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

In re Personal Restraint of: Jerry Brock, Petitioner.	C.A. # 36398-4-II REPLY BRIEF (EVIDENTIARY HEARING REQUESTED)

COMES NOW, Jerry Lee Brock, pro-se defendant, replying to brief of respondent in the above captioned matter.

A. PROCEDURAL HISTORY

Mr. Brock stipulates to the relevant history layed out in respondents brief (Pg. 1-4). Mr. Brock would also incorporate by reference his own Statement of Relief Sought contained in his original CrR 7.8 Motion (now tendered as this PRP).

B. ARGUMENT

1. Brock's CrR 7.8 Motion should be reviewed by this Court and/or the Washington State Supreme Court.

On collateral review, a petitioner raising a new issue must show that he or she was actually and substantially prejudiced by constitutional error or that a nonconstitutional error occurred constituting a fundamental defect that inherently resulted in a complete miscarriage of justice. In re Personal Rest. of Lord, 123 Wn.2d 296, 303, 868 P.2d 835(1994).

Respondent concedes that if Mr. Brock's legal argument concerning the court violating Article II, section 19 of the Washington State Constitution is found to be meritorious then his motion would not be barred by **RCW 10.73.090.** Therefore, the only procedural demurrer at bar concerns **RCW 10.73.140** which involves successive petitions.

If this is infact the only procedural contention by respondent, it would appear the proper forum for this petition would be the Washington State Supreme court.

It is well known that successive bars do not apply to the State Supreme Court. "**RCW 10.73.140**, which concerns the court of appeals jurisdiction to decide successive personal restraint petitions raising new issues, does not apply to personal restraint petitions filed in this court." **In re Personal Restraint of Johnson, 131 Wn.2d 558, 566, 933 P.2d 1019(1997).** "Thus, the only direct bar to raising new issues in this Court [Supreme] is the abuse of writ doctrine." **In re Personal Restraint of Stoudmire, 141 Wn.2d 342, 352, 5 P.3d 1240(2000).**

Respondent has not raised the "abuse of writ doctrine" in Mr. Brock's case. Hence, the facial invalidity argument layed out in the original CrR 7.8 Motion (and arguement layed out below) is determinitive to the only existing bar the respondent holds to. And such determinations in similar type of arguments has always been a matter for the Supreme Court. The above fact is manifested by the table of cases contained in respondent's brief that shows clearly most cases (14 out of 15) relied upon were eventually Washington State Supreme Court cases.

This court has the power and should transfer this matter to the Washington State Supreme Court.

Moreover, if this court (Division II) needs further precedent to show the proper venue for this case, Division III can be looked to for instruction. In the case of, State v Klump, 80 Wa.App.391, 397, 909 P.2d 317(1996), Division III addressed the issue of validity in RCW 10.73.090 when it held that the time limit of the statute did not apply where the federal sentence to which a state sentence was referred was invalidated. Specifically Klump stated, "when the federal sentence was reversed, there was no previously imposed sentence on which the state sentence could operate, and the state sentence therefore became invalid." Id. at 397-98.

Klump is analogous to the case at hand, in that if the strike that serves as the predicate to Mr. Brock's POAA sentence is found to be an unconstitutional infirmity, then the POAA sentence does not have the proper statutory elements to operate on as a valid sentence.

2. **Initiative 593, the Persistant Offender Accountability Act, is in violation of the Washington State Constitution; hence, violating the Federal Constitution Due Process Clause.**

The respondent resorts to a tortured personal perspective that runs down a obviously subjective analyzation of "most serious offense." In the process they have somehow traveled down a path where they connect violent crime . . . to most serious crime . . . to a victim of a crime . . . to a financial crime. In the end, this rationale would attempt to make this court believe, that under the definition "victim" (see Pg. 10, Brief of Respondent),

financial crimes without any force or violence involved are crimes that voters believed would be necessarily included in the "three strikes" law placed before the people. This is a stretch that the court should not and cannot make.

Respondent points out the definition of "violent offense" in the Sentencing Reform Act at the time of I-593's conception (Pg. 8-9 Brief of Respondent). No portion of the definition would fit with Promoting Prostitution °1 as committed by Mr. Brock (the alternative ways of committing the crime will be discussed later in this pleading).

Somehow between the voters pamphlet (see Petitioner's Original Brief at Appendix "B") and the official Ballot Title, exist a grey area in which some crimes which were not "most serious" were incopoprated. A good question that should be determined is:

> What is the difference between a "serious" crime; and that of a "most serious" crime?

The rules of statutory construction say that all words are deemed to have purpose and meaning. So what does "most" mean?

Promoting °1 is a good example of a crime that contains alternative means that could be a "serious" or "most serious."

PROMOTING PROSTITUTION °1 (RCW 9A.88.070)

(a) Compelling a person by threat or force

(b) Profits fom prostitution of a person less than eighteen (18) years old.

Obviously, alternative "a" involves a mens rea that involves some type of violence (or threat to do such). Alternative "b"

involves no element that could even remotely be described as violent.

The State cites, **State v Farmer**, **116 Wn.2d 414, 805 P.2d 200 (1991)**, assumably to prove that any sexual exploitation of a child is violent or could be deemed such by governmental interest (see State's Motion to Transfer). **Farmer** does not say this. What **Farmer** say's is that "government has an interest in protecting children from sexual exploitation."

Farmer does provide solid instruction for the case at hand. A pornography case where no force was used, only a question of if a 16 or 17 year old had the right to consent to pose for explicit photographs. So was Farmer a violent offender? would the public believe that because a child was involved this would be the type of crime a person could be "struck" out for?

It would seem that Mr. Brock's court should have held inquiry into which alternative of the predicate strike he was originally convicted of (a hearing which Mr. Brock believes should be held if this court decides alternative "b" was a violation of the subject in title requirement).

Mr. Brock would strongly stress that this reviewing court (whether it end up being the court of appeals or supreme court) decide if a crime of profit, without any force or compulsion, is the type of crime the public believed would be included in the "strike" list.

Looking objectively at prostitution, and avoiding any subjective opinions that some persons may have, the crime of prostitution is only a misdemeanor in the State of Washington.

It is a stretch to believe that excepting money without any force or compulsion would elevate Mr. Brock's crime to that of the most serious crimes in the State.

Mr. Brock has provided ample evidence (in his appendix of his original brief) of the path and message that was promoted concerning the proposed "three strikes" initiative. It was a very aggressive campaign rhetorizing the ultimate concept that the public would be protected from repeat violent offenders. Nowhere does any evidence exist that property or financial crimes would be part of the initiative. The fact that Promoting °1 is part of the verbage tucked into the text, is dichotomous to the issue and problem cited earlier concerning the conflict with the alternative means of committing said crime.

C. CONCLUSION/RELIEF

Mr. Brock would ask that this court vacate his POAA sentence. Assuming arguendo, that the issue of successive petition becomes relevant to the court of appeals, this petition should be transferred to the Washington State Supreme Court for the foregoing reasons established in this document. It should also be noted that Mr. Brock has requested an evidentiary hearing in regard to establishing the alternative means to how he committed the crime of Promoting Prostiution °1. If this cannot be established by the record, the rule of lenity should apply and the POAA sentence should be vacated.

_____ Date

_____ Jerry Brock

WASHINGTON STATE COURT OF APPEALS
DIVISION II

In re the Personal Restraint of: Jerry Lee Brock, Petitioner, Pro se.	)	NO. 3639-4-II AFFIDAVIT OF SERVICE BY MAILING

I, Jerry Lee Brock, pro se, being first sworn upon oath, do hereby certify that I have served the following documents: REPLY BRIEF

Upon: CAROL L. LaVERNE
Thurston County Prosecutors Office
2000 Lakeridge Dr. SW Bldg.#2
Olympia, WA 98502-6045

By placing same in the United States mail at:

WASHINGTON STATE PENITENTIARY
1313 NORTH 13TH AVENUE
WALLA WALLA, WA. 99362

On this 5th day of October, 2007.

Jerry L. Brock #632588
Name & Number

Affidavit pursuant to 28 U.S.C. 1746, Dickerson v. Wainwright 626 F.2d 1184 (1980); Affidavit sworn as true and correct under penalty of perjury and has full force of law and does not have to be verified by Notary Public.