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No. 94582-9

THE SUPREME COURT OF THE STATE OF WASHINGTON

In re the Personal Restraint Petition of:

GARY DANIEL MEREDITH,

Respondent.

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

SUPPLEMENTAL BRIEF OF RESPONDENT

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A. SUPPLEMENTAL ASSIGNMENTS OF ERROR

1. Failure by a trial court to provide the full number of statutorily mandated peremptory challenges is a structural error that undermines the framework of the trial. Prejudice is presumed when raised on direct appeal or when based on ineffective assistance of appellate counsel. Is the court's failure to provide all required peremptory challenges structural error for which prejudice is presumed?

2. Whether Meredith's right to due process under Washington Constitution Article 1, § 3 and U.S. Constitution, Fourteenth Amendment were violated where the trial court failed to provide the full number of peremptory challenges allowed to him pursuant to CrR 6.5?

3. Whether Meredith was denied his Sixth Amendment right to effective assistance of counsel when defense counsel failed to object to the failure of the court to grant an eighth peremptory challenge?

4. Whether Meredith was denied his right to effective appellate counsel where counsel did not challenge his right to an eighth peremptory challenge in his direct appeal?

5. Did the failure of the trial court to provide an eighth peremptory challenge constitute a material departure from the rules regarding jury selection?

B. SUPPLEMENTAL STATEMENT OF FACTS

Meredith was convicted of rape of a child in the second degree (count I) and communication with a minor for immoral purposes (count II). The trial court's usual practice was to seat fourteen jurors and, prior to deliberations, draw two alternates randomly from the entire panel. In this case the court, using this method, seated twelve jurors and two alternates. *State v. Meredith*.¹ Under CrR 6.4(e)(1) and CrR 6.5, each party was entitled to eight preemptory challenges. However, the court allowed only seven preemptory challenges per side, and each exercised all seven peremptories allowed. *In re Restraint of Meredith*, No. 46671-6-II (2017 WL 588205, Slip Op. filed February 14, 2017, at 6). During trial, the court excused one of the empaneled jurors (No. 32) due to illness and after both sides rested, randomly selected the second alternate (No. 16), leaving a panel of twelve jurors to deliberate. *In re Meredith*, Slip Op. at 6. Meredith argued a *Batson*² violation on direct appeal,³ and this Court affirmed his convictions after review was accepted to determine the

¹*State v. Meredith*, 165 Wn. App. 704, 259 P.3d 324 (2011), aff'd, 178 Wn.2d 180, 306 P.3d 942 (2013), cert. denied, 134 S. Ct. 1329, 188 L. Ed. 2d 339 (2014).

²*Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

³Meredith also argued that (1) the trial court violated his rights to confrontation and cross-examination, (2) insufficient evidence supported his conviction for communication with a minor for immoral purposes, and (3) the trial court improperly prohibited him from arguing the absence of DNA evidence during closing argument.

scope of the bright line *Batson* rule articulated in *State v Rhone*.⁴ Meredith filed a personal restraint petition alleging, *inter alia*, that his right to the required number of peremptory challenges under CrR 6.5 was impaired and that he did not receive effective assistance of trial and appellate counsel. *In re Meredith*, Slip Op. at 3-6. Division Two of the Court of Appeals reversed his convictions and determined that if appellate counsel had raised the peremptory challenge issue on direct appeal, the lower court would have reversed and remanded Meredith's case for a new trial, and therefore Meredith was prejudiced by appellate counsel's failure to raise that issue. *In re Meredith*, Slip Op. at 6, 11. The State filed a motion for reconsideration, which was denied on May 23, 2017.

C. SUPPLEMENTAL ARGUMENT

1. The Court Of Appeals Properly Reversed Meredith's Convictions

a. *Meredith was entitled to eight peremptory challenges under CrR 6.5*

There is no dispute that Meredith was entitled to eight peremptory challenges, yet the court granted only seven. The court empaneled a total of 14 jurors, including two alternates. Both the State and Meredith exhausted all seven peremptory challenges, Meredith demonstrated that he

⁴168 Wn.2d 645, 229 P.3d 752 (2010).

would have exercised his eighth peremptory challenge, if it had been granted, on venire member 11, 14, or 16, two of whom deliberated to reach a verdict. *In re Meredith*, Slip. Op. at 6.

In *Rivera v. Illinois*, 556 U.S. 148, 129 S.Ct. 1446, 173 L.Ed.2d 320 (2009), the issue addressed by the Supreme Court was whether the erroneous denial of a defense peremptory challenge required automatic reversal of the conviction pursuant to the Due Process Clause of the Fourteenth Amendment. The Court held that an error is “‘structural,’ therefore ‘requir[ing] automatic reversal,’ only when ‘the error necessarily render[s] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.’ ” *Id.* at 160 (quoting *Washington v. Recuenco*, 548 U.S. 212, 218–19, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006)). The Court held that individual states “retain[ed] the prerogative to decide whether such errors deprive a tribunal of its lawful authority and thus require automatic reversal.” *Rivera*, 556 U.S. at 160. It is the domain of the individual state to determine the number of peremptory challenges allowed and to define their purpose and the manner of their exercise. *Ross v. Oklahoma*, 487 U.S. 81, 108 S.Ct. 2273, 101 L.Ed.2d 80 (1988) (citing *Stilson v. United States*, 250 U.S. 583, 587, 40 S.Ct. 28, 29, 63 L.Ed. 1154 (1919)). In *State v. Vreen*, 143 Wn.2d 923, 26 P.3d 236

(2001), this Court held that an erroneous denial of a litigant's peremptory challenge cannot be harmless when the objectionable juror actually deliberates. See also *State v. Evans*, 100 Wn.App. 757, 774, 998 P.2d 373 (2000) ("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.") *Evans*, 100 Wn.App. at 774 (footnote omitted)). The statutory "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 88. In this case, Meredith's statutory right to eight peremptory challenges was impaired; after exercising seven peremptory challenges, two more jurors needed to be empaneled. *In re Meredith*, Slip Op. at 6. . Although the premise of a peremptory challenge is that the accused need not identify a specific basis upon which to challenge a particular juror, and therefore, the accused person is not required to show that a particular juror sat on the case that should have been excused. *Vreen*, 143 Wn. 2d at 931. Meredith has presented evidence that has he been allotted his full compliment of eight peremptories, he could have afforded to be more liberal of his challenges regarding venire members 11, 14, and 16, for each of whom he would have used a peremptory challenge if possible. Reply Brief of Petitioner and

Declaration of Bret Purtzer. He would have challenged venire member 11 (Report of Proceedings (RP) (5/2/96) at 45), venire member 14 (RP (5/2/96) at 22-23), or venire member 16 (RP (5/2/96) at 25-26). However, because the full number of peremptories was impaired, Meredith needed to be protective of the use of his seven peremptories. But even if he struck any or all of those jurors, other jurors whom Meredith found necessary to strike would have been seated. Meredith was precluded from exercising his eighth challenge on Juror 35 and 39, both of whom ultimately deliberated to a verdict. Venire member 39 unquestionably qualified as an objectionable juror due to his unusually strict parental attitude regarding permitting his daughter to date given the circumstances of the case, which involved young teenage girls "partying" and drinking with older males. RP (5/2/96) at 124-25. Had Meredith been provided with his eighth peremptory, he would have undoubtedly used it on Juror 39. Jurors 11, 14, 35, and 39 all deliberated to reach a verdict. By not being afforded his statutorily- guaranteed eighth peremptory, his right to exercise his peremptory challenge was impaired, requiring reversal.

2. **The Trial Court's Failure To Grant All Eight Mandated Peremptory Challenges Is Structural Error**
"The denial or impairment of the right [to peremptory challenge] is

reversible error without a showing of prejudice.” *Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965), overruled on other grounds by *Batson*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

Generally, a party must contemporaneously object to preserve an error. RAP 2.5. However, RAP 2.5(a)(3) allows an error to be raised for the first time on appeal if it is a “manifest error affecting a constitutional right.” This Court has previously interpreted “manifest error” as requiring a defendant to show actual prejudice. *State v. O’Hara*, 167 Wn.2d 91, 99, 217 P.3d 756 (2009). In this case, RAP 2.5(a) does not apply in its typical manner because the failure to provide all mandated peremptory challenges constitutes structural error. Structural error is “a special category of manifest error affecting a constitutional right.” *State v. Paumier*, 176 Wn.2d 29, 36, 288 P.3d 1126 (2012). See also, *id.* at 54 (Wiggins, J., dissenting) (“If an error is labeled structural and presumed prejudicial, like in these cases, it will always be a ‘manifest error affecting a constitutional right.’”)

In *Arizona v. Fulminante*, 499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991), the Supreme Court divided constitutional errors into two classes: structural errors and trial-type errors. See *State v. Levy*, 156 Wn.2d 709, 725, 132 P.3d 1076 (2006) (reiterating difference between

structural and trial-type errors). Unlike structural error, a classic trial error is one “which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt.” *Fulminante*, 499 U.S. at 307-08. Far from being an error during the presentation of the case, which is quantifiable in light of the evidence presented, the impairment of Meredith’s right to an eighth peremptory impacted the structure of the trial. Structural errors are “defects in the constitution of the trial mechanism, which defy analysis by ‘harmless-error’ standards.” *Id.* at 309. Unlike most constitutional errors, structural errors are not subject to harmless error review. See, *Paumier*, 176 Wn.2d at 33 (Wiggins, J., dissenting). Because structural errors are necessarily unquantifiable and indeterminate, such errors require automatic reversal. *In re Pers. Restraint of Stockwell*, 179 Wn.2d 588, 608, 316 P.3d 1007 (2014).

This case does not entail a “peremptory loss” case where a litigant “loses” a peremptory strike when he or she strikes a juror who should have been removed for cause; any argument that the venire members in question were not challenged for cause is not relevant; the harm that occurred is the failure to grant the peremptory itself.

In addressing peremptory challenges, this Court has previously held that impairment of peremptory challenges is structural error. In *Vreen, supra*, this Court held that the erroneous denial of a peremptory challenge is not subject to harmless error analysis when the objectionable juror sits on the panel that convicts the defendant. *Id.* at 932. In doing so, this Court recognized that there was no way to determine the impact of improperly seating the juror, and that the only appropriate remedy was a new trial. *Id.* at 930-31.

In *Rivera v. Illinois*, 556 U.S. 148, 129 S.Ct. 1446, 173 L.Ed.2d 320 (2009) the Court noted that “[s]tates 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*.” The doctrine that an erroneous denial or impairment of a peremptory challenge may constitute structural or *per se* reversible error is followed in *State v. Bird*, 136 Wn.App. 127, 148 P.3d 1058 (2006). In *Bird*, the trial court miscalculated the number of Bird’s remaining peremptory challenges during jury selection, thereby denying him an available challenge to which he was entitled. *Bird*, 136 Wn.App. at 131–32. Division Two held that the trial court’s erroneous denial of a peremptory challenge left an objectionable juror on the jury, which required reversal without a showing of prejudice. *Bird*, 136 Wn.App. at

134. In a post-*Rivera* unpublished opinion involving analogous facts to the case at bar, Division One found the trial court deprived the appellant of the additional peremptory challenges to which he was entitled and the erroneous denial of a peremptory challenge is not subject to harmless error analysis. *State v. Pederson*, 76 Wn.App. 2013 WL 4500345 (August 19, 2013).⁵ The Court held that Pederson did not waive his right to an additional peremptory by failing to object because the record does not indicate Pederson knew of and then intentionally and voluntarily relinquished his right to the full number of peremptories to which he was entitled. *Id.* at 5.

Although the law regarding automatic reversal has softened in federal courts, Washington is not alone among states in its adherence to an automatic reversal standard where peremptory challenges are impaired. See, e.g., *State v. Mootz*, 808 N.W.2d 207 (Iowa 2012) (rule governing peremptory challenges requires automatic reversal of a defendant's conviction when the trial court's erroneous ruling on a reverse-*Batson* challenge leads to the denial of one of the defendant's peremptory challenges and the objectionable juror is improperly seated);

⁵ Pursuant to GR 14.1, unpublished opinions filed after March 1, 2013 may be cited but are not binding authorities. They may be given such persuasive value as this Court deems appropriate.

Commonwealth v. Hampton, 457 Mass. 152, 928 N.E.2d 917, 927 (2010) (erroneous denial of a peremptory challenge requires automatic reversal without a showing of prejudice); *People v. Hecker*, 15 N.Y.3d 625, 917 N.Y.S.2d 39, 942 N.E.2d 248, 272 (2010) (denial of a peremptory challenge mandates automatic reversal); *Hardison v. State*, 94 So.3d 1092, 1099 (Miss. 2012) (trial court's failure to conduct full *Batson* analysis by failing to require State to show pretext was presumptively prejudicial, warranting automatic reversal for new trial).

The impairment by the trial court of Meredith's eighth peremptory is in distinct contrast to cases in which peremptory challenge errors do not result in automatic reversal. In those cases, the error arises from "loss" of a peremptory due to denial of a "for-cause" challenge, thus "forcing" the use of a peremptory. *State v. Fire*, 145 Wn.2d 152, 165, 165, 34 P.3d 1218 (2001) (defendant using a peremptory challenge who elects to cure a trial court's error in not excusing a juror for cause, exhausts his peremptory challenges before the completion of jury selection and is subsequently convicted by a jury on which no biased juror sat has not demonstrated prejudice, and reversal of his conviction is not warranted.)

In *Paumier*, which involves a courtroom closure challenge, Justice Wiggins' dissent held that no structural error occurred. *Paumier*, 176

Wn.2d at 47–50 (Wiggins, J., dissenting). In his dissent, however, Justice Wiggins notes that “[s]tructural errors are rare and encompass only the most egregious constitutional violations.” *Id.* at 46. As examples of structural errors, he writes that instances of structural error

include complete denial of counsel, a biased trial judge, racial discrimination in the selection of a grand jury, denial of right to self-representation, and a defective reasonable-doubt instruction. *Id.*; see also *State v. Vreen*, 143 Wash.2d 923, 930, 26 P.3d 236 (2001) (denial of peremptory challenge is structural error).

Paumier, 176 Wn.2d at 46 (Wiggins, J., dissenting).

The error in this case, because it involves more than mere “peremptory loss,” is comparable to courtroom closure cases requiring automatic reversal or “reversal per se” due to structural error.

a. The trial court’s failure to grant all required peremptory challenges violated Meredith’s right to due process

Meredith was denied due process because he was denied the full complement of eight peremptory challenges allowed under Washington law. Meredith did not knowingly or voluntarily relinquish or waive his eighth peremptory challenge to which he was entitled under CrR 6.5.

There is no freestanding constitutional right to peremptory challenges. See, e.g., *U.S. v. Martinez–Salazar*, 528 U.S., 304, 311, 120 S.Ct. 774, 145 L.Ed.2d 792 (2000). *Ross v. Oklahoma*, 487 U.S. 81 89,

108 S.Ct. 2273 101 L. Ed. 2d 80 (1988)) and *Martinez-Salazar* held that the remedy of automatic reversal was not constitutionally required. Peremptory challenges are not constitutionally protected fundamental rights, and therefore “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.

Criminal defendants have a constitutionally protected liberty interest in their state-provided peremptory challenge rights. *Cf. Evitts v. Lucey*, 469 U.S. 387, 393, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985) (although “the Constitution does not require States to grant appeals as of right to criminal defendants,” States that provide such appeals “must comport with the demands of the Due Process and Equal Protection Clauses”). Here, because Meredith received only seven peremptories and because the case does not involve a “peremptory loss” in which he was forced to use a peremptory strike to remove a prospective juror not removed for cause, but instead involved a failure to grant a peremptory, he is able to show that the error violates the due process provisions in both the Washington Constitution, Article 1, Section 3,⁶ and United States Constitution,

⁶Const. art. 1, § 3 provides: “No person shall be deprived of life, liberty, or property, without due process of law.”

Fourteenth Amendment.⁷

The trial court unquestionably impaired Meredith's full complement of peremptories; he did not receive all that Washington law allowed him, in violation of his right to due process. Unlike cases in which an error by the court resulted in a litigant being forced to use or "wasting" a peremptory in order to "undo" the trial court's error (see, e.g., *Ross, supra*), Meredith was deprived of his eighth peremptory through a combination of court error and error by trial counsel. Due process requires reversal whenever a criminal defendant's peremptory challenge is erroneously withheld, as is the case here. See also, Supplemental Reply Brief of Petitioner at 7-8.

3. Meredith Received Ineffective Assistance Of Trial Counsel

Assuming *arguendo* that automatic reversal is not required pursuant to *Vreen, supra*, Meredith was prejudiced by counsel's failure to object to the trial counsel's failure to provide eight peremptories. Had counsel objected, the trial court would have been obligated to provide an eighth peremptory, and would then have been able to exercise his

⁷Fourteenth Amendment of the United States Constitution provides, in pertinent part: No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any state deprive any person life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

challenges to remove an objectionable venire member such as Juror 39. The Sixth Amendment and Article I, § 22 guarantee effective assistance of counsel. *State v. Estes*, 188 Wn.2d 450, 457, 395 P.3d 1045 (2017). To prevail on an ineffective assistance claim, trial counsel's conduct must have been deficient in some respect, and that deficiency must have prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984).

Trial counsel was ineffective due to his failure to object to the trial court's failure to allocate the correct number of peremptory challenges. The peremptory challenge is one of the oldest established rights of the criminal defendant. While not guaranteed by the Constitution, the right of peremptory challenge is nonetheless an important statutory right that courts have considered vital to an impartial jury trial. *Stilson v. United States*, 250 U.S. 583, 586, 40 S.Ct. 28, 29–30, 63 L.Ed. 1154 (1919). The right of peremptory challenge has “very old credentials[.]” *Swain*, 380 U.S. at 212, 85 S.Ct. at 831. Meredith's trial counsel, had he been aware of the basic, clear, and easily understood requirements of CrR 6.4(e)(1) and CrR 6.5, would have known that Meredith was entitled to eight peremptory challenges and made the appropriate objection and argument in favor of an eighth peremptory. Due to his failure to object, counsel

forfeited Meredith's fundamental, statutory right. The failure to be aware of this fundamental right and corresponding failure to object during *voir dire* constituted deficient performance of trial counsel. See also, Petitioner's Supplemental Reply at 10 -12.

a. Meredith's appellate counsel provided ineffective assistance by failing to challenge the trial court's failure to grant the mandated number of peremptory challenges

Due process and the right to counsel guarantee the effective assistance of appellate counsel. *In re Pers. Restraint Petition of Dalluge*, 152 Wn.2d 772, 787, 100 P.3d 279 (2004) (citing *Evitts v. Lucey*, *supra*). Furthermore, Washington's constitution specifically includes a constitutional right to appeal. Art. I, § 22; *State v. Chetty*, 167 Wn. App. 432, 438, 272 P.3d 918 (2012). Appellate counsel provides ineffective assistance in a criminal appeal by failing to raise meritorious legal issues on direct review. *In re Pers. Restraint of Morris*, 176 Wn.2d 157, 165, 288 P.3d 1140 (2012). Here, Meredith's appellate attorney provided deficient performance by failing to argue on direct appeal that the trial court did not grant a full complement of peremptory challenges. Just as in cases in which appellate counsel was determined to be ineffective by failing to raise issues regarding courtroom closure, had Meredith's counsel raised the issue, this would have resulted in automatic reversal. *Morris*,

176 Wn.2d at 166-67. Counsel's failure is analogous to the reasoning contained in *In re Personal Restraint of Orange*, 152 Wn.2d 795, 814, 100 P.3d 291 (2004), in which this Court held that "[t]he failure to raise the courtroom closure issue was not the product of 'strategic' or 'tactical' thinking, and it deprived Orange of the opportunity to have the constitutional error deemed per se prejudicial on direct appeal." *Orange*, 152 Wn.2d at 814. The reasoning in *Morris* and *Orange* are instructive; as was the case in *Morris*, neither the State nor Meredith objected to the error at trial. *Morris*, 176 Wn.2d at 162. This Court determined that Morris did not waive his right to be present and that "[m]oreover, a defendant must have knowledge of a right to waive it." *Id.* at 167 (citing *State v. Duckett*, 141 Wn.App. 797, 806-07, 173 P.3d 948 (2007)). Meredith's appellate counsel provided deficient performance by neglecting to raise this issue on direct appeal, in violation of Meredith's Sixth Amendment right to counsel. *Morris*, 176 Wn.2d at 166. Moreover, Meredith was prejudiced because he would have been entitled to automatic reversal on direct appeal. See *In re Pers. Restraint of D'Allesandro*, 178 Wn.App. 457, 474, 314 P.3d 744 (2013) (public trial violation in which defendant was denied effective assistance of appellate counsel because he would have been entitled to the benefit of the per se

prejudice/automatic reversal rule), review denied), 182 Wn.2d 1021 (2015). See also, Petitioner's Supplemental Reply Brief, at 13-16.

b. Meredith did not waive his right to an eighth peremptory challenge

Under these facts, it cannot be said that Meredith knew of or had any intent to waive his right to additional peremptory challenges. Waiver “ordinarily applies to all rights or privileges 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 at 102 (“Waiver is the intentional relinquishment of a known right”). Waiver is a matter of intention, cannot be inferred from oversight or negligence. *Dombrosky*, 84 Wn.App. at 255. Although Meredith’s counsel failed to object to the court’s error, there is no indication the Meredith knew of and intentionally relinquished his right to an eighth peremptory, therefore preserving this right for appellate review. See, *Pederson*, 76 Wn.App. 2013 WL 4500345, *supra*, (error preserved for review despite failure of trial counsel to object to failure to provide all peremptories, resulting in reversal without showing of prejudice). Last, the issues raised by Meredith constitute a structural error inhering a conclusion presumption of

prejudice. See, *In re Stockwell*, 179 Wn.2d at 605. See also, Petitioner's Supplemental Reply at 9-10, 17-18.

4. The Trial Court's Material Departure From The Statutory Requirements For Jury Selection Is Presumed Prejudicial

Prejudice is presumed when there is a material departure from the statutes or rules governing jury selection. *State v. Tingdale*, 117 Wn.2d 595, 600, 817 P.2d 850 (1991). Here, the trial court's failure to comply with CrR 6.5 constitutes a "material departure from the established standards applicable to the exercise of peremptory challenges." *Bird*, 36 Wn.App. at 132. The trial court's failure to provide the correct number of peremptories meant that the case was tried to a jury that was not seated in accordance with the method required by law. Prejudice is presumed where there is a material departure from the applicable statute. See *Tingdale*, 117 Wn.2d at 603.

5. The Court of Appeals' Holding That the Limiting Instruction Regarding Prior Conviction Evidence Was Inadequate Should Be Affirmed

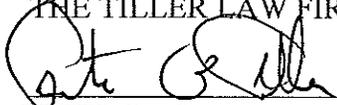
The lower court also reversed Meredith's convictions on the basis of insufficient limiting instruction. Division Two held that Meredith's prior convicting evidence was admissible as an element of Count 2 (communication with a minor for immoral purposes), but that it was

inadmissible under ER 404(b), and that the probative value did not exceed its prejudicial value. *In re Meredith*, Slip. Op. at 10. The underlying facts of the conviction were not introduced, but the conviction itself was entered as evidence. *Id.* The limiting instruction given was insufficient as it informed the jury that the sole purpose of the prior conviction evidence was to decide Count 2, but did not further instruct the jury it could only use the fact of conviction to decide an element of Count 2. *Id.* at 11. The State's argument conflates the court's ruling regarding admission of the prior conviction evidence under ER 404(b) with the insufficient limiting instruction. The State, albeit contesting the ruling in the context of ER 404(b) has presented no basis to reverse the lower court on this discrete issue of the inadequate limiting instruction, and therefore the lower court's ruling should be affirmed.

D. CONCLUSION

For the reasons stated here and in prior briefing, the court's reversal of Meredith's convictions should be affirmed.

DATED: February 1, 2018.

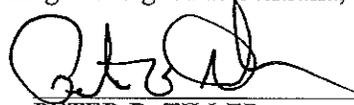
Respectfully submitted,
THE TILLER LAW FIRM

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CERTIFICATE OF SERVICE

The undersigned certifies that on February 1, 2018 that this Supplemental Brief was sent by JIS link to the Temple of Justice, for Washington State Supreme Court, and to James Schacht, and copies were mailed by U.S. mail, postage prepaid to the Appellant, Gary Meredith:

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This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on February 1, 2018.


PETER B. TILLER

THE TILLER LAW FIRM

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