

NO. 46671-6-II

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

In Re the Personal Restraint Petition of:

GARY MEREDITH,
Petitioner.

REPLY BRIEF TO STATE'S SECOND SUPPLEMENTAL RESPONSE
TO PERSONAL RESTRAINT PETITION

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TABLE OF CONTENTS

	<u>Page</u>
A. ARGUMENT IN REPLY	1
1. <u>The trial court denied Mr. Meredith his full number of peremptory challenges</u>	1
2. <u>The two jurors who were seated after Mr. Meredith's seventh peremptory challenge participated in deliberations</u>	3
3. <u>The denial of the eighth peremptory challenge constitutes structural error.</u>	4
4. <u>Mr. Meredith did not waive his right to contest the court's failure to give an eighth peremptory challenge.</u>	7
5. <u>The court's error may be raised in collateral attack.</u>	8
D. CONCLUSION.....	10

TABLE OF AUTHORITIES

<u>WASHINGTON CASES</u>	<u>Page</u>
<i>In re Personal Restraint of Coggin</i> , 182 Wn.2d 115, 340 P.3d 810 (2014).....	9
<i>In re Personal Restraint of Morris</i> , 176 Wn2d 157, 288 P.3d 1140 (2012).....	7, 8
<i>In re Personal Restraint of Orange</i> , 152 Wn.2d 795, 100 P.3d 291 (2004).....	8
<i>In re Personal Restraint of Stockwell</i> 179 Wn.2d 588, 316 P.3d 1007(2014).....	9
<i>State v. Bird</i> , 136 Wn.App. 127, 148 P.3d 1058 (2006).....	4, 6, 7, 9
<i>State v. Easterling</i> , 157 Wn.2d 167, 137 P.3d 825 (2006).....	5
<i>State v. Evans</i> , 100 Wn.App. 757, 998 P.2d 373 (2000).....	4, 6
<i>State v. Paumier</i> , 176 Wn.2d 29, 288 P.3d 1126 (2012).....	5
<i>State v. Vreen</i> , 143 Wn.2d 923, 26 P.3d 236 (2001).....	4, 6, 7, 9
<i>State v. Wise</i> 176 Wn.2d 1, 288 P.3d 1113(2012).....	4, 5
<u>UNITED STATES CASES</u>	<u>Page</u>
<i>Arizona v. Fulminante</i> , 499 U.S. 279, 310, 111 S.Ct. 1246, 113 L.Ed. 2nd 302 (1991).....	5
<i>Dombrosky v. Farmers Ins. Co.</i> , 84 Wn. App. 245, 928 P.2d 1127 (1996).....	7
<i>Rose v. Clark</i> , 478 U.S. 570, 106 S.Ct. 3101, 92 L. Ed.2d 460 (1986).....	5
<i>Sullivan v. Louisiana</i> , 508 275, 113 S.Ct. 2078, 124 L.ed2d 182 (1993).....	5
<u>COURT RULE</u>	<u>Page</u>
CrR 6.4 (e) (1).....	1
CrR 6.5.....	1
CrR6.5(e)(2).....	6

A. **ARGUMENT IN REPLY**

1. **The trial court denied Mr. Meredith his full number of peremptory challenges**

Petitioner Gary Meredith was entitled to eight peremptory challenges because two alternate jurors were empaneled. However, the trial court erroneously gave him only seven challenges. CrR 6.4(e)(1),¹ CrR 6.5.² The defense and the prosecution were each afforded seven peremptory challenges. During a colloquy with the parties regarding the number of alternate jurors to seat, the court indicated that there would be 14 jurors seated, including two alternate jurors. The State noted that there were twenty-eight jurors for challenges, which includes 14 jurors and 14 peremptory challenges, and “the extra jurors in case there are excuses for cause.” RP (5/1/96) at 5. The trial court affirmed the State’s assessment of the number of jurors needed by

¹ CrR 6.4(e) provides: (1) Peremptory Challenges Defined. A peremptory challenge is an objection to a juror for which there is no reason given, but upon which the court shall exclude the juror. In prosecutions for capital offenses the defense and the state may challenge peremptorily 12 jurors each; in prosecution for offenses punishable by imprisonment in the state Department of Corrections 6 jurors each; in all other prosecutions, 3 jurors each. When several defendants are on trial together, each defendant shall be entitled to one challenge in addition to the number of challenges provided above, with discretion in the trial judge to afford the prosecution such additional challenges as circumstances warrant.

² CrR 6.5 provides: “When the jury is selected the court may direct the selection of one or more additional jurors, in its discretion, to be known as alternate jurors. Each party shall be entitled to one peremptory challenge for each alternate juror to be selected.”

stating “I was doing the math, as the State has already done, that leaves us 12 out of the 40.” RP (5/1/96) at 5. This shows that only seven peremptory strikes were contemplated by the court: 28 jurors indicate that there were 14 jurors, including two alternates, and 14 peremptory challenges, and 12 extra jurors for cause, for a total of 40 jurors. RP (5/1/96) at 5.

The court “ratified” the State’s calculation by stating: “I was doing the math as the State has already done, that leaves us 12 out of the 40.” RP (5/1/96) at 5. Based on this, the court granted only 14 peremptory challenges; seven for the prosecution and seven for the defense.

Mr. Meredith exhausted all seven of the peremptory challenges allocated to him, and the State similarly used all its peremptories. Mr. Meredith did not express acceptance of the panel, and continued to challenge for cause. See also, declaration of trial counsel Brett Purtzer,³ confirming that 14 peremptory challenges were used, that each side was only allocated seven challenges, and that had the defense been awarded additional peremptory challenges, he would have used the challenge to excuse one of three objectionable jurors: No. 11, 14 or 16.⁴

³The declaration is attached to Reply Brief of Petitioner, filed July 13, 2015.

⁴A discussion of the specific basis for excusing these jurors is found at Reply Brief of

2. The two jurors who were seated after Mr. Meredith's seventh peremptory challenge participated in deliberations

The court empaneled 14 jurors; the final two jurors (Juror No. 35 and 39) deliberated to a verdict. After the State and the defense exercised seven peremptory challenges each, only 12 jurors had been seated and left seven unselected remaining. The court empanelled the next two jurors, who were No. 35 and No. 39, without affording Mr. Meredith the ability to exercise his final peremptory challenges. The court seated 14 jurors, and Juror no. 35 and Juror no. 39 deliberated to a verdict because one juror was excused during the trial and the other was chosen to be an alternate.

During the trial, Juror No. 32, who was in seat 12, was excused due to illness. RP at 491. The alternates were not designated as such until the end of trial. At the close of trial, the court randomly selected Juror No. 7 as the alternate to be excused prior to deliberations. RP at 603. Therefore, both jurors (No. 35 and No. 39) for whom Mr. Meredith was unable to exercise an eighth peremptory challenge, participated in deliberation. Because Mr. Meredith used each of his allocated peremptory challenges and because the jurors participated in deliberations, his right to challenge no. 35 and no. 39 was impaired. "Any impairment of a party's right to

Petitioner, at 6-7.

exercise a peremptory challenge constitutes reversible error without a showing of prejudice. As such, harmless error analysis does not apply.” *State v. Evans*, 100 Wn.App 787, 998 P.2d 373 (2000). See also *State v. Vreen*, 143 Wn.2d 923, 930, 932, 26 P.3d 236 (2001) (erroneous denial of a litigant’s peremptory challenge cannot be harm unless the objectionable juror actually deliberates).

3. **The denial of the eighth peremptory challenge constitutes structural error.**

Mr. Meredith submits that denial of a peremptory challenge is structural error. See, *State v. Vreen*, 143 Wn.2d at 930. Structural error is a special category of constitutional error. *State v. Wise* 176 Wn.2d 1, 13-14, 288 P.3d 1113 (2012). Any impairment of exercising peremptory challenges must result in automatic reversal without a showing of prejudice. *State v Vreen*, 143 Wn.2d 923, 26 P.3d 236 (2001), *State v. Bird*, 136 Wn.App. 127, 148 P.3d 1058 (2006).

In its response, the State attempts to portray the court’s error as not involving a constitutional right. (State’s Second Supplemental Response to Personal Restraint Petition, at 2). The State emphasizes that there is no constitutional right to peremptory challenges. The attempt to characterize the right as a constitutional issue is an incorrect designation and the Court should not be swayed by the State’s mischaracterization of the nature of the error.

“Structural error is a special category of constitutional error that “affect[s] the framework within which the trial proceeds, rather than simply an error in the trial process itself.” *State v. Wise*, 176 Wn.2d 1, 13-14, 288 P.3d 1113 (2012), (quoting *Arizona v. Fulminante*, 499 U.S. 279, 310, 111 S.Ct. 1246, 113 L.Ed. 2nd 302 (1991)). “Where there is structural error “ ‘a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair.’ ” *Id.* (quoting *Rose v. Clark*, 478 U.S. 570, 577–78, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986)). Structural error is not subject to harmless analysis. *Fulminante*, 499 U.S. at 309–10; *State v. Easterling*, 157 Wn.2d at 181, 137 P.3d 825 (2006) (in the context of courtroom closure). “A structural error “[j]affect[s] the framework within which the trial proceeds” and renders a criminal trial an improper “vehicle for determin[ing] guilt or innocence.” *State v. Paumier*, 176 Wn.2d 29, 288 P.3d 1126 (2012) (quoting *Arizona v. Fulminante*, 499 U.S. 279, 310, quoting *Rose v. Clark*, 478 U.S. 570, 578, 106 S.Ct. 3101, 92 L.Ed. 2d 460 (1986)). See also, *Wise*, 176 Wn.2d at 18-19 (structural errors have repercussions that are ‘necessarily unquantifiable and indeterminate (quoting *Sullivan v. Louisiana*, 508 275, 282, 113 S.Ct. 2078, 124 L.Ed 2d 182 (1993)).

In *State v. Vreen*, 143 Wn.2d 923, 26 P.3d 236 (2001), the Court adopted the doctrine contained in *Evans; supra*. In *Vreen*, the Court held that if a juror deliberates and renders a verdict after the court has improperly denied the defendant the opportunity to exercise a peremptory strike, the error is structural and reversal is required. *Vreen*, 143 Wn.2d at 932.

The reasoning announced by the court in *Vreen* is controlling in this case. The error is structural in nature, meaning that the defect defies analysis by “harmless error” standards. In *State v. Bird*, 136 Wn.App. 127, 148 P.3d 1058 (2006), the trial court misapplied CrR 6.5(e)(2), and erroneously counted an acceptance of the jury panel to be a peremptory challenge, depriving Bird of a peremptory challenge to which he was entitled. This Court reversed his conviction and noted “[A]s our Supreme Court has held: [‘]Any impairment of a party’s right to exercise a peremptory challenge constitutes reversible error without a showing of prejudice. As such, harmless error analysis does not apply.[’]” *Vreen*, 143 Wn.2d at 931, 26 P.3d 236 (quoting *State v. Evans*, 100 Wn.App. 757, 774, 998 P.2d 373 (2000)).

Based on the foregoing, the failure of the trial court to provide Mr. Meredith with the number of peremptory challenges to which he was entitled mandates that

he receive a new trial without the necessity of showing prejudice or otherwise engaging in harmless error analysis. Any impairment of the ability to exercise peremptory challenges results in automatic reversal without the necessity of a showing of prejudice. *Vreen*, 143 Wn.2d at 931.

4. Mr. Meredith did not waive his right to contest the denial of an eighth peremptory challenge

The record contains no indication that Mr. Meredith knew that under CrR 6.5 he was entitled to an eighth peremptory challenge. 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, 928 P.2d 1127 (1996). Here, the record does not show that Mr. Meredith knew of or had any intent to waive his right to additional peremptory challenges.

A defendant must have knowledge of a right in order to waive it. *In re Restraint of Morris*, 176 Wn.2d 157, 166, 288 P.3d 1140 (2012). The record makes it clear that Mr. Meredith was not aware of his right to an eighth peremptory strike; therefore he could not waive the right.⁵ In *Morris*, neither counsel objected to an error regarding public trial. *Morris*, 176 Wn.2d at 162. In

⁵ This is also discussed in the petitioner’s Supplemental Reply Brief, at p. 10

this case, inasmuch as trial counsel did not object to the failure of the court to allow the correct number of peremptory challenges, trial counsel was ineffective.

Mr. Meredith has also raised a claim of ineffective appellate counsel due to his appellate counsel's failure to raise a peremptive challenge on direct appeal. The error here was presumptively prejudicial, and appellate counsel's failure to raise the issue on appeal is both deficient performance and prejudicial, requiring remand for new trial. See, *In re Personal Restraint of Orange*, 152 Wn.2d 795, 100 P.3d 291 (2004); *In re Morris*, 176 Wn2d at 166. In *Orange* the court held that Orange's public trial right error was presumptively prejudicial, so that his appellant council failed to raise the issue on appeal was both deficient and prejudicial. The remedy for the failure was a remand for a new trial,

Here, had the issue been raised during direct appeal, and because the error is structural in nature, Mr. Meredith would have received a new trial on remand. See e.g. *Orange*, and *Morris*, supra.

5. **The court's error may be raised in collateral attack**

In its response, the State implies that Mr. Meredith has to show actual and substantial prejudice in his personal restraint petition. (State's Second Supplemental Response at 1.) Here, the error is structural therefore prejudice need

not be shown. In addition, the failure of the court to give Mr. Meredith an eighth peremptory challenge had no benefit for Mr. Meredith, unlike *In re Restraint of Coggin*, 182 Wn.2d 115, 340 P.3d 810 (2014). The failure of the trial court to give the required number of a peremptory challenge *a priori* results in the impairment of the right to exercise a defendant's full compliment of challenges in instances where all peremptory challenges have been exhausted. This constitutes reversible error without the necessity of demonstrating prejudice to the defendant. See, *Bird*, 136 Wn. App. at 130; *State v. Vreen* 143 Wn2d at 930.

Our Supreme Court has recognized a category of PRP where the petitioner need not prove harm in addition to that which is inherent in proof of the error itself. *Stockwell*, 179 Wn.2d at 607. The court also notes that in PRPs raising claims of "so-called 'structural' error," and notes that many of these "defy analysis by 'harmless error' standards." *Stockwell*, 179 Wn.2d at 608 (McCloud, J., concurring). The error raised in this case defy analysis by 'harmless error' standards. *Stockwell*, 179 Wn.2d at 608 (McCloud, J., concurring). Here, "proof of a harmful effect on the trial outcome inheres in the claim itself." *Id.* A personal restraint petitioner can prevail only if he or she shows one of four categories, which include "....[s]tructural error resulting in automatic reversible error." *In re*

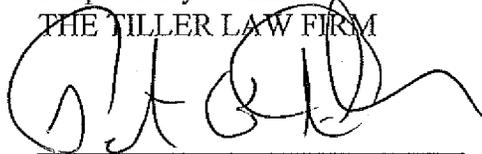
Restraint of Stockwell 179 Wn.2d 588, 607-608, 316 P.3d 1007(2014). As noted in Justice McCloud's concurring opinion in *Stockwell*: the rule "that errors which are presumptively prejudicial on direct appeal will generally be presumed prejudicial in a PRP—is still good law." *Stockwell*, 179 Wn.2d at 604-605. Here, as noted *supra*, failure to grant an eighth peremptory challenge is error that mandates automatic reversal without a showing of prejudice.

B. CONCLUSION

Based on the forgoing, as well as the previously submitted briefs of the petitioner, Mr. Meredith requests this Court to reverse his conviction and and remand for new trial.

DATED: September 2, 2016.

Respectfully submitted,
THE TILLER LAW FIRM

A handwritten signature in black ink, appearing to read 'Peter B. Tiller', is written over the printed name of the law firm.

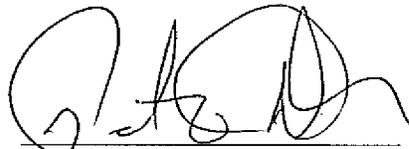
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CERTIFICATE OF SERVICE

The undersigned certifies that on September 2, 2016, that this Appellant's Opening Brief was sent by the JIS link to Mr. David Ponzoha, Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, and copies were mailed by U.S. mail, postage prepaid, to the Gary Meredith and a copy was e-mailed to Thomas Roberts:

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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 September 2, 2016.



PETER B. TILLER

TILLER LAW OFFICE

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