

FILED
SUPREME COURT
STATE OF WASHINGTON
2/1/2018 9:03 AM
BY SUSAN L. CARLSON
CLERK

NO. 94582-9

**SUPREME COURT OF THE
STATE OF WASHINGTON**

IN RE: PERSONAL RESTRAINT OF:

GARY DANIEL MEREDITH, RESPONDENT

Petition for Review from the
Court of Appeals, Division II

Case No. 46671-6

SUPPLEMENTAL BRIEF OF PETITIONER

MARK LINDQUIST
Prosecuting Attorney

By
JAMES SCHACHT
Deputy Prosecuting Attorney
WSB # 17298

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

Table of Contents

A.	ISSUES PERTAINING TO PETITION FOR REVIEW.....	1
1.	Under the personal restraint Constitutional error standard, did the court below err when it held that prejudice need not have been shown in order to obtain personal restraint relief for alleged ineffective assistance of appellate counsel?	1
2.	Under the personal restraint constitutional error standard, did the court below err when it held that ineffective assistance of appellate counsel had been shown where the alleged peremptory challenge error was not shown to be error, where it was not preserved, and where no prejudice was demonstrated?	1
B.	STATEMENT OF THE CASE.....	1
C.	ARGUMENT.....	4
1.	THE COURT BELOW ERRED WHEN IT HELD THAT PREJUDICE NEED NOT HAVE BEEN SHOWN IN ORDER TO OBTAIN PERSONAL RESTRAINT RELIEF FOR INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL WHERE THE PEREMPTORY CHALLENGE ERROR WAS NOT CONSTITUTIONAL, MUCH LESS STRUCTURAL ERROR THAT WOULD ALLOW A REVIEWING COURT TO DISPENSE WITH THE REQUIREMENT OF PREJUDICE.....	5
2.	THE DEFENDANT HAS NOT ESTABLISHED INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL BECAUSE HE HAS NOT SHOWN THAT THE PEREMPTORY CHALLENGE ISSUE HAD MERIT IF IT HAD BEEN RAISED ON DIRECT REVIEW, AND BECAUSE HE HAS NOT SHOWN PREJUDICE.	11
D.	CONCLUSION.....	16

Table of Authorities

State Cases

<i>In re Caldellis</i> , 187 Wn.2d 127, 143, 385 P.3d 135, 144 (2016)	13
<i>In re Coggin</i> , 182 Wn.2d 115, 121, 340 P.3d 810, 813 (2014).....	12
<i>In re Pers. Restraint of Coats</i> , 173 Wn.2d 123, 132, 267 P.3d 324 (2011).....	11
<i>In re: Per. Restraint of Meredith</i> , 197 Wn. App. 1070, 2017 WL 588205 (2017).....	5
<i>In re: Pers. Restraint of Lord</i> , 123 Wn.2d 296, 868 P.2d 835 (1994).....	16
<i>Matter of Canha</i> , 189 Wn.2d 359, 377, 402 P.3d 266 (2017)	11
<i>Matter of Salinas</i> , ___ Wn.2d ___, 408 P.3d 344 (January 4, 2018)	5, 14, 15
<i>Matter of Sandoval</i> , ___ Wn.2d ___, 2018 WL 456981 (January 18, 2018)	11
<i>State v. Arredondo</i> , 188 Wn.2d 244, 256, 394 P.3d 348, 355 (2017).....	9
<i>State v. Bird</i> 136 Wn. App. 127, 130, 148 P.3d 1058 (2006).....	6
<i>State v. Bone-Club</i> , 128 Wn.2d 254, 261-62, 906 P.2d 325 (1995)	7
<i>State v. Elmore</i> , 139 Wn.2d 250, 277-78, 985 P.2d 289 (1999)	7
<i>State v. Evans</i> , 100 Wn. App. 757, 774-75, 998 P.2d 373 (2000)	6
<i>State v. Grier</i> , 171 Wn.2d 17, 32-33, 246 P.3d 1260 (2011).....	11
<i>State v. Jones</i> , 185 Wn.2d 412, 426, 372 P.3d 755 (2016)	7
<i>State v. Kender</i> , 21 Wn. App. 622, 626, 587 P.2d 551 (1978).....	6

<i>State v. Kyllo</i> , 166 Wn.2d 856, 862, 215 P.3d 177 (2009)	12
<i>State v. Marsh</i> , 126 Wash. 142, 146–47, 217 P. 705 (1923).....	7
<i>State v. Mason</i> , 160 Wn.2d 910, 934, 162 P.3d 396 (2007)	10
<i>State v. Meredith</i> , 163 Wn. App. 75, 165 Wn. App. 704, 259 P.3d 324 (2011).....	1, 4
<i>State v. Meredith</i> , 178 Wn.2d 180, 306 P.3d 942 (2013).....	1
<i>State v. Nelson</i> , 18 Wn. App. 161,164, 566 P.2d 984 (1977)	6
<i>State v. Saintcalle</i> , 178 Wn.2d 34, 73, 309 P.3d 326 (2013)	6
<i>State v. Slert</i> , 186 Wn.2d 869, 876, 383 P.3d 466 (2016).....	7, 8
<i>State v. Vreen</i> , 143 Wn.2d 923, 26 P.3d 237 (2001).....	4, 5, 6, 10
<i>State v. Vy Thang</i> , 145 Wn.2d 630, 642, 41 P.3d 1159 (2002).....	10
<i>State v. Wise</i> , 176 Wn.2d 1, 16, 288 P.3d 1113, 1120 (2012).....	7
Federal and Other Jurisdictions	
<i>Chapman v. California</i> , 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967).....	13
<i>Jones v. Barnes</i> , 463 U.S. 745, 751–52, 103 S. Ct. 3308, 3313, 77 L. Ed. 2d 987 (1983).....	16
<i>Neder v. United States</i> , 527 U.S. 1, 7, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999).....	13
<i>Smith v. Murray</i> , 477 U.S. 527, 536, 106 S. Ct. 2661, 2667, 91 L. Ed. 2d 434 (1986).....	16
<i>United States v. Gonzalez–Lopez</i> , 548 U.S. 140, 149, n. 4, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006).....	7

<i>United States v. Marcus</i> , 560 U.S. 258, 263, 130 S. Ct. 2159, 2164-65, 176 L. Ed. 2d 1012 (2010).....	7
<i>Weaver v. Massachusetts</i> , ___ U.S. ___, 137 S. Ct. 1899, 1912, 198 L. Ed. 2d 420 (2017).....	13
<i>Weaver v. Massachusetts</i> , 137 S. Ct. 1899, 198 L. Ed. 2d 420 (2017)....	12
 Statutes	
RCW 9.68A.090(2).....	1
 Rules and Regulations	
CrR 6.4.....	8, 9, 10
CrR 6.4(e)(1).....	9
CrR 6.4(e)(2).....	9
CrR 6.5.....	8, 9, 10
RAP 2.5(a)	15

A. ISSUES PERTAINING TO PETITION FOR REVIEW.

1. Under the personal restraint constitutional error standard, did the court below err when it held that prejudice need not have been shown in order to obtain personal restraint relief for alleged ineffective assistance of appellate counsel?
2. Under the personal restraint constitutional error standard, did the court below err when it held that ineffective assistance of appellate counsel had been shown where the alleged peremptory challenge error was not shown to be error, where it was not preserved, and where no prejudice was demonstrated?

B. STATEMENT OF THE CASE.

In 1996 Respondent Gary Daniel Meredith (the “defendant”) was charged with second degree child rape and communicating with a minor for immoral purposes. *See State v. Meredith*, 178 Wn.2d 180, 306 P.3d 942 (2013). The communicating charge included an allegation that the defendant had been previously convicted of a felony sexual offense, thereby increasing the seriousness of the crime from a gross misdemeanor to a class C felony pursuant to RCW 9.68A.090(2). *See State’s Response to Personal Restraint Petition, Appendix A.* The victim of the rape was twelve years old, the victim of the communicating charge was thirteen, and the two girls’ best friends who testified along with them at trial were also thirteen. *State v. Meredith*, 163 Wn. App. 75, 165 Wn. App. 704, 259 P.3d 324 (2011)(Unpublished Facts.).

The trial was called on May 1, 1996. 1 RP 3. Before calling for a jury panel the trial court engaged in a colloquy with the trial lawyers about jury selection issues and certain pretrial motions, including a motion to admit or exclude the defendant's prior 1991 conviction for third degree rape, and his 1992 conviction for third degree assault with sexual motivation. The trial court ruled on the jury selection procedures without objection from either party and with encouragement from the defense as to how alternate jurors were to be selected. 1 RP 3-10. The court then distributed a juror questionnaire and proceeded with argument about the prior conviction issue and other pre-trial motions. 1 RP 10-32.

Concerning the prior conviction issue, the trial court issued a provisional ruling that was re-visited several times during the pretrial proceedings and during trial. *See* 1 RP 30-32; RP 62-71; 2 RP 70 et. seq.; 4 RP 507-17. The provisional ruling never became final; the defendant was permitted to re-argue the issue and did so several times. *Id.* The trial court ultimately ruled that the evidence could be admitted only as proof of the sentence enhancement allegation for count two. 4 RP 507-11. 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 issued an order *in limine* restricting argument. *Id.* 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.

As to the parties' peremptory challenges, after starting the trial on May 1st the trial court conducted three additional days of jury selection. Jury Selection VRP 4, et.seq.¹ During the individual and panel questioning the defendant did not object to the peremptory challenge procedure nor to the number of peremptory challenges that had been awarded. *Id.* He also did not object during argument about other jury selection issues, including a vigorously contested *Batson* challenge that this court reviewed from the defendant's direct appeal. In short, both parties exercised their allotted peremptory challenges at the end of *voir dire* and thereby seated fourteen jurors, all of whom were eligible to deliberate at the end of the case. The court, with the defendant's express approval, followed through on its proposal to randomly select and excuse one alternate (another juror had been excused for hardship during the trial) just before the jury was excused to deliberate. 7 RP 602-605.

The defendant was found guilty of both offenses on June 10, 1996. *See* State's Response to Personal Restraint Petition, Appendix A. He was allowed to remain out of custody on bail pending sentencing and

¹ The jury selection verbatim reports are contained in three consecutively paginated volumes dated May 2, 3, and 6, 1996. The trial verbatim reports are contained in seven volumes dated from May 1, 1996, to May 9th.

thereupon absconded for twelve years. He was not sentenced until November 2008. *Id.* He appealed his conviction and was represented by retained appellate counsel throughout the direct appeal proceedings, including in a petition for a *writ of certiorari* to the United States Supreme Court. *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). The court below and this court affirmed his convictions in 2011 and 2013. *Id.* This petition was filed within one year of the denial of *certiorari*.

C. ARGUMENT.

Both the court below and this court's commissioner held that the defendant need not have established prejudice in order to obtain personal restraint relief for alleged ineffective assistance of appellate counsel. Both courts erred in two ways. First they misapplied this court's *Vreen*² decision and decided that, although this case did not involve a constitutional issue, and although the issue was not objected to in the trial court and therefore not preserved, it nevertheless was an issue that would have constituted "reversible error without a showing of prejudice" if the defendant's appellate lawyer had included it as an assignment of error in his direct appeal. *In re: Per. Restraint of Meredith*, 197 Wn. App. 1070,

² *State v. Vreen*, 143 Wn.2d 923, 26 P.3d 237 (2001).

2017 WL 588205 (2017)(Unpublished Opinion, p.7). *See* Ruling Denying Review, p. 3. Second, as a consequence of the misapplication of *Vreen*, both courts also misapplied the ineffective assistance of appellate counsel standard because the defendant was not required to show prejudice, that is he was not required “to show a reasonable probability of a different trial outcome” or of a fair trial violation “so serious as to render his trial fundamentally unfair.” *Matter of Salinas*, ___ Wn.2d ___, 408 P.3d 344 (January 4, 2018). These errors should be corrected and the defendant’s petition should be dismissed because his appellate counsel did not commit ineffective assistance.

1. THE COURT BELOW ERRED WHEN IT HELD THAT PREJUDICE NEED NOT HAVE BEEN SHOWN IN ORDER TO OBTAIN PERSONAL RESTRAINT RELIEF FOR INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL WHERE THE PEREMPTORY CHALLENGE ERROR WAS NOT CONSTITUTIONAL, MUCH LESS STRUCTURAL ERROR THAT WOULD ALLOW A REVIEWING COURT TO DISPENSE WITH THE REQUIREMENT OF PREJUDICE.

In its modification motion, the state previously submitted its analysis of the *Vreen* case and several lower court decisions that applied *Vreen*. Motion to Modify, pp. 7-8. *See State v. Vreen*, 143 Wn.2d 923, 26 P.3d 237 (2001). Without repeating that analysis, it is worth noting that all three cases relied upon by the court below involved peremptory challenge error that was clearly preserved through objection, colloquy, and

rather extensive argument in the trial courts. *State v. Vreen*, 143 Wn.2d at 925-26, *State v. Evans*, 100 Wn. App. 757, 774-75, 998 P.2d 373 (2000), and *State v. Bird* 136 Wn. App. 127, 130, 148 P.3d 1058 (2006). Thus, there was no question in any of those direct review cases as to whether the peremptory challenge issue could have or should have been challenged as a matter of ineffective assistance of appellate counsel. It is also worth noting that two of the three cases, *Vreen* and *Evans*, also involved constitutional *Batson* challenges that could have been challenged on appeal even without preservation. In short, none of the cases relied upon by the court below stand for the proposition that peremptory challenge error may be raised for the first time on appeal, much less that it must always be raised under all procedural circumstances as a requirement of constitutionally effective appellate advocacy.

As is also argued in the state's motion to modify, peremptory challenge error is not by itself constitutional. See *State v. Nelson*, 18 Wn. App. 161,164, 566 P.2d 984 (1977), and *State v. Kender*, 21 Wn. App. 622, 626, 587 P.2d 551 (1978). See also *State v. Saintcalle*, 178 Wn.2d 34, 73, 309 P.3d 326 (2013) (Gonzalez, J. concurring). If there is no constitutional right to peremptory challenges, it follows that any error in the awarding of peremptory challenges is also not constitutional.

There are of course jury selection errors that have been permitted to be raised for the first time on appeal. The most obvious example is open court error, which has been held to be structural and thus may be appealed without the necessity of preservation. *State v. Wise*, 176 Wn.2d 1, 16, 288 P.3d 1113, 1120 (2012), citing *State v. Bone-Club*, 128 Wn.2d 254, 261–62, 906 P.2d 325 (1995), and *State v. Marsh*, 126 Wash. 142, 146–47, 217 P. 705 (1923). The rationale has been stated as follows: “The reason such structural error is rightly presumed prejudicial is that ‘it is often ‘difficul[t]’ to ‘asses[s] the effect of the error.’ ” *Id.*, citing *United States v. Marcus*, 560 U.S. 258, 263, 130 S. Ct. 2159, 2164-65, 176 L. Ed. 2d 1012 (2010), quoting *United States v. Gonzalez-Lopez*, 548 U.S. 140, 149, n. 4, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006).

Other alleged jury selection error however requires preservation. For example, violation of a defendant’s right to be present during dismissal of jurors for cause requires preservation. *State v. Slert*, 186 Wn.2d 869, 876, 383 P.3d 466 (2016). As does the right to be present during dismissal of alternate jurors. *State v. Jones*, 185 Wn.2d 412, 426, 372 P.3d 755 (2016). *See also State v. Elmore*, 139 Wn.2d 250, 277-78, 985 P.2d 289 (1999). In such cases this court has said, “The failure to timely object prevented the trial court from mending any error and creating a clear record for the appellate court to review. As in *Elmore* and

Jones, we find Slert waived consideration of any error.” *State v. Slert*, 186 Wn.2d at 876.

This case is a prime example of a case where preservation is crucial to a just outcome. The alleged peremptory challenge error here was not raised during the trial in 1996. If the defendant had voiced an objection to the number of peremptory challenges during any of the four days of jury selection in 1996, the trial court could have reviewed whether seven was the appropriate number of challenges in light of the jury selection procedure preferred by the defense. *See* 1 RP 3-10, Jury Selection RP pp. 4 et. seq. No objection or motion was made, and thus when the trial attorneys stood before the panel to exercise their peremptory challenges, both used their allotted peremptory challenges to select 14 jurors to hear the case. As they exercised each peremptory challenge neither attorney knew, nor could they have known, whether they were challenging a deliberating juror or an alternate. 1 RP 9. The defendant expressly preferred this procedure when he said, “I think that the jurors’ attention is much more focused when no one knows exactly who is going to be the alternate.” *Id.*

If the trial court had not been invited by the defendant to conduct *voir dire* as it did, it might have reviewed CrR 6.4 and 6.5. Had the trial court done so, it would have found that the rules do not explicitly

determine how many peremptory challenges should be awarded where no alternates are to be chosen during jury selection. *See* CrR 6.4(e)(1) and (2), and CrR 6.5.

The practice of not selecting alternate jurors during jury selection leads to ambiguity in the court rules. CrR 6.5 expressly states that alternate jurors are to be selected during jury selection: “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.” *Id.* In light of this discretionary potential, if the trial court’s attention had been directed to CrR 6.5 via an objection or request for an additional peremptory challenge, the trial court might well have decided to keep the number of challenges consistent with the number called for by CrR 6.4 rather than 6.5. After all, since all fourteen jurors were equally likely to deliberate, it seems reasonable and consistent to use the CrR 6.4 ratio for peremptory challenges for deliberating jurors rather than the CrR 6.5 ratio for alternates. It goes without saying that this court, or any appellate court reviewing such a reasonable exercise of discretion, would have upheld the decision under the abuse of discretion standard because it surely cannot be said that no reasonable jurist would have made a similar ruling. *See State v. Arredondo*, 188 Wn.2d 244, 256, 394 P.3d 348, 355 (2017) (“ ‘Abuse of discretion’ means ‘no reasonable judge would have ruled as the trial

court did.’ ”) quoting *State v. Mason*, 160 Wn.2d 910, 934, 162 P.3d 396 (2007), citing *State v. Vy Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002).

The decision of the court below should be reversed because *Vreen* and the other cases relied upon do not stand for automatic reversal under the procedural posture of this case. It should also be reversed because there can be no showing that the number of challenges awarded was an abuse of discretion in light of the jury selection procedure that was expressly approved of by the defendant. This case is a collateral attack based on ineffective assistance of appellate counsel. Even if it could be shown that the number of peremptory challenges awarded to the parties was inconsistent with CrR 6.4 and 6.5, any such error is not exempt from the requirement of preservation. It follows that in the absence of preservation, or more accurately in light of the defendant having advocated for the jury selection procedure actually used, the defendant’s excellent, retained appellate lawyer did not provide deficient representation as required by the ineffective assistance standards.

2. THE DEFENDANT HAS NOT ESTABLISHED INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL BECAUSE HE HAS NOT SHOWN THAT THE PEREMPTORY CHALLENGE ISSUE HAD MERIT IF IT HAD BEEN RAISED ON DIRECT REVIEW, AND BECAUSE HE HAS NOT SHOWN PREJUDICE.

The standards of review for personal restraint petitions are heightened in the interests of finality for both constitutional and unconstitutional issues. *Matter of Sandoval*, ___ Wn.2d ___, 2018 WL 456981 (January 18, 2018). A petitioner “must demonstrate error and, if the error is constitutional, that the petitioner is ‘actually and substantially prejudiced’.” *Id.* citing *In re Pers. Restraint of Coats*, 173 Wn.2d 123, 132, 267 P.3d 324 (2011).

The court below dispensed with the requirement that the defendant establish prejudice. It did so in large part because it erroneously deemed the non-constitutional, peremptory challenge error to be the functional equivalent of structural error. Had the court applied the prejudice element of ineffective assistance, it necessarily would have required a showing “that ‘there is a reasonable probability that, but for counsel’s deficient performance, the outcome of the proceedings would have been different.’” *Matter of Canha*, 189 Wn.2d 359, 377, 402 P.3d 266, 275–76 (2017), quoting *State v. Grier*, 171 Wn.2d 17, 32-33, 246 P.3d 1260 (2011), and

State v. Kylo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). Since no such showing was required, actual and substantial prejudice was not established, nor was there shown a reasonable probability that the outcome of the proceedings would have been any different. *Id.*

It has not been shown that there is a reasonable probability that outcome of the direct appeal would have been different. As discussed above, on direct review some errors occurring during jury selection, such as open court violations, have been deemed structural, and thus exempt from preservation requirements. The same holds true in exceptional “narrowly recognized and applied” collateral attack cases. *In re Coggin*, 182 Wn.2d 115, 121, 340 P.3d 810, 813 (2014). Non-constitutional alleged peremptory challenge error has heretofore not been one of those exceptional cases.

Structural error originated as an exception to harmless error. The term means “only that the government is not entitled to deprive the defendant of a new trial by showing that the error was ‘harmless beyond a reasonable doubt.’ . . . Thus, in the case of a structural error where there is an objection at trial and the issue is raised on direct appeal, the defendant generally is entitled to ‘automatic reversal’ regardless of the error's actual ‘effect on the outcome.’ ” *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1910, 198 L. Ed. 2d 420 (2017) (citations omitted), quoting *Chapman v.*

California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967), and *Neder v. United States*, 527 U.S. 1, 7, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999).

Collateral attack cases are a different matter. The price of a new trial in some collateral attack cases such as the one now before the court can be extraordinarily high. In this case, the junior high-age girls who were sexual assault victims in their early teens are now in their thirties. Such circumstances led the United States Supreme Court to observe recently:

When an ineffective-assistance-of-counsel claim is raised in postconviction proceedings, the costs and uncertainties of a new trial are greater because more time will have elapsed in most cases. The finality interest is more at risk . . . and direct review often has given at least one opportunity for an appellate review of trial proceedings. These differences justify a different standard for evaluating a structural error depending on whether it is raised on direct review or raised instead in a claim alleging ineffective assistance of counsel. (citation omitted)

Weaver v. Massachusetts, ___ U.S. ___, 137 S. Ct. 1899, 1912, 198 L. Ed. 2d 420 (2017).

This court has required prejudice in ineffective assistance of appellate counsel cases. *In re Caldellis*, 187 Wn.2d 127, 143, 385 P.3d 135, 144 (2016) (“To establish ineffective assistance of appellate counsel, [the defendant] must show any legal issue his counsel failed to raise was

meritorious and demonstrate prejudice.”). Even in cases of indisputable structural error the defendant may still be required to establish prejudice. *Matter of Salinas*, ___ Wn.2d ___, 408 P.3d 344 (January 4, 2018). In *Salinas* this court recently reviewed a public trial violation during jury selection in the context of an ineffective assistance of appellate counsel claim. The defendant had proposed through multiple proposed jury questionnaires that the jurors be given the option of answering questions about personal experiences with sexual abuse or misconduct in private. *Matter of Salinas*, Slip Opinion, p.3. In light of the defense role in (1) “the request for private questioning”, and (2) “advocacy for private questioning”, and (3) “active participation in the private questioning”, and (4) “benefiting from such questioning”, and (5) “failure to object to such proceeding”, the defendant was held not to be able to rely on the automatic reversal that generally attends a public trial violation “because he invited such error.” *Id.*, p.10-11.

In this case the defendant, like the defendant in *Salinas*, advocated in favor of the trial court’s preferred jury selection method. 1 RP 3-10. While the state did not argue invited error in the court below, the procedural defect in this case was just as much of a problem in the direct appeal as invited error was in *Salinas*, and on collateral attack it is analytically indistinguishable. The state has repeatedly asserted that since

the peremptory challenge issue is non-constitutional, under RAP 2.5(a) it could not be raised for the first time on appeal. The appellate lawyer should not be deemed deficient for having elected not to pursue such an issue. In this regard, *Salinas* discussed at length the unpreserved, open court/ineffective assistance issue in *Weaver* and stated:

The core holding of *Weaver* is that if defense counsel objects to courtroom closure at trial and raises the issue on direct appeal, prejudice is presumed and defendant gets a new trial. However, where the courtroom closure issue is raised later, e.g., as in *Weaver*, in a motion for a new trial based on allegation of ineffective assistance, finality concerns prevail such that the burden is on defendant to show a reasonable probability of a different trial outcome or to show that the particular public trial violation was so serious as to render his trial fundamentally unfair. In other words, absent a timely preservation of the public trial error and a timely raising of the issue on direct appeal, a defendant alleging a public trial violation generally must show prejudice in order to get a new trial.

Matter of Salinas, Slip Opinion, p.14.

The failure of trial counsel to preserve the issue meant that in this case, just as in *Salinas*, that “[the defendant] cannot demonstrate that his conviction would have been reversed if appellate counsel had raised the public trial right violation. Thus, he cannot demonstrate prejudice from appellate counsel's failure to raise the right to public trial violation that he alleges.” *Id.*, p.13.

It should also be noted that the defendant would not necessarily be entitled to relief even if the issue had been preserved. This is because the issue need not have been included in the direct appeal even if it had been meritorious. As a matter of effective appellate advocacy, “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: Pers. Restraint of Lord*, 123 Wn.2d 296, 302-03, 868 P.2d 835 (1994), quoting *Smith v. Murray*, 477 U.S. 527, 536, 106 S. Ct. 2661, 2667, 91 L. Ed. 2d 434 (1986), and *Jones v. Barnes*, 463 U.S. 745, 751–52, 103 S. Ct. 3308, 3313, 77 L. Ed. 2d 987 (1983). It is significant in this case that appellate counsel submitted a far more serious peremptory challenge issue, namely the *Batson* issue, to this court and to the United States Supreme Court. It would be ironic and inconsistent with the interests of justice if such dedicated and effective advocacy were tossed aside because of an unpreserved jury selection issue.

D. CONCLUSION.

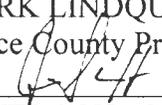
The court below granted the defendant’s petition only on the ineffective assistance of appellate counsel ground even though it decided several other issues, “because they may arise on retrial.” Unpublished Opinion, p. 7. One such issue concerned the limiting instruction given in

conjunction with the prior conviction evidence that was admitted because it was an element of the crime in count two. 6 RP 507-17. Reversal of that part of the decision of the court below need not be granted since that issue was not a basis for the granting of the personal restraint petition. Nevertheless, the state does not concede that the court below correctly decided the limiting instruction issue for the reasons stated in its motion for discretionary review and its motion for reconsideration in the court below. See Petition for Discretionary Review § E.3 and Motion for Reconsideration, § III.C.

As to the preemptory challenge and ineffective assistance of counsel issue, for the reasons stated above, the state respectfully requests that the decisions of the court below and of the commissioner be reversed and that the defendant's petition be dismissed.

DATED: Wednesday, January 31, 2018.

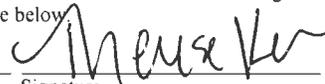
MARK LINDQUIST
Pierce County Prosecuting Attorney



JAMES SCHACHT
Deputy Prosecuting Attorney
WSB # 17298

Certificate of Service:

The undersigned certifies that on this day she delivered by US 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.

21-18 
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

February 01, 2018 - 9:03 AM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 94582-9
Appellate Court Case Title: Personal Restraint Petition of Gary Daniel Meredith
Superior Court Case Number: 95-1-04949-6

The following documents have been uploaded:

- 945829_Briefs_20180201090239SC007149_6301.pdf
This File Contains:
Briefs - Respondents Supplemental
The Original File Name was Meredith Supp Brief.pdf

A copy of the uploaded files will be sent to:

- bleigh@tillerlaw.com
- ptiller@tillerlaw.com

Comments:

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

Filing on Behalf of: James S. Schacht - Email: jschach@co.pierce.wa.us (Alternate Email: PCpatcecf@co.pierce.wa.us)

Address:
930 Tacoma Ave S, Rm 946
Tacoma, WA, 98402
Phone: (253) 798-7400

Note: The Filing Id is 20180201090239SC007149