NO. 46671-6-II

COURT OF APPEALS

OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

GARY MEREDITH,

Petitioner.

REPLY BRIEF OF PETITIONER

FILED
COURT OF APPEALS
DIVISION II
2015 JUL 13 PM 1:32
STATE OF WASHINGTON
BY
DEPUTY

GARY MEREDITH
DOC # 984777
STAFFORD CREEK CORRECTIONS CENTER
UNIT HH, CELL B-38
191 CONSTANTINE WAY
ABERDEEN, WA 98520

A. ARGUMENT IN REPLY

1. TRIAL COURT ERRONEOUSLY FAILED TO ALLOT MEREDITH HIS FULL COMPLEMENT OF PEREMPTORY CHALLENGES AUTHORIZED BY LAW REQUIRING REVERSAL.

a. The State inaccurately asserts that the record does not reflect how many peremptory challenges each party exercised or if each party exercised all peremptory challenges they were allotted.

The State concedes that Meredith was entitled to eight peremptory challenges pursuant to CrR 6.4(e)(1) and 6.5.

Although the record does not reflect specifically which prospective jurors each party peremptorily challenged, the record is clear that the trial court indicated it would be providing a total of 14 peremptory challenges. RP 5. In reference to how many jurors should be called up, the prosecutor stated:

> "40 to be safe ... 28 potentially from either side for purposes of challenges, and the extra jurors in case there are excuses for cause."

The prosecutor's figure of 28 plainly translates as 14 jurors, plus 14 peremptory challenges, with (12) extra jurors for cause, to equal 40 jurors.

The trial judge expressed the court's intentions by affirming those calculations:

> "I was doing the math as the State has already done, that leaves us 12 out of the 40." RP 5.

By way of the calculations above, it's clear the trial court

intended to allot a total of 14 peremptory challenges. There is absolutely nothing in the entire record that suggests otherwise. Pursuant to CrR 6.4(e)(1) and 6.5, each party receives an equal number of peremptory challenges. The record reflects that 14 peremptory challenges were exercised. Resp't brief, Appendix A. It can easily be ascertained that each party was allotted 7 peremptory challenges and exercised all 7 they were provided. This conclusion is supported by a sworn affidavit from Meredith's trial attorney, Brett Purtzer, which separately confirms the number of peremptory challenges each party was allotted and exercised.

b. <u>The State's claim that there is no declaration from Meredith's trial attorney, Brett Purtzer, regarding the number of peremptory challenges is now without merit since a sworn affidavit from Mr. Purtzer has been submitted.</u>

In Mr. Purtzer's sworn affidavit[1], he declares that he can conclude as true and accurate the following:

1. The trial court allotted only 7 peremptory challenges to each party;
2. The exercising of peremptory challenges took place at sidebar;
3. The defense exercised all 7 of its allotted peremptory challenges;
4. Had the defense been afforded an additional peremptory challenge, we would definitely have used it to our advantage by excusing one of three objectionable/undesirable jurors: Jurors No. 11, 14, 16. (See affidavit for details).

1 Appendix A, Brett Purtzer's affidavit

C. <u>The State's motion to strike the affidavit of Rayanne Robertson, Appendix B in supplemental brief, is rife with speculation and inaccuracies, and should be denied.</u>

The State's assertions that Ms. Robertson's declaration is "hearsay" and "Ms. Robertson has no first hand knowledge as to what occurred at petitioner's trial, specifically during jury selection" are inaccurate and speculative, respectively. Ms. Robertson, Meredith's mother, attended her son's trial from the beginning of the first day to the end of the last day, every day, attaining "first-hand knowledge" the entire time.

The State inaccurately argues that "it is even unknown if the person Ms. Robertson spoke to on the telephone was Mr. Purtzer." It is indisputable that Mr. Purtzer was the individual Ms. Robertson spoke to, as well as referred to, in her affidavit. Ms. Robertson has known Mr. Purtzer professionally for over 22 years and definitely was not mistaken as to who she spoke with and what he specifically told her regarding his recollection of the number of peremptory challenges Meredith was afforded and how many peremptories the defense exercised.

Ms. Robertson's affidavit did not contain speculative matters or hearsay as to what somebody might testify to, it contained matters to which she, as well as Mr. Purtzer, would competently testify. Contrary to the State's argument, the declarations Ms. Robertson has made in her affidavit are entirely relevant to the issue at hand, and are supported by Mr. Purtzer's affidavit as well.

The State's assertion that Ms. Robertson's affidavit "is neither sworn nor notorized" is entirely in error. Ms. Robertson's

affidavit clearly states in bold text that it is "sworn as true and correct under penalty of perjury ... and is not required to be verified by notary public."

Ms. Robertson's affidavit should not be stricken. The State's motion should be denied.

d. The State erroneously asserts that even if Meredith was improperly allotted fewer peremptory challenges than he was entitled, he must demonstrate prejudice. When error is "structural", prejudice is presumed; harmless error analysis is not applicable.

The State's argument fails as our Supreme Court has confirmed that "denial of a peremptory challenge is structural error." State v. Paumier, 176 Wn. 2d 29, 46, 288 P. 3d 1126 (2012)(citing State v. Vreen, 143 Wn. 2d 923, 930, 26 P. 3d 236 (2001). Appellate courts grant automatic reversal and remand for a new trial only when errors are structural in nature. An error is structural when it "necessarily renders a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." If the error is structural in nature, it warrants automatic reversal of conviction and remand for a new trial. State v. Momah, 167 Wn. 2d 140, 149, 217 P. 3d 321 (2009)(citing Washington v. Recuenco, 548 U.S. 212, 218-19, 126 S.Ct. 2546, 165 L. Ed. 2d 466 (2006)(quoting Neder v. United States, 527 U.S. 1, 9, 119 S. Ct. 1827, 144 L.Ed. 2d 35 (1999).

Structural errors are presumed prejudicial because "'it is often difficult to assess the effect of the error.'" State v. Wise, 176 Wn. 2d 1, 17, 288 P. 3d 1113 (2012)(quoting United States v. Marcus,

560 U.S. 258, 263, 130 S. Ct. 2159, 176 L.Ed 2d 1012 (2010)). Structural errors are "defects in the constitution of the trial mechanism, which defy analysis by harmless-error standards." State v. Vreen, 143 Wn. 2d at 930 (quoting Arizona v. Fulminante, 499 U.S. 279, 309, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991)).

Our Supreme Court in Vreen, supra, expressed that several circuits "have found harmless error doctrine simply inappropriate in such circumstances," citing U.S. v. Annigoni, 96 F. 3d 1132, 1144 (9TH Cir. 1996) ("[T]he erroneous denial of a right of peremptory challenge is simply not amenable to harmless-error analysis"); U.S. v. McFerron, 163 F. 3d 952, 956 (6TH Cir. 1998) ("[W]e reject the application of harmless error analysis to the denial of a right to exercise peremptory challenges."); U.S. v. Broussard, 987 F. 2d 215, 217 (5TH Cir. 1993) (Application of harmless error review to denial of a peremptory challenge "would eviscerate the right to exercise peremptory challenges, because it would be virtually impossible to determine that [the denial], injurious to the perceived fairness of the petit jury, [was] harmless."); Kirk v. Raymark Indus. Inc., 61 F. 3d 147, 160 (3RD Cir. 1995) ("[A] showing of prejudice is not required to reverse a verdict after demonstrating that a statutorily-mandated peremptory challenge was impaired.")

Considering that the trial court committed a structural error when it deprived Meredith of his full complement of peremptory challenges he was statutorily-entitled to, his convictions must be reversed.

e. If this error does happen to require prejudice be shown, Meredith can demonstrate prejudice as well.

Meredith contends that the error of failing to allot him his full complement of peremptory challenges is identical in nature to the error of denying the proper use of a peremptory challenge, but is actually more egregious because the outright deprivation means one never even has the opportunity to attempt to use it. Although the remedy is the same with either of these type of errors - reversal without a showing of prejudice - just in case the remedy may have changed and a show of prejudice is required, Meredith can show prejudice as demonstrated below.

Meredith is analogous to Vreen in that both defendants were denied/deprived a peremptory challenge, but also very similar as well in that had Meredith not been erroneously deprived one of his peremptory challenges, he definitely would have exercised it on one of the multiple objectionable/undesirable jurors seated on his jury. For example:

Juror No. 11, seat 3 was objectionable due to the fact the juror's daughter's employer was Good Samaritan Hospital where the victim was examined, as well as being the employer of the State's testifying medical experts, Dr. Bobbie Sipes and RN Michelle Russell. RP 45 of voir dire. This conflict of interest posed the potential for the juror to be unjustly influenced towards the State without providing Meredith with the presumption of innocence, constituting the type of objectionable/undesirable juror Meredith would have peremptorily removed.[2]

Jurors No. 14, seat 5 and No. 16, seat 7 were both objectionable as both spoke of being very strict parents that would allow their former teenage children to attend only supervised group parties, church functions, school activities, and family-approved dates.

2. See Appendix A

Both jurors never kept any alcohol in the home. RP 22-23 ; 25-26 of voir dire. Taking into account these jurors' manner of strict, wholesome parenting, including a strong averseness towards alcohol, the fact that there was to be evidence of young teenagers consuming alcohol, plus testimony of Meredith having provided it, undoubtedly caused these jurors to frown in a big way and potentially develop a preconceived notion of disgust towards Meredith, which qualified them as the type of objectionable/undesirable juror Meredith definitely would have removed with a peremptory challenge.[3]

A strong argument can also be made that Juror 32, seat 12 was extremely objectionable, as he was challenged for cause for expressing strong biased views, the challenge was denied and he was impaneled, but did not deliberate due to an excusal for illness. But since the excusal could not have been forseen during the exercising of peremptory challenges, this juror was also very objectionable.

A similar analogy can be drawn from State v. Bird, 136 Wn. App. 127, 148 P. 3d 1058 (Div. 2 2006) in which the defendant was erroneously denied a peremptory challenge when the trial court mistakenly counted an "acceptance" of the jury panel as one of Bird's seven allotted peremptory challenges, thus depriving him of a peremptory challenge. Defense counsel objected believing he had exercised only six of his challenges and expressed a desire to excuse a juror. Bird's objection was denied and the juror sat on the jury that convicted Bird. The Court of Appeals reversed, citing the Supreme Court in Vreen holding: "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 at 134

3. See Appendix A.

(quoting State v. Evans, 100 Wn. App. 757, 774, 998 P. 2d 373 (Div. 1 2000).

Meredith is analogous to both Bird and Vreen in that (1) the trial court erroneously deprived him of his right to exercise a peremptory challenge, (2) an "objectionable" juror sat on the convicting jury, and (3) if not for the trial court's error, Meredith has clearly demonstrated, as well as Mr. Purtzer's affidavit has confirmed, that he, irrefutably, would have removed an "objectionable" juror. This is very plausible, just as the Vreen court found it "plausible" that Vreen would not want Juror 55 on his jury "based on his belief that Juror 55's background evidenced a bias for the prosecution." State v. Vreen, 99 Wn. App. 662, 667, 669, 994 P. 2d 905 (Div. 3 2000). But Meredith's ability to attempt to remove another juror was severely encumbered since he had exhausted all of the peremptory challenges he "knowingly" was afforded.

To show that an "objectionable" juror deliberated to a guilty verdict, Meredith contends, is equivalent to showing prejudice, which, with this type of error, is not required, although Meredith has done so.

Nowhere in State v. Bird, supra, does the court indicate any reason or to what level or extent the juror that Bird desired to have excused was "objectionable", only that Bird would have used a peremptory challenge on him.

In the more recent opinion of State v. Saintcalle, our Supreme Court cited the conclusions made by the courts in Vreen and Bird that new trials were granted because of a "wrongly denied peremptory challenge." No other contingencies or requirements were specified or mentioned. See State v. Saintcalle, 178 Wn. 2d 34, 68, 309 P. 3d 326 (2013). Nevertheless, the deprivation

of a peremptory challenge to which Meredith was lawfully entitled constitutes a structural error requiring reversal. Meredith contends his case is analogous in every relevant respect to State v. Vreen and State v. Bird, and should be reversed accordingly.

f. Meredith asserts that the trial court erred when it materially departed from the applicable rules governing the allotment of peremptory challenges, requiring reversal as prejudice is presumed.

Number of peremptory challenges to be afforded a defendant is a procedural matter properly controlled by court rule. State v. Nelson, 18 Wn. App. 161, 556 P. 2d 984 (Div. 1 1977).

Meredith asserts that the trial court materially departed from the mandates of CrR 6.4(e)(1) and 6.5.

Prejudice will be presumed if there has been a material departure from the applicable statutes or rules governing the jury selection process. RCW 4.44.210; CrR 6.4(e); State v. Williamson, 100 Wash. App. 248, 253, 996 P. 2d 1097 (Div. 3 2000); State v. Tingdale, 117 Wash. 2d 595, 600, 817 P. 2d 850 (1991).

When statutory jury selection procedures are materially violated, the claimant need not show actual prejudice; rather prejudice is presumed. Brady v. Fireboard Corp., 71 Wn. App. 280, 284, 857 P. 2d 1094 (Div. 2 1993)(citing State v. Tingdale, 117 Wash. 2d at 600).

9. The State ignores Meredith's argument that his constitutional right to due process was violated.

The State has failed to respond to Meredith's claim that his due process rights under the 14TH Amendment and article 1, section 3 of the Washington Constitution were violated when the trial court erroneously deprived him of his full complement of peremptory challenges required under CrR 6.4(e)(1) and 6.5.

The Ninth Circuit in Vansickel v. White, 166 F. 3d 953 (9TH Cir. 1999) addressed whether denial of peremptory challenges provided for by a state statute violates a state criminal defendant's federal constitutional rights. The court held that "Vansickel's constitutional rights were violated because he did not receive the full complement of peremptory challenges he was entitled to under California law." Id. at 954. "This state right to peremptory challenges is a state-created liberty interest protected by the Fourteenth Amendment to the Constitution." Id. at 957.

In arriving at this conclusion that Vansickel's due process rights were violated, the court cited numerous cases that have considered the same issue: In Ross v. Oklahoma, 487 U.S. 81, 89 (1988), the Supreme Court concluded that peremptory challenges are a creature of statute, not required by the Constitution, and "[a]s such, the 'right' to peremptory challenges is 'denied or impaired' only if the defendant does not receive that which state law provides." Id. at 89; also U.S. v. Martinez-Salazar, 146 F. 3d 653, 658 (1998) (held "due process would be violated if a trial court permitted a defendant to exercise fewer than the number of peremptory challenges authorized by law." Overturned in U.S. v. Martinez-

Salazar, 528 U.S. 304 (2000)(holding Martinez-Salazar was not denied a peremptory challenge, but used it curatively, therefore, he received all he was lawfully entitled, so his due process claim fails)), Fetterly v. Paskett, 997 F. 2d 1295, 1300 (9TH Cir. 1993)("[T]he failure of a state to abide by its own statutory commands may implicate a liberty interest protected by the Fourteenth Amendment against arbitrary deprivation by a state.") ; Hines v. Enomoto, 658 F. 2d 667 (9TH Cir. 1981)(holding denial of half of the peremptory challenges authorized by statute violates a defendant's due process rights).

Other relevant cases of due process violations requiring reversal: In Harrison v. United States, 163 U.S. 140, 141, 16 S. Ct. 961, 41 L.Ed 104 (1896), the Supreme Court reversed because the trial judge erred in allotting defendant only three peremptory strikes, instead of the ten to which he was entitled. The court did not require a showing of prejudice for this statutory violation. Kirk v. Raymark Indus. Inc., 61 F. 3d at 158 (3RD Cir. 1995); In U.S. v. Baker, 10 F. 3d 1374, 1404 (C.A. 9 (Nev.) 1993) the court held: "Defendants' due process regarding prospective jurors extended only to guarantee that defendants would receive full complement of peremptory challenges to which they were entitled by law."

It does not end due process inquiry to state that peremptory challenges are a creature of statute, and not constitutionally required, and when peremptory challenges are granted by statute, manner in which use is permitted must comport with due process. U.S. Const. Amend. 5 ; U.S. v. Harbin, 250 F. 3d 532 (C.A. 7 (Ind.) 2001).

The due process requirement of the Fifth Amendment is incorporated into the Fourteenth Amendment. Vansickel v. White, 166 F. 3d at 957 (9TH Cir. 1999).

Meredith argues that his case is analogous to the above cases in that the trial court erroneously deprived him of his full complement of peremptory challenges lawfully entitled to him via CrR 6.4(a)(1) and 6.5, which, in turn, precluded Meredith of his state-protected right to exercise or exhaust all entitled peremptory challenges pursuant to CrR 6.4(e)(2), thus violating Meredith's due process rights under either the U.S. Constitution, Amendment 14 and/or the Washington Constitution, art. 1, section 3.

"Absent a constitutional violation, 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." Rivera v. Illinois, 556 U.S. 148 (2009).

Moreover, according to the Court in Rivera, due process is violated if "the trial judge repeatedly or deliberately misapplied the law or acted in an arbitrary or irrational manner." Id. Meredith asserts that the trial judge in his case had a fundamental duty to correctly apply CrR 6.4(e)(1) and 6.5, the applicable rules that govern the number of peremptory challenges to properly allot to each party. Meredith's trial judge irrationally misapplied this state-protected rule.

Merriam-Webster Dictionary defines "irrational" as "not endowed with reason or understanding."

Meredith is not in any way suggesting his trial judge acted intentionally, only that depriving Meredith of a peremptory challenge to which he was lawfully entitled was to act without reason or understanding. In this regard, Meredith's constitutional right to due process was violated, requiring reversal.

2. FAILURE TO OBJECT TO THE TRIAL COURT'S ERROR OF FAILING TO ALLOT MEREDITH HIS FULL COMPLEMENT OF PEREMPTORY CHALLENGES VIOLATED MEREDITH'S SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

a. In contrast to the State's assertion, Meredith can demonstrate deficiency of trial counsel for failing to object to the trial court's failure to allot Meredith his full complement of peremptory challenges.

To demonstrate ineffective assistance of counsel, a defendant must satisfy the two-prong test laid out in Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984); see also State v. Thomas, 109 Wn.2d 222, 743 P.2d 816 (1987). First, a defendant must demonstrate that his attorney's representation fell below an objective standard of reasonableness. Second, a defendant must show that he was prejudiced by the deficient representation.

When counsel's conduct can be characterized as legitimate trial strategy or tactics, performance is not deficient. But a criminal defendant can rebut the presumption of reasonable performance by demonstrating that there is no conceivable legitimate tactic explaining counsel's performance. State v. Grier, 171 Wn.2d 17, 246 P.3d 1260 (2011).

"[A]n attorney ordinarily will fail to make an objection for one or two reasons: either a strategic decision is made not to object, or the attorney will fail to object because of ignorance

of the law." Hines v. Enomoto, 658 F. 2d 667, 673 (9TH Cir. 1981).

Meredith contends there is no conceivable legitimate tactic or strategic value in a party's failing to object to not receiving the full number of peremptory challenges to which one is entitled; hence Mr. Purtzer's failure to object was clearly due to his oversight of the rules that govern peremptory challenges, not due to a strategic decision. Therefore, Mr. Purtzer's performance cannot be characterized as legitimate trial strategy or tactics. Mr. Purtzer's failure to object can only be characterized as deficient performance which fell below an objective standard of reasonableness.

Mr. Purtzer missed the most elementary statutory protection provided to defendants. He unknowingly forfeited one of Meredith's guaranteed allotment of peremptory challenges, "one of the most important of the rights secured to the accused," Pointer v. United States, 151 U.S. 396, 408 (1894), due to his oversight of this basic statutory protection. This error would not have been difficult for counsel to avoid. A mere reading of the basic peremptory challenge statute would have revealed that Meredith was entitled to eight peremptory challenges. Mr. Purtzer's failure to make even this minimal effort to protect such an important right constitutes deficient performance. See, Morris v. California, 966 F. 2d 448, 454-55 (1991).

b. Meredith can meet his burden of establishing prejudice for purposes of his claim of ineffective assistance of counsel.

The State acknowledge in their response that "[t]he record does not reflect that either party objected to the number of peremptory challenges or being deprived a peremptory challenge."

Meredith has established that his counsel's performance was deficient for his failure to object to the trial court's error of allotting Meredith an improper number of peremptory challenges, resulting in a structural error.

"Where counsel's deficient performance resulted in a structural error, prejudice will be presumed." McGurk v. Stenberg, 163 F. 3d 470, 475 (8TH Cir. 1998)(held that when a 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 Wash. 2d 58, 132, 292 P. 3d 715 (2012).

Trial counsels' failure to object was also prejudicial in that had counsel objected and received an additional entitled peremptory challenge, the composition of the jury would have been different as counsel would have removed another objectionable/undesirable juror from the jury that deliberated, as confirmed by Mr. Purtzer in his affidavit. A different juror may have rendered a different verdict. Also, with a full

allotment of peremptory challenges, counsel's strategy, as well as the State's strategy, for exercising their peremptory challenges would have been different, resulting in a different jury that may have rendered a different verdict.

The rule in Gray v. Mississippi is that constitutional error in jury selection requires reversal if it changes the composition of the jury. Gray v. Mississippi, 481 U.S. 648 (1987).

Meredith's due process violation which resulted from the violation of his statutory right to exercise all of his authorized peremptory challenges constitutes a "constitutional error in jury selection" for purposes of this rule.

Meredith has established prejudice, whether it be "presumed prejudice" or otherwise.

3. INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL.

Although Sixth Amendment right to counsel does not require an appellate attorney to raise every non-frivolous issue on appeal, an attorney who has presented strong but unsuccessful claims on appeal may nonetheless deliver a deficient performance by omitting an issue that obviously would have resulted in reversal on appeal. Allen v. Howes, 599 F. Supp. 2d 857 (E.D. Mich. 2009).

Meredith's appellate attorney, James E. Lobsenz, could have, and should have, raised the issue of the trial court's failure to provide Meredith with his full complement of peremptory challenges resulting in a structural error, as well as raising the issue of Meredith's trial attorney's failure to object.

Had Meredith's appellate attorney raised these issues on direct appeal, Meredith would have received a new trial. See In re Orange, 152 Wash. 2d 795, 814, 100 P. 3d 291 (2014).

4. MEREDITH CAN SATISFY THE REQUIREMENTS OF RAP 2.5 (a)(3) IF DEEMED NECESSARY.

Manifest errors affecting a constitutional right may be raised for the first time on appeal. RAP 2.5 (a)(3).

It is well established that to raise a claim for the first time on appeal, "the trial record must be sufficient to determine the merits of the claim." State v. Koss, 181 Wn. 2d 493, 334 P. 3d 1042, 1047 (2014).

As Meredith has demonstrated, the record is sufficient in his case to determine the merits of the claimed errors of failure to provide him his full allotment of peremptory challenges, as well as his counsel's failure to object.

"When error is structural, it defies harmless error analysis. Further, it makes sense to presume prejudice despite the lack of an objection for structural errors because such errors necessarily render a trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence. Thus, RAP 2.5 will always be satisfied in cases of structural error like Bone-Club, Orange, Easterling, and Brightman." State v. Sublett, 176 Wash. 2d 58, 153, 292 P. 3d 715 (2012) (citations omitted). "And where error is not structural, we must conduct a thorough RAP 2.5 analysis." Id. at 154.

5. THE STATE INCORRECTLY ASSERTS THAT A "SAME CRIMINAL CONDUCT ANALYSIS IS REQUIRED IN MEREDITH'S ISSUE OF MISCALCULATION OF HIS OFFENDER SCORE.

The "same criminal conduct analysis is inapplicable to Meredith's sentence. The applicable statute in 1994, the date of Meredith's crime is RCW 9.94A.360 (former). The issue is "prior offenses ran concurrently should be counted as one offense in Meredith's offender score. The mandatory "same criminal conduct" rule came into effect in 1995.

6. The standard for a PRP can be met by Meredith.

Where error alleged in a personal restraint petition gives rise to conclusive presumption of prejudice, proof of the error automatically provides proof of the prejudice. In re of Richardson, 100 Wn. 2d 669, 675 P. 2d 209 (1983)

[T]he rule established in In re Richardson, [supra], and restated in In re of St. Pierre, 118 Wash. 2d 321, 328, 823 P. 2d 492 (1992) -- that errors that are presumptively prejudicial on direct appeal will generally be presumed prejudicial in a PRP -- is still good law. In re of Stockwell, 179 Wn. 2d 558, 604, 316 P. 3d 1007 (2014).

7. CONCLUSION

Meredith's convictions should be reversed pursuant

to the arguments laid out by Meredith in both his Opening Brief and his Supplemental Brief and this Reply Brief.

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

Dated, this day of July 9TH, 2015

GARY MEREDITH
DOC # 984777
STAFFORD CREEK CORRECTIONS CENTER
191 CONSTANTINE WAY
ABERDEEN, WA 98520

APPENDIX

A

IN THE WASHINGTON STATE COURT OF APPEALS
DIVISION II

STATE OF WASHINGTON, Plaintiff, v. GARY D. MEREDITH, Defendant.	))))))))))	NO. 46671-6-II AFFIDAVIT OF BRETT A. PURTZER

STATE OF WASHINGTON)
: ss.
County of Pierce)

Brett A. Purtzer, being first duly sworn, on oath, deposes and says:

I am over the age of eighteen and competent to be a witness herein.

I represented Gary Meredith during his trial in 1996, Pierce County Superior Court cause #95-1-04949-6. To the best of my recollection, as well as referring to the trial transcripts and other document, I can conclude that:

1. The trial court allotted only 7 peremptory challenges to each party;

2. The exercising of peremptory challenges took place at sidebar;

3. The defense exercised all 7 of its allotted peremptory challenges;

4. Had we, the defense, been afforded an additional peremptory challenge, we would have definitely used it to our advantage by excusing one of

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the following jurors, with a high probability for an entirely different outcome in the verdict.

Juror #11, Seat 3 was objectionable/undesirable because the juror's daughter was employed at Good Samaritan Hospital where the victim, Bobbi Lapie, was examined. Additionally, Good Samaritan employed the state's testifying medical expert witnesses, Dr. Bobbie Sipes and RN Michelle Russell. RP 45 of voir dire.

Juror #14, Seat 5 was objectionable/undesirable because the juror was strict. When the juror's children were teenagers, they were allowed to attend only approved, supervised group parties, church and school activities. When the son was older, he could only attend family-approved dates. No alcohol was kept in the home and this case involved alcohol consumption and associated behavior. RP 22-23.

Juror #16, Seat 7 was objectionable/undesirable because the juror only allowed group dating within church functions and alcohol was not allowed in the home. Further, the juror's children were against alcohol and this case involved alcohol consumption and associated behavior. RP 25-26.

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The above is true and accurate to the best of my recollection.

FURTHER YOUR AFFIANT SAYETH NAUGHT.

BRETT A. PURTZER

SUBSCRIBED AND SWORN to before me this 24th day of June, 2015.

LEE ANN MATHEWS
NOTARY PUBLIC
COMMISSION EXPIRES
11-05-18
STATE OF WASHINGTON

NOTARY PUBLIC in and for the State of Washington, residing at Puyallup.
My commission expires: 11/05/18.

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DECLARATION OF SERVICE BY MAIL
GR 3.1

I, GARY MEREDITH, declare and say:

That on the 9TH day of JULY, 2015, 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:

Petitioner's Reply Brief to personal restraint petition;

Motion for Permission TO FILE EXTENDED BRIEF

addressed to the following:

Court of Appeals
of the
State of Washington
Div. 2
950 Broadway, Ste 300
Tacoma, WA 98402

FILED
COURT OF APPEALS
DIVISION II
2015 JUL 13 PM 1:32
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 9TH day of JULY, 2015, in the City of Aberdeen, County of Grays Harbor, State of Washington.

WITH ALL RIGHTS RESERVED.

Gary Meredith
Signature

GARY MEREDITH
Printed Name

c/o [DOC 984777 UNIT H4/B38
STAFFORD CREEK CORRECTIONS CENTER
191 CONSTANTINE WAY
ABERDEEN WA (98520)]

CERTIFICATE OF SERVICE
I certify that I mailed
1 copies of Reply
to T Roberts, DPA
&
7/15/15 [signature]
Date Signed