NO. 46671-6-II

COURT OF APPEALS

OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent

V.

GARY MEREDITH,

Petitioner

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DIVISION II
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STATE OF WASHINGTON
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SUPPLEMENTAL REPLY BRIEF OF PETITIONER

GARY MEREDITH

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STAFFORD CREEK CORRECTIONS CENTER

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THE ERRONEOUS DEPRIVATION OF A PEREMPTORY CHALLENGE IN WASHINGTON STATE CONSTITUTES REVERSIBLE ERROR WITHOUT A SHOWING OF PREJUDICE.

An accused person has a right to participate in selecting an empaneled jury by fair and impartial means. Batson v. Kentucky, 476 U.S. 79, 85, 106 S.Ct. 1712, 90 L.Ed. 2d 69 (1986); State v. Irby, 170 Wn. 2d 874, 884-85, 246 P. 3d 796 (2011), U.S. Const. amends. 6, 14; Wash. Const. art I, section 22. Article I, section 22 contains stronger protections guaranteeing the right to trial by jury than the federal constitution. Irby, 170 Wn. 2d at 884 (right to "appear and defend" mandates defendant's personal participation in all stages of jury selection); see State v. Williams-Walker, 167 Wn. 2d 889, 896 n. 2, 225 P. 3d 913 (2010) ("greater protection" for jury trial rights under article I, sections 21 and 22 than federal constitution).

The peremptory challenge is a "means of assuring the selection of a qualified and unbiased jury." Batson, 476 U.S. at 91. Even though the right to peremptory challenges is not explicitly guaranteed in the constitution, the peremptory challenge is "one of the most important rights secured to the accused." Pointer v. United States, 151 U.S. 396, 408, 14 S. Ct. 410, 38 L. Ed. 208 (1894).

SUMMARY OF FACTS PERTAINING TO ERROR

Because two alternate jurors were empanelled on Meredith's jury panel, the trial court had an obligation pursuant to CrR 6.4(e)(1) and CrR 6.5 to provide Meredith with eight peremptory challenges and the State eight peremptory challenges, for a total of 16. The trial judge explicitly made it known that a total of 14 peremptory challenges would be made available. RP 5. The trial court erroneously allotted only seven peremptory challenges to each party. This fact is acknowledged several times throughout the State's Supplemental Response Brief, pp. 9-12, and is supported in the sworn declaration of Brett Purtzer, Meredith's trial attorney, following his review of pertinent trial documents. Moreover, the State has proffered a declaration from trial prosecutor, James Schacht, "regarding the number and exercise of peremptory challenges in this case." Supp. Br. of Resp., p. 10

After the prosecution and defense exercised seven peremptory challenges each, only 12 jurors had been empanelled and seven unselected jurors remained.

The court then empanelled the next two jurors, No. 35 and No. 39[1], without affording Meredith the opportunity to exercise his final peremptory challenge. The court sat 14 jurors, and both jurors, No. 35 and No. 39, deliberated to a verdict.

During the course of the trial, the juror in seat 12 (Juror No. 32) was excused due to illness. RP 491. At the close of the case, the court randomly selected Juror No. 7 as the alternate to be excused before deliberations. RP 603. Both jurors, No. 35 and No. 39, were empanelled to the petit jury.

THE TRIAL COURT FAILED TO ADHERE TO THE REQUIREMENTS OF CrR 6.5

Any time the court selects alternate jurors, "[e]ach party shall be entitled to one peremptory challenge for each alternate juror to be selected." CrR 6.5 (emphasis added). By mandating that "each party shall be entitled" to additional peremptory challenges when the court seats alternate jurors, the court rule is construed as "presumptively imperative and operates to create a duty." See State v. Krall, 125 Wn. 2d 146, 148, 881 P. 2d 1040 (1994).

The trial court failed to allot Meredith an additional peremptory challenge for each alternate juror despite the mandatory language of CrR 6.5, yet it added two alternate jurors to the panel. Additionally, those two added jurors deliberated in the verdicts rendered.

The trial court's failure to adhere to the directive of CrR 6.5 constituted a "material departure from the established standards applicable to the exercise of peremptory challenges." See State v. Bird, 136 Wash. App. 127, 132, 148 P. 3d 1058 (2006). A litigant is entitled to have his case submitted to a jury selected in the manner required by law; if the selection is not made substantially in the manner required by law, an error may be claimed without showing prejudice, which will be presumed. But it will only be presumed when there has been a material departure from the statute. State v. Tingdale, 117 Wn. 2d 595, 600, 817 P. 2d 850 (1991). A material departure from the statutory scheme for selecting a jury results in presumptive prejudice requiring reversal and remand for new trial. Id. at 602-03.

FN 1. See State's Appendix C, Jury Panel Chart

THE STATE ATTEMPTS TO MISCHARACTERIZE OR CONFUSE THE ERROR

Despite the State's concession or acknowledgement of the trial court's error depriving Meredith of his entitled peremptory challenge, the State attempts to confuse or mischaracterize the error by remarking that "the court never even 'denied' the petitioner his eighth challenge." The State's assertion is of no import as the terms "deprived" and "denied" are used interchangeably in a synonomous context regarding peremptory challenges. This interchangeable usage is found throughout myriad case law. A prime example is found in Golden v. State, 2006 OK CR 2 (Okla. Crim. App. 2006):

"We agree with Mr. Golden that the trial court's error 'deprived' him of his statutory right to nine peremptory challenges and his constitutional right to due process of law", at 1152 (emphasis added);

"In this case, the trial court caused structural error by 'denying' Mr. Golden the complete array of peremptory challenges to which he was entitled by Oklahoma law," at 1155 (emphasis added).

Whichever synonomous context is used, both the erroneous "denial" or the erroneous "deprivation" of a defendant's peremptory challenge or statutory right to exercise a peremptory challenge constitutes reversible error without a showing of prejudice under Washington law.

Additionally, the State mischaracterizes the error as "trial error." The State's assertion that "any alleged error in applying CrR 6.4 (e) in this case is trial error" is entirely incorrect. This error occurred during the jury selection process, not during the presentation of the case to the jury. See Hines v. Enomoto, 658 F. 2d 667 (9TH Cir. 1981)(outright denial of full number of peremptory challenges may vitally affect integrity of "jury selection process").

THE STATE MISTAKENLY CLAIMS THAT THE ERRONEOUS DENIAL OF A PEREMPTORY CHALLENGE IS NOT A STRUCTURAL ERROR OR AN ERROR REQUIRING AUTOMATIC REVERSAL WITHOUT A SHOWING OF PREJUDICE

The deprivation of Meredith's right to exercise a peremptory challenge

(and participate in the selection of all juror who deliberate in his case) is a structural error under Washington precedent.

The trial court's misapplication of the requirement of CrR 6.5 improperly deprived Meredith of a peremptory challenge to which he was entitled and his opportunity to exercise a peremptory challenge on all jurors that rendered a verdict in his case.

"Any impairment of a party's right to exercise a peremptory challenge constitutes reversible error without a showing of prejudice. As such, harmless error analysis does not apply." State v. Evans, 100 Wn. App. 757, 774, 998 P. 2d 373 (2000).

The Supreme Court explicitly adopted the reasoning of Evans in State v. Vreen, 143 Wn. 2d 923, 931-32, 26 P. 3d 236 (2001). In Vreen, the court held that if jurors deliberate and render a verdict after the court has improperly denied the defendant the opportunity to exercise a peremptory strike to which he is entitled, the error is structural and reversal is required. Id., at 932.

The holdings and logic of Evans and Vreen are instructional in Meredith's case. The trial court deprived Meredith of his right to exercise a peremptory challenge to which he was "entitled" under CrR 6.5. The premise of a peremptory challenge is that the accused need not identify a specific basis on which to challenge a particular juror, and therefore, the accused person is not required to show that a particular juror sat on the case should have been excused. Id., at 931. Instead, denying the accused the right to exercise a peremptory challenge to which he was entitled is a fundamental error undermining the integrity of the trial process. Id., at 931.

In State v. Bird, 136 Wn. App. 127, 148 P. 3d 1058 (Div. 2 2006), the trial court misapplied CrR 6.4 (e)(2), mistakenly counting an acceptance of the jury panel as a peremptory challenge, resulting in Bird receiving one less peremptory challenge to which he was entitled under CrR 6.4(e)(1) and CrR 6.5. In reversing, this court concluded: "[A]s our Supreme Court has held, 'Any impairment of a party's right to exercise a peremptory challenge constitutes reversible error without a showing of prejudice. As such, harmless error does not apply.'" Bird, 136 Wn. App. at 134 (quoting State v. Vreen, 143 Wn. 2d at 931 (quoting State v. Evans, 100 Wn. App. at 774).

The holding and logic of Bird is instructive to Meredith, as well. As in Meredith's case, the trial court's misapplication of a court rule deprived Bird of a peremptory challenge to which he was lawfully entitled. As in Bird, the error in Meredith's case requires an automatic reversal of his convictions. Furthermore, the theory of which the State proffers that "[a]t most, the court's 'error' here was an oversight in miscounting how many peremptory challenges had been exercised by the parties," constitutes a per se reversible error under Bird, as well.

Meredith used the seven peremptories he was allowed. However, the court sat two additional jurors as alternates and Meredith was unable to exercise a peremptory challenge to which he was entitled. Just as Evans', Vreen's, and Bird's right to exercise an entitled peremptory challenge was impaired constituting reversible error without a showing of prejudice, likewise, the deprivation of Meredith's entitled peremptory challenge impaired his lawful right to exercise a peremptory challenge constituting reversible error without a showing of prejudice. The fact that the deprivation of Meredith's eighth peremptory challenge was the result of a misapplication of a court rule (as in Bird) rather than a misapplication or misreading of Batson (as in Evans and Vreen) is of no moment. The trial court's failure to adhere to the clear directive of CrR 6.5 and to deprive Meredith the right to exercise a peremptory challenge to which he was entitled requires a new trial. Vreen, 143 Wn.2d at 932; Evans, 100 Wn. App. at 774; Bird, 136 Wn. App. at 134.

Contrary to the State's assertion, State v. Vreen is valid law.

The U.S. Supreme Court in Rivera v. Illinois, 556 U.S. 148, 162, 129 S.Ct. 1446, 1456, 173 L.Ed. 2d 320 (2009), held that: "States are free to decide, as a matter of state law, that a trial court's mistaken denial of a peremptory challenge is reversible error per se." In its comparison of various states' holdings, the Court made reference to Washington's precedent, citing State v. Vreen, 143 Wash. 2d at 927-32 (applying automatic reversal rule to the erroneous denial of a peremptory challenge).

Since the Court in Rivera held that "[b]ecause peremptory challenges are within the States' province to grant or withhold, the mistaken denial of a

state-provided peremptory challenge does not, without more, violate the Federal Constitution," Rivera v. Illinois, at 158, the Court, in the Federal constitutional sense, and as the State here correctly asserts, effectively overruled the holding of U.S. v. Annigoni, 96 F. 3d 1132 (9TH Cir. 1996) in its application of the automatic reversal rule in federal jurisprudence. But that is of no moment here in Meredith since "state law determines the consequences of an erroneous denial of [a peremptory] challenge." Rivera v. Illinois, at 152, and Washington appellate courts do not rely on the Ninth Circuit to determine state law issues. In re detention of D.F.F., 172 Wn.2d 37 n.6, 256 P. 3d 357 (2009).

In the wake of Rivera v. Illinois, Washington State continues to adhere to its precedent that, for purposes of state law, the erroneous denial of a peremptory challenge constitutes structural or per se reversible error. See State v. Paumier, 176 Wn.2d 29, 46, 288 P. 3d 1126, 1134-35 (2012), a post-Rivera v. Illinois case in which the Washington Supreme Court specifically cites State v. Vreen, 143 Wn.2d at 930 ("denial of peremptory challenge is structural error") in a "very limited class of cases" comprising structural error.

Moreover, other states, following the United States Supreme Court's pronouncement in Rivera v. Illinois making it clear that the states that opted to apply an automatic reversal rule — pre-Rivera v. Illinois — were permitted to do so. See e.g., People v. Hecker, 15 N.Y. 3d 625, 662-63, 942 N.E. 2d 248, 917 N.Y.S. 2d 39 (2010) (mistaken denial of a peremptory challenge under New York law mandates automatic reversal; "we perceive no basis to depart from our existing precedent... and hold that the unjustified denial of a peremptory challenge violates CPL 270.25 (2) and requires reversal without regard to harmless error."); Commonwealth v. Hampton, 457 Mass. 152, 164, 928 N.E. 2d 917, 927 (2010) (given the importance of peremptory challenges in state jurisprudence, "[w]e continue to adhere to the view that, for purposes of state law, the erroneous denial of a peremptory challenge requires automatic reversal.").

Since the Supreme Court in Rivera v. Illinois, supra, concluded that states are free to decide whether an erroneous denial of a peremptory challenge requires automatic reversal under state law, and precedent in Washington holds that such a mistake under Washington law mandates automatic reversal, nothing in Rivera v. Illinois disturbs Washington precedent. For this reason, the State's assertion that Meredith's "reliance on Vreen for an automatic reversal, based

upon structural error, is unavailing" is unpersuasive.

DUE PROCESS VIOLATION

The State inaccurately argues the proposition that trial court error in applying state-provided rules or statutes regarding peremptory challenges is not a violation of the United States Constitution, including due process. The State cites Rivera v. Illinois, 556 U.S. 148, 129 S.Ct. 1446 (2009) in confronting this issue. But several courts, including Rivera, have made it clear that some such errors regarding the erroneous denial or loss of an entitled peremptory challenge can violate a defendant's due process rights.

In two U.S. Supreme Court cases, Ross v. Oklahoma, 487 U.S. 81, 108 S.Ct. 2273, 101 L.Ed.2d 80 (1988) and United States v. Martinez-Salazar, 528 U.S. 304, 120 S. Ct. 774, 145 L.Ed 2d 792 (2000), the Court held in each case — Ross in state court; Martinez-Salazar in federal court — the defendants used a peremptory challenge to rectify the trial court's erroneous denial of a for-cause challenge and, thereby, did not "lose" a peremptory challenge.

The Ross Court held that "the 'right' to peremptory challenges is 'denied or impaired' only if the defendant does not receive that which state law provides." Ross, 487 U.S. at 89. "But he received all that Oklahoma law allowed him, and therefore his due process challenge fails." Id., at 91.

The Martinez-Salazar Court concluded that Martinez-Salazar was accorded the exact number of peremptory challenges, "receiv[ing] precisely what federal law allowed; he cannot tenably assert any violation of his Fifth Amendment right to due process." Martinez-Salazar, supra at 317 (citing Ross, at 91); See also Rivera v. Illinois, 556 U.S. at 159 (citing the due process analysis in Martinez-Salazar).

In State v. Fire, 145 Wn. 2d 152, 34 P. 3d 1218 (2001), the Court held that because defendant received the number of peremptory challenges under the law, the trial court did not deny him due process. Although Fire did not expressly mention the phrase "due process", it cites the due process analysis in Martinez-Salazar in adopting that case's holding. Fire, at 162-63 (citing Martinez-Salazar, 528 U.S. at 314-15; Ross v. Oklahoma, 487 U.S. 81 (1988)).

Various federal courts have addressed whether errors regarding peremptory challenges violate due process. See United States v. Baker, 10 F. 3d 1374, 1404 (9TH Cir. 1993)(citing the holding of Ross v. Oklahoma, 487 U.S. 81, 89 (1988)); Vansickel v. White, 166 F. 3d 953 (9TH Cir. 1999)(due process rights were violated because "Vansickel was entitled to twenty peremptory challenges and he received only ten. This state right to peremptory challenges is a state-created liberty interest protected by the Fourteenth Amendment to the Constitution). Post-Rivera v. Illinois cases: Parker v. Phillips, 717 F. Supp. 2d 310 (W.D.N.Y. 2010)(citing Ross v. Oklahoma, at 89, "Parker's due process challenge must fail, since he received the number of peremptory challenges to which he was entitled under New York State law."). Accord, e.g., Willoughby v. Perlman, No. 03 Civ. 3345 DLC FM (S.D.N.Y. 2004)("Because [Willoughby] has failed to demonstrate that he was deprived of the statutorily-prescribed number of challenges, there has been no due process violation in this case."); Turley v. Estep, 375 Fed Appx. 867, 870 (10TH Cir. 2010)(followed the holding of Ross v. Oklahoma, 487 U.S. at 89, while making reference to Rivera v. Illinois, supra, at 1453).

The Ninth Circuit Criminal Handbook, Copyright 2015 (Matthew Bender and Co., Inc.), section 12.03(6)(c), clearly states: "'[D]ue process would be violated if a trial court permitted a defendant to exercise fewer than the number of peremptory challenges authorized by law.' see United States v. Martinez-Salazar, 146 F. 3d 653, 658 (9TH Cir. 1998)." This holding was affirmed in United States v. Martinez-Salazar, 528 U.S. 304, 120 S.Ct. 774 (2000).

Under the circumstances here in Meredith of trial court error in providing him with fewer than the number of peremptory challenges authorized by Washington law, CrR 6.4(e)(1) and CrR 6.5, and the pertinent case law cited above, Meredith's due process rights under Washington Constitution, art. 1, section 3, and the U.S. Constitution, Amendment 14, were clearly violated.

EQUAL PROTECTION VIOLATION

Meredith maintains his claim that his peremptory challenge error violated his right to equal protection, and thus, is constitutional. As a defendant prosecuted by the State of Washington, Meredith has a right to be protected under the Equal Protection Clause of the Washington Constitution, which requires the same

treatment as any other person similarly situated with respect to the legitimate purpose of the law. A defendant in the same exact circumstances as Meredith in a felony criminal trial comprised of 12 jurors, plus 2 alternate jurors, is guaranteed under Washington law to receive eight peremptory challenges pursuant to CrR 6.4(e)(1) and CrR 6.5. Meredith was erroneously provided only seven such challenges. The trial court's failure to adhere to the mandatory directives of these criminal rules and treat Meredith the same as any other person similarly situated with respect to the legitimate purpose of the law violated Meredith's right to equal protection under article 1, section 12, and under the Fourteenth Amendment of the U.S. Constitution.

Although many errors involving the denial of a peremptory challenge are not of constitutional dimension, Meredith has established that the particular peremptory challenge error in his case — the deprivation of his statutorily-mandated peremptory challenge — violated his constitutional due process and equal protection rights under the Washington Constitution and the U.S. Constitution. Therefore, contrary to the State's assertion, the error occurring during Meredith's jury selection process is a "constitutional error."

MEREDITH DID NOT WAIVE HIS RIGHT TO EXERCISE HIS EIGHTH PEREMPTORY CHALLENGE.

The State correctly asserts that defense counsel failed to object or call the error to the attention of the trial court. But the circumstances do not show that Meredith knew of or had any intent to waive his right to his eighth entitled peremptory challenge. Waiver "ordinarily applies to all rights or priveledges to which a person is legally entitled" and "is the intentional and voluntary relinquishment of a known right[.]" Dombrosky v. Farmers Ins. Co., 84 Wn. App. 245, 255, 928 P.2d 1127 (1996); see also Wagner v. Wagner, 95 Wn. 2d 94, 102, 621 P. 2d 1279 (1980) ("Waiver is the intentional relinquishment of a known right."). Courts indulge in every reasonable presumption against waiver of fundamental rights. Glasser v. United States, 315 U.S. 60, 70, 62 S.Ct. 457, 86 L.Ed. 680 (1942); City of Bellevue v. Acrey, 103 Wash. 2d 203, 207, 691 P. 2d 957 (1984). A lack of objection alone is not grounds for a waiver. State v. Frawley, 181 Wn. 2d 452, 469, 334 P. 3d 1022 (2014).

Waiver is a matter of intention, cannot be inferred from oversight or

negligence, or doubtful or ambiguous factors, and the burden of demonstrating waiver is on the person asserting a right has been waived:

[Waiver] may result from an express agreement, or be inferred from circumstances indicating an intent to waive. Thus waiver is essentially a matter of intention. Negligence, oversight or thoughtlessness does not create it. The intention to relinquish the right or advantage must be proved, and the burden is on the party claiming waiver. Dombrosky v. Farmers Ins. Co., 84 Wn. App. at 255 (Internal citations omitted).

Even though Meredith's defense counsel failed to object to the trial court's error, there is no indication that Meredith knew of and intentionally and voluntarily relinquished his right to his eighth peremptory challenge, therefore, Meredith's peremptory challenge issue is preserved for appellate review.[2]

FN 2. For instructional purposes, see State v. Pederson, No. 67926-1-I (2013). In this unpublished case, Division One held that because the record did not show Pederson knew of and intentionally and voluntarily relinquished his rights to the additional peremptory challenges he was entitled to under CrR 6.5, impairing Pederson's right to exercise a peremptory challenge, the error was preserved for appellate review despite counsel's failure to call the error to the attention of the trial court. Reversal without a showing of prejudice was required.

RAP 10.4 (h) does not prevent a court from considering authorities cited in an unpublished Court of Appeals opinion or from viewing the analysis in an unpublished opinion as instructive. State v. Golden, 112 Wn. App. 68, 47 P. 3d 587 (2002).

FAILURE TO OBJECT CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL

Meredith's trial attorney, Brett Purtzer, was ineffective for failing to object to the trial court's error either because he failed to research the applicable rules that govern the required number of peremptory challenges or from just plain oversight of those rules. See Supp. Br. of Pet., pp. 2, 13; Reply Br. of Pet., pp. 13-15.

"As applied to Washington, the holding in Padilla v. Kentucky, 559 U.S. 356, 130 S.Ct. 1473, 176 L.Ed. 2d 284 (2010) is an affirmation of an old rule of state constitutional law -- the duty to provide effective assistance of counsel includes the duty

to research and apply relevant statutes." In re Pers. Restraint of Yung-Cheng Tsai, 183 Wn. 2d 91, 96, 351 P. 3d 138 (2015).

Had Mr. Purtzer been consciously aware of the requirements of CrR 6.4 (e)(1) and CrR 6.5, he properly would have raised an objection during the pretrial colloquy for deciding how many jurors to call to the venire when the trial judge explicitly made known that 14 jurors would be empanelled and 14 peremptory challenges would be made available, two peremptories short of what is required for 14 jurors. RP 5. There's no strategic or tactical benefit to knowingly receive a lesser number of peremptory challenges to what you're entitled.

The State's assertion that "after exercising seven peremptory challenges, the defense decided not to exercise its last one" is completely inaccurate and unfounded, as there is nothing in or outside of the record to support such a claim. Had Mr. Purtzer been aware of the applicable rule or been made aware by the trial judge that Meredith was entitled to exercise an eighth peremptory challenge, he would have objected or attempted to use that eighth challenge during the exercising of peremptory challenges, evinced by his sworn affidavit, declaring that "[t]he trial court allotted only 7 peremptory challenges to each party" and "[h]ad we, the defense, been afforded an additional peremptory challenge, we would have definitely used it to our advantage by excusing one of the following jurors."

After exercising all peremptory challenges Mr. Purtzer knowingly believed he was authorized, it is expected that he would sign the jury selection sheet. The State's assertion that "this is evidence that the party has ratified, or is satisfied, with the jury selection process" is immaterial to the fact that Meredith erroneously received less than the full complement of peremptory challenges that state law entitles him.

"An attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under Strickland." Hinton v. Alabama, 571 U.S. , 134 S. Ct. 1081, 188 L.Ed. 2d 1, 9 (2014).

Mr. Purtzer's deficient performance in failing to research and apply or assert applicable relevant rules which lawfully entitle Meredith his full complement of peremptory challenges contributed or led to the per se reversible error of Meredith not receiving his full complement of peremptory challenges

to which state law guarantees him. "Where counsel's deficient performance resulted in a structural error, prejudice will be presumed." McGurk v. Stenburg, 163 F. 3d 470, 475 (8TH Cir. 1998)(held that when counsel's performance has led to an error that is "not amenable to harmless error analysis, but require[s] automatic reversal," prejudice must also be presumed for purposes of the Strickland analysis).

"[I]t is impossible to determine whether structural error is prejudicial, therefore, assuming the failure to object was not a strategic decision, actual prejudice need not be shown." Owens v. United States, 483 F. 3d 48, 64 (1ST Cir. 2007); accord Johnson v. Sherry, 586 F. 3d 439, 447 (6TH Cir. 2009); State v. Sublett, 176 Wn. 2d 58, 132, 292 P. 3d 715 (2012).

Mr. Purtzer's failure to research and apply or assert the relevant statutes, as well as his failure to object to the trial court's error, contributed to and resulted in a presumptively prejudicial error, thus constitutionally violating Meredith's Sixth Amendment right to effective assistance of counsel, requiring reversal and remand for a new trial.

As well, Mr. Purtzer's failure to object resulting in a structural error preserves Meredith's peremptory challenge issue for appellate review.

IF NECESSARY, MEREDITH'S PEREMPTORY CHALLENGE ERROR MEETS THE STANDARDS OF RAP 2.5

"Where error is structural, our RAP 2.5 analysis is straightforward. See [State v.] Easterling, 157 Wash. 2d [167], at 173 n. 2, 137 P. 3d 825 [2006]." State v. Paumier, 176 Wn. 2d at 54. "If an error is labeled structural and presumed prejudicial, it will always be 'manifest error affecting a constitutional right,' in other words, RAP 2.5 will apply, but it will always be satisfied because prejudice has been presumed and structural errors defy harmless error analysis. See Easterling, [Id.]. Moreover, it makes sense to presume prejudice despite the lack of objection when an error is structural because by the time we have decided an error is structural, we have already determined that it is of such an egregious nature that it has rendered the underlying trial unfair and deprived the defendant of 'basic protections' without which 'no criminal punishment may be regarded as

fundamentally fair.'" State v. Paumier, 176 Wn.2d at 54 (quoting Neder v. United States, 527 U.S. 1, 8-9, 119 S. Ct. 1827, 144 L.Ed. 2d 35 (1999).

See also In re Pers. Restraint of D'Allesandro, 178 Wash. App. 457, 466, 314 P. 3d 744 (2013). D'Allesandro, a personal restraint petitioner, failed to object to a structural error (public trial right violation), the error was preserved for appellate review, petitioner raised ineffective assistance of appellate counsel claim for counsel's failure to raise the structural error during direct review where petitioner would have been entitled to reversal of convictions; petition was granted.

Meredith's structural error of erroneous deprivation/denial of a peremptory challenge meets the standards of RAP 2.5 as illustrated above and in Reply Br. of Pet., p. 17.

INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL FOR FAILING TO RAISE PEREMPTORY CHALLENGE ERROR ON DIRECT REVIEW

The State's assertion that Meredith's claim of the erroneous deprivation of his entitled peremptory challenge "should have been raised in the direct appeal" is positively correct.

When a petitioner for relief from personal restraint has not had a previous opportunity to obtain judicial review, as is the case with a claim of ineffective assistance of appellate counsel, the general heightened standard for relief does not apply. In re Pers. Restraint of D'Allesandro, 178 Wash. App. at 470 (citing In re Pers. Restraint of Coats, 173 Wn. 2d 123, 132, 267 P. 3d 324 (2011). Instead, to prevail on a claim of ineffective assistance of counsel, the petitioner must demonstrate the merit of any legal issue appellate counsel raised inadequately or failed to raise and also show that he or she was prejudiced. D'Allesandro, at 470 (citing In re Pers. Restraint of Netherton, 177 Wash. 2d 798, 801, 306 P. 3d 918 (2013); see also In re Pers. Restraint of Morris, 176 Wn. 2d 157, 166, 288 P. 3d 1140 (2012)(citing Smith v. Robbins, 528 U.S. 259, 285, 120 S. Ct. 746, 145 L. Ed. 2d 756 (2000); In re Pers. Restraint of Orange, 152 Wn. 2d 795, 814, 100 P. 3d 291 (2004)).

To establish deficient performance by appellate counsel, Meredith must show that his appellate counsel should have known, but failed, to raise the deprivation of a peremptory challenge issue in his direct appeal. See In re Pers.

Restraint of Morris, 176 Wn. 2d at 167. To establish prejudice, Meredith must show that had appellate counsel included the peremptory challenge issue in his direct appeal, Meredith would have received a new trial. See In re Pers. Restraint of Netherton, 177 Wn. 2d at 801.

Meredith's appellate counsel, James Lobsenz, should have known to raise the error, as a thorough examination of the record, or trial transcripts, would have clearly revealed that the trial court, unequivocally, would be allotting a total of 14 peremptory challenges, or two peremptory challenges less than what is required under CrR 6.4(e)(1) and CrR 6.5 when the trial includes 2 alternate jurors. This total was calculated and confirmed during the pretrial colloquy that took place on the record. See RP 5.

Constant to every jury trial are peremptory challenges. The court rule or statute governing the number of peremptory challenges the court is required to allot each party has remained unchanged for many years. When a trial court fails to adhere to the requirements of the applicable rule and erroneously affords a defendant in a felony criminal trial a lesser number of peremptory challenges than what he or she is entitled, it constitutes a structural or per se reversible error. The traditional remedy of automatic reversal for this error has been a constant of Washington precedent, as well.

Considering the limited class of errors which require automatic reversal without a showing of prejudice, such as errors regarding the allotment and exercising of peremptory challenges, it would be more than reasonable to believe that an appellate attorney, with decades of experience in Washington appellate law, would be aware of such an error and remedy and would easily discover such an error, that's apparent in the transcript, when combing the record for prevailing or winnable errors.

"An attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under Strickland." Hinton v. Alabama, 571 U.S. , 134 S. Ct. 1081, 188 L.Ed. 2d 1, 9 (2014).

Meredith's peremptory challenge error was apparent in the record, and Mr. Lobsenz, endowed with many years of experience, should have discovered this error with minimal effort and raised the issue in Meredith's direct appeal. The State, in its conclusion, concedes to this argument by stating: "All of the issues

raised in this portion of the PRP were known, could and should have been raised in the direct appeal." See Supp. Br. of Resp., p. 12. "In fact, the primary issue in his direct appeal was regarding peremptory challenges: whether the State's challenge violated Batson v. Kentucky." Id. at 10.

The failure of Mr. Lobsenz to raise Meredith's peremptory challenge issue was not the product of "strategic" or "tactical" thinking, and it deprived Meredith of the opportunity to have the error deemed per se prejudicial on direct appeal. See In re Pers. Restraint of Orange, 152 Wn. 2d at 814.

Meredith first satisfies the deficient performance prong of the ineffective assistance of counsel test by showing that counsel should have known to raise the peremptory challenge issue in Meredith's direct appeal. See In re Pers. Restraint of D'Allesandro, supra, at 472; In re Pers. Restraint of Morris, supra, at 167.

Once a petitioner has shown deficient performance he "must also 'show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" Hinton v. Alabama, 188 L.Ed. 2d at 10 (quoting Strickland, 466 U.S. at 694).

In In re Pers. Restraint of Orange, supra, at 814, the Court held that Orange's public trial right error was presumptively prejudicial, so that his appellant counsel's failure to raise the issue on appeal was both deficient and prejudicial, and not the product of strategic or tactical thinking. The remedy for the failure was a remand for a new trial.

The Supreme Court affirmed the Orange holding in In re Pers. Restraint of Morris, 176 Wn. 2d 157, 166, 288 P. 3d 1140 (2012). In Morris, the Court held that the petitioner established prejudice because the result of his direct appeal would certainly have been different had his appellate counsel raised the public trial issue, a presumptively prejudicial structural error. The State nor Morris objected to the error at trial. Id. at 162. A defendant must have knowledge of a right to waive it. Id. at 167 (citing State v. Duckett, 141 Wn. App. 797, 805-07, 173 P. 3d 948 (2007)). "Here, there was no discussion of Morris' public trial right before the closure. Thus, we do not find that Morris waived his right to a public trial." Morris, at 167.

In reaffirming Orange, the Court concluded that Morris is entitled to relief under his ineffective assistance of appellate counsel claim because the error would

have been presumed prejudicial on direct review. No clearer prejudice could be established. Morris, 176 Wn.2d at 166, 173.

The holdings and logic of Orange and Morris are instructive to Meredith's ineffective assistance of appellate counsel issue. As was the case in Morris, the State nor Meredith objected to the error at trial, and Meredith did not waive his right to an entitled peremptory challenge or waive his right to exercise it. The peremptory challenge error in Meredith's case is a per se presumptively prejudicial error. Had Meredith's appellate counsel raised this issue on direct review, Meredith would have received a new trial. Because he would have received a new trial, Meredith was prejudiced by his appellate counsel's failure to raise the peremptory challenge issue on direct appeal. Here, as in Morris, where appellate counsel fails to raise a claim where prejudice would have been presumed on direct review, a petitioner is entitled to relief on collateral review. See Morris, supra, at 161.

Turning to the second prong of the ineffective assistance of counsel test, Meredith shows prejudice because he would have been entitled to the benefit of the per se prejudice / automatic reversal rule for this error on direct appeal and remand for a new trial. See In re Pers Restraint of D'Allesandro, supra, at 474; In re Pers. Restraint of Netherton, supra, at 802; In re Pers. Restraint of Morris, supra, at 173; In re Pers. Restraint of Orange, supra, at 814.

Because Meredith's Sixth Amendment right to effective assistance of counsel was violated by his appellate counsel, James Lobsenz's, ineffective assistance for failing to raise a presumptively prejudicial error on direct review, Meredith is entitled to a reversal of his convictions and remand for new trial.

MEREDITH'S STRUCTURAL ERROR REQUIRES A PRESUMPTION OF PREJUDICE WITHIN HIS PERSONAL RESTRAINT PETITION

The State alleges that Meredith must show actual and substantial prejudice within his personal restraint petition to his claim of erroneous deprivation of a peremptory challenge, despite the fact that the error is a structural error, or per se reversible error. In the case the State cited, In re Pers. Restraint of Coggin, 182 Wn.2d 115, 119, 340 P.3d 810 (2014), the alleged public trial right error did not rise to a structural, presumptive prejudicial level.

Meredith's error is distinguishable. The erroneous denial or deprivation of an entitled peremptory challenge is unequivocally a structural error, and always considered a per se prejudicial error, under Washington law. A defendant receiving a lesser number of peremptory challenges than what he or she is entitled has no perceived or actual benefit, contrary to the circumstances in Coggin, where it was determined he likely benefitted from the private questioning in chambers. Being deprived of even one peremptory challenge in violation of CrR 6.4(e)(1) and CrR 6.5 will always result in an impairment of a defendant's right to exercise a peremptory challenge, contingent on exhaustion of all challenges that the trial court did allot the defendant, constituting reversable error without a showing of prejudice. State v. Bird, 136 Wn. App. 127, 148 P. 3d 1058 (Div. 2 2006); State v. Vreen, 143 Wn. 2d 923, 26 P. 3d 236 (2001). This error is presumed prejudicial on direct review and should be presumed prejudicial in a PRP, as well.

Under controlling precedent, a personal restraint petitioner can prevail only if he or she shows (1) a constitutional error of the "trial" type that caused actual and substantial prejudice; (2) a nonconstitutional error that inherently caused a complete miscarriage of justice; (3) a limited number of constitutional errors where prejudice inheres in the proof of the error itself, see In re Pers. Restraint of Crace, 174 Wn. 2d 835, 843, 280 P. 3d 1102 (2012) (explaining that a petitioner who proves ineffective assistance of counsel necessarily shows prejudice on collateral review); (4) structural errors resulting in automatic reversible error. In re Pers. Restraint of Stockwell, 179 Wn. 2d 588, 607-08, 316 P. 3d 1007 (2013).

Meredith's erroneous deprivation of a peremptory challenge error definitely falls into the fourth category of structural error resulting in automatic reversal, and likely fits into the third category, as Meredith has alleged a claim of ineffective assistance of counsel for failing to research and assert applicable mandatory rules governing peremptory challenges and failing to object to the trial court error of failing to provide the required number of peremptory challenges, a structural error inhering a conclusive presumption of prejudice. In addition, Meredith has raised a meritorious claim of ineffective assistance of appellate counsel for failure to raise Meredith's erroneous deprivation of his

entitled peremptory challenge on direct appeal, which may fit into the third category, as well.

"[T]here is no single rule that a personal restraint petitioner must show actual and substantial prejudice to obtain relief in all cases." In re Pers. Restraint of Stockwell, 179 Wn. 2d at 605. The rule that errors which are presumptively prejudicial on direct appeal will generally be presumed prejudicial in a PRP is still good law. Id. at 604-05.

The State's assertion that Meredith must show actual and substantial prejudice in his PRP, citing In re Pers. Restraint of Brockie, 178 Wn. 2d 532, 539, 309 P. 3d 498 (2013), should be of no moment as Meredith has raised a meritorious claim of ineffective assistance of appellate counsel for failing to raise Meredith's erroneous deprivation of a peremptory challenge error on direct appeal, where the error would have been deemed per se prejudicial. See In re Pers. Restraint of Morris, 176 Wn. 2d 157, 166, 288 P. 3d 1140 (2012); See In re Pers. Restraint of D'Allesandro, 178 Wn. App. 457, 468 n. 11 ("Because we address the public trial right here as ineffective assistance of appellate counsel claim (emanating from D'Allesandro's earlier direct appeal), we need not adress the standard discussed in Brockie.").

In sum, the trial court erroneously deprived Meredith of his eighth peremptory challenge in violation of CrR 6.5, thus impairing Meredith's statutory right to exercise a peremptory challenge, constituting reversible error without a showing of prejudice under state law and precedent. Meredith never waived or relinquished his right to his entitled peremptory challenge nor his right to exercise that challenge. Meredith's trial attorney was ineffective for failing to research and assert the applicable rule and failing to object to the trial court's error. Meredith's appellate attorney was ineffective for failing to raise the peremptory challenge error on direct appeal, where the error would have constituted an automatic reversal of Meredith's convictions and remand for a new trial.

Meredith asserts that each constitutional issue argued within his personal restraint petition and supporting briefs has been federalized

and fairly presented to this court for review.

CONCLUSION

Pursuant to the arguments and reasoning pertaining to the issues Meredith has outlined in his personal restraint petition and supporting briefs, Meredith respectfully requests this court to grant his petition for relief, reverse his convictions and remand for a new trial.

I, GARY MEREDITH, swear under the laws of perjury of the State of Washington that the foregoing is true and correct.

DATED, THIS DAY OF MARCH 21, 2016.

GARY MEREDITH
DOC NO. 984777
STAFFORD CREEK CORRECTIONS CENTER
UNIT H4, CELL B-106
191 CONSTANTINE WAY
ABERDEEN, WA 98520

Gary Meredith

DECLARATION OF SERVICE BY MAIL
GR 3.1

I, GARY MEREDITH, declare and say:

That on the 21 day of MARCH, 2016, I deposited the following documents in the Stafford Creek Correction Center Legal Mail system, with First Class U.S. Mail, pre-paid postage affixed, under cause No. 46671-6-II:

SUPPLEMENTAL REPLY BRIEF OF PETITIONER

addressed to the following:

COURT OF APPEALS OF THE	PIERCE COUNTY	
STATE OF WASHINGTON	PROSECUTOR	
DIV. 2	930 TACOMA AVE S,	
950 BROADWAY, STE 300	ROOM 946	
TACOMA, WA 98402	TACOMA, WA 98402	

FILED
COURT OF APPEALS
DIVISION II
2016 MAR 24 AM 11:07
STATE OF WASHINGTON
BY DEPUTY

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my belief.

DATED THIS 21 day of MARCH, 2016, in the City of Aberdeen, County of Grays Harbor, State of Washington.

WITH ALL RIGHTS RESERVED.

Signature

GARY MEREDITH
Printed Name
c/o [DOC 984777 UNIT H4, B-106
STAFFORD CREEK CORRECTIONS CENTER
191 CONSTANTINE WAY
ABERDEEN WA (98520)]