered to ascertain the collective purpose and intent of the people. Id. at 763. In this case, such statements may reasonably be construed as representing the typical voter's understanding of what crimes were covered by the term "most serious offenses."

The voting pamphlet for I-593 states:

INITIATIVE 593 GETS TOUGH ON VIOLENT CRIME.

Under 593, anyone convicted of a third violent offense goes to prison for life . . . In aiming at three time violent offenders, it targets the "worst of the worst" criminals who most deserve to be behind bars.

CP 201 (capitalization in original).

Lest there be any doubt that I-593 voters equated "most serious offense" with "violent offense," the pamphlet states in the beginning "It's time to get tougher on violent criminals. The problem is clear: the overwhelming majority of violent crime is committed by less than 10% of violent criminals. And most of them will re-offend again when released." CP 201.

The "Statement Against" I-593 argued, "Proponents claim 593 only applies to 'most serious' offenses.' Not true! 593 also includes reckless car accidents with injuries, as well as bar fights if a blow accidentally, recklessly injures someone." CP 202. Proponents rebutted the statement as follows:

593's opponents claim that violent offenders can already be locked up for life. The problem is, they aren't. That will change when 593 becomes law. Three time serious felons will stay behind bars for life . . . The crimes covered by 593 are serious, violent felonies, not "barfights" or car accidents. 593 keeps the "worst of the worst" in prison. Isn't that where they belong?

CP 201.

Such statements in the ballot pamphlet represent an expression of the ordinary and common understanding of the term "most serious offenses." The commonly understood meaning of the term is violent offenses as applied to "the worst of the worst." This is the meaning that

must be attributed to the term "most serious offense" as used in the ballot title. See Grange, 153 Wn.2d at 495 (terms used in title are given their commonly understood meaning).

Advancing or profiting from the prostitution of a minor, however, is not a violent offense. This alternative means of committing first degree promoting prostitution contains no force or threat of force requirement, nor any requirement that physical contact take place. Former RCW 9A.88.070.

"Words in a title must be taken in their common and ordinary meanings, and the legislature cannot in the body of an act impose another or unusual meaning upon a term used in the title without disclosing such special meaning therein." DeCano v. State, 7 Wn.2d 613, 626, 110 P.2d 627 (1941) (citation omitted). The ballot title of I-593 violates article II, section 19 because the term "most serious offenses" defined in the act has a specialized, broader meaning than the commonly understood meaning of the term used in the ballot title.

A number of cases illustrate the principle that an act violates article II, section 19 when the title does not fairly notify a voter that a term used in the title does not have the same meaning as the term defined in the body of the act.

In Amalgamated, the ballot title of I-695 was "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?" Amalgamated, 142 Wn.2d at 193. Dispute centered on the term "tax." Id. at 218. The Supreme Court held I-695 was unconstitutional under article II, section 19 because the ballot title violated the "subject in title" requirement. Id. at 192. I-695's express definition of the term "tax" differed from the term as commonly understood. Id. "Instead, tax as used in I-695 has a broader meaning, including fees and charges which are not traditionally considered to be taxes. The title therefore fails to provide notice that I-695's voter approval provision does not apply only to taxes as that term is commonly understood." Id. The ballot title was misleading because the average voter would not anticipate the broader application of the initiative to fees that fell outside of the commonly understood definition of a tax. Id.

In Swedish Hosp. v. Dep't of Labor & Indus., the title was "An Act giving workmen's compensation benefits to persons engaged in hazardous and extrahazardous occupations in charitable institutions." Swedish Hosp. v. Dep't of Labor & Indus., 26 Wn.2d 819, 831, 176 P.2d 429 (1947). The title gave notice of a proposed bill that affected "charitable institutions," but the body of the act included individuals, firms,

associations or corporations operating non-profit institutions, businesses or establishments. *Id.* Charitable institutions and non-profit institutions were different entities. *Id.* The act violated article II, section 19 because the title did not give notice that provisions concerning nonprofit entities were encompassed within the act. *Id.* at 831-32.

In Petroleum Lease Properties Co. v. Huse, the Court applied the same rule in finding an article II, section 19 violation. Petroleum Lease Properties Co. v. Huse, 195 Wn. 254, 258-60, 80 P.2d 774 (1938). The title was "An act providing for the regulation and supervision of the issuance and sale of securities to prevent fraud in the sale thereof." *Id.* at 257. The body of the act defined the term "securities" to include oil or gas leases. *Id.* at 258. The title did not give notice that regulation of such matters were included in the act because the act defined "securities" in a manner different than that term was commonly understood and defined by standard dictionaries. *Id.* It was self-evident that an oil or gas lease was not a "security" as ordinarily understood. *Id.*

In DeCano, the title was "An Act relating to the rights and disabilities of aliens with respect to land, and amending chapter 50, Laws of 1921." DeCano, 7 Wn.2d at 623. The body of the act specifically defined "alien" in a way that brought "within its purview a whole new class of

of persons who are not in fact aliens in common understanding." Id. at 624. The title was therefore "misleading and deceptive." Id. at 631.

In holding the alien act violated article II, section 19, the Court in DeCano relied on the Petroleum case while distinguishing State ex rel. Port of Seattle v. Department of Public Service, 1 Wn.2d 102, 95 P.2d 1007 (1939). Id. at 625, 630-31. The title in Port of Seattle survived an article II, section 19 challenge because, "by using the phrase 'defining the same' following the words 'storage warehouses and warehousemen,'" the title "specifically called attention to the fact that these basic terms were defined in the body of the statute." Id. at 630.⁹ "The title involved in the Petroleum case gave no indication that the term 'securities' was defined in the act." Id.

The ballot title in I-593 likewise gave no indication that "most serious offenses" was defined in the act. As in Amalgamated, Petroleum, Swedish, and DeCano, the title in I-593 did not clearly notify the average voter that the body of the act for which they were voting defined an

⁹ The title in Port of Seattle was "An Act relating to storage warehouses and warehousemen in any county of this state having a population of thirty thousand or more, defining the same, providing for payment of fees thereby, providing for the regulation and supervision thereof by the department of public service, providing for the enforcement of the provisions of this act and penalties for the violation thereof, and amending sections 1, 6 and 11 and repealing section 5 of chapter 154 of the Session Laws of 1933." Port of Seattle, 1 Wn.2d at 107.

important term differently than the commonly understood definition of the term conveyed by the title. The title did not give fair notice that "most serious offenses," as that term is commonly understood, encompassed the crime of advancing or profiting from the prostitution of a minor.

The Supreme Court has "long interpreted article II, section 19 to require the titles of bills give clear information as to their contents." Patrice, 136 Wn.2d at 852. The reader must, "by a mere glance at a few catch words in the title, be apprised of what the act treats, without further search." Id. (citation omitted). The title here fails that test because the average voter understands the catch phrase "most serious offenses" to mean "the worst of the worst" offenses, including violent offenses. The portion of the POAA defining first degree promoting prostitution as a "most serious offense" is unconstitutional because it violates the "subject in title" rule.¹⁰

¹⁰ "A legislative act is not unconstitutional in its entirety unless invalid provisions are unseverable and it cannot be reasonably be believed that the legislative body would have passed one without the other, or unless elimination of the invalid part would render the remaining part useless to accomplish the legislative purposes." Amalgamated, 142 Wn.2d at 227-28. In the event this Court agrees a "subject in title" violation occurred, the entire act need not be struck because elimination of the invalid prostitution offense part does not render the remaining parts of the POAA useless.

d. This Court Should Vacate The Persistent Offender Sentence.

A personal restraint petitioner asserting constitutional error is entitled to relief when he establishes the error resulted in actual and substantial prejudice. In re Pers. Restraint of Hinton, 152 Wn.2d 853, 858, 100 P.3d 801 (2004). Here, the prejudice is obvious. Brock will be imprisoned for the rest of his life if his persistent offender sentence stands.

"A trial court only possesses the power to impose sentences provided by law." In re Pers. Restraint of Carle, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980). The court lacked authority to impose a persistent offender sentence on Brock because its reliance on one of the predicate offenses to impose the sentence was unconstitutional. "When a sentence has been imposed for which there is no authority in law, the trial court has the Power and the duty to correct the erroneous sentence, when the error is discovered." Id. (citation omitted). Brock is entitled to relief from a sentence predicated on an unconstitutional law. This Court should therefore strike the persistent offender sentence and remand for resentencing.

D. CONCLUSION

For the reasons stated, this Court should vacate Brock's persistent offender sentence and remand for resentencing.

DATED this 25th day of April, 2008.

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC



CASEY GRANNIS
WSBA No. 37301
Office ID No. 91051

Attorneys for Petitioner

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In re the
Personal Restraint Petition of

JERRY LEE BROCK,

Petitioner.

No. 36398-4-II

ORDER REFERRING PETITION
TO PANEL, APPOINTING
COUNSEL, AND SETTING
BRIEFING SCHEDULE

RECEIVED
DEC 17 2007
Nielsen, Broman & Koch, P.L.L.C.

In this timely petition, Jerry Lee Brock seeks relief from personal restraint imposed after his conviction of child molestation in Thurston County Superior Court cause 95-1-00402-8. After initial consideration under RAP 16.11(b), the Acting Chief Judge has determined that the issues raised by this petition are not frivolous.

Accordingly, it is hereby ordered that this petition is referred to a panel of judges for determination on the merits. Under RAP 16.11(b) and 16.15(h), this court will appoint a lawyer to represent Petitioner in this court's consideration of the petition at public expense, including briefing of any issues raised by Petitioner. This court also orders that under RAP 16.15(h), any necessary preparation of the record of prior proceedings shall be at public expense and waives charges for reproducing briefs or motions in this appellate cause. At public expense, this court will provide Petitioner's appointed lawyer with copies of the briefs, together with attached records.

Within 20 days of appointment of counsel, Petitioner must arrange to transcribe any hearings from other proceedings necessary to resolve the issues raised in the petition by filing a statement of arrangements. *See* RAP 9.2, 16.7(a)(2)(i). Within the same 20

days, Petitioner must also designate any clerk's papers or exhibits from other proceedings necessary to resolve the petition. *See* RAP 9.6, 16.7(a)(2)(i). The record on review should be filed within 30 days of when Petitioner files the statement of arrangements and the designation of clerk's papers. Respondent also remains obligated to provide to this court copies of any records of other proceedings relevant to answering the petition. *See* RAP 16.9. The parties must comply with RAP Title 9 when providing the record necessary to decide this petition.

Petitioner's opening brief is due within 45 days after the report of proceedings is filed. Respondent may, but is not required to, file a responding brief within 30 days after service of Petitioner's brief. Respondent must notify this court and Petitioner if it intends to rely on its earlier briefing. If Respondent files a brief, then Petitioner may file a reply brief within 20 days after service of Respondent's brief. After the opening briefs are filed, this court will determine under RAP 16.11(c) whether to decide the Petition with or without oral argument.

DATED this 11~~th~~ day of December, 2007.

Van Deren, A.C.J.
Acting Chief Judge

cc: Jerry L. Brock
Thurston County Clerk
County Cause No. 95-1-00402-8
Edward Gene Holm
Carol L. La Verne
Washington State Office of Public Defense

APPENDIX B

CASE PARTICIPANTS # 269333

Petitioner

Jerry Lee Brock # 632588 Washington State Penitentiary 1313 N. 13th Ave Walla Walla WA 99362	
ID Number/DOC Number:	AIPRO67487
Pro Se:	Yes

Respondent

State of Washington	
ID Number/DOC Number:	AC02029113

Attorney(s) for Respondent(State of Washington)

Edward Gene Holm Attorney at Law Thurston County Prosecuting Attorney 2000 Lakeridge Dr SW # 2 Olympia WA 98502-6001	
Date on: 12/28/2000	Date off: 02/07/2001
Bar Number:	01455
Work phone number:	360-786-5540
Fax number:	360-754-3358
e-mail:	holme@co.thurston.wa.us

Attorney(s) for Respondent(State of Washington)

Steven Curtis Sherman Attorney at Law PO Box 322 Allyn WA 98524-0322	
Date on: 02/07/2001	Date off: 05/15/2002
Bar Number:	20685
Work phone number:	360-275-8589
Fax number:	360-509-7887

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

In re Personal Restraint of:)
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)

JERRY LEE BROCK,)
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Petitioner.)
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COA NO. 36398-4-II

DECLARATION OF SERVICE

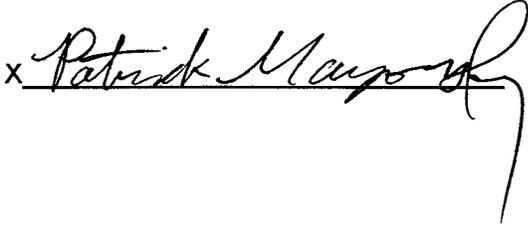
I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 25TH DAY OF APRIL 2008, I CAUSED A TRUE AND CORRECT COPY OF THE **SUPPLEMENTAL OPENING BRIEF OF PETITIONER** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] CAROL LA VERNE
THURSTON COUNTY PROSECUTOR'S OFFICE
2000 LAKERIDGE DRIVE SW
OLYMPIA, WA 98502-6001

- [X] JERRY BROCK
DOC NO. 632588
WASHINGTON STATE PENITENTIARY
1313 N. 13TH AVENUE
WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 25TH DAY OF APRIL 2008.

x. 

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2008 APR 25 PM 4:13

