

NO. 94582-9

**THE SUPREME COURT
STATE OF WASHINGTON**

STATE OF WASHINGTON, PETITIONER,

v.

GARY DANIEL MEREDITH, RESPONDENT

Court of Appeals Cause No. 46671-6
Appeal from the Superior Court of Pierce County
The Honorable Vicki Hogan

No. 95-1-04949-6

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER.

Petitioner, State of Washington, respondent below, asks this Court to accept review of the Court of Appeals' decision terminating review that is designated in part B of this petition.

B. COURT OF APPEALS DECISION.

The state seeks review of the Unpublished Opinion of the Court of Appeals in this case, filed on February 14, 2017, under case number 46671-6-II. The state has also filed a timely motion to reconsider which is currently pending. *See* Appendices A and B.

C. ISSUES PRESENTED FOR REVIEW.

1. Where the ineffective assistance of appellate counsel issue was not included among the defendant's original grounds for relief, and where the Court of Appeals has not entered an order granting leave to amend under RAP 16.8(e), should the petition have been dismissed as to that issue where the issue was not sufficiently raised or supported before expiration of the time bar?

2. Does the decision below conflict with decisions of the United States Supreme Court and of this Court concerning the ineffective assistance of appellate counsel standard thereby creating a conflict as to the application of the standard to a non-constitutional, unpreserved peremptory challenge issue not raised on direct appeal?

3. Does the decision below conflict with decisions of this court and the courts of appeals as to a limiting instruction given when prior conviction evidence is admitted to prove an element of one of the charged crimes?

D. STATEMENT OF THE CASE.

In 1996 Gary Daniel Meredith (the “defendant”), petitioner below was convicted of second degree child rape and communicating with a minor for immoral purposes. Appendix A. He filed a direct appeal which was resolved by the court below and this Court in 2011 and 2013. *See State v. Meredith*, 163 Wn. App. 75, 165 Wn. App. 704, 259 P.3d 324 (2011), *affirmed*, 178 Wn.2d 180, 306 P.3d 942 (2013), *certiorari denied*, 143 S. Ct. 1329 (2014). During the defendant’s direct appeal he was represented by retained counsel, James Lobsenz. Appendix B, *infra*, Exhibit 2. The primary issue arose from a peremptory challenge exercised by the state and objected to by the defendant on *Batson*¹ grounds.

The primary issue raised or attempted to be raised in this petition was grounded in a separate un-objected to peremptory challenge issue. The trial court, with the consent and advocacy of the defendant, utilized a struck jury selection method in which all fourteen prospective jurors

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

would be selected as if they would all deliberate and at the end of the trial alternates would be selected at random from among the fourteen and then excused. 1 RP 9². No objection was interposed by the defendant to this procedure, and in fact he voiced his approval of the random selection of the alternates at the close of the case. *Id.* The trial court allowed each side seven peremptory challenges and did not discriminate as to whether they could be used against the panel that would deliberate or against alternates. 1 RP 5-9.

In addition to the jury selection procedures, the trial court also heard and entered a provisional ruling on a motion brought by the state concerning the defendant's prior sex offense convictions. The court initially ruled that the convictions could be admitted both as proof of an element of count two and as ER 404(b) evidence. 1 RP 31. The provisional ruling never became final; the defendant was permitted to re-argue the issue and did so several times, and the court ultimately ruled that the evidence could be admitted only as proof of an element of count two. *See* 1 RP 30-32; RP 62-71; 2 RP 70 et. seq.; 4 RP 507-17. It gave a limiting instruction consistent with its final ruling at the time the evidence was admitted and in the final instructions at the close of the case, plus it

² Citations to the record in this petition are to the verbatim reports and clerks papers submitted to this Court and the court below during the defendant's direct appeal under case No.s 38600-3 and 86825-5.

issued an order *in limine* restricting argument. 4 RP 507-11. No objection was interposed as to the content of the instruction and no alternative was proposed. 4 RP 507-17. CP 150-168. During closing arguments no argument was presented by either party concerning the prior convictions.

The defendant filed this petition in August 2014, less than a year after the United States Supreme Court denied certiorari. No order has been entered by the court below authorizing additional grounds for relief. Before expiration of the one year collateral attack time limit, the defendant filed two legal briefs in support of his petition. In the second he made brief mention of ineffective assistance of appellate counsel, but without supporting legal authority and without discussion of his appellate lawyer's extensive body of work, including a petition for review to this court that was accepted, and a writ of certiorari to the United States Supreme Court. *See* Personal Restraint Petition, filed August 4, 2014, and Brief in Support of Personal Restraint Petition, filed January 29, 2015, pp. 14-15, 35-36.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED.

1. THE DECISION BELOW CONFLICTS WITH THE 2014 AMENDMENTS TO RAP 16.8 AND DECISIONS OF THIS COURT AS TO AMENDMENT AND SUPPORT OF PERSONAL RESTRAINT PETITION GROUNDS FOR RELIEF.

The state recently submitted briefing and argument on this issue in a case that is currently pending before this Court, *In re: Personal*

Restraint of Michael Louis Rhem, No. 92689-1. The authorities and arguments submitted in the ***Rhem*** matter support the state's position in this case.

The court below did not, as is now required by RAP 16.8(e), authorize additional grounds for relief to be added to the defendant's petition. While the defendant included superficial references to ineffective assistance of appellate counsel in a brief, he did not adequately support the additional ground with evidence or authority. ***Matter of Cook***, 114 Wn.2d 802, 813, 792 P.2d 506 (1990) (On collateral review "the appellate court will reach the merits of a constitutional issue when the petitioner demonstrates that the alleged error gives rise to actual prejudice, and will reach the merits of a nonconstitutional issue when the claimed error constitutes a fundamental defect which inherently results in a complete miscarriage of justice."), ***In re: Personal Restraint of Rice***, 118 Wn.2d 876, 886, 828 P.2d 1086, *cert. den.* 506 U.S. 958 (1994) (A petitioner "must state with particularity facts which, if proven, would entitle him to relief."), ***In re: Personal Restraint of Lord***, 123 Wn.2d 296, 302–03, 868 P.2d 835, 842 (1994) ("To obtain relief with respect to either constitutional or nonconstitutional claims, the petitioner must show that he was actually and substantially prejudiced by the error."). Moreover subsequent briefing accepted for filing should not be viewed as supplanting the required

authorization of the court to add additional grounds for relief. See *In re Haghghi*, 178 Wn.2d 435, 449, 309 P.3d 459, 466 (2013) (added ground for relief of “ineffective assistance of appellate counsel is time barred”).

Accordingly, the ineffective assistance of appellate counsel ground should have been dismissed as time-barred pursuant to RCW 10.73.090(1).

2. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THE UNITED STATES SUPREME COURT AND OF THIS COURT CONCERNING THE INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL STANDARD THEREBY CREATING A CONFLICT AS TO THE APPLICATION OF THE STANDARD TO AN UNPRESERVED, NON-CONSTITUTIONAL ALLEGED PEREMPTORY CHALLENGE ERROR THAT WAS NOT RAISED ON APPEAL.

The court below applied an incorrect ineffective assistance of appellate counsel standard. The *Strickland* ineffective assistance standard applied to trial counsel’s performance is necessarily distinct from its application to appellate counsel’s performance. Nowhere is this more true than when it comes to pursuing or not pursuing particular issues. “[No] decision of this Court suggests, however, that the indigent defendant has a constitutional right to compel appointed counsel to press nonfrivolous points requested by the client, if counsel, as a matter of professional judgment, decides not to present those points. . . ‘One of the first tests of a discriminating advocate is to select the question, or questions, that he will

present orally. Legal contentions, like the currency, depreciate through over-issue.’ ” *Jones v. Barnes*, 463 U.S. 745, 751-52, 103 S. Ct. 3308, 3313, 77 L. Ed. 2d 987 (1983), quoting Jackson, *Advocacy Before the Supreme Court*, 25 Temple L.Q. 115, 119 (1951); *In re: Personal Restraint of Lord*, 123 Wn.2d 296, 302–03, 868 P.2d 835, 842 (1994). The appellate standard takes into account that professional judgment, pragmatism and respect for the appellate court requires appellate advocates to choose which issues to pursue. *Id.*

The appellate standard requires deference to appellate counsel’s professional judgment and the elimination of hindsight-enhanced second guessing. *In re: Personal Restraint of Stenson*, 142 Wn.2d 710, 16 P.3d 1, 14 (2001), *In re: Personal Restraint of Lord*, 123 Wn.2d 296, 868 P.2d 835, 842 (1994). “For judges to second-guess reasonable professional judgments and impose on appointed counsel a duty to raise every ‘colorable’ claim suggested by a client would disserve the very goal of vigorous and effective advocacy that underlies *Anders*. Nothing in the Constitution or our interpretation of that document requires such a standard.” *In re: Personal Restraint of Stenson*, 142 Wn.2d at 733–34, citing *Jones v. Barnes*, 463 U.S. at 751, 754. In addition, this court has observed, “The ‘process of ‘winnowing out weaker arguments ... and focusing on’ those more likely to prevail, far from being evidence of

incompetence, is the hallmark of effective appellate advocacy’ . ”. *In re: Personal Restraint of Lord*, 123 Wn.2d at 302–03, quoting *Smith v. Murray*, 477 U.S. 527, 536, 106 S. Ct. 2661, 2667, 91 L. Ed. 2d 434 (1986).

Under the above standards, ineffective assistance of counsel is not to be evaluated in isolation or as an academic matter. The test to be applied, the defendant’s burden of proof on collateral attack, is to “establish that (1) counsel's performance was deficient, and (2) the deficient performance actually prejudiced the defendant” in light of the above standards. *In re Morris*, 176 Wn.2d 157, 166, 288 P.3d 1140 (2012). Deficient performance, as was made clear in *Jones, Stenson*, and *Lord*, necessarily includes evaluation of how the appellate advocate performed the task “of ‘winnowing out weaker arguments . . . and focusing on’ those more likely to prevail. . . .” *In re: Personal Restraint of Lord*, 123 Wn.2d 296, 302–03.

In addition to showing deficient overall performance and prejudice, a personal restraint petitioner must also show that an issue not raised in a defendant’s direct appeal had merit. *In re Pers. Restraint Petition of Dalluge*, 152 Wn.2d 772, 777–78, 100 P.3d 279, 282 (2004)(“If a petitioner raises ineffective assistance of appellate counsel on collateral review, he or she must first show that the legal issue that

appellate counsel failed to raise had merit.”). Furthermore, a petitioner must also show that “he was ‘actually prejudiced by the failure to raise or adequately raise the issue.’ ” *In re Pers. Restraint Petition of Dalluge*, 152 Wn.2d at 788, quoting *Matter of Maxfield*, 133 Wn.2d 332, 344, 945 P.2d 196 (1997), quoting *In re: Personal Restraint of Lord*, 123 Wn.2d at 314. And finally, the general collateral attack sufficiency requirements referenced above must also be met. *Matter of Cook*, 114 Wn.2d at 813; *In re: Personal Restraint of Rice*, 118 Wn.2d at 886; and *In re: Personal Restraint of Lord*, 123 Wn.2d at 302–03.

The retained appellate lawyer in this case filed a fifty page opening brief that included eight assignments of error, nine major argument sections and twelve sub-argument sections. One cannot read the brief, much less the appellate lawyer’s credentials [Appendix L, Motion for Reconsideration.], without concluding that the appeal was handled by a seasoned, appellate lawyer applying exceptional professional judgment. To hold that the lawyer was ineffective because he did not include a single unpreserved assignment of error is “to second-guess reasonable professional judgments and impose on appointed counsel” a nigh impossible standard of professional performance. *In re: Personal Restraint of Stenson*, 142 Wn.2d at 733–34.

This is all the more evident when the merits of the peremptory

challenge issue was examined. First of all, it was an unpreserved, non-constitutional issue. RAP 2.5(a). *State v. Nelson*, 18 Wn. App. 161, 164, 566 P.2d 984, 986 (1977). “There is no constitutional right to be afforded peremptory challenges. . . In any event, the argument is waived inasmuch as it was raised for the first time during oral argument.” *Id.*, *State v. Kender*, 21 Wn. App. 622, 626, 587 P.2d 551, 554 (1978) (“Both the sixth amendment to the United States Constitution and the tenth amendment to the Washington Constitution provide that one accused of a crime is entitled to trial by an impartial jury, but there is no constitutional right to peremptory challenges.”). *State v. Saintcalle*, 178 Wn.2d 34, 73, 309 P.3d 326, 349–50 (2013) (Gonzalez, J., concurring.) (“There is no constitutional requirement that peremptory challenges be included within our trial procedures.”).

Appellate counsel should not be faulted for not including a single unpreserved, non-constitutional issue in his appeal. Knowing that the “appellate court may refuse to review any claim of error which was not raised in the trial court”, Mr. Lobsenz rightly concluded that a non-constitutional, jury selection issue, that was not preserved with an objection or motion was not appropriate to be added to the appeal. RAP 2.5(a).

The court below may have also misunderstood the facts. It

attributed the one “objection” voiced by either party to the defense when in fact it was voiced by the prosecution. 1 RP 9. The following colloquy took place on the first day of trial:

The Court: The two alternates, the Court’s usual procedure is we seat 14 and then at the end of the State’s rebuttal, prior to them commencing deliberations, we draw randomly from the entire 14 in the panel. Unless you all wanted to indicate some other proposal.

Mr. Schacht: My strong preference is to know who the [the prosecutor] alternates are. I would prefer not to draw them from random.

Mr. Purtzer: Your Honor, my preference is to draw [defense counsel] because I think that if you do it at that point in time everybody pays attention. You don't have to worry about alternates not being involved in the case at some point in time. I think that the jurors' attention is much more focused when no one knows exactly who is going to be the alternate.

1 RP 9.

The court below referred to this part of the record twice and both times incorrectly attributed the prosecution’s preference to the defense. In short, from Mr. Lobsenz’s standpoint when analyzing the appropriate issues for the appeal, the issue was (1) non-constitutional under RAP 2.5(a) and required preservation, (2) not objected to when it first came up [1 RP 3-9.], (3) not objected to during three additional court days of jury selection [Jury Selection RP pp. 4 et.seq.], (4) not objected to during

argument about other jury selection issues, including the *Batson* challenge, during two additional court days [2 RP 96, et. seq., 3 RP 122], and (5) expressly advocated for by the defense in at least one respect [1 RP 3 et. seq.].

The defense attorney accepted the panel after it had been selected according to his preferred procedural method. Appendix K, State's Supplemental Response to Personal Restraint Petition. It is not overstatement to say that the full record from jury selection made the peremptory challenge issue a non-issue during the direct appeal.

Ineffective assistance "requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). If the failure to pursue a single unpreserved, non-constitutional issue invalidates an entire body of work from an outstanding appellate lawyer who pursued other issues to the nation's highest court, then effective appellate assistance is a daunting standard indeed.

The misapplication of the *Strickland* standard is compounded by the court's incorrect analysis of the peremptory challenge issue. "The trial court has broad discretion over the jury selection process." *State v. Williamson*, 100 Wn. App. 248, 255, 996 P.2d 1097, 1101 (2000), citing

People v. Reese, 670 P.2d 11, 13 (Colo. App. 1983). Except in cases of racial discrimination, the question is whether the “court here substantially complied with both the statute and the rule” in its jury selection procedure. *Id.*

The trial court was not using the traditional method of jury selection whereby twelve jurors are seated in the box and the parties then exercise their first six peremptory challenges against those jurors. CrR 6.4(e) provides for a ratio of one peremptory challenge for every two of deliberating jurors. By contrast CrR 6.5 provides for a ratio of one for one for alternates. Since with the support of the defendant, alternate jurors were not to be selected until the conclusion of the case, the trial court reasonably adopted the CrR 6.4(e) ratio rather than the alternate juror ratio from CrR 6.5. This is consistent with CrR 1.2 which provides “These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration, effective justice, and the elimination of unjustifiable expense and delay.”

The court below also deviated from this court’s collateral attack standards in favor of automatic reversal. The defendant here was not required to establish a fundamental defect that inherently results in a miscarriage of justice concerning the non-constitutional peremptory

challenge error. *Matter of Cook*, 114 Wn.2d at 813, *In re Pers. Restraint of Lord*, 152 Wn.2d 182, 94 P.3d 952 (2004). See Appendix A, *infra*, p.5-6. The deviation from the *Cook* standard was rooted in misinterpretation of the relied upon direct appeal peremptory challenge cases, all of which were readily distinguishable.

In each case cited by the court below, the defendant was wrongly deprived of one or more peremptory challenges that the trial court had originally awarded him. See *State v. Vreen*, 143 Wn.2d 923, 926, 26 P.3d 236, 237 (2001) (erroneous *Batson* ruling); *State v. Evans*, 100 Wn. App. 757, 760 and 762, 998 P.2d 373 (2000) (erroneous *Batson* ruling in two cases) and *State v. Bird*, 136 Wn. App. 127, 130, 148 P.3d 1058, 1060 (2006) (trial court diminished the number of the defendant's peremptory challenges from seven to six by counting a pass as a peremptory challenge).

This case is readily distinguishable. The defendant was permitted to exercise every challenge that he started with and was thus not deprived of any of his peremptory challenges. To read these cases as dispensing with the non-constitutional, collateral attack, miscarriage of justice standard was error. There is no hint in any of these cases that a personal restraint defendant need not show a fundamental defect that inherently results in a miscarriage of justice merely because the issue involved a

peremptory challenge. *Matter of Cook*, 114 Wn.2d at 813, *In re Pers. Restraint of Lord*, 152 Wn.2d at 188.

Finally there was little factual support for any supposed prejudice. The trial court's record of the peremptory challenges shows that the defendant excused numbers 2, 3, 5, 7 and 12 out of the first 14 jurors. *See* Appendix C, State's Response to Personal Restraint Petition and Appendix K, State's Supplemental Response to Personal Restraint Petition. He then did not exercise another peremptory challenge until numbers 27 and 33. Far from supporting the defendant's claim of prejudice, the actual exercise of the peremptory challenges shows that the defendant was not concerned about the three jurors he now (twenty years later) claims were unfairly seated. When those jurors numbers came up he had peremptory challenges to use against them but chose not to.

3. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT AS TO A LIMITING INSTRUCTION ISSUED WHEN PRIOR CONVICTION EVIDENCE IS ADMITTED BECAUSE IT IS AN ELEMENT OF ONE OF THE CHARGED CRIMES.

The decision of the court below also conflicts with this court's and the courts of appeals' decisions concerning limiting instructions. Factual errors also contributed to the incorrect holding. The court below overlooked that no ER 404(b) evidence was admitted, and thus the limiting instruction properly did not reference an ER 404(b) purpose.

The evidence in question was contained in two exhibits. These were judgments from two prior sex offense convictions which were admitted at the end of the state's case. 4 RP 517. The exhibits were admitted for the sole purpose that they were proof of an element of one of the crimes and thus necessary for the jury to consider. See *Blakely v. Washington*, 542 U.S. 296, 301, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L.Ed.2d 435 (2000). See also *State v. Roswell*, 165 Wn.2d 186, 197–98, 196 P.3d 705, 710 (2008) (“Courts have long held that when a prior conviction is an element of the crime charged, it is not error to allow the jury to hear evidence on that issue . . .” any “prejudice created by evidence of the prior conviction may be countered with a limiting instruction from the trial court.”), citing *Spencer v. Texas*, 385 U.S. 554, 565–66, 87 S. Ct. 648, 17 L.Ed.2d 606 (1967). Accordingly, the trial court's limiting instruction restricted the evidence to that purpose and explicitly directed the jury that, “Evidence that the defendant has been previously convicted of a crime is not evidence of the defendant's guilt.” CP 32-50, Instruction 14.

In giving a limiting instruction a trial court must tread carefully. Article 4, §16 of the Washington Constitution provides that “Judges shall not charge juries with respect to matters of fact, nor comment thereon, but

shall declare the law.” See *State v. Lane*, 125 Wn.2d 825, 838, 889 P.2d 929, 935 (1995). “A statement by the court constitutes a comment on the evidence if the court's attitude toward the merits of the case or the court's evaluation relative to the disputed issue is inferable from the statement.” *Id.*, citing *State v. Hansen*, 46 Wn. App. 292, 300, 730 P.2d 706, 737 P.2d 670 (1986).

Since a judge may not comment on any issue of fact to be decided by the jury, it follows that, “Any remark ‘that has the potential effect of suggesting that the jury need not consider an element of an offense’ could qualify as a judicial comment.” *State v. Hartzell*, 156 Wn. App. 918, 936–37, 237 P.3d 928, 938 (2010), quoting *State v. Levy*, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006).

In *Levy*, the offending references were to elements of burglary. The trial court instructed that an apartment was considered a “building” and a crowbar a “deadly weapon”. *State v. Levy*, 156 Wn.2d at 721-23. These references were improper although they were also considered harmless. *Id.* In both instances the instruction at issue dealt with a particular fact contained in a particular element of one of the crimes.

Consistent with the requirements of Article 4, § 16, the trial court in this case restricted the jury’s consideration of the prior conviction evidence even though it was admitted as proof of an element of a crime.

This was a delicate balance where the evidence was not controverted but was also not stipulated by the defendant. The trial court had to restrict the purpose without indicating that the element had been established.

The trial court performed its balancing act admirably. It did so first by referencing the prior convictions in its element instruction. CP 32-50, Instruction 11. No suggestion was made that the jury “need not consider an element of an offense” consistent with *Hartzell*. *State v. Hartzell*, 156 Wn. App. at 936–37. Next, the limiting instruction restricted the jury’s consideration of the prior conviction evidence as comprehensively as possible. The jury was explicitly directed that it could consider the evidence in “deciding Count II and for no other purpose.” CP 32-50, Instruction 14.

A proper limiting instruction in an ER 404(b) case directs the jury that it is “prohibited from considering the evidence of [the defendant’s] prior sex offenses for the purpose of showing his character and action in conformity with that character. . . .” *State v. Gresham*, 173 Wn.2d 405, 425, 269 P.3d 207(2012). There is nothing in the court’s instructions that violated this principle even though the evidence was not admitted under ER 404(b).

The court below did not explain how the limiting instruction could be improved upon. In light of the court’s discussion of the ER 404(b)

issue, there is reason to believe that it thought the instruction should have included a reference to an ER 404(b) purpose. To have included such a reference would have been error since the evidence was not admitted for any purpose under ER 404(b).

While it is true that the trial court gave a provisional ruling [1 RP 29-30.] based on ER 404(b), it is not an accurate view of the record that the evidence was admitted under ER 404(b). The trial court modified its ruling and ultimately admitted the evidence solely because it was proof of an element of count two. 4 RP 507-11. Not surprisingly there was no objection to the court's limiting instruction.

As any seasoned criminal trial lawyer knows, caution is wisdom when it comes to ER 404(b) evidence. Caution is exactly what led to no ER 404(b) evidence actually being offered or admitted despite the trial court's initial provisional ruling. Review of the witness record and the trial testimony transcripts shows that none of the witnesses involved in the incidents that led to the defendant's prior convictions testified. *See* Appendix I, State's Response to Personal Restraint Petition. *See also* Appendix B, *infra*. Thus none of the facts of any of the defendant's prior offenses were admitted into evidence. The only evidence actually admitted were exhibits 9 and 10, the judgments of conviction, and those were admitted with a limiting instruction that stated, "Evidence that the

defendant has been previously convicted of a crime is not evidence of the defendant's guilt. . . ." CP 32-50, Instruction 14.

Finally, the court below overlooked the source of the limiting instruction. The instruction was modified from WPIC 5.05. 4 RP 511. Without modification, WPIC 5.05 would have been appropriate if the defendant had testified and if the convictions were admitted under ER 609 for impeachment. They were not, and the instruction was adapted to a case-specific purpose. In addition, it is significant that the limiting instruction was not based on WPIC 5.30, the instruction commonly used in connection with ER 404(b) evidence. 11 Washington Practice, Pattern Jury Instructions, Criminal, WPIC 5.30 (4th Ed. 2016).

F. CONCLUSION.

For the foregoing reasons, this Court should grant review to correct the above-referenced errors in the unpublished opinion of the court below that conflict with prior decisions of the United States Supreme Court, this Court and the courts of appeals.

DATED: Wednesday, March 15, 2017

MARK LINDQUIST
Pierce County
Prosecuting Attorney



JAMES SCHACHT
Deputy Prosecuting Attorney
WSB # 17298

Certificate of Service:

The undersigned certifies that on this day she delivered by ^{Hand}U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

3.15.17 
Date Signature

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. Saintcalle*, 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.

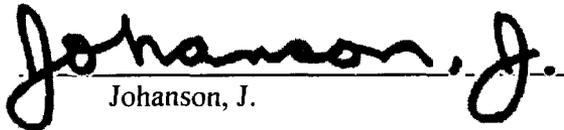
We grant Meredith’s petition and reverse for a new trial.

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.

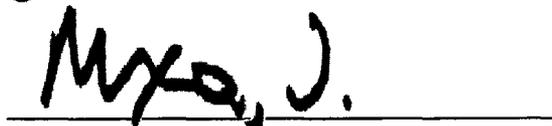


Melnick, J.

We concur:



Johanson, J.



Maxa, A.C.J.

APPENDIX “B”

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

IN RE: THE PERSONAL RESTRAINT
PETITION OF:

NO. 46671-6

MOTION FOR RECONSIDERATION

GARY DANIEL MEREDITH,

Petitioner.

I. IDENTITY OF MOVING PARTY:

Respondent, State of Washington, requests the relief designated in Part II.

II. STATEMENT OF RELIEF SOUGHT:

Reconsideration of this court's opinion issued February 14, 2017.

III. FACTS RELEVANT TO CASE AND ARGUMENT:

A. RESPECTFULLY, THE COURT'S OPINION OVERLOOKED THAT THE INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL ISSUE WAS TIME-BARRED BECAUSE LEAVE TO ADD IT AS AN ADDITIONAL GROUND WAS NOT GRANTED PURSUANT TO RAP 16.8(e).

Personal restraint procedure was adopted to implement the Supreme Court's constitutional habeas corpus jurisdiction at the appellate level. *Matter of Cook*, 114 Wn.2d 802, 805, 792 P.2d 506 (1990), citing RAP 16.3-16.15 and *Toliver v. Olsen*, 109 Wn.2d 607, 611, 746 P.2d 809 (1987); *In re Hagler*, 97 Wn.2d 818, 823, 650 P.2d 1103

1 (1982). A personal restraint petition, like a petition for a writ of habeas corpus, is not a
2 substitute for an appeal nor an opportunity for a second appeal. *In re Hagler*, at 824.
3 “Collateral relief undermines the principles of finality of litigation, degrades the
4 prominence of the trial, and sometimes costs society the right to punish admitted
5 offenders.” *Id.* citing *Engle v. Issac*, 456 U.S. 107, 102 S. Ct. 1558, 71 L.Ed.2d 783
6 (1982). These costs are significant and require that collateral relief be limited. *Id.*, *Matter*
7 *of Cook*, 114 Wn.2d at 809.

8 One limitation adopted by the Washington legislature is a one year time bar. RCW
9 10.73.090 and .100. It is well settled that a personal restraint petition must be filed within
10 one year from the date that the judgment becomes final, except where the petition satisfies
11 one of the enumerated statutory exceptions. *In re Personal Restraint of Clark*, 168 Wn.2d
12 581, 585, 230 P.3d 156 (2010), *In re Personal Restraint of Coats*, 173 Wn.2d 123, 138,
13 267 P. 3d 324 (2011). “The defendants' right to a fair trial is protected by a right of direct
14 appeal. After the right of appeal has been exhausted and the appeal is final, the defendant
15 is afforded the additional right to collateral review by a personal restraint petition. This
16 right, however, is not unlimited. It requires the petitioner to make a heightened showing of
17 prejudice, among many other things. . . Personal restraint petitions based upon most
18 claimed errors made at trial by the judge, such as jury instructions and rulings on evidence
19 and motions, must be brought within the one-year time limit prescribed by RCW
20 10.73.090.” *Id.* at 140.

21 The judgment in this case became final on the date that the United States Supreme
22 Court denied the defendant’s writ of certiorari, February 28, 2014. Petition p. 3; Appendix
23 L. RCW 10.73.090(3). The one year time bar deadline was thus February 28, 2015.

24 The defendant filed the petition in this case on August 6, 2014, less than a year (six
25 months) after the judgment became final. Petition p. 1. Review of the voluminous filings

1 in this case indicates that this court has never been asked leave to amend the petition as
2 pursuant to RAP 16.8(e). But even if leave had been requested, any new grounds would
3 have been “subject to the time limitation provided in [the time bar statutes].” *Id.*

4 The defendant’s petition alleged five original grounds for relief, including
5 ineffective assistance of *trial* counsel. *Id.* It did not allege ineffective assistance of
6 *appellate* counsel. The defendant also filed two briefs in support of his petition, one on
7 August 11, 2014, and the second on January 29, 2015. No motion to add additional
8 grounds for relief was filed and to the best information of the state via review of the
9 ACORDS case chronology, leave had not been granted by the court pursuant to RAP
10 16.8(e). Thus as of February 28, 2015, the defendant had not alleged in his original
11 petition and had not been granted authorization to add the additional ground based on
12 ineffective assistance of appellate counsel. His grounds for relief were premised on trial
13 counsel’s performance, not appellate counsel.

14 The state acknowledges that the defendant referenced appellate counsel's
15 performance briefly in his second brief. He did not seek or receive this Court's
16 authorization to add it as an additional ground for relief and he was not directed to support
17 it with evidence or citations of authority. His brief focused primarily on trial counsel's
18 performance with appellate as an afterthought. As to appellate counsel, no citations of
19 authority, no evidence and very little argument were included in the brief. Thus, while the
20 state briefly addressed the issue in its response brief, the issue was insufficiently supported
21 even if leave to amend had been sought. *In re: Personal Restraint of Rice*, 118 Wn.2d
22 876, 886, 828 P.2d 1086, *cert. den.* 506 U.S. 958(1994) (A defendant seeking post-
23 conviction relief must offer competent evidence to support his petition.); *In re: Personal*
24 *Restraint of Lord*, 123 Wn.2d 296, 302–03, 868 P.2d 835, 842 (1994) (Allegations in a
25 personal restraint petition must be proved by "competent admissible evidence."). In short

1 the Court overlooked that the ineffective assistance of appellate counsel ground for relief
2 that was the basis for granting the defendant's petition was not one of the defendant's
3 grounds for relief, was insufficiently supported and is time-barred.

4 B. RESPECTFULLY, THE COURT'S OPINION OVERLOOKED OR
5 MISAPPREHENDED THE APPLICABLE INEFFECTIVE ASSISTANCE
6 OF COUNSEL STANDARD WHERE THE PEREMPTORY
7 CHALLENGE ISSUE WAS NON-CONSTITUTIONAL, NOT
8 PRESERVED AND BASED ON AN INCORRECT UNDERSTANDING
9 OF THE RECORD.

10 For obvious reasons the application of the *Strickland* ineffective assistance
11 standard to trial counsel's performance is necessarily distinct from its application to
12 appellate counsel's performance. "There are countless ways to provide effective assistance
13 in any given case. Even the best criminal defense attorneys would not defend a particular
14 client in the same way." *Strickland v. Washington*, 466 U.S. 668, 689, 104 S. Ct. 2052,
15 80 L. Ed. 2d 674 (1984).

16 The appellate standard requires deference to appellate counsel's professional
17 judgment and the elimination of hindsight-enabled second guessing. *In re: Personal*
18 *Restraint of Stenson*, 142 Wn.2d 710, 733-34, 16 P.3d 1, 14 (2001), *In re: Personal*
19 *Restraint of Lord*, 123 Wn.2d 296, 302-03, 868 P.2d 835, 842 (1994). As the United
20 States Supreme Court put it, "[No] decision of this Court suggests, however, that the
21 indigent defendant has a constitutional right to compel appointed counsel to press
22 nonfrivolous points requested by the client, if counsel, as a matter of professional
23 judgment, decides not to present those points. . . Experienced advocates since time beyond
24 memory have emphasized the importance of winnowing out weaker arguments on appeal
25 and focusing on one central issue if possible, or at most on a few key issues. Justice
Jackson, after observing appellate advocates for many years, stated: 'One of the first tests
of a discriminating advocate is to select the question, or questions, that he will present

1 orally. Legal contentions, like the currency, depreciate through over-issue.’ ” *Jones v.*
2 *Barnes*, 463 U.S. 745, 751–52, 103 S. Ct. 3308, 3313, 77 L. Ed. 2d 987 (1983), quoting
3 Jackson, *Advocacy Before the Supreme Court*, 25 Temple L.Q. 115, 119 (1951).

4 The deference required by *Jones* has been embraced by Washington Courts. “For
5 judges to second-guess reasonable professional judgments and impose on appointed
6 counsel a duty to raise every ‘colorable’ claim suggested by a client would disserve the
7 very goal of vigorous and effective advocacy that underlies *Anders*. Nothing in the
8 Constitution or our interpretation of that document requires such a standard.” *In re:*
9 *Personal Restraint of Stenson*, 142 Wn.2d at 733–34, citing *Jones v. Barnes*, 463 U.S. at
10 751, 754. In addition our court has observed, “The ‘process of ‘winnowing out weaker
11 arguments ... and focusing on’ those more likely to prevail, far from being evidence of
12 incompetence, is the hallmark of effective appellate advocacy’.” *In re: Personal*
13 *Restraint of Lord*, 123 Wn.2d 296, 302–03, Quoting *Smith v. Murray*, 477 U.S. 527, 536,
14 106 S. Ct. 2661, 2667, 91 L. Ed. 2d 434 (1986).

15 Under the above standards, ineffective assistance of counsel should not be
16 evaluated in a vacuum or in isolation or as an academic matter. The test to be applied, that
17 is the defendant’s burden, is to “establish that (1) counsel’s performance was deficient and
18 (2) the deficient performance actually prejudiced the defendant” in light of the above
19 standards. *In re Morris*, 176 Wn.2d 157, 166, 288 P.3d 1140 (2012). Deficient
20 performance, as was made clear in *Jones*, *Stenson*, and *Lord*, necessarily requires
21 evaluating how the appellate advocate performed the “ ‘process of ‘winnowing out weaker
22 arguments . . . and focusing on’ those more likely to prevail. . . .” *In re: Personal*
23 *Restraint of Lord*, 123 Wn.2d 296, 302–03.

1 In this case (perhaps due to the focus in the briefing on trial ineffective assistance)
2 the Court overlooked the great bulk of what the defendant's appellate lawyer did on his
3 behalf. To begin with, the appellate lawyer appears to have been retained on behalf of the
4 defendant and his original appointed appellate counsel was allowed to withdraw. The
5 retained appellate lawyer filed a fifty page opening brief that included eight assignments of
6 error, nine major argument sections and twelve sub-argument sections. To say that the
7 defendant's conviction should be overturned now twenty years after the trial for failure to
8 include yet another argument section in an appeal is "to second-guess reasonable
9 professional judgments and impose on appointed counsel" a nigh impossible standard of
10 professional performance. *In re: Personal Restraint of Stenson*, 142 Wn.2d at 733-34.

12 One cannot read the defendant's opening brief, much less the appellate lawyer's
13 credentials [Appendix L.], without concluding that the appeal was handled by a seasoned,
14 appellate lawyer who knew what he was doing. No supplemental briefing prompted by
15 perceived insufficiency in the appellant's legal work was ordered and thus there is no hint
16 that the panel that assigned to the appeal was concerned about Mr. Lobsenz performance.
17 Based on the information available at the time of the appeal, that is the record on appeal,
18 not the self-serving, twenty year late objection in the declaration filed by defendant's trial
19 counsel, the defendant's appellate lawyer, Mr. Lobsenz, should not be second-guessed in
20 his decision not to pursue a single questionable issue.

22 The peremptory challenge issue was questionable for many reasons. The Court
23 appears to have overlooked that it was not preserved and non-constitutional. *See State v.*
24 *Nelson*, 18 Wn. App. 161, 164, 566 P.2d 984, 986 (1977) ("There is no constitutional right
25 to be afforded peremptory challenges. . . In any event, the argument is waived inasmuch as

1 it was raised for the first time during oral argument.”). *State v. Kender*, 21 Wn. App. 622,
2 626, 587 P.2d 551, 554 (1978) (“Both the sixth amendment to the United States
3 Constitution and the tenth amendment to the Washington Constitution provide that one
4 accused of a crime is entitled to trial by an impartial jury, but there is no constitutional
5 right to peremptory challenges.”). *State v. Saintcalle*, 178 Wn.2d 34, 73, 309 P.3d 326,
6 349–50 (2013) (Gonzalez, J., concurring.) (“There is no constitutional requirement that
7 peremptory challenges be included within our trial procedures.”). Thus, there had to have
8 been an objection or some other means by which the issue was preserved for it to have
9 been an appellate issue. RAP 2.5(a).

11 Appellate counsel cannot be faulted for not including an unpreserved, non-
12 constitutional issue in his appeal. Under the circumstances of this case, knowing that the
13 “appellate court may refuse to review any claim of error which was not raised in the trial
14 court”, Mr. Lobsenz rightly concluded that a non-constitutional, jury selection issue, that
15 was not preserved with an objection, motion or even a complaint should not cloud the
16 many other colorable issues that actually were preserved. RAP 2.5(a).

17 Although the opinion does not discuss preservation, it does suggest that the defense
18 lodged at least a complaint about the jury selection procedures. Slip Opinion, p. 6. This is
19 incorrect. The opinion attributes the complaint to the defense when in fact it was voiced
20 by the prosecution. 1 RP 9.

22 On the first day of trial, during the trial court’s discussion of jury selection, before
23 the jury questionnaires were distributed, the following colloquy took place:

24 The Court: The two alternates, the Court’s usual procedure is we seat 14
25 and then at the end of the State’s rebuttal, prior to them commencing
deliberations, we draw randomly from the entire 14 in the panel.
Unless you all wanted to indicate some other proposal.

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Mr. Schacht: My strong preference is to know who the alternates are. I
[the prosecutor] would prefer not to draw them from random.

Mr. Purtzer: Your Honor, my preference is to draw because I think that if
[defense counsel] you do it at that point in time everybody pays attention. You
don't have to worry about alternates not being involved in the
case at some point in time. I think that the jurors' attention is
much more focused when no one knows exactly who is
going to be the alternate.

1 RP 9.

The opinion referred to this part of the record twice. Both times the complaint was
attributed to the defense. The actual record supports not just that it was not the defense but
also that the defense was advocating for the procedures being followed. From Mr.
Lobsenz's standpoint when analyzing the appropriate issues for the appeal, this was one of
a number of factors that made the addition of what would have been a tenth argument
section to his brief unwise. The issue was (1) non-constitutional under RAP 2.5(a) and
required preservation, (2) it was not objected to when it first came up [1 RP 3-9.], (3) not
objected to during three additional court days of jury selection [Jury Selection RP pp. 4
et.seq.], (4) not objected to during argument about other jury selection issues, including the
Batson challenge, during two additional court days [2 RP 96, et. seq., 3 RP 122], and (5)
expressly advocated for by the defense in at least one respect [1 RP 3 et. seq.]. What's
more, the defense attorney accepted the panel after the peremptory challenges were taken
when he signed the trial court's written record of the challenges. Appendix K, State's
Supplemental Response to Personal Restraint Petition. It is not overstatement to say that
the state of the record made the peremptory challenge issue appear to be a non-issue.

Setting aside 20/20 hindsight it may reasonably be said that the addition of an
unpreserved issue might well have weakened the primary jury selection issue. Mr.
Lobsenz pursued the *Batson* issue all the way to the Supreme Court. See *State v.*

1 *Meredith*, 178 Wn.2d 180, 306 P.3d 942 (2013). Could an *ineffective* appellate lawyer
2 have done the same? To hold that Mr. Lobsenz rendered ineffective assistance “requires
3 showing that counsel made errors so serious that counsel was not functioning as the
4 ‘counsel’ guaranteed the defendant by the Sixth Amendment.” *Strickland v. Washington*,
5 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). If the failure to pursue a
6 single unpreserved, non-constitutional issue invalidates an entire body of work from an
7 outstanding appellate lawyer who pursued other issues to the state’s highest court, then
8 effective appellate assistance is a frightening standard indeed.

9 The merits of the jury selection issue add further support for reconsideration. “The
10 trial court has broad discretion over the jury selection process.” *State v. Williamson*, 100
11 Wn. App. 248, 255, 996 P.2d 1097, 1101 (2000), citing *People v. Reese*, 670 P.2d 11, 13
12 (Colo. App. 1983). Except in cases of racial discrimination, the question is whether the
13 “court here substantially complied with both the statute and the rule” in its jury selection
14 procedure. *Id.* The trial court’s deviation from the strict or traditional method of
15 peremptory challenges in favor of the “struck method” as was preferred by the defendant
16 and should be viewed as substantial compliance. 1 RP 9.

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18 The court was not using the traditional method of jury selection whereby twelve
19 jurors are seated in the box and the parties then exercise their first six peremptory
20 challenges against those jurors. It modified the procedures in CrR 6.4 and 6.5 in several
21 ways but with the defendant’s acquiescence and at his request. CrR 6.4(e) provides for a
22 ratio of one peremptory challenge for every two of the twelve deliberating jurors. By
23 contrast CrR 6.5 provides for a ratio of one for one. Since with the support of the
24 defendant, alternate jurors were not to be selected until the conclusion of the case, the trial
25 court reasonably adopted the CrR 6.4(e) ratio rather than the alternate juror ratio. Again in

1 light of the defendant's preference for the struck method, this modification is an
2 imminently reasonable interpretation of a non-constitutional court rule adapted to a new
3 jury selection procedure.

4 To read the above criminal rules as mandating the reversal of a twenty year old sex
5 abuse conviction is to elevate form above justice. This is contrary to the admonition of the
6 rules which provides: "These rules are intended to provide for the just determination of
7 every criminal proceeding. They shall be construed to secure simplicity in procedure,
8 fairness in administration, effective justice, and the elimination of unjustifiable expense
9 and delay." CrR 1.2. The cases relied upon as supporting this result do not mandate such
10 an outcome contrary to this admonition. In this case, the defendant was arguably given
11 and exercised the correct number of challenges based on the CrR 6.4 ratio.

12 The cases cited in support of automatic reversal are readily distinguishable. In each
13 case said to support "reversible error without a showing of prejudice" the defendant was
14 deprived of one or more challenges that the trial court had originally awarded. See Slip
15 Opinion, p.5-6. In the *Vreen* case, the trial court was held to have improperly refused, as a
16 result of an improper prosecution *Batson* challenge, to allow the defendant to use a
17 peremptory challenge that he admittedly had available to him against a particular juror.
18 *State v. Vreen*, 143 Wn.2d 923, 926, 26 P.3d 236, 237 (2001). The *Evans* case involved a
19 similar *Batson* issue in two separate cases where the defendants were deprived of
20 peremptory challenges against particular jurors that they had originally been awarded.
21 *State v. Evans*, 100 Wn. App. 757, 760 and 762, 998 P.2d 373 (2000). This case is readily
22 distinguishable since the defendant was permitted to exercise every challenge that he was
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1 awarded. Thus he was not deprived of a peremptory challenge in any way comparable to
2 the *Vreen* and *Evans* defendants.

3 The *Bird* case is similarly distinguishable. In *Bird* the trial court diminished the
4 number of the defendant's peremptory challenges from seven to six by counting a pass as a
5 peremptory challenge. *State v. Bird*, 136 Wn. App. 127, 130, 148 P.3d 1058, 1060 (2006).
6 As in *Vreen* and *Evans*, the trial court improperly took a peremptory challenge that was
7 originally awarded to the defendant away from him. Thus the issue of prejudice was patent
8 where a juror that the defendant sought to challenge was seated and deliberated.

9 In this case it was the prosecution's preference to know whom the twelve jurors
10 would be who would deliberate. 1 RP 9. The defendant had no such preference and in fact
11 quite the opposite. In that light the opinion overlooked several additional facts. If for the
12 sake of argument the lack of an eighth peremptory challenge was constitutional error, that
13 does not mean that a juror the defendant would have challenged deliberated. Of the three
14 jurors the defense attorney claims he might have challenged (twenty years after the fact),
15 two would have been seated. The defense attorney could not know whether one or the
16 other or both would deliberate. Thus, unlike *Vreen*, *Evans* and *Bird* it cannot be said that
17 a juror the defendant would have challenged actually deliberated.

18 A final fact overlooked by the Court and that supports reconsideration of the
19 opinion is the trial court's record of the peremptory challenges. Trial counsel's claim in
20 his declaration that he would have excused Nos. 11, 14, or 16 is contradicted by the trial
21 court's record which the defense attorney signed as evidence that he accepted the jury as
22 constituted. The trial court kept track by means of a line on the juror sheet which juror was
23 the new number fourteen each time a peremptory was exercise by either party. By
24 reviewing which side excused which juror during the peremptory challenges, it can be
25 shown where the parties passed back in 1996. *See Appendix C, State's Response to*

1 Personal Restraint Petition and Appendix K, State's Supplemental Response to Personal
2 Restraint Petition. Doing so shows that the defendant excused numbers 2, 3, 5, 7 and 12
3 out of the first 14 potential jurors, but then did not exercise another peremptory challenge
4 until numbers 27 and 33. Far from supporting the defendant's claim of prejudice, the
5 actual exercise of the peremptory challenges shows that the defendant was not concerned
6 about 11, 14 or 16 and had peremptory challenges to use against them.

7 For all of the foregoing reasons, the state respectfully submits that the Court should
8 reconsider its opinion as to the facts and analysis of the peremptory challenge and
9 ineffective assistance of appellate counsel issues. Unfortunately, the Court overlooked or
10 misapprehended points of law and material facts that call the Court's opinion into question.

11 C. RESPECTFULLY, THE COURT'S OPINION OVERLOOKED OR
12 MISAPPREHENDED THE FACTS AND LEGAL STANDARDS
13 CONCERNING THE ADMISSION OF EXHIBITS 9 AND 10, THE
14 ONLY EVIDENCE ADMITTED CONCERNING THE DEFENDANT'S
15 PRIOR CONVICTIONS.

16 Respectfully the Court should also reconsider its opinion concerning the admission
17 of prior convictions and the limiting instruction. The Court's opinion overlooked that the
18 trial court's initial provisional ruling during the pre-trial motions was changed by the close
19 of the state's case. No ER 404(b) evidence was introduced, and no ER 404(b) argument
20 was presented. There were no objections during the closing arguments and no reference by
21 either counsel that could be construed as a propensity argument. The defendant's prior
22 convictions were introduced for one reason and one reason only; they were an element of
23 one of the crimes and were not even discussed during the arguments.

24 For obvious reasons the defendant's prior convictions occupied the attention of
25 both the court and the parties during the pre-trial proceedings. On the first day of trial the
court heard and ruled on the state's motion to admit the prior convictions. 1 RP 29-30. Its
ruling however was provisional; the defense attorney requested and was permitted to ask

1 for reconsideration or clarification or to bring further motions. 1 RP 30-32, 70.
2 Thereafter, the defense brought the issue back before the court several times before
3 opening statements and at the close of the state's case. 1 RP 62-71; 2 RP 70 *et. seq.*; 4 RP
4 517. In response to one of the subsequent motions, the defense requested a limiting
5 instruction just before the evidence was to be introduced so that the precise purpose would
6 be preserved in the record. 2 RP 96. That was accomplished and there was no objection to
7 the limiting instruction. 4 RP 507-11.

8 The multiple times that the trial court considered the ER 404(b) evidence and the
9 motions related to it are examples of an experienced trial judge treading carefully and
10 exercising appropriate discretion. ER 404(b), the propensity rule, prevents the state from
11 introducing evidence and argument that the defendant is guilty because he or she may have
12 had a propensity or proclivity to commit the crime. ER 404(b). *State v. McCreven*, 170
13 Wn. App. 444, 458, 284 P.3d 793, 800 (2012) citing *State v. Everybodytalksabout*, 145
14 Wn.2d 456, 466, 39 P.3d 294 (2002). ER 404(b) rulings are reviewed for an abuse of
15 discretion. *State v. Embry*, 171 Wn. App. 714, 732, 287 P.3d 648 (2012), *review denied*,
16 177 Wn.2d 1005, 300 P.3d 416 (2013). The standard of review is thus whether the trial
17 court's decision is manifestly unreasonable or exercised on untenable grounds or for
18 untenable reasons. *Id.* at 731-32. Under that standard, an appellate court should reverse
19 the ruling only if it has "a definite and firm conviction that the court below committed a
20 clear error of judgment in the conclusion it reached." *United States v. Schlette*, 842 F.2d
21 1574, 1577 (9th Cir. 1988).

22 As any seasoned criminal trial lawyer knows, caution is wisdom when it comes to
23 ER 404(b) evidence. Caution is exactly what led to no ER 404(b) evidence actually being
24 offered or admitted despite the trial court's initial provisional ruling. Review of the
25 witness record and the trial testimony transcripts shows that none of the witnesses involved

1 in the incidents that led to the defendant's prior convictions testified. *See* Appendix I,
2 State's Response to Personal Restraint Petition and Appendix M. Thus there was no
3 evidence of the facts of any of the defendant's prior offenses being admitted into evidence.
4 The only evidence actually admitted were exhibits 9 and 10, the judgments of conviction,
5 and those were admitted with a limiting instruction that stated, "Evidence that the
6 defendant has been previously convicted of a crime is not evidence of the defendant's
7 guilt. . . ." Slip Opinion, p.11.

8 While the trial court's initial, provisional ruling may have authorized the state to
9 introduce additional evidence, nothing compelled the state to follow through and put
10 witnesses from those cases on the stand. By the end of the case, the only purpose for
11 which the evidence was admitted was that it was an element of one of the crimes.

12 Nowhere can this be more clearly seen than in the limiting instruction. The
13 instruction was modified from WPIC 5.05. 4 RP 511. As published in the pattern
14 instructions, WPIC 5.05 would have been appropriate if the defendant had testified and if
15 the convictions were admitted under ER 609 for impeachment. The pattern instruction was
16 necessarily modified because the evidence was not admitted under ER 609. The two
17 exhibits were actually admitted only because they were elements of the crime. It is
18 significant that the limiting instruction was not based on WPIC 5.30. That pattern
19 instruction is commonly used in connection with ER 404(b) evidence. 11 Washington
20 Practice, Pattern Jury Instructions, Criminal, WPIC 5.30 (4th Ed. 2016) (The comments
21 state, "The cases hold that the court should specify the limited purpose for which the
22 evidence is admissible, and instruct the jury to disregard the evidence for other purposes.").
23 In this case, the trial court ultimately did not admit the evidence under ER 404(b) and thus
24 did not specify absence of mistake, intent, motive or the like as a purpose. Moreover the
25 court, at the request of the defendant, properly issued an order *in limine* restricting

1 argument about the prior convictions to the purpose for which they were admitted. 4 RP
2 507-11. The parties went beyond the order and simply did not discuss the prior
3 convictions during argument. In short, the court dealt with a thorny trial issue with
4 deliberation and care and cannot be said to have abused its discretion.

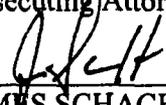
5 Although the Court did not reverse the defendant's conviction on the prior
6 conviction issue, it nevertheless misapprehended the actual evidence admitted and the
7 support for the limiting instruction. In the event that the defendant invites the Court to
8 overturn his conviction on the limiting instruction issue, the Court should decline the
9 invitation. That issue, like the ineffective assistance issue and the prior conviction issues,
10 should be reconsidered too.

11 IV. CONCLUSION:

12 For the foregoing reasons the state respectfully submits that the Court overlooked
13 or misapprehended multiple points of fact and law, and thus should reconsider and
14 withdraw its opinion and dismiss the defendant's petition.

15 DATED: Monday, March 06, 2017.

16 MARK LINDQUIST
17 Pierce County
18 Prosecuting Attorney

19 
20 _____
21 JAMES SCHACHT
22 Deputy Prosecuting Attorney
23 WSB # 17298

21 Certificate of Service:

22 The undersigned certifies that on this day she delivered by e mail and/or
23 ABC-LMI delivery to the attorney of record for the appellant and appellant
24 c/o his or her attorney true and correct copies of the document to which this
25 certificate is attached. This statement is certified to be true and correct under
penalty of perjury of the laws of the State of Washington. Signed at Tacoma,
Washington, on the date below.

24 3.6.17 Theresa Kar
Date Signature

APPENDIX "L"

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

IN RE: THE PERSONAL RESTRAINT
PETITION OF:

GARY DANIEL MEREDITH,

Petitioner.

DECLARATION OF JAMES SCHACHT

Declarant JAMES SCHACHT declares as follows:

1. That I am an attorney licensed to practice in the State of Washington, am employed by the Pierce County Prosecutor's Office in the Appellate Division, and am currently assigned to this case.

2. Attached as Exhibit 1 to this declaration is a true and correct copy of a screen shot from the ACORDS chronology from the defendant's direct appeal showing the date that the United States Supreme Court denied the defendant's writ of certiorari to be February 28, 2014.

3. Attached as Exhibit 2 to this declaration is a true and correct copy of the professional qualifications of the defendant's retained appellate counsel, James E.

1 Lobsenz, from the defendant's direct appeal. This document was accessed via the web site
2 for Mr. Lobsenz law firm on Monday, March 6, 2017.

3 I HEREBY DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF
4 THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

5 Dated: Monday, March 06, 2017

6 Signed at Tacoma, WA.

7 
8 JAMES SCHACHT

9 Certificate of Service:
10 The undersigned certifies that on this day she delivered by U.S. mail
11 and or ABC-LMI delivery to the attorney of record for the appellant and
12 appellant c/o his attorney true and correct copies of the document to which
13 this certificate is attached. This statement is certified to be true and correct
14 under penalty of perjury of the laws of the State of Washington. Signed at
15 Tacoma, Washington, on the date below.

16 Date Signature

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Exhibit 1
“ACORDS Chronology Excerpt”

CASE EVENTS # 868255

Date	Item	Action	Participant
04/14/2017	Sealed Event <i>Sealed: Yes Comment: Sealed Event</i>	Sealed Event	
09/13/2016	Report of Proceedings <i>Comment: 10 transcripts sent to Court of Appeals, Division II attention: Sandy Williams on loan status to be returned upon completion of their case no. 46671-6-II lz 742 462 03 9175 7213</i>	Sent by Court	
02/28/2014	Letter <i>Comment: The U.S. Supreme Court denied the petition for writ of certiorari</i>	Filed	
01/06/2014	Letter <i>Comment: From US Supreme Court advising the petition for writ of certiorari was filed and placed on the docket as No. 13-8062</i>	Received by Court	

Exhibit 2
“Professional Qualifications of
James E. Lobsenz”

CARNEY BADLEY SPELLMAN

James E. Lobsenz

James E. Lobsenz joined the firm in 1989 through the merger of his firm, Wolfe & Lobsenz, P.S., with the Carney firm.

Mr. Lobsenz has an extensive appellate practice in both the state and federal appellate courts. His substantive areas of experience are constitutional law, freedom of speech, police misconduct, civil rights, criminal defense law, employment law and evidence.

After clerking for the Honorable Mathew O. Tobriner, Associate Justice of the California Supreme Court, and the Honorable Vincent L. McKusick, Chief Justice of the Supreme Judicial Court of Maine, Mr. Lobsenz came to Seattle and served as a deputy prosecuting attorney in King County for three years. Later he served as a public defender before going into private practice.

Mr. Lobsenz is the author of several law review articles, and he is an Adjunct Professor of Law at Seattle University, where he teaches courses on constitutional law, the First Amendment and civil rights litigation.

Mr. Lobsenz is the author of the website *Seattle Criminal Appeals*, where he publishes information on the criminal appeals process and representative cases.

Honors and Recognitions

Mr. Lobsenz is an elected Fellow of the American Academy of Appellate Lawyers. In 2009, Mr. Lobsenz received the William O. Douglas Award from the Washington Association of Criminal Defense Lawyers in recognition of exceptional lifetime courage and dedication to the defense of persons accused of crime. He also has received the 2010 Community Leadership Award from Washington's GLBT Bar Association for his work opposing discrimination against gays and lesbians in the armed forces; the 1991 Civil Libertarian Award from the Washington ACLU; and the 1985 Human Rights Day Award from the Seattle Chapter of the United Nations Association.

He has been named by Washington *Super Lawyers* magazine as one of the top attorneys in the state for each of the last sixteen years, including 2016, and a *Top Lawyer* by *Seattle Magazine* for multiple years.

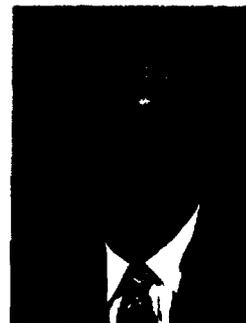
He was recognized by *Seattle Metropolitan Magazine* as one of King County's "Top Lawyers 2010." *Seattle Metropolitan Magazine* culled their list using the Martindale-Hubbell® ratings. He has been awarded an "AV" Preeminent rating by Martindale-Hubbell. This rating is given to attorneys who demonstrate the highest ethical standards and professional ability.

Education

- JD, UC Berkeley School of Law, 1978
- MA, Stanford University, 1975
- BA, Political Science, Stanford University, 1974

Bar and Court Admissions

- State of Washington
- U.S. Supreme Court
- U.S. Court of Appeals, Ninth Circuit
- U.S. District Court, Western District of Washington
- U.S. Court of Claims



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Seattle, WA 98104

- U.S. Court of Appeals for the Armed Forces
- Army Court of Criminal Appeals

Representative Cases

Mr. Lobsenz has argued over 25 cases in the Washington Supreme Court and over 150 appeals in the state and federal courts. His past cases include the following:

- *Fisher Broadcasting – Seattle TV v. City of Seattle*, 180 Wn.2d 515, 326 P.3d 688 (2014) (counsel for amicus curiae)
- *State v. Lau*, 174 Wn. App. 857, 300 P.3d 838 (2013)
- *Tatham v. Rogers*, 170 Wn. App. 76 (2012)
- *Yates v. Fithian*, 2010 WL 3788272 (W.D. Wash. 2010)
- *State v. Sutherby*, 165 Wn2d 870 (2009)
- *Witt v. Department of the Air Force*, 527 F.3d 806 (9th Cir. 2008)
- *Watada v. Head*, 530 F.Supp.2d 1136 (W.D.Wash. 2007)
- *M.L. v. Federal Way School District*, 394 F. 3d 634 (9th Cir.) cert. denied 345 U.S. 1128 (2005)
- *State v. Stein*, 144 Wn.2d 236 (2001)
- *King v. Olympic Pipeline Co.*, 104 Wn. App. 338 (2000)
- *Swinomish Indian Tribal Community v. Siland County*, 87 Wn. App. 552 (1997)
- *Washington State Physicians Exchange v. Fisons*, 122 Wn.2d 299 (1993)
- *Ski Acres, Inc. v. Kittitas County*, 118 Wn 2d 852 (1992)
- *Employco Personnel Services v. Seattle*, 117 Wn 2d 606 (1991)
- *In re Blauvelt*, 115 Wn.2d 735, 801 P.2d 235 (1990)
- *Thao v. Control Data Corporation*, 57 Wn. App. 802 (1990)
- *Watkins v. United States Army*, 875 F. 2d 699 (9th Cir. 1989) (en banc), cert. denied, 498 U.S. 957 (1990)
- *Levison v. Washington Horse Racing Comm'n*, 48 Wn. App. 822 (1987)

Publications

- "Raising and Litigating Ineffective Assistance of Counsel Claims," *Washington Criminal Defense*, Vol. 16, No. 3 (August 2002)
- "The Residential Tenant's Right to Freedom of Political Expression," (co-author) 10 *University of Puget Sound Law Review* 1 (1987)
- "A Constitutional Right to an Appeal: Guarding Against Unacceptable Risks of Erroneous Conviction," 8 *University of Puget Sound Law Review* 375 (1985)
- "Bakke, Lochner, and Law School: The Nobility Clause Versus a Republican Form of Medicine," 32 *Maine Law Review* 1 (1980)

Professional Associations

- American Civil Liberties Union of Washington, previously served on legal committee for thirty-seven years; former board member
- Northwest Women's Law Center
- Society of Counsel for the Representation of Accused Persons, board of directors
- Stanford Club of Western Washington, former board member
- Washington Association of Criminal Defense Lawyers, former board member
- Washington State Bar Association

APPENDIX "M"

PIERCE COUNTY PROSECUTOR
March 15, 2017 - 3:50 PM
Transmittal Letter

Document Uploaded: 2-466716-Petition for Review.pdf

Case Name: State v. Meredith

Court of Appeals Case Number: 46671-6

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

Brief: ____

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Therese M Kahn - Email: tnichol@co.pierce.wa.us

A copy of this document has been emailed to the following addresses:

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