

No. 34424-6-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

ROY WAYNE RUSSELL, JR.,

Appellant.

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

The Honorable John P. Wulle

BRIEF OF APPELLANT

THOMAS M. KUMMEROW
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
CLERK OF COURTS
BY DEPUTY
07 FEB -1 11 1:03
2011
CLARK COUNTY

TABLE OF CONTENTS

A. SUMMARY OF ARGUMENT 1

B. ASSIGNMENTS OF ERROR 1

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR..... 2

D. STATEMENT OF THE CASE 3

E. ARGUMENT 4

 1. THE TRIAL COURT’S ARBITRARY ORDER
 BARRING PHOTOGRAPHING OF THE
 JUVENILE WITNESSES VIOLATED MR.
 RUSSELL’S CONSTITUTIONALLY
 PROTECTED RIGHT TO A PUBLIC TRIAL 4

 a. The Washington and United States Constitutions
 guarantee a public trial..... 6

 b. The court’s order denying the television media the
 opportunity to photograph juvenile witnesses was an
 improper prior restraint..... 9

 c. The court’s order violated Mr. Russell’s right to a
 public trial because it limited access to witness
 testimony occurring in open court. 10

 2. THE JUDGE’S DETERMINATION BY A
 PREPONDERANCE OF THE EVIDENCE
 THAT MR. RUSSELL HAD SUFFERED TWO
 QUALIFYING PRIOR CONVICTIONS AND
 WAS THUS A PERSISTENT OFFENDER
 VIOLATED HIS CONSTITUTIONALLY
 PROTECTED RIGHT TO A JURY TRIAL AND
 DUE PROCESS..... 14

 a. A defendant has a constitutionally protected right
 to a jury determination and proof beyond a

reasonable doubt of every element of the charged crime.	14
b. Whether Mr. Russell had two prior convictions that constituted “strike” crimes was required to be determined by the jury beyond a reasonable doubt.	16
c. Mr. Russell’s sentence as a persistent offender must be reversed and remanded for resentencing within the standard range.	19
3. THE PERSISTENT OFFENDER ACCOUNTABILITY ACT VIOLATES THE SINGLE SUBJECT RULE OF THE WASHINGTON CONSTITUTION	20
a. A voter initiative may not contain more than one subject.	20
b. The Persistent Offender Accountability Act contained more than one subject.	22
F. CONCLUSION	23

TABLE OF AUTHORITIES

UNITED STATES CONSTITUTIONAL PROVISIONS

U.S. Const. amend. VI.....2, 6, 14, 18

U.S. Const. amend. XIV2

WASHINGTON CONSTITUTIONAL PROVISIONS

Art. I, § 10.....6

Art. I, § 22.....1, 2, 10, 13

Art. II, § 19.....2, 20, 22, 23

FEDERAL CASES

Almendarez-Torres v. United States, 523 U.S. 224, 118 S.Ct. 1219,
140 L.Ed.2d 350 (1998) 17

Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147
L.Ed.2d 435 (2000) passim

Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d
403 (2004) 14, 19

Craig v. Harney, 331 U.S. 367, 67 S.Ct. 1249, 91 L.Ed.3d 1546
(1947) 11

Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 102 S.Ct.
2613, 73 L.Ed.2d 248 (1982) 6

Nebraska Press Ass'n. v. Stuart, 427 U.S. 539, 559, 96 S.Ct. 2791,
49 L.Ed.2d 683 (1976) 9

Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 104 S.Ct.
819, 78 L.Ed.2d 629 (1984) 7

Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556
(2002) 14, 15, 18

<i>Shepard v. United States</i> , 544 U.S. 13, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005)	18
<i>Waller v. Georgia</i> , 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984)	8
<i>Washington v. Recuenco</i> , ___ U.S. ___, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006)	15
WASHINGTON CASES	
<i>Allied Daily Newspapers of Wash. v. Eikenberry</i> , 121 Wn.2d 205, 848 P.2d 1258 (1993)	7, 9, 10, 12
<i>Amalgamated Transit v. State</i> , 142 Wn.2d 183, 11 P.3d 762 (2000)	20, 21, 22, 23
<i>Burien v. Kiga</i> , 144 Wn.2d 819, 31 P.3d 659 (2001) ...	20, 21, 22, 23
<i>Cohen v. Everett City Council</i> , 85 Wn.2d 385, 535 P.2d 801 (1974)	10
<i>Dreiling v Jain</i> , 151 W.2d 900, 93 P.3d 861 (2003)	7, 10
<i>In re Personal Restraint of Orange</i> , 152 Wn.2d 795, 100 P.3d 291 (2004)	6, 8
<i>Power, Inc. v. Huntley</i> , 39 Wn.2d 191, 235 P.2d 173 (1951)...	21, 22
<i>Seattle Times Co. v. Ishikawa</i> , 97 Wn.2d 30, 640 P.2d 716 (1982)	9
<i>State ex rel. Wash. Toll Bridge Authority v. Yelle</i> , 32 Wn.2d 13, 200 P.2d 467 (1948)	21
<i>State ex. rel. Snohomish County Superior Court v. Sperry</i> , 79 Wn.2d 69, 483 P.2d 608, <i>cert. denied</i> , 404 U.S. 939 (1971)	10
<i>State v. Bone-Club</i> , 128 Wn.2d 254, 906 P.2d 325 (1995)	7, 9
<i>State v. Brightman</i> , 155 Wn.2d 506, 122 P.3d 150 (2005)	9

<i>State v. Cloud</i> , 95 Wn.App. 606, 976 P.2d 649 (1999).....	22, 23
<i>State v. Coe</i> , 101 Wn.2d 364; 679 P.2d 353 (1984).....	9, 10, 11
<i>State v. Easterling</i> , 157 Wn.2d 167, 137 P.3d 825 (2006)	6, 9
<i>State v. Marsh</i> , 126 Wash. 142, 217 P. 705 (1923).....	8
<i>State v. Thorne</i> , 129 Wn.2d 736, 921 P.2d 514 (1996)	21
STATUTES	
RCW 9.94A.030	19
RCW 9.94A.510	16
RCW 9.94A.525	16
RCW 9.94A.530	16
RCW 9.94A.570	16
RCW 9.94A.595	16
RULES	
GR 16.....	11, 12
LAW REVIEWS	
C. Thomas Dienes, <i>Trying Cases in the Media: Legal Ethics, Fair Trials and Free Press: Trial Participants in the Newsgathering Process</i> , 34 U. Rich. L. Rev. 1107 (2001).....	7
Kathleen S. Bean, <i>Changing the Rules: Public Access to Dependency Court</i> , 79 Denv.U.L. Rev. 1 (2001)	6

A. SUMMARY OF ARGUMENT

Roy Russell was charged with second degree murder in a highly sensationalized case in Vancouver. Local television stations were allowed access to the trial, but, over Mr. Russell's objection, the court barred the television media from photographing the juvenile witnesses, many of whom were State's witnesses. The court imposed the limitation based on a generalized desire to protect juveniles. Mr. Russell was subsequently convicted as charged.

On appeal, Mr. Russell contends the court's order barring photography of the juvenile witnesses violated his constitutionally protected right to a public trial. In addition, Mr. Russell contends his sentence of life imprisonment without the possibility of parole violated his constitutionally protected rights to a jury trial and proof beyond a reasonable doubt, and the underlying persistent offender statutory scheme is unconstitutional as it violates the single subject rule.

B. ASSIGNMENTS OF ERROR

1. The trial court violated Mr. Russell's right to a public trial under art. I, § 22 of the Washington Constitution.

2. The court violated Mr. Russell's Sixth Amendment right to a jury trial and Fourteenth Amendment right to due process when it found he had suffered two qualifying convictions and sentenced him as a persistent offender.

3. The Persistent Offender Accountability Act violates the Washington Constitution's requirement under article II, section 19 that a bill or initiative not contain more than a single subject.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Art. I, § 22 of the Washington Constitution guarantees the right to a public trial. Limitations on this right are disfavored and must be supported by an individualized finding of harm. The trial court's barring local television news crews from televising during the testimony of juvenile witnesses was just such a limitation on the right to a public trial and was supported only by the court's generalized desire to protect juveniles. Did the trial court's limitation on media access to the trial violate Mr. Russell's right to a public trial?

2. A defendant possesses a Sixth Amendment right to a jury trial and a Fourteenth Amendment right to proof beyond a reasonable doubt on every fact that increases the sentence beyond that authorized by the facts as found by the jury. In Washington, a

finding that the defendant is a persistent offender, which increases the sentence from a standard range term to life imprisonment without the possibility of parole, is made by the trial court at sentencing by a preponderance of the evidence. Did the trial court violate Mr. Russell's right to a jury trial when it found him to be a persistent offender, in the absence of a jury finding beyond a reasonable doubt that he had suffered two prior convictions which qualified as predicates for a finding he was a persistent offender?

3. The Washington Constitution prohibits legislative bills or citizen initiatives from containing more than one subject. Where an initiative contains more than one subject the entire initiative must be stricken. Is this Court required to invalidate the Persistent Offender Accountability Act where Division One of this Court previously ruled the initiative contained more than one subject thus rendering the entire initiative invalid?

D. STATEMENT OF THE CASE

Roy Russell was charged with second degree felony murder, alternatively second degree intentional murder, or alternatively first degree manslaughter, in the death of fourteen-year old C.M.H. who was a guest at his house on November 1, 2005. CP 11-12. The trial gained substantial media attention in the Vancouver

metropolitan area including television coverage. Following the jury trial Mr. Russell was convicted as charged. CP 328-30.

Finding by a preponderance of the evidence that Mr. Russell had suffered two prior qualifying convictions, the court found Mr. Russell to be a persistent offender and sentenced him on the conviction for intentional second degree murder to a term of life imprisonment without the possibility of parole. CP 434-446. The court merged the two remaining counts with the count upon which it sentenced Mr. Russell. CP 439.

E. ARGUMENT

1. THE TRIAL COURT'S ARBITRARY ORDER BARRING PHOTOGRAPHING OF THE JUVENILE WITNESSES VIOLATED MR. RUSSELL'S CONSTITUTIONALLY PROTECTED RIGHT TO A PUBLIC TRIAL

Prior to trial, at the State's request, the court barred the television media from photographing juvenile witnesses during the trial. RP 121.¹ The State based its request on the pretrial action of the one of the local television stations:

¹ The court ruled:

The other thing I did is I said that – and this is at the request of the State. There was a concern about the photography of juvenile witnesses, and I said that we would not photograph juvenile witnesses. However, you can be in the courtroom, you can report what they've said, you can even record their voice if

[Your] Honor, one of the reasons for the State's suggesting the Court would limit video or photographic imaging of juvenile witnesses was due to the fact that when this probable cause statement was filed it was put on the web site on kgw.com.

RP 135.

The local television media objected to the court's actions, which was joined by Mr. Russell. RP 140 ("And our position is that as long as the press does not interfere with the business of the court, distract from the testimony, there should not be any limitations.").

In limiting the television media, the court stated it was trying to "protect the children." RP 127- 29.

But I just think that what we could do is we have a bunch of photographers out there, two from the newspapers and – and, of course, the very blaring camera that's recording me right now, it could dampen [the witnesses'] ability to report on the facts, it could dampen their ability to speak. And we've seen it in court, that children can be impacted by the environment.

RP 129. The court made no specific findings that a compelling state interest required the restriction.

that's what you desire to do. It's just taking their photograph and putting in the press is the thing that I limited.

RP 121.

a. The Washington and United States Constitutions

guarantee a public trial. The law is well settled that a criminal defendant has a right to a public trial:

Article I, section 22 of the Washington State Constitution guarantees that “[i]n criminal prosecutions the accused shall have the right . . . to have a speedy public trial.”

In re Personal Restraint of Orange, 152 Wn.2d 795, 804-05, 100 P.3d 291 (2004). See also U.S. Const. amend. VI (providing that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial”). In addition, art. I, § 10 provides that “[j]ustice in all cases shall be administered openly, and without unnecessary delay.” The Supreme Court has determined that this provision “gives the public and the press a right to open and accessible court proceedings.” *State v. Easterling*, 157 Wn.2d 167, 174, 137 P.3d 825 (2006).

Open public access to the judicial system helps ensure fairness and is also necessary for a healthy democracy, providing a check on the judicial process. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606, 102 S.Ct. 2613, 73 L.Ed.2d 248 (1982); Kathleen S. Bean, *Changing the Rules: Public Access to Dependency Court*, 79 Denv.U.L. Rev. 1, 10-13 (2001); C. Thomas

Dienes, *Trying Cases in the Media: Legal Ethics, Fair Trials and Free Press: Trial Participants in the Newsgathering Process*, 34 U. Rich. L. Rev. 1107, 1114-17 (2001). When trials are open to the public, citizens may be confident that established, fair procedures are being followed and that deviations from those standards will be made known. *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 508, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984). Public access to the court system is necessary to promote understanding and trust in the judicial system and “give judges the check of judicial scrutiny.” *Dreiling v Jain*, 151 W.2d 900, 903, 93 P.3d 861 (2003).

We adhere to the constitutional principle that it is the right of the people to access open courts where they may freely observe the administration of civil and criminal justice. Openness of courts is essential to the courts’ ability to maintain public confidence in the fairness and honesty of the judicial branch of government as being the ultimate protector of liberty, property, and constitutional integrity.

Allied Daily Newspapers of Wash. v. Eikenberry, 121 Wn.2d 205, 211, 848 P.2d 1258 (1993).

Further, as the Washington Supreme Court has stated, “[a]lthough the public trial right may not be absolute, protection of this basic constitutional right clearly calls for a trial court *to resist a closure motion except under the most unusual circumstances.*” *State v. Bone-Club*, 128 Wn.2d 254, 259, 906 P.2d 325 (1995)

(emphasis added). "Prejudice is presumed where a violation of the public trial right occurs." *Bone-Club*, 128 Wn.2d at 261-62, citing *State v. Marsh*, 126 Wash. 142, 146-47, 217 P. 705 (1923).

The *Orange* court stated:

"The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered."

Orange, 152 Wn.2d at 806 (emphasis added), quoting *Waller v. Georgia*, 467 U.S. 39, 45, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984).

The Washington Supreme Court therefore requires compliance with five standards before the court can properly close any part of a trial to the public:

1. The proponent of closure . . . must make some showing [of a compelling interest], and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a "serious and imminent threat" to that right.
2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.
3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.
4. The court must weigh the competing interests of the proponent of closure and the public.
5. The order must be no broader in its application or duration than necessary to serve its purpose.

Bone-Club, 128 Wn.2d at 258-59, quoting *Allied Newspapers of Wash.*, 121 Wn.2d at 210-11. The trial court must weigh these factors and enter *specific* findings justifying the closure. *Bone-Club*, 128 Wn.2d 258-59, citing *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 37, 640 P.2d 716 (1982).

When the record “lacks any hint that the trial court considered [the defendant’s] public trial right as required by *Bone-Club*, [the court on appeal] cannot determine whether the closure was warranted.” *State v. Brightman*, 155 Wn.2d 506, 518, 122 P.3d 150 (2005).

Finally, the denial of the constitutional right to public access to judicial proceedings is not subject to a harmless error analysis. *Easterling*, 157 Wn.2d at 181; *Bone-Club*, 128 Wn.2d at 261-62.

b. The court’s order denying the television media the opportunity to photograph juvenile witnesses was an improper prior restraint. A trial court’s order barring media access to courtroom proceedings is a prior restraint on the exercise of free speech. *State v. Coe*, 101 Wn.2d 364, 373; 679 P.2d 353 (1984). Prior restraints are presumed unconstitutional. See *Nebraska Press Ass’n. v. Stuart*, 427 U.S. 539, 559, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976) (“Prior restraints on speech and publication are the most

serious and the least tolerable infringement of First Amendment rights.”). The rights to free speech and access to the judicial system are not absolute, however, and may be limited to protect other significant and fundamental rights, such as the parties’ right to a fair trial. *Dreiling*, 151 Wn.2d at 909; *Allied Daily Newspapers*, 121 Wn.2d at 210-11. A prior restraint upon a party’s exercise of his right to free speech must be narrowly tailored and may not be greater than necessary to accomplish the desired purpose. *Allied Newspapers*, 121 Wn.2d at 210-11; *State ex. rel. Snohomish County Superior Court v. Sperry*, 79 Wn.2d 69, 78, 483 P.2d 608, *cert. denied*, 404 U.S. 939 (1971).

c. The court’s order violated Mr. Russell’s right to a public trial because it limited access to witness testimony occurring in open court. The court’s order limited the video media from televising the juvenile witnesses while they testified, thus impermissibly limiting the video media’s access to the proceedings in open court and violating art. I, § 22.

A Washington court may not constitutionally forbid the publication of information lawfully obtained in public court proceedings. *Coe*, 101 Wn.2d at 378-79; *Cohen v. Everett City Council*, 85 Wn.2d 385, 387, 535 P.2d 801 (1974).

A trial is a public event. What transpires in the court room is public property. . . . Those who see and hear what transpired can report it with impunity. There is no special prerequisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events which transpire in proceedings before it.

Coe 101 Wn.2d at 380-81, quoting *Craig v. Harney*, 331 U.S. 367, 374, 67 S.Ct. 1249, 91 L.Ed.3d 1546 (1947).

Regarding television coverage of courtroom proceedings, the Supreme Court adopted GR 16 which governs access to courtroom proceedings and limitations which may be imposed. GR 16 states in relevant part:

- b. The judge shall exercise reasonable discretion in prescribing conditions and limitations with which media personnel shall comply.
- c. If the judge finds that sufficient reasons exist to warrant limitations on courtroom photography or recording, the judge shall make *particularized* findings on the records [sic] at the time of announcing the limitations. This may be done either orally or in a written order. In determining what, if any, limitations should be imposed, the judge shall be guided by the following principles:
 - (1) *Open access is presumed*; limitations on access must be supported by reasons found by the judge to be sufficiently compelling to outweigh that presumption;
 - (2) Prior to imposing any limitations on courtroom photography or recording, the judge shall, upon request, hear from any party and

from any other person or entity deemed appropriate by the judge; and
(3) Any reasons found sufficient to support limitations on courtroom photography or recording *shall relate to the specific circumstances of the case before the court rather than reflecting merely generalized views.*

(Emphasis added).

The court here failed to comply with GR 16 in any manner. The court failed to presume open access of the courtroom, instead assuming its limitations took precedence. Further, the court did not base its limitation to the specific circumstances of this case, instead relying on its generalized notion that juveniles are in need of protection. GR 16 specifically states such a generalized notion cannot be the basis for a limitation of television access.

Further, judging from the State's contention that it wanted the limitations because one of the local television stations had published portions of the probable cause statement, the court's limitations were in fact a retaliatory action for the stations' lawful actions rather than on any desire to protect the juvenile witnesses.

In *Allied Newspapers*, the Supreme Court declared a statute unconstitutional which required trial courts to close courtrooms whenever a child victim's identity might be revealed in a sex offense prosecution. 121 Wn.2d at 211. The perceived basis for

the ban was the generalized need to protect the child victim and prevent further trauma. *Id.* The Supreme Court found this goal laudable but unconstitutional *unless* it was based on an individualized application.

Since a complete ban on the disclosure of a juvenile victim's identity would violate art. I, § 22 where it is based on a generalized desire to protect juvenile victims, then the court's ban here on disclosure of the identity of juvenile witnesses must result in a similar outcome where it too is based only on the court's generalized desire to protect juveniles. The court's order barring the photographing of the juvenile witnesses violated Mr. Russell's right to a public trial. This Court must reverse his convictions and remand for a new trial.

2. THE JUDGE'S DETERMINATION BY A PREPONDERANCE OF THE EVIDENCE THAT MR. RUSSELL HAD SUFFERED TWO QUALIFYING PRIOR CONVICTIONS AND WAS THUS A PERSISTENT OFFENDER VIOLATED HIS CONSTITUTIONALLY PROTECTED RIGHT TO A JURY TRIAL AND DUE PROCESS

a. A defendant has a constitutionally protected right to a jury determination and proof beyond a reasonable doubt of every element of the charged crime. The Sixth Amendment guarantees a criminal defendant the right to a trial by jury. *Blakely v. Washington*, 542 U.S. 296, 302, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004); *Ring v. Arizona*, 536 U.S. 584, 602, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002); *Apprendi v. New Jersey*, 530 U.S. 466, 476-77, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). This right includes the right to “a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.” *Id.* If the State makes an increase in a defendant’s authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt. *Apprendi*, 530 U.S. at 482-83, *see also id.*, at 501 (Thomas J., concurring) (“[I]f the legislature defines some core crime and then provides for increasing

punishment of that crime upon a finding of some aggravating fact[,] . . . the core crime and the aggravating fact together constitute an aggravated crime, just as much as grand larceny is an aggravated form of petit larceny. The aggravating fact is an element of the aggravated crime.”). See also *Ring*, 536 U.S. at 602 (“A defendant may not be ‘expose[d] . . . to a penalty *exceeding* the maximum he would receive if punished according to the facts as reflected in the jury verdict alone.”), quoting *Apprendi*, 530 U.S. at 482-83 (emphasis in original).

Whether the State calls the fact which increases the sentence a “sentencing factor” and not an element is of no moment:

Our decision in *Apprendi* makes clear that “[a]ny possible distinction between an ‘element’ of a felony offense and a ‘sentencing factor’ was unknown to the practice of criminal indictment, trial by jury, and judgment by court as it existed during the years surrounding our Nation’s founding.” 530 U.S., at 478, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (footnote omitted). Accordingly, we have treated sentencing factors, like elements, as facts that have to be tried to the jury and proved beyond a reasonable doubt. *Id.*, at 483-484, 120 S. Ct. 2348, 147 L. Ed. 2d 435.

Washington v. Recuenco, ___ U.S. ___, 126 S.Ct. 2546, 2552, 165 L.Ed.2d 466 (2006).

Here, the two prior convictions found by the court which elevated Mr. Russell to the status of a persistent offender were

elements of the offense which were required to be proved beyond a reasonable doubt and found by a jury.

b. Whether Mr. Russell had two prior convictions that constituted “strike” crimes was required to be determined by the jury beyond a reasonable doubt. RCW 9.94A.570 states:

“Notwithstanding the statutory maximum sentence or any other provision of this chapter, a persistent offender shall be sentenced to a term of total confinement for life without the possibility of parole[.]” Without the persistent offender provision of the SRA, Mr. Russell would have been sentenced on second degree murder with an offender score of 8, and his standard range would have been 257 to 357 months. RCW 9.94A.510, RCW 9.94A.525, RCW 9.94A.530; RCW 9.94A.595. Thus, based upon the jury’s verdict, Mr. Russell would have faced a maximum punishment of 357 months.

The persistent offender allegation, based upon Mr. Russell having two qualifying prior convictions, elevated his punishment to life imprisonment without the possibility of parole. RCW 9.94A.570 recognizes that the statutory maximum no longer applies for persistent offenders and they must be sentenced to life imprisonment once the two qualifying prior convictions are found.

Thus, Mr. Russell's two qualifying prior convictions were facts which increased the maximum penalty for the crimes charged. As such, the jury was required to find the existence of the prior convictions beyond a reasonable doubt. *Apprendi*, 530 U.S. at 482-83.

It may be argued the "fact" that increased Mr. Russell's sentence from a standard range to a persistent offender was the fact of a prior conviction, which was excluded in *Apprendi*. *Apprendi*, 530 U.S. at 489. This argument overlooks two important factors.

First, the "exception" for prior convictions in *Apprendi* was taken from the Court's decision in *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998). Yet, the Court has retrenched from this position. In *Apprendi*, the Court criticized the "exception" for prior convictions, noting that it was arguable that *Almendarez-Torres* was incorrectly decided. *Apprendi*, 530 U.S. at 489.

Even though it is arguable that *Almendarez-Torres* was incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were contested, *Apprendi* does not contest the decision's validity and we need not revisit it for the purposes of our decision today to treat the case as a

narrow exception to the general rule we recalled at the outset.

*Id.*²

The Court also noted that *Almendarez-Torres* represented “at best an exceptional departure from the historic practice we have described.” *Id.* at 487. Further, the Court noted one of the reasons for the decision in *Almendarez-Torres* was the fact the defendant had pleaded guilty and admitted the prior convictions, thus mitigating “the due process and Sixth Amendment concerns otherwise implicated in allowing a judge to determine a ‘fact’ increasing punishment beyond the maximum of the statutory range.” *Id.* at 488. Finally, in *Ring*, the Court expanded *Apprendi* so that it applied to *any* fact which increases the punishment beyond that authorized by the jury verdict, thus seemingly overruling *Almendarez-Torres sub silentio*. *Ring*, 536 U.S. at 607-09.

But more importantly in this case, it is not the simple “fact” of the two prior convictions that increases the punishment, but it

² Justice Thomas continues to adhere to his position that the exception to the jury trial and due process requirement for prior convictions violates *Blakely* and *Apprendi* and has repeatedly urged the Court to reexamine the decision in *Almendarez-Torres* as it was wrongly decided. See *Shepard v. United States*, 544 U.S. 13, 125 S.Ct. 1254, 1264, 161 L.Ed.2d 205 (2005) (Thomas, J., concurring) (“*Almendarez-Torres* like *Taylor*, has been eroded by this Court’s subsequent Sixth Amendment jurisprudence, and a majority of the Court now recognizes that *Almendarez-Torres* was wrongly decided.”).

extends beyond that to specific “types” of prior convictions. In order to qualify as a persistent offender it is not enough to simply have suffered two prior convictions; the defendant must have suffered two prior convictions for felonies defined as “most serious offenses.” RCW 9.94A.030 (29), (31). Thus it is not simply the fact of the prior conviction that is at issue, but the particular type of prior conviction. As a consequence, the “exception” for the fact of prior convictions enumerated in *Almendarez-Torres* does not apply.

c. Mr. Russell’s sentence as a persistent offender must be reversed and remanded for resentencing within the standard range. The remedy for a court’s imposition of a sentence which exceeds the jury verdict is reversal of the sentence and remand for resentencing to a term authorized by the jury’s verdict. *Blakely*, 542 U.S. at 303-04; *Apprendi*, 530 U.S. at 482-83.

Here, the court’s verdict following the stipulated facts trial authorized a sentence for second degree murder. Since the jury was not required to find beyond a reasonable doubt that Mr. Russell had suffered two prior convictions which constituted “most serious offenses,” the court could only sentence to a maximum term of 357 months. This Court must reverse Mr. Russell’s

sentence and remand for resentencing to a term authorized by the jury's verdict.

3. THE PERSISTENT OFFENDER
ACCOUNTABILITY ACT VIOLATES THE
SINGLE SUBJECT RULE OF THE
WASHINGTON CONSTITUTION

a. A voter initiative may not contain more than one subject. Art. II, § 19 of the Washington Constitution provides: "No bill shall embrace more than one subject, and that shall be expressed in the title." This constitutional provision applies equally to voter initiatives as well as legislative bills. *Burien v. Kiga*, 144 Wn.2d 819, 824-25, 31 P.3d 659 (2001). Art. II, § 19 actually contains two distinct prohibitions: it prohibits bills that embrace one or more subjects, and prohibits bills that have a subject which is not expressed in the bill's title. *Amalgamated Transit v. State*, 142 Wn.2d 183, 207, 11 P.3d 762 (2000).

Mr. Russell's challenge to the Persistent Offender Accountability Act concerns the first of these prohibitions, the prohibition against more than one subject. The underlying purpose of the single subject rule is to prevent an unpopular provision pertaining to one subject from being enacted by attaching it to another more popular provision dealing with another subject,

referred to as “log-rolling.” *Amalgamated Transit*, 142 Wn.2d at 207; *State v. Thorne*, 129 Wn.2d 736, 757, 921 P.2d 514 (1996); *Power, Inc. v. Huntley*, 39 Wn.2d 191, 198, 235 P.2d 173 (1951).

In assessing whether an initiative is violative of the single subject rule, this Court must first assess whether the ballot title was restrictive or general. *Kiga*, 144 Wn.2d at 824. If the Court determines the title to be general, there need only be a rational unity among the subjects to survive constitutional scrutiny. *Kiga*, 144 Wn.2d at 825-26. General titles are liberally construed and “no elaborate statement of the subject is necessary.” *State ex rel. Wash. Toll Bridge Authority v. Yelle*, 32 Wn.2d 13, 26, 200 P.2d 467 (1948).

If, on the other hand, the title is found to be restrictive it is strictly construed. *Amalgamated Transit*, 142 Wn.2d at 210. “[v]iolations of the single subject rule are more readily found where a restrictive title is used.” *Id.* at 211. In *Thorne*, the Supreme Court found the title of the Persistent Offender Accountability Act to be a restrictive title. *Thorne*, 129 Wn.2d at 758.

When an initiative contains two or more subjects, “it is impossible for the court to assess whether either subject would have received majority support if voted on separately[,]” thus, the

entire initiative must be voided. *Kiga*, 144 Wn.2d at 825, citing *Power, Inc.*, 39 Wn.2d at 200.

In *Amalgamated Transit*, the Supreme Court struck down an entire initiative after finding the ballot title to be a general title but because the initiative contained two unrelated subjects that shared no rational unity. *Amalgamated Transit*, 142 Wn.App. at 216-17. Similarly, in *Kiga*, the Court struck down the entire initiative after finding the ballot title to be a general title when the initiative contained two subjects, therefore violative of article II, section 19.

b. The Persistent Offender Accountability Act contained more than one subject. The Persistent Offender Accountability Act contained more than one subject in the body of the initiative. The initiative dealt with persistent offenders *and* restricted the ability of first time offenders to earn earned early release. In *State v. Cloud*, Division One of this Court found the Persistent Offender Accountability Act violated the single subject rule because it had included the earned early release provision in the persistent offender initiative. *State v. Cloud*, 95 Wn.App. 606, 617-18, 976 P.2d 649 (1999). The Court's remedy for the violation was to strike the offending portion of the initiative. *Id.*

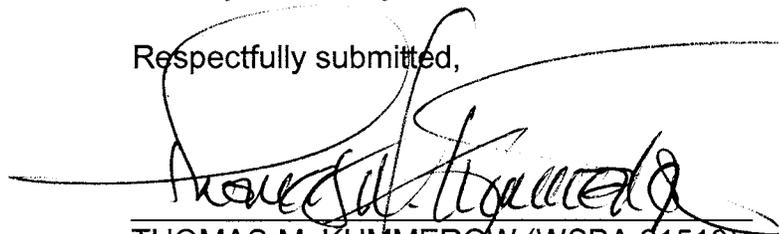
Cloud was decided prior to the Supreme Court's decisions in *Amalgamated Transit, supra* and *Kiga, supra*. In both cases, the Supreme Court's remedy for a violation of the "single subject rule" was to strike down the *entire* initiative. *Kiga*, 144 Wn.2d at 828; *Amalgamated Transit*, 142 Wn.2d at 216-17. As such, this Court should uphold Division One's prior ruling in *Cloud*, and also must follow *Amalgamated Transit* and *Kiga*, and find the entire initiative violative of article II, section 19, and strike down the entire initiative.

F. CONCLUSION

For the reasons stated Mr. Russell submits this Court must reverse his conviction and remand for a new trial.

DATED this 30th day of January 2007,

Respectfully submitted,



THOMAS M. KUMMEROW (WSBA 21518)
Washington Appellate Project – 91052
Attorneys for Appellant

