

Supreme Court No. 94582-9
COA No. 46671-6-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In Re Personal Restraint of

GARY MEREDITH,

Respondent.

ANSWER TO PETITION FOR REVIEW

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TABLE OF CONTENTS

	Page
Table of Authorities	iii
A. IDENTITY OF RESPONDING PARTY	1
B. COURT OF APPEALS DECISION	1
C. ISSUES PRESENTED BY THE STATE IN ITS PETITION FOR REVIEW	1
D. STATEMENT OF THE CASE	3
E. ARGUMENT	4
1. THIS COURT SHOULD DENY THE STATE'S PETITION BECAUSE THE COURT OF APPEALS CONSIDERED THE RELEVANT FACTS AND APPLICABLE LAW AND PROPERLY REVERSED MEREDITH'S CONVICTIONS.....	4
a. <i>The State's contention that Meredith's ineffective assistance of appellate counsel claim cannot be raised for the first time in a motion for reconsideration</i>	<i>4</i>
b. <i>The issue of ineffective assistance of appellate counsel was properly before the Court under RAP 16.8(e) and was extensively briefed.....</i>	<i>5</i>
2. THE LOWER COURT CORRECTLY HELD THAT MEREDITH'S COUNSEL ON DIRECT APPEAL WAS INEFFECTIVE	11
3. THE LOWER COURT'S RULING REGARDING THE LIMITING INSTRUCTION IS NOT IN CONFLICT WITH DECISIONS OF THIS COURT .	18
F. CONCLUSION	20

TABLE OF AUTHORITIES

<u>WASHINGTON CASES</u>	<u>Page</u>
<i>1515—1519 Lakeview Boulevard Condo. Ass'n v. Apartment Sales Corp.</i> , 146 Wn.2d 194, 43 P.3d 1233 (2001).....	4
<i>State v. Bird</i> , 136 Wn. App. 127, 148 P.3d, 1058 (2006).....	2, 16
<i>City of Bellevue v. Acrey</i> , 103 Wn.2d 203, 691 P.2d 957 (1984)	12
<i>Cockle v. Dept. of Labor and Indus.</i> , 96 Wn.App. 69, 977 P.2d 668 (1999), aff'd and modified, 142 Wn.2d 801, 16 P.3d 583, 594 (2001).....	4, 5
<i>In Re Restraint of Dalluge</i> , 152 Wn. 2d 772, 100 P.3d. 279 (2004).....	2, 12
<i>Dombrosky v. Farmers Ins. Co.</i> , 84 Wn.App. 245, 928 P.2d 1127 (1996).....	12
<i>State v. Evans</i> , 100 Wn.App. 757, 998 P.2d 373 (2000).....	13, 16
<i>State v. Fort</i> , 190 Wn.App. 202, 360 P.3d 820 (2015), <i>review denied</i> , 185 Wn.2d 1011, 368 P.3d 171 (2016).....	6
<i>State v. Frawley</i> , 181 Wn.2d 452, 334 P.3d 1022 (2014)	11
<i>JDFJ Corp. v. Int'l Raceway, Inc.</i> , 97 Wn.App. 1, 970 P.2d 343 (1999).....	4
<i>State v. Meredith</i> , 163 Wn.App. 75, 165 Wn. App 704, 259 P.3d 324 (2011) affirmed, 178 Wn.2d 180, 306 P.3d 942 (2013), <i>cert. denied</i> , 134 U.S. 1329, 134 S.Ct. 1329, 188 L.Ed.2d 339 (2014).....	3, 14
<i>State v. Moses</i> , 105 Wn.App. 153, 15 P.3d 1058 (2001).....	4
<i>State v. Olson</i> , 126 Wn.2d 315, 893 P.2d 629, (1995)	9
<i>In re Orange</i> , 152 Wn.2d 795, 100 P.3d 291 (2014)	8, 10
<i>In re Restraint of Rhem</i> , ___ Wn.2d ___, 394 P.3d 367 (2017)	7, 8
<i>Rhinehart v. Seattle Times</i> , 59 Wn.App. 332,798 P.2d 1155 (1990)	10
<i>Wilcox v. Lexington Eye Inst.</i> , 130 Wn.App. 234, 241, 122 P.3d 729 (2005).....	4
<i>State v. Vreen</i> , 143 Wd. 2d, 923, 26 P.3d, 236 (2001)	2, 16, 17
<i>Wagner v. Wagner</i> , 95 Wn.2d 94, 621 P.2d 1279 (1980).....	12
<i>In re Pers. Restraint of Williams</i> , 111 Wn.2d 353, 759 P.2d 436 (1988) .	9

<u>UNITED STATES CASES</u>	<u>Page</u>
<i>Batson v. Kentucky</i> , 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).....	3, 13
<i>Glasser v. United States</i> , 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942).....	12

<u>REVISED CODE OF WASHINGTON</u>	<u>Page</u>
RCW 10.73.090(1)	1, 3

<u>COURT RULES</u>	<u>Page</u>
CrR 6.5.....	3, 17
RAP 1.2(a)	9
RAP 12.1(a)	7
RAP 16.7(a)(2)	7
RAP 16.8(e)	5, 6, 7
RAP 16.10(a).....	0

<u>EVIDENCE RULE</u>	<u>Page</u>
ER 404(b)	2, 18, 20

A. IDENTITY OF RESPONDING PARTY

Gary Meredith, respondent and petitioner below, asks this Court to deny the State's petition for review of the unpublished Court of Appeals decision.

B. COURT OF APPEALS DECISION

The State seeks review of the Court of Appeals' unpublished opinion in *In re Pers. Restraint of Meredith*, No. 46671-6-II (Slip. Op. filed February 14, 2017, and amended by Order Denying Reconsideration and Amending Opinion on May 23, 2017). A copy of the Unpublished Opinion and Order Denying Reconsideration and Amended Opinion are attached as Appendix A and B, respectively.

C. ISSUES PRESENTED BY THE STATE IN ITS PETITION FOR REVIEW

1. The State seeks review of whether the issue of ineffective assistance of appellate counsel may be raised under RAP 16.8(e), and whether the issue was sufficiently "raised or supported" prior to the expiration of the time bar contained in RCW 10.73.090(1). Where permission to raise the issue of ineffective assistance of appellate counsel in supplemental briefing was granted by the Court of Appeals, and where the issue was identified and argued in the respondent's supplemental brief, and then argued three additional times in other briefs submitted by the

respondent, and where the State responded to the issue and did not argue that the issue was untimely or not in compliance with RAP 16.8(e) until the State's motion for reconsideration filed after the Court of Appeals' decision in February, 2017, may the State now argue that the issue should have been dismissed?

2. The State seeks review of the Court's decision finding that appellate counsel was ineffective by failing to raise and argue the issue of failure to provide the statutorily required number of peremptory challenges. The State does not identify a valid legal conflict with precedent, but rather complains that it preferred a different result. Where the peremptory challenge error was overt and controlled by case law in *In Re Pers. Restraint of Dalluge*, 152 Wn.2d, 772, 100 P.3d. 279 (2004), *State v. Bird*, 136 Wn. App. 127, 148 P.3d, 1058 (2006) and *State v. Vreen*, 143 Wd.2d, 923, 26 P.3d, 236 (2001), was appellate counsel prejudicially ineffective by failing to raise the issue of the trial court's failure to allocate the statutorily required number of peremptory challenges on direct appeal?

3. The State seeks review of the decision below regarding the limiting instruction given, alleging that the decision conflicts with decisions of this Court and the Court of Appeals regarding the trial court's limiting instruction pertaining to prior conviction evidence. Where the limiting instruction was defective by failing to instruct the jury it could

only use the prior convictions to decide an element of count 2 and is controlled by settled law, and where the State elected not to introduce Evidence Rule 404(b) evidence, has the State demonstrated any basis justifying review of this case?

D. STATEMENT OF THE CASE

Respondent Gary Meredith was convicted in 1996 of second degree rape of a child and communicating with a child for immoral purposes in Pierce County. During trial he was not allocated eight peremptory challenges as required by CrR 6.5. The trial court entered a judgment and sentence imposing a 198-month sentence. On direct review, the Court of Appeals rejected Meredith's *Batson*¹ challenge and affirmed his conviction and sentence. *State v. Meredith*, 163 Wn.App. 75, 165 Wn.App. 704, 259 P.3d 324 (2011). This Court denied the *Batson* challenge and his conviction was affirmed in *State v. Meredith*, 178 Wn.2d 180, 184, 306 P.3d 942 (2013), *cert. denied*, 134 U.S. 1329, 134 S.Ct. 1329, 188 L.Ed.2d 339 (2014). The respondent filed the underlying personal restraint petition on August 4, 2014.

The Court of Appeals reversed his convictions in an opinion filed February 14, 2017. *In re Pers. Restraint of Meredith*, No. 46671-6-II. The State's motion for reconsideration was denied on March 6, 2017.

¹*Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

E. ARGUMENT

1. THIS COURT SHOULD DENY THE STATE'S PETITION BECAUSE THE COURT OF APPEALS CONSIDERED THE RELEVANT FACTS AND APPLICABLE LAW AND PROPERLY REVERSED MEREDITH'S CONVICTIONS

a. *The State's contention that Meredith's ineffective assistance of appellate counsel claim cannot be raised for the first time in a motion for reconsideration*

As an initial matter, the State's contention that the issue of ineffective assistance of appellate counsel which was is time barred by RCW 10.73.090(1) and not preserved for appellate review is untimely raised and therefore should not be addressed by this Court.

The State first argued that Meredith's ineffective assistance of appellate claim was not sufficiently raised was contained in its Motion for Reconsideration, filed March 6, 2017. A party may not propose new theories that could have been raised before entry of an adverse decision. More specifically, a party is not permitted to present new argument based on new authority on a motion for reconsideration. *Wilcox v. Lexington Eye Inst.*, 130 Wn.App. 234, 241, 122 P.3d 729 (2005); *JDFJ Corp. v. Int'l Raceway, Inc.*, 97 Wn.App. 1, 7, 970 P.2d 343 (1999).

A footnote in *1515-1519 Lakeview Boulevard Condo. Ass'n v.*

Apartment Sales Corp., 146 Wn.2d 194, 43 P.3d 1233 (2001) is instructive. In that case, this Court declined to consider an issue that was not raised until the motion for reconsideration of the Court of Appeals' opinion. *Lakeview*, 146 Wn.2d at 203, n. 4. See also, *State v. Moses*, 105 Wn.App. 153, 15 P.3d 1058 (2001) (in dicta, Division Two declined to consider a motion for reconsideration in which the defendant advanced a new legal theory not raised prior to issuing the opinion).

In *Cockle v. Dept. of Labor and Indus.* 96 Wn.App. 69, 977 P.2d 668 (1999), aff'd and modified, 142 Wn.2d 801, 16 P.3d 583, 594 (2001), Division Two declined to consider as "untimely" two arguments made by the State not advanced to the trial court nor to the Court of Appeals until raised in a motion for reconsideration made after the opinion was filed. *Cockle*, 96 Wn.App. at 86, n. 48.

In accordance with the decisions cited *supra*, Division Two affirmed its previous ruling and did not address the State's tardy argument in its ruling on the State's motion for reconsideration. Appendix B.

Moreover, Meredith argued the issue of ineffective assistance of appellate counsel in his supplemental brief filed January 29, 2015. Not only did the State did not object to the argument alleging ineffective assistance of appellate counsel contained in his supplemental brief, but

responded to Meredith's argument on the merits in its initial responsive brief. (State's Supplemental Reply Brief).

b. The issue of ineffective assistance of appellate counsel was properly before the Court under RAP 16.8(e) and was extensively briefed.

As noted above, the State did not challenge the claim of ineffective assistance of appellate counsel when raised in Meredith's supplemental briefing, but instead propounded the argument that Meredith did not have leave to raise the issue under RAP 16.8 in an entirely new theory argued for the first time in its motion for reconsideration of the lower court's decision, on March 6, 2017.

The State contends that Meredith's ineffective appellate counsel argument was not adequately presented and Meredith was not given leave to supplement his briefing under RAP 16.8(e). Petition for Review at 4-6. Contrary to the State's assertion, a letter from the Court dated October 29, 2014 designates Meredith's brief as a supplemental brief and the Court granted leave to file a supplemental brief, and also granted a 90 day extension on October 29, 2014. Meredith filed a supplemental brief on January 29, 2015, containing, *inter alia*, his argument that he received ineffective assistance of appellate counsel. Supplemental Brief, pp 14-15. This occurred prior to expiration of the one year deadline, which required the issue to be filed by February 28, 2015.

Meredith challenged the effectiveness of appellate counsel four different times in his briefing to the lower court. As noted above, he argued that he received ineffective assistance of appellate counsel in his supplemental brief at pp. 14-15 (filed January 29, 2015); his reply brief at pp. 16-17 (filed July 13, 2015); a supplemental reply brief at pp. 13-16 (filed March 24, 2016); and reply to second supplemental response at p. 8 (filed September 2, 2016).

The Court of Appeals recently addressed a similar fact pattern in *State v. Fort*, 190 Wn.App. 202, 360 P.3d 820 (2015), review denied, 185 Wn.2d 1011, 368 P.3d 171 (2016). In *Fort*, the appellant filed a supplemental brief appending his ineffective assistance of counsel argument to his original public trial right allegation, but did not formally amend his petition to add the ineffective assistance of counsel allegation. Division Three treated Fort's supplemental brief as an amendment expressly asserting ineffective assistance of counsel. *Fort*, 190 Wn.App. at 243.

In this case the State had no difficulty understanding that Meredith was asserting ineffective assistance of appellate counsel as a claim of error, and in fact responded to the claim in its Supplemental Response to Personal Restraint Petition.

In its petition for review, the State cites *In re Pers. Restraint of*

Rhem, ___ Wn.2d ___, 394 P.3d 367 (2017) to support its contention that Meredith’s argument addressing ineffective assistance of appellate counsel was not adequately raised and supported. Petition for Review at 5. In *Rhem*, this Court announced that “under the rules, a petitioner can amend an initial PRP and raise new grounds for relief, without requesting a formal amendment, as long as the brief is timely filed and the new issue is adequately raised. See RAP 16.8(e); RAP 12.1(a); RAP 16.7(a)(2).” *Rhem*, ___ Wn. 2d at ___, 394 P.3d at 371.

Meredith complied with those criteria. In his supplemental brief he argued that “had his appellate counsel, James E. Lobsenz, argued in Meredith’s direct appeal that it was error for the trial court to afford Meredith a lesser number of peremptory challenges to which he was entitled.... Meredith would have met the prejudicial standard required on direct appeal ... and reversal of his convictions would have been required.” Supplemental Brief at 14-15. In his reply brief, he argued that his appellant attorney “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[,]” and cited *In re Orange*, 152 Wn.2d 795, 100P.3d 291 (2014) in support of his argument. Meredith provided extensive briefing and relevant case law regarding ineffective assistance of appellate counsel in his March 24, 2016

supplemental reply brief, at 13-16.

Rhem is eminently distinguishable from the facts of Meredith's case. In *Rhem*, the petitioner did not raise the issue of courtroom closure (and that the error was structural not requiring a showing of prejudice), until the "conclusion" portion of his reply brief, and even then merely mentioned the issue without further argument or citation to authority:

Rhem then stated in conclusion, "Rhem would also request that this Court consider sua [s]ponte the ineffective appellate argument that the State broaches in their response. Or allow additional briefing." Reply Br. of Pet'r at 7. ___

Rhem, ___ Wn. 2d at ___, 394 P.3d at 369.

This Court held that although Rhem timely raised the issue of courtroom closure, it was improperly raised "for the first time in his *pro se* reply brief and made without supporting argument." *Rhem*, ___ Wn. 2d at ___, 394 P.3d at 370. Rhem therefore failed to meet the standard that the PRP must contain more than a conclusory allegation or merely present a claim in broad general terms. *In re Pers. Restraint of Williams*, 111 Wn.2d 353, 364-65, 759 P.2d 436 (1988).

In contrast, Meredith identified the issue, obtained permission to file a supplemental brief from the lower court, and presented argument regarding ineffective assistance of appellate counsel, specifically arguing

that had his appellate counsel raised the issue of insufficient allotment of the statutorily required number of peremptory challenges on direct appeal, reversal would have required.

Where the nature of the challenge is clear and the relevant issue is sufficiently argued in the brief and the court is not inconvenienced and the responding party is not prejudiced, the court should decide the case on the merits. *State v. Olson*, 126 Wn.2d 315, 323, 893 P.2d 629 (1995).

In *Olson*, this Court noted:

It is clear from the language of RAP 1.2(a), and the cases decided by this court, that an appellate court may exercise its discretion to consider cases and issues on their merits. This is true despite one or more technical flaws in an appellant's compliance with the Rules of Appellate Procedure.

Olson, 126 Wn.2d at 323.

In *Rhinehart v. Seattle Times*, 59 Wn.App. 332, 798 P.2d 1155 (1990), appellate counsel's failure to assign error to any of the findings of fact or conclusions of law in the case was not deemed fatal. Division

One held:

[a]lthough Rhinehart has failed to set out proper assignments of error, the manner in which the claimed errors are set forth and described in the brief is adequate to understand what has been asserted as error. *The Times had no difficulty in responding directly to the issues raised* and the failure to properly assign error was not prejudicial to appellate review

Rhinehart, 59 Wn.App. at 336 (emphasis added).

In this case, as in *Rhinehart*, the State had no difficulty understanding that Meredith was asserting ineffective assistance of appellate counsel as a claim of error, and in fact responded to the claim in its initial response brief (State's Response to PRP, April 20, 2015). Moreover, in his reply brief filed July 13, 2015, Meredith countered the State's argument to the ineffective assistance of appellate counsel claim, citing authorities including *In re Orange*, 152 Wn.2d 794, 814, 100 P.3d 291 (2014). Reply Brief at 16-17. Meredith returned to the argument in his supplemental reply brief, filed March 24, 2016, with additional legal authority. Supp. Reply Brief at 13-16.

Division Two was not precluded from review of the claim of ineffective assistance of counsel in its unpublished opinion.

2. THE LOWER COURT CORRECTLY HELD THAT MEREDITH'S COUNSEL ON DIRECT APPEAL WAS INEFFECTIVE

The phrase "unpreserved non-constitutional," repeatedly invoked in the State's petition, is not the controlling factor to determine if counsel was ineffective by not identifying and arguing the issue of the trial court's failure to allocate the full number of eight preemptory challenges. Waiver

requires the intentional relinquishment or abandonment of a known right or privilege. *State v. Frawley*, 181 Wn.2d 452, 461, 334 P.3d 1022 (2014). 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 94, 102, 621 P.2d 1279 (1980) (“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. Courts indulge 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 Wn.2d 203, 207, 691 P.2d 957 (1984).

Notwithstanding counsel’s failure to object, Meredith did not voluntarily or intentionally relinquish his right to all eight peremptory challenges to which he was entitled. CrR 6.5 provides that “each party shall be entitled to one peremptory challenge for each alternate juror to be selected.” It is clear that the trial court failed to provide the parties with the mandatory additional peremptory challenges for alternate jurors under CrR 6.5. Meredith did not decline to exercise any peremptory challenges, and objectionable venire members---whom Meredith was entitled to

challenge and would have challenged---were seated and participated in deliberations. “Any impairment of a party’s right to exercise a peremptory challenge constitutes reversible error without a showing of prejudice.” *State v. Evans*, 100 Wn.App. 757, 774, 998 P.2d 373 (2000).

The lower court’s opinion that Meredith’s appellate counsel on direct review was ineffective cited *In re Pers. Restraint of Dalluge*, 152 Wn.2d 772, 777–78, 100 P.3d 279 (2004). In *Dalluge*, this Court noted that the standard for raising ineffective assistance of appellate counsel on collateral review must show that (1) the legal issue that appellate counsel failed to raise had merit, and (2) actual prejudice resulted from appellate counsel’s failure to raise the issue.

Meredith successfully demonstrated that his former appellate counsel James Lobsenz failed to assign error to the trial court’s failure to grant the statutorily required number of peremptory challenges. Contrary to the State’s assertion in its petition, there is no evidence to support the contention that appellate counsel considered and then made a decision not to pursue the claim. The State’s argument that appellate counsel was not ineffective where counsel failed to recognize the peremptory challenge issue - which is overt in the record - because it was non-constitutional and not preserved by objection, is a baseless contention.

Moreover, the issue regarding the allocated number of peremptory

challenges is not esoteric or novel; a substantial body of Washington case law shows that the issue is a basic, bedrock *voir dire* issue that should be examined in every appeal. Appellate counsel's ineffective representation is particularly troubling since counsel's primary argument on direct review involved a *Batson* challenge, which required detailed study of the *voir dire* record, including the number of peremptory challenges allocated and used. In fact, the number of peremptory challenges would presumably be an important aspect of appellate counsel's *Batson* argument. On direct appeal, Meredith's counsel argued that the prosecution's peremptory challenge during *voir dire* of juror 4, the sole African American on the venire, constituted a violation of *Batson*. *State v. Meredith*, 163 Wn.App. 75, 165 Wn.App. 704, 711–12, 259 P.3d 324 (2011), review granted, 173 Wn.2d 1031, 275 P.3d 303 (2012). The court stated that “[d]uring voir dire, the prosecutor peremptorily challenged juror 4, the sole African American on the venire. Meredith, who is Caucasian, objected, arguing that the State did not give a basis for challenging juror 4 and, thus, the [‘]only belief can be that she was removed because of her minority status.[‘]” *Meredith*, 165 Wn.App. 707-08. Division Two affirmed the convictions and appellate counsel Lobsenz had a *second* opportunity to closely examine the trial court's failure to provide the full complement of peremptory challenges when Meredith's petition for

review was accepted by this Court. *State v. Meredith*, 178 Wn.2d 180, 306 P.3d 942 (2013). It cannot be reasonably argued that appellate counsel did not have the complete record or that he did not concentrate on the issue of jury selection.

The State's argument regarding Mr. Lobsenz' skill and credentials leading to the conclusion that the appeal "was handled by a seasoned appellate lawyer applying exceptional professional judgment" and that the "retained appellate lawyer in this case filed a fifty page opening brief that included eight assignments of error, nine minor argument sections and twelve sub-argument sections" is also without merit. Petition for Review at 9. The State argues that Mr. Lobsenz' experience as a "seasoned appellate lawyer" precludes a finding that he was ineffective because he did not include the peremptory issue is baseless. The State's argument assumes that Mr. Lobsenz initially identified the issue and decided not to include it in the brief because it was "unpreserved." Petition at 9. The State's argument would lead to the conclusion that an appellate counsel's job is limited to merely reading the record and noting objections when made, without consideration of the myriad of instances in which errors occur which are not objected to during trial. The State's strangely limited understating of the role of appellate counsel is at odds with the considerable responsibilities inherent in appellate practice.

Finally, the State's argument that to hold appellate counsel responsible for identifying the error in the record is a "a nigh impossible standard of professional performance" is belied by the fact that the State previously acknowledged that all the errors contained in Meredith's briefing---including ineffective assistance of appellate counsel argument contained in his Supplemental Response to PRP---was known or should otherwise have been raised at trial. The State argued "[a]ll of the issues raised in that portion of the PRP were known, could and should have been raised in the direct appeal." Supplemental Response at 12. The State apparently agreed, at least at that time it filed its Supplemental Response, that the peremptory challenge error was overt, obvious and contained in the portion of the record that appellate counsel addressed in the *Batson* challenge.

The State alleges that the failure to identify the error did not constitute ineffective assistance of appellate counsel because error was an "unpreserved, non-constitutional issue." Petition for Review at 9-11. Any impairment of a party's right to exercise a peremptory challenge constitutes reversible error without a showing of prejudice. *State v. Vreen*, 143 Wn.2d 923, 931-32, 26 P.2d 236 (2001). This Court held that "erroneous denial of a litigant's peremptory challenge cannot be harmless when the objectionable juror actually deliberates." *Vreen*, 143 Wn.2d at

932. An erroneous denial of a peremptory challenge cannot be harmless where the objectionable juror actually deliberates. *State v. Bird*, 136 Wn.App. 127, 133, 148 P.3d 1058 (2006). If a defendant's right to exercise a peremptory challenge is impaired, this constitutes reversible error without a showing of prejudice, and as such, harmless error analysis does not apply. *State v. Evans*, 100 Wn.App. 757, 774, 998 P.2d 373 (2000).

Here, it is incontrovertible that Meredith was entitled to eight peremptory challenges under CrR 6.5. Had Meredith been provided with his statutorily-mandated number of eight peremptory challenges, he could have afforded to be more liberal with his use of challenges. The trial court empaneled fourteen jurors, two of whom were alternates. The court, using its usual procedure, seated fourteen jurors and then randomly drew two alternates prior to deliberations. The prosecution and defense both exercised all seven allocated peremptory challenges, and the court excused one juror due to illness. After both sides rested, the court randomly selected the second alternate, leaving twelve jurors to deliberate. Meredith had a right to an additional peremptory challenge, and presented evidence that he would have exercised his eighth peremptory challenge on venire member 11, 14, or 16. In addition, had he used a challenge for venire member 11, 14, or 16, that would mean that another, more

objectionable venire member, would have been seated. When defense counsel exercised its final allocated peremptory on venire member 33, two more jurors needed to be empaneled. He was precluded from challenging 35 or 39, both of whom deliberated. By not being afforded his statutorily guaranteed eighth peremptory, his right to exercise a peremptory challenge was impaired, requiring reversal. See, *Vreen*. 143 Wn.2d at 931-32 (erroneous denial of a peremptory challenge is reversible error when the objectionable juror deliberates).

Meredith did not receive all peremptory challenges to which he was entitled, and he was prejudiced by appellate counsel's failure to raise the issue on direct appeal.

3. THE LOWER COURT'S RULING REGARDING THE LIMITING INSTRUCTION IS NOT IN CONFLICT WITH DECISIONS OF THIS COURT

As an initial matter, the State argues that the court's ruling regarding admission of evidence of the prior sex offense conviction was a "provisional ruling" that was ultimately modified. Petition at 19. This is an inaccurate reading of the record. The trial court's ruling to admit the prior convictions under ER 404(b) was not provisional and did not change during the trial, and in fact was reiterated by the court several times. The evidence was admitted under ER 404(b). 1RP at 29-30. The court clearly

stated: “the court is going to admit the two prior convictions through the certified records.” 1RP at 20. The State later reiterated its understanding that the Court’s ruling that the convictions were admissible under ER 404(b) and as an element of Count 2 while argued in against severance. 1RP at 63-64. The prosecutor argued for the court to provide a limiting instruction for both counts and to not sever the charges. 1RP at 68-69. The court later affirmed its decision to admit the evidence as to both counts under ER 404(b) when denying the motion to sever and defense counsel then asked for a limiting instruction. 2RP at 96. Finally, the court again reiterated its denial of severance based on previous reasons, including ER 404(b). 6RP at 517-18.

The State appears to complain that because of the fact of the prior convictions, the court was correct in not including an instruction for the jury to consider the prior convictions under ER 404(b). The prior convictions were explicitly admitted early in the case, and the State simply chose not to present the facts and circumstances of the convictions.²

The contested portion of Division Two’s opinion makes no mention of ER 404(b). The State’s petition, however, attempts to blur the distinction between evidence admitted under ER 404(b) and evidence admitted to prove an element of Count 2. Division Two is unequivocal

²Interestingly, a victim from one of Meredith’s prior convictions was present in the courtroom, a fact mentioned by the prosecution during trial. 2RP at 89.

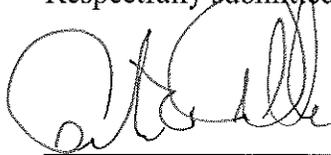
and carefully made clear that the defective limiting instruction insufficiently specified the purpose of the jury to consider the prior conviction evidence—which was to decide an element of Count 2. The defective instruction did not further instruct the jury it could only use the fact of conviction to decide an element of Count 2. This is controlled by settled case law and does not merit review by this Court.

F. CONCLUSION

Meredith asks this court to deny the petition for review of the Court of Appeals' decision, which is wholly consistent with other decisions of this Court.

DATED this 3rd day of July, 2016.

Respectfully submitted:

A handwritten signature in black ink, appearing to read "Peter Tiller", written over a horizontal line.

Peter Tiller WSBA 20835
Attorneys for Respondent

CERTIFICATE

I certify that I mailed a copy of the foregoing Answer for Petition for Review was e-filed by the JIS Link to the Washington State Supreme Court, and to James S. Schacht, Prosecuting Attorney and to the following, by first class mail, postage pre-paid on July 3, 2017 at the Centralia, Washington post office addressed as follows: postage prepaid on July 3, 2017, to the petitioner, Mr. Gary Meredith:

James S. Schacht Deputy Prosecuting Attorney 930 Tacoma Ave S Rm 946 Tacoma, WA 98402-2171	Washington State Supreme Court Supreme@courts.wa.gov
Gary Meredith DOC #984777, Stafford Creek Corrections Center 191 Constantine Way Aberdeen, WA 98520 <u>LEGAL MAIL/SEPCIAL MAIL</u>	

Dated: July 3, 2017



PETER B. TILLER, WSBA NO. 20835
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APPENDIX A

February 14, 2017

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In re the Personal Restraint Petition of:

GARY DANIEL MEREDITH,

Petitioner,

No. 46671-6-II

UNPUBLISHED OPINION

MELNICK, J. — Gary Meredith petitions for relief from his convictions of rape of a child in the second degree (count I) and communication with a minor for immoral purposes (count II). We conclude that Meredith received ineffective assistance of appellate counsel who, on direct appeal, failed to assign error to the trial court granting Meredith an incorrect number of peremptory challenges. In addition, the trial court properly admitted Meredith's prior conviction to prove an element of count II, but gave an improper limiting instruction. Because we grant the petition and reverse for a new trial, we need not decide the remaining issues.

FACTS

In 1996, Meredith was charged with rape of a child in the second degree (count I) and communication with a minor for immoral purposes (count II). We affirmed the convictions, as did the Supreme Court. *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).

I. PRETRIAL MOTION AND PEREMPTORY CHALLENGES

The State moved to admit Meredith's prior convictions for rape in the third degree and assault in the third degree with sexual motivation. The State argued the convictions were admissible both as an element of communication with a minor and pursuant to ER 404(b). The prior felony conviction elevated the communication with a minor charge to a felony. Meredith argued that his prior convictions were admissible only for sentencing purposes and were inadmissible under ER 404(b). The trial court granted the State's motion, ruling that the prior convictions were admissible under both of the State's theories.

Jury selection occurred over a period of three days. Both parties requested the court seat twelve jurors and two alternates. Meredith expressed that his "strong preference" was to know who the alternates were. Report of Proceedings (RP) (May 1, 1996) at 10. The State preferred to randomly draw alternates. The trial court stated that its usual practice was to seat fourteen jurors and, prior to deliberations, draw two alternates randomly from the entire panel. Under CrR 6.4(e)(1) and CrR 6.5, each party was entitled to eight preemptory challenges. However, the court only allowed seven preemptory challenges per party, and each side exercised all seven.

II. JURY INSTRUCTIONS AND CONVICTION

Near the close of trial, the court reviewed the parties' proposed jury instructions. Meredith's proposed instructions did not include a limiting instruction regarding the prior convictions evidence; however, he objected to the limiting instruction the State proposed because it did not sufficiently explain the purpose of the prior conviction evidence. The trial court gave the following limiting instruction to the jury:

I would like to advise the jury that evidence that Mr. Meredith has previously been convicted of a crime is not evidence of his guilt. Such evidence may be considered by you in deciding Count II and for no other purpose.

RP (May 9, 1996) at 513.

On the final day of trial, the court excused juror 12 due to illness. Neither party objected. After closing argument, the court randomly selected and excused juror 7 as the second alternate, leaving twelve of the empaneled jurors to deliberate. On the following day, the jury convicted Meredith of both rape of a child in the second degree and communication with a minor for immoral purposes. He received a 198 month sentence.

We affirmed Meredith's convictions on appeal. *Meredith*, 165 Wn. App. 704.¹ He files this personal restraint petition (PRP) seeking relief.

ANALYSIS

I. PERSONAL RESTRAINT PETITION STANDARD OF REVIEW

A petitioner may request relief through a PRP when he or she is under an unlawful restraint. RAP 16.4(a)-(c). "A personal restraint petitioner must prove either a (1) constitutional error that results in actual and substantial prejudice or (2) nonconstitutional error that 'constitutes a fundamental defect which inherently results in a complete miscarriage of justice.'" *In re Pers. Restraint of Monschke*, 160 Wn. App. 479, 488, 251 P.3d 884 (2010) (quoting *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 672, 101 P.3d 1 (2004) (internal quotations omitted)). The petitioner must prove the error by a preponderance of the evidence. *In re Pers. Restraint of Lord*, 152 Wn.2d 182, 188, 94 P.3d 952 (2004). In addition, "[t]he petitioner must support the petition with facts or evidence and may not rely solely on conclusory allegations." *Monschke*, 160 Wn. App. at 488; RAP 16.7(a)(2)(i).

¹ None of the issues decided in this personal restraint petition were addressed in his appeal.

A PRP may be based on ineffective assistance of appellate counsel. *See In re Pers. Restraint of Crace*, 174 Wn.2d 835, 846-47, 280 P.3d 1102 (2012). If the petitioner shows prejudice in the context of an ineffective assistance of counsel claim, he or she necessarily meets the burden of showing actual and substantial prejudice for a PRP. *Crace*, 174 Wn.2d at 846-47.

In evaluating PRPs, we may “(1) dismiss the petition if the petitioner fails to make a prima facie showing of constitutional or nonconstitutional error, (2) remand for a full hearing if the petitioner makes a prima facie showing but the merits of the contentions cannot be determined solely from the record, or (3) grant the PRP without further hearing if the petitioner has proven actual prejudice or a miscarriage of justice.” *In re Pers. Restraint of Stockwell*, 160 Wn. App. 172, 176-77, 248 P.3d 576 (2011).

II. INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

Meredith argues that he should have received eight peremptory challenges instead of the seven given to him by the trial court. For this reason, Meredith argues that he received ineffective assistance of appellate counsel who failed to raise the issue on appeal. The State argues that denial of a peremptory challenge is not of constitutional magnitude and was not structural error. It also argues that even if the error was structural, Meredith cannot demonstrate actual and substantial prejudice. We agree with Meredith. He was entitled to eight peremptory challenges and he was prejudiced when appellate counsel was ineffective for failing to raise the issue on appeal.

A. STANDARD OF REVIEW

A petitioner raising ineffective assistance of appellate counsel on collateral review must show that (1) the legal issue that appellate counsel failed to raise had merit, and (2) actual prejudice resulted from appellate counsel's failure to raise the issue. *In re Pers. Restraint of Dalluge*, 152 Wn.2d 772, 777-78, 100 P.3d 279 (2004). Failure to raise all possible nonfrivolous issues on

appeal is not ineffective assistance. *Dalluge*, 152 Wn.2d at 787. A petitioner is “actually prejudiced” by appellate counsel’s failure to raise the issue if there was a reasonable probability that, but for counsel’s error, the result of the proceeding would have been different. *Dalluge*, 152 Wn.2d at 788.

B. MEREDITH RECEIVED INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

In Washington, a criminal defendant is entitled to six peremptory challenges and one additional peremptory challenge for each alternate juror who is empaneled. CrR 6.4(e)(1), 6.5. Such challenges are not a constitutional right.² *State v. Evans*, 100 Wn. App. 757, 763, 998 P.2d 373 (2000). Peremptory challenges are a “creature of statute.”³ *Rivera v. Illinois*, 556 U.S. 148, 157, 129 S. Ct. 1446, 173, L. Ed. 2d. 320 (2009) (quoting *Ross v. Oklahoma*, 487 U.S. 81, 89, 108 S. Ct. 2273, 101 L. Ed. 2d 80 (1988)). Peremptory challenges are not constitutionally protected fundamental rights; “rather, they are but one state-created means to the constitutional end of an impartial jury and fair trial.” *Georgia v. McCollum*, 505 U.S. 42, 57, 112 S. Ct. 2348, 120 L. Ed. 2d 33 (1992). “As such, 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.

Any impairment of a party’s right to exercise a peremptory challenge, however, constitutes reversible error without a showing of prejudice. *State v. Vreen*, 143 Wn.2d 923, 931-32, 26 P.3d 236 (2001) (erroneous denial of a peremptory challenge is reversible error when the objectionable juror deliberates); *State v. Bird*, 136 Wn. App. 127, 133-34, 148 P.3d 1058 (2006) (erroneous

² Unless the issue involves discriminatory intent by the State, peremptory challenges do not involve a constitutional right. *State v. Meredith*, 178 Wn.2d 180, 306 P.3d 942 (2013); *State v. Saintcalte*, 178 Wn.2d 34, 309 P.3d 326 (2013).

³ In Washington, peremptory challenges in criminal cases are governed by court rule. See CrR 6.4(e)(1), 6.5. Peremptory challenges in civil cases are governed by both statute and court rule. See RCW 4.44.130 (each party in a civil case is entitled to three peremptory challenges).

denial of a litigant's peremptory challenge cannot be harmless when the objectionable juror actually deliberates); *Evans*, 100 Wn. App. at 774 (impairment of a party's right to exercise a peremptory challenge constitutes reversible error without a showing of prejudice and harmless error analysis does not apply).

It is undisputed that Meredith was entitled to eight peremptory challenges because the trial court empaneled fourteen jurors, two of whom would be alternates. CrR 6.4(e)(1), 6.5. In Meredith's case, the trial court mistakenly gave each party seven peremptory challenges. The parties did not object to the number of challenges. Meredith expressed that his strong preference was to know who the alternates were. The State preferred to randomly draw alternates. The court stated that its usual procedure was to seat fourteen jurors and randomly draw two alternates at the end of the State's rebuttal and prior to deliberations. The parties, therefore, did not know who would end up as the alternate jurors. At the end of voir dire, Meredith and the State each exercised all seven peremptory challenges. The court excused one of the empaneled jurors because of illness and was, thus, the first "alternate" to be selected. At trial, after both sides rested, the court randomly selected the second alternate thereby leaving a panel of 12 jurors to deliberate.

The issue regarding the number of peremptory challenges has merit because Meredith had a right to an additional peremptory challenge. Based on the manner in which the trial court selected the twelve jurors who heard the case, the parties could not know who the alternate jurors were until the end of trial. Meredith has presented evidence showing that he would have exercised his eighth peremptory challenge on juror 11, 14, or 16, all of whom deliberated in this case.

Under *Vreen*, 143 Wn.2d 923, if appellate counsel had raised this issue on direct appeal, we would have reversed and remanded Meredith's case for a new trial. Therefore, we conclude that Meredith was prejudiced by appellate counsel's ineffective assistance.

III. ADMISSION OF PRIOR CONVICTIONS

Meredith argues that the trial court erred by improperly admitting his prior convictions, thereby violating his right to a fair trial by an impartial jury. He argues that the prior convictions had no material relevance or probative value in proving either rape of a child or communication with a minor, and was overwhelmingly prejudicial for the jury to hear. We address this issue and subsequent ones because they may arise on retrial. We conclude that the prior conviction evidence was admissible as an element of the communication with a minor charge, but that it was inadmissible under ER 404(b).

A. STANDARD OF REVIEW

An evidentiary error, such as erroneous admission of ER 404(b) evidence, is not of constitutional magnitude. *State v. Everybodytalksabout*, 145 Wn.2d 456, 468-69, 39 P.3d 294 (2002). We review evidentiary rulings for an abuse of discretion. *State v. Williams*, 137 Wn. App. 736, 743, 154 P.3d 322 (2007). A trial court abuses its discretion when its evidentiary ruling is manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. *Williams*, 137 Wn. App. at 743.

B. PRIOR SEX CONVICTIONS ADMISSIBLE AS AN ELEMENT

Under RCW 9.68A.090(1) and (2), a person who communicates with a minor for immoral purposes is guilty of a gross misdemeanor, unless that person has previously been convicted of a felony sexual offense, in which case the person is guilty of a class C felony.⁴ The State must prove all of the elements of the crime beyond a reasonable doubt, including that the defendant has been previously convicted under this same section or of any other felony sex offense. *State v. Bache*,

⁴ Although RCW 9.68A.090 has been amended since the date of Meredith's crimes, none of the amendments are relevant to this case.

146 Wn. App. 897, 905-06, 193 P.3d 198 (2008); *State v. Oster*, 147 Wn.2d 141, 146, 52 P.3d 26 (2002).

Prior convictions that elevate a crime from a gross misdemeanor to a felony need to be proved to a jury. See *Blakely v. Washington*, 542 U.S. 296, 302-05, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004); *State v. Roswell*, 165 Wn.2d 186, 197-98, 196 P.3d 705 (2008) (where prior conviction is an element of the crime charged, it is not error to allow jury to hear evidence on that issue). To avoid the details of the prior offense being placed before the jury, a defendant may stipulate to the predicate offense. See *Old Chief v. United States*, 519 U.S. 172, 191, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997); *State v. Gladden*, 116 Wn. App. 561, 565-66, 66 P.3d 1095 (2003).

Meredith argues that the prior felony sex convictions were overly prejudicial and should have been utilized solely for sentencing.⁵ Meredith, however, conceded that the prior convictions constituted an element of the charged crime. The trial court properly ruled that the prior sex convictions were admissible as an element of the communication with a minor charge.

C. PRIOR SEX CONVICTIONS INADMISSIBLE UNDER ER 404(b)

ER 404(b) provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

⁵ Meredith offered to stipulate to the prior convictions, but incorrectly argued that the prior convictions stipulated to should be considered by the court at sentencing, not by the jury as an element of the crime. See *Old Chief*, 519 U.S. at 177-78; *Gladden*, 116 Wn. App. at 565-66.

“The basic operation of the rule follows from its plain text: certain types of evidence (i.e. ‘[e]vidence of other crimes, wrongs, or acts’) are not admissible for a particular purpose (i.e. ‘to prove the character of a person in order to show action in conformity therewith’).” *State v. Gresham*, 173 Wn.2d 405, 420, 269 P.3d 207 (2012) (quoting ER 404(b)). The same evidence may, however, be admissible for other purposes, depending on its relevance and the balancing of its probative value and danger of unfair prejudice; the list of other purposes in the second sentence of ER 404(b) is merely illustrative. *Gresham*, 173 Wn.2d at 420. The burden of demonstrating a proper purpose is on the proponent of the evidence. *State v. DeVincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003).

Washington courts have developed an analytical structure for the admission ER 404(b) evidence. *Gresham*, 173 Wn.2d at 421. To admit evidence of a person’s prior misconduct, the trial court must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect. *State v. Vy Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002).

The trial court heard argument from the parties regarding the admissibility of Meredith’s prior convictions under ER 404(b). The court found that Meredith’s prior convictions were admissible for the purpose of showing absence of mistake because part of Meredith’s defense was a denial that the crimes occurred. It also found the evidence admissible to prove preparation and plan due to the similarity between the victims, circumstances, and acts that occurred in the prior and current offenses.

In deciding the admissibility of the prior convictions under ER 404(b), the trial court took into consideration the facts underlying the prior convictions. However, the record shows that the facts underlying the convictions were not introduced as evidence. The State merely introduced the fact that Meredith had been previously convicted. While the underlying facts may have demonstrated a common scheme, preparation, or plan, the fact of conviction alone is not admissible under ER 404(b). Further, the probative value did not outweigh its prejudicial effect. *Vy Thang*, 145 Wn.2d at 642. We conclude that the trial court erred by admitting the prior conviction evidence under ER 404(b).

IV. LIMITING JURY INSTRUCTION

Meredith argues that the trial court erred by giving an insufficient limiting instruction which failed to instruct the jury on how to apply the prior conviction evidence to the communication with a minor charge. We agree.

A. LEGAL STANDARDS

We review the adequacy of jury instructions de novo as a question of law. *State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995), *cert. denied*, 518 U.S. 1026, 116 S. Ct. 2568, 135 L. Ed. 2d 1084 (1996). Jury instructions are sufficient if they are supported by substantial evidence, allow the parties to argue their theories of the case, and when read as a whole properly inform the jury of the applicable law. *State v. Riley*, 137 Wn.2d 904, 909, 976 P.2d 624 (1999).

Once a criminal defendant requests a limiting instruction, the trial court has a duty to correctly instruct the jury, notwithstanding defense counsel's failure to propose a correct instruction. *Gresham*, 173 Wn.2d at 424. "[J]ury instructions read as a whole must make the

relevant legal standards manifestly apparent to the average juror.” *State v. Marquez*, 131 Wn. App. 566, 575, 127 P.3d 786 (2006). A trial court is under no obligation to give inaccurate or misleading instructions. *State v. Ehrhardt*, 167 Wn. App. 934, 939, 276 P.3d 332 (2012).

B. LIMITING INSTRUCTION WAS INSUFFICIENT

At trial, the court gave the following limiting instruction:

Evidence that the defendant has previously been convicted of a crime is not evidence of the defendant’s guilt. Such evidence may be considered by you *in deciding count II* and for no other purpose.

Response to PRP (Appendix F, Instr. 14) (emphasis added).

This limiting instruction informed the jury that the sole purpose of the prior conviction evidence was to “decid[e]” count II, the communication with a minor charge. Response to PRP (Appendix F, Instr. 14). While the instruction correctly limited the consideration of the prior conviction evidence to count II, it did not further instruct the jury it could only use the fact of conviction to decide an element of the count II. We conclude the trial court erred by giving this instruction.

Because of our disposition of this case, we need not decide the remaining issues and the parties are not precluded from relitigating them if they arise again.

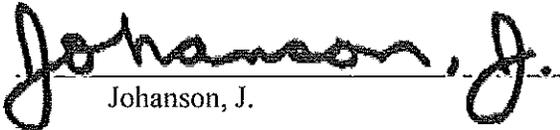
We grant Meredith’s petition and reverse for a new trial.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.



Melnick, J.

We concur:



Johanson, J.



Maxa, A.C.J.

APPENDIX B

May 23, 2017

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In re the Personal Restraint Petition of:

GARY DANIEL MEREDITH,

Petitioner,

No. 46671-6-II

**ORDER DENYING RECONSIDERATION
AND AMENDING OPINION**

Respondent, State of Washington, filed a motion for reconsideration of our February 14, 2017 unpublished opinion. After further review of the record, we deny the motion for reconsideration. We do, however, amend our opinion as follows:

It is ordered that the second full paragraph of page 2 that reads:

Jury selection occurred over a period of three days. Both parties requested the court seat twelve jurors and two alternates. Meredith expressed that his “strong preference” was to know who the alternates were. Report of Proceedings (RP) (May 1, 1996) at 10. The State preferred to randomly draw alternates. The trial court stated that its usual practice was to seat fourteen jurors and, prior to deliberations, draw two alternates randomly from the entire panel. Under CrR 6.4(e)(1) and CrR 6.5, each party was entitled to eight preemptory challenges. However, the court only allowed seven preemptory challenges per party, and each side exercised all seven.

is deleted. The following paragraph is inserted in its place:

Jury selection occurred over a period of three days. Both parties requested the court seat twelve jurors and two alternates. Meredith expressed that his preference was to randomly draw alternates. The State’s “strong preference” was to know who the alternates were. Report of Proceedings (RP) (May 1, 1996) at 10. The trial court stated that its usual practice was to seat fourteen jurors and, prior to deliberations, draw two alternates randomly from the entire panel. The court used its usual procedure. Under CrR 6.4(e)(1) and CrR 6.5, each party was entitled to eight preemptory challenges. However, the court only allowed seven preemptory challenges per party, and each side exercised all seven.

It is ordered that sentences 4 and 5 of the first full paragraph of page 6 that read:

Meredith expressed that his strong preference was to know who the alternates were. The State preferred to randomly draw alternates.

are deleted.

It is ordered that sentence 6 of the first full paragraph of page 6 that reads:

The court stated that its usual procedure was to seat fourteen jurors and randomly draw two alternates at the end of the State's rebuttal and prior to deliberations.

is deleted. The following sentence is inserted in its place:

The court chose to use its usual procedure and seat fourteen jurors and randomly draw two alternates at the end of the State's rebuttal and prior to deliberations.

It is ordered that sentence 3 of the second full paragraph of page 6 that reads:

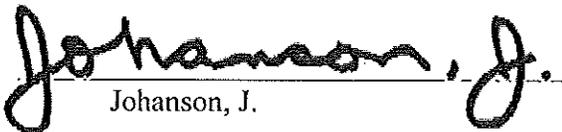
Meredith has presented evidence showing that he would have exercised his eighth peremptory challenge on juror 11, 14, or 16, all of whom deliberated in this case.

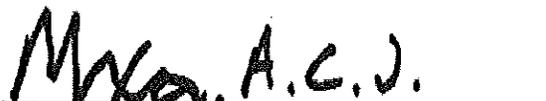
is deleted. The following sentence is inserted in its place:

Meredith has presented evidence showing that he would have exercised his eighth peremptory challenge on venire member 11, 14, or 16, two of whom deliberated in this case.


Melnick, J.

We concur:


Johanson, J.


Maxa, A.C.J.

THE TILLER LAW FIRM

July 03, 2017 - 4:24 PM

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