IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 18-0664

CLARENCE EDWARD CHAMPAGNE,

Petitioner and Appellant,

v.

STATE OF MONTANA,

Respondent and Appellee.

BRIEF OF APPELLEE

On Appeal from the Montana Twelfth Judicial District Court,
Hill County, The Honorable Robert G. Olson, Presiding

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STATEMENT OF THE CASE

On August 15, 2011, a jury convicted Petitioner Clarence Edward Champagne (Champagne) of sexually assaulting a ten-year-old girl.[1] (Doc. 41 at 1.) Champagne appealed his conviction to the Montana Supreme Court contending, among other arguments, that his trial counsel provided ineffective assistance by failing to adequately question prospective juror Andrew Herdina (Herdina) during voir dire. *State v. Champagne*, 2013 MT 190, ¶¶ 13, 27-28, 371 Mont. 35, 305 P.3d 61. Herdina would ultimately sit on the jury. *Champagne*, ¶ 13. This Court affirmed his conviction and found that "[a] post-conviction proceeding represents the appropriate avenue for Champagne to bring his ineffective assistance of counsel claim." *Champagne*, ¶ 31.

Champagne filed a petition for postconviction relief and an amended petition for postconviction relief in the Montana Twelfth Judicial District Court, Hill County (district court). (Docs. 1, 31.) The district court denied the amended

[1] The Honorable Laurie McKinnon (trial court) presided over Champagne's trial.

petition after concluding that Champagne failed to show that his counsel was ineffective. (Doc. 41 at 5-10; Petr.'s App. 1.) Champagne now appeals the district court's denial of his amended petition.

STATEMENT OF THE FACTS

The offense

In 2010, J.B. told her grandmother that Champagne had touched the inside of her vagina. *Champagne*, ¶ 8. J.B. was ten years old at the time and Champagne was previously married to her grandmother. *Id*. Her grandmother told J.B. that it was probably just a hug and instructed her not to tell anyone. *Id*., ¶ 9. Several months later, J.B. told her mother about the assault and her mother alerted the police. *Id.*, ¶ 9. The police initiated an investigation and Champagne was charged with felony sexual assault. *Id*., ¶ 10. The case proceeded to trial. *Id*.

Jury questionnaires

Prior to trial, in June 2011, prospective juror Herdina completed a questionnaire and affidavit as to his qualifications for jury service. (Doc. 17; State's App. 1 (June affidavit).) Herdina listed his occupation as "US Border Patrol." (*Id*. at 1.) The last question on the questionnaire stated: "Do you feel you should be excused from serving on the jury because of undue hardship or because

you do not meet the eligibility requirements for jury service?" (*Id*.) Herdina checked the box marked "Yes," and completed the "Affidavit for Excusal" on the reverse side of the form. (*Id*. at 1-2.) In a section of the form entitled "Permanent Exclusion," Herdina stated: "I am a federal law enforcement officer and feel I may be biased in a criminal trial." (*Id*. at 2.)

The trial court did not excuse Herdina and checked two boxes on the form regarding its decision not to excuse him. (State's App. 1 at 2.) The first box stated: "If you are summoned you may make your comments to the attorneys at trial." (*Id*.) The second box stated: "The Court will consider a request outlining your circumstances at the time you are summoned." (*Id*.)

In July 2011, Herdina completed a second questionnaire and affidavit regarding jury service. (Doc. 18 at 12-19; State's Ex. 2 (July affidavit).) This questionnaire and affidavit consisted of 38 questions. (*Id*.) After completing the affidavit, Herdina was required to affirm, under penalty of perjury, that his answers were true and correct. (*Id.* at 9.) Question 7 of the July affidavit related to whether Herdina had any legal or law enforcement training. (*Id*. at 3.) Herdina checked "Yes," and stated: "I have been a Border Patrol Agent for the past two years." (*Id*.) Question 8 asked Herdina if he belonged to any organization concerned with law enforcement. (*Id*.) Herdina checked "Yes," and stated: "I work for the US Border Patrol." (*Id*.) Question 12 asked Herdina if he had ever served on a jury and he

indicated that he had, and it was a civil case where the issue was reckless driving. (*Id*. at 4.)

Questions 13 through 24 of the July affidavit related to whether Herdina could follow the court's instructions, whether he preferred that the defendant prove his innocence, whether a defendant's choice not to testify would affect his determination of the case, whether he could effectively deliberate with the other jurors, whether he could remain objective in the face of unpleasant evidence, and whether he was more likely to find for the defendant because of the alleged victim's age. (State's App. 2 at 4-6.) Herdina's answers to these questions indicated that he could serve without bias and as an impartial juror. Specifically, question 23 asked: "Is there any other reason you could not be a fair juror in a criminal case?" (*Id*. at 6.) Herdina answered "No." (*Id*.) Likewise, question 24 asked: "Is there anything which you feel should be brought to the court's attention that might affect your ability to [be] a fair and impartial juror?" (*Id*.) Herdina again answered "No." (*Id*.)

Similarly, question 36 of the July affidavit asked if there was anything not covered by the form that the court or the attorneys would want to know if they considered Herdina as a juror. (State's App. 2 at 8-9.) Herdina answered "No." (*Id*. at 9.) Importantly, question 37 asked if there was any reason Herdina "could not be

fair to the prosecution or defense in this case?" (*Id*.) Herdina again answered "No." (*Id*.)

Voir dire and trial

At trial, Champagne was represented by two attorneys: Dan Minnis (Minnis) and James Spangelo (Spangelo). (Doc. 41 at 2; Petr.'s App. 1.) Herdina was called as 1 of 30 prospective jurors to be initially questioned by the parties. (*See* 8/11/2011 Tr. at 27.) The trial court allowed each side 1 hour and 15 minutes for voir dire. (Tr. at 21.) The State went first and questioned the prospective jurors regarding whether any had previously served on a jury. (Tr. at 27, 40.) Herdina, consistent with his July affidavit, volunteered that he had previously served on a jury in a case involving a "traffic ticket." (Tr. at 52.) Herdina stated that the experience "was fine." (Tr. at 53.) The State asked Herdina if anything about the case made him "want to run for the hills" and Herdina replied "[n]ot really." (*Id*.) Shortly thereafter, the State went over the basic facts of the case and asked the prospective jurors: "Is there anyone here who feels just based on those very basic facts would not be able to sit as a juror on this case?" (Tr. at 54-55.) Herdina did not indicate that he would be unable to sit as a juror. (Tr. at 55.)

Minnis conducted the voir dire on behalf of the defense. (Tr. at 101.) Minnis covered multiple topics in the limited time he had for voir dire. These topics

included: (1) whether any members of the jury pool were biased against public defenders; (2) whether any of the potential jurors had previously been in trouble with the law; (3) whether any of the prospective jurors had a relationship with the prosecution; (4) whether any members of the jury pool had daughters or granddaughters; (5) whether the prospective jurors could remain impartial when faced with the subject matter of the case; (6) the State's burden of proof and whether Champagne was required to prove his innocence; (7) whether any of the jury pool believed that Champagne was required to testify; (8) whether any of the prospective jurors would hold it against Champagne if he did not testify; (9) whether any of the potential jurors held any inherent prejudices that would affect their ability to render an unbiased verdict; (10) whether anyone would have a problem with the defense cross-examining the victim; (11) the concept of reasonable doubt and whether the members of the jury pool could apply the concept during deliberations; (12) the reasons why a child may lie; (13) the possibility that an intoxicated adult may involuntary touch a child; and (14) whether any of the jurors held a leadership position in an organization. (Tr. at 101-61.)

Prior to the final selection of the jury, Minnis advised the trial court that:

> Well, I heard at lunch time that there is a gentleman who had approached someone else who is on the jury. And said, yeah, I'm on jury duty. And so he asked him, what it was all about. And he said,

> It's this Clarence Champagne fellow and he's guilty of child molesting.

(Tr. at 212-13.)

Minnis stated that an employee in his office had relayed this information to him. (*See* Tr. at 213.) Minnis told the trial court that he was concerned that because the July affidavit contained Champagne's name, the jurors were presented with an opportunity to research the defendant, either through "social networking or asking friends or listening to rumors." (Tr. at 213.) The trial court permitted Minnis to address the jury pool regarding this issue. (Tr. at 214.) Three jurors, including Herdina, were ultimately taken back into chambers and questioned about this issue. (Tr. at 215-23.) The first juror admitted that he had googled Champagne's name and learned "[h]e was a registered offender." (Tr. at 215-16.) The trial court excused the juror for cause. (*See* Tr. at 217.) The second juror also admitted that he had googled Champagne's name, and learned that he had a past history of sexual offenses and was a registered sexual offender.[2] (Tr. at 217.) This juror was also excused for cause. (Tr. at 220.)

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[2] Spangelo clarified for the record that Champagne was actually registered as a violent offender at the time of trial. (Tr. at 220.)

The trial court next called Herdina into chambers. (Tr. at 220.) Herdina told the parties that:

> It was mentioned to me in passing over the lunch break, or whatever that somebody had checked on the internet and said that there might have possibly been a previous assault conviction. So I figured that it was pertinent to what you were asking. So I thought that I would bring that up.

(Tr. at 221.)

Upon questioning by the State, Herdina clarified that he had not done any independent investigation and the information was just mentioned to him in passing during the lunch break. (Tr. at 221.) The State asked Herdina whether this was going to affect his ability to be fair to both the prosecution and Champagne and Herdina replied, "No, not really." (Tr. at 221-22.) Herdina further offered, "Like I said, I don't know whether it's true or not." (Tr. at 222.) Minnis then asked, "So, after having heard that, you're not making any assumption about Mr. Champagne?" (Tr. at 222.) Herdina replied, "No." (Tr. at 222.) Minnis declined to move for Herdina's dismissal and he was left on the jury pool. (*See* Tr. at 222-23.)

Prior to the seating of the jury and outside the presence of the jury pool, Minnis moved for a mistrial. (Tr. at 247.) In support, Minnis argued that because the July affidavit contained Champagne's name, the jurors were presented with an opportunity to research the defendant and discover that he is a registered offender.

(Tr. at 247.) Minnis further argued that the trial court could not be sure that the person who stated that Champagne was a child molester had been removed from the jury. (*See* Tr. at 248.)

The trial court denied the motion and stated:

> We have had several jurors, I think there were two that came forward, and indicated that they had googled the Defendant's name. And learned that Mr. Champagne is a registered offender. And as a result those jurors were excused.
>
> The third juror overheard one of those jurors speaking and he was not excused, *because he was very clear that he could be fair and impartial*. And he determined, didn't determine that the information that he received is truthful.

(Tr. at 249-50 (emphasis added).)

Shortly after this exchange, the parties exercised their preemptory challenges and a jury was seated. (Tr. at 267.) Herdina was the second juror on the panel. (Tr. at 267.) During the course of voir dire, Minnis moved to challenge at least seven prospective jurors and the trial granted six of the motions. (Tr. at 16, 105, 112, 126, 156, 179, 205, 218.) Following the presentation of the State's case-in-chief and the testimony of seven witnesses, Champagne was convicted.[3] (Tr. at 293-571, 670.)

[3] Although Champagne's opening brief states that the jury deliberated for "six minutes" (Petr.'s Br. at 4), the trial transcript does not reflect the length of deliberations. (Tr. at 665-69.)

Postconviction proceedings

Following his conviction, Champagne filed his direct appeal before this Court. *Champagne*, ¶ 1. Champagne raised several issues on appeal, including that his counsel was ineffective for failing to question Herdina regarding his affidavit, i.e., the June affidavit. *See Champagne*, ¶ 28. The Court concluded that Champagne's allegation of ineffective assistance was inappropriate for direct review because the record provided no explanation why defense counsel did not inquire about Herdina's affidavit. *Champagne*, ¶¶ 30-31. The Court then affirmed Champagne's conviction and remanded regarding a restitution issue. *See Champagne*, ¶¶ 51, 53.

Champagne filed a petition for postconviction relief in the district court and the court ordered the State to respond. (Doc. 8 at 6.) The district court also ordered Minnis and Spangelo to respond to Champagne's allegation of ineffective assistance.[4] (Doc. 14.)

Shortly thereafter, Minnis filed his affidavit regarding the issue. (Doc. 17; State's App. 2.) Minnis's affidavit stated:

> 1. I have no specific recollection of whether or not I individually questioned Juror Herdina or if I asked general questions related to any juror's involvement with law enforcement; so for purposes of this affidavit I am assuming that I did not.

[4] Spangelo never responded to the district court's order and passed away in August 2017. (Doc. 39 at 2.)

2. I do recall the individual *voir dire* of 2 to 3 law enforcement officials in Judge McKinnon's chambers.

3. These jurors were singled out because they were heard opining about the case. They apparently had accessed the internet and had acquired information about the trial case before appearing for jury duty.

4. I believe based on their response to questions from the County Attorney, myself and the Judge that all were approved for service, but I do not have a specific recollection of whether any of these jurors were excused for cause. Nor do I have a specific recollection as to whether Juror Herdina was among this group of jurors.

5. I do recall hearing after trial that a law enforcement officer sat on the jury, and I remember feeling that I had made a mistake. I do not recall whether or not that law enforcement officer was Juror Herdina. Nor do I recall whether I had a strategic reason for not questioning jurors about law enforcement involvement.

6. I cannot imagine that since I believed I had made a mistake, that I would have had a strategic reason for not questioning Juror Herd[ina]. If I did not question him, it would have been a mistake.

7. I recall that the law enforcement person I identified as the juror who I did not question sat on the left side of the jury box as I faced it. But even if juror Herd[ina] did not sit in that position, I do not recall any specific reason why I did not ask the question about law enforcement involvement.

8. My recollection is that I learned the facts of paragraph 5 soon after trial; probably within 30 days of trial, so I was well aware of the facts at that time.

(State's App. 2 at 1-2.)

The State responded to the initial petition for postconviction relief and the district court appointed counsel to represent Champagne during the postconviction

proceeding. (Docs. 18, 22.) Champagne's postconviction counsel eventually filed an amended petition for postconviction relief (Petition) and the State filed an additional response. (Docs. 31, 39.) Upon review, the district court denied the Petition after concluding that Champagne failed to meet his burden "that counsel was deficient and fell below an objective standard of reasonableness because, taking voir dire as a whole, Herdina objectively showed his ability and willingness to be fair and impartial in the case at issue." (Doc. 41 at 5, 10.)

SUMMARY OF THE ARGUMENT

Champagne has not satisfied his burden under the two-prong *Strickland* test that his counsel provided ineffective assistance. He has failed to establish that his counsel's performance was deficient for not moving to strike Herdina for cause. Champagne has also not overcome the presumption that Minnis was making reasonable strategic and tactical decisions during voir dire.

Champagne has also failed to prove prejudice under *Strickland*. Importantly, Champagne cannot meet his burden to show that Herdina was biased and his presence undermined confidence in the outcome of the trial because Herdina consistently and clearly stated that he could be a fair and impartial juror. Additionally, the Court should reject Champagne's contention that prejudice should be assumed in this matter.

ARGUMENT

I. Standard of review

In a postconviction relief proceeding, this Court reviews whether a district court's findings of fact are clearly erroneous and whether its conclusions of law are correct. *Rogers v. State*, 2011 MT 105, ¶ 12, 360 Mont. 334, 253 P.3d 889. "Ineffective assistance of counsel claims present mixed questions of law and fact that this Court reviews de novo." *Id*. A postconviction petitioner trying to reverse a district court order denying postconviction relief on claims of ineffective assistance of counsel has a heavy burden. *Sartain v. State*, 2012 MT 164, ¶ 9, 365 Mont. 483, 285 P.3d 407.

II. Champagne fails to meet his burden that his counsel provided ineffective assistance.

In evaluating an ineffective assistance of counsel claim, this Court utilizes the two-part test from *Strickland v. Washington*, 466 U.S. 668 (1984). *Whitlow v. State*, 2008 MT 140, ¶ 9, 343 Mont. 90, 183 P.3d 861. First, the defendant must show that counsel's performance was deficient. *Strickland*, 466 U.S. at 687; *Whitlow*, ¶ 10. Specifically, "'the defendant must show that counsel's representation fell below an objective standard of reasonableness.'" *Whitlow*, ¶ 14, *quoting Strickland*, 466 U.S. at 687-88.

In order to eliminate the distorting effects of hindsight, judicial scrutiny of counsel's performance must be highly deferential. *Strickland*, 466 U.S. at 689; *Whitlow*, ¶ 15. Courts should "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id*. As the United States Supreme Court explained, "[t]here are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." *Strickland*, 466 U.S. at 689. Secondly, under the prejudice prong of the *Strickland* test, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

A. Champagne fails to overcome his burden that his counsel was deficient.

Champagne raises two arguments in support of his contention that his counsel's representation was deficient and fell below an objective standard of reasonableness. First, Champagne contends that his counsel was deficient for failing to move to strike Herdina for cause. (Petr.'s Br. at 9, 11.) Second, Champagne argues that his counsel was deficient because Minnis could not recall a tactical reason for not moving to strike Herdina. (Petr.'s Br. at 11.) Champagne is incorrect under both arguments.

1. Champagne fails to show that his counsel was deficient for not moving to strike Herdina for cause.

Montana Code Annotated § 46-16-115 outlines the various grounds on which a juror may be excused for cause. *Whitlow*, ¶ 30. Most applicable to this case is Mont. Code Ann. § 46-16-115(2)(j), which provides:

> (2) A challenge for cause may be taken for all or any of the following reasons or for any other reason that the court determines: . . .
> (j) having a state of mind in reference to the case or to either of the parties that would prevent the juror from acting with entire impartiality and without prejudice to the substantial rights of either party.

Mont. Code Ann. § 46-16-115(2)(j).

"If voir dire examination raises a serious question about a prospective juror's ability to be fair and impartial, then dismissal for cause is favored." *Whitlow* ¶ 30. Dismissal based on a juror's supposed prejudice is only required when the juror has "formed fixed opinions on the guilt or innocence of the defendant which they would not be able to lay aside and render a verdict based solely on evidence presented in court, or when a serious question arises about a juror's ability to be fair and impartial." *State v. Russell*, 2018 MT 26, ¶ 14, 390 Mont. 253, 411 P.3d 1260 (internal citations and quotation marks omitted). In evaluating whether a serious question has been raised, a court "should review the totality of a prospective juror's voir dire responses and give more weight to spontaneous statements than coaxed recantations elicited by counsel because spontaneous

statements are most likely to be reliable and honest." *Russell*, ¶ 14 (internal citations and quotation marks omitted).

Furthermore, "a juror should not be removed merely because she voices a concern about being impartial—every person comes to jury duty with preconceptions." *State v. Jay*, 2013 MT 79, ¶ 20, 369 Mont. 332, 298 P.3d 396. Indeed, if a "prospective juror merely expresses concern about impartiality but believes he can fairly weigh the evidence, the court is not required to remove the juror." *State v. Normandy*, 2008 MT 437, ¶ 22, 347 Mont. 505, 198 P.3d 834. A petitioner for postconviction relief who claims that his counsel's representation was deficient for failing to move to strike a juror for cause retains the burden to show that the trial court likely would have granted the motion. *See Foston v. State*, 2010 MT 281, ¶ 13, 358 Mont. 469, 245 P.3d 1103 (Court rejected petitioner's claim that his counsel was ineffective for not raising an objection at trial because petitioner failed to show that the objection would have been proper and that the trial court likely would have sustained the objection).

Here, Champagne does not meet his burden to show that Herdina should have been removed for cause. Critically, Champagne fails to show that Herdina would have met the statutory requirements to be excused for cause under Mont. Code Ann. § 46-16-115(2)(j). As stated, a juror should only be excused for cause if he: (1) forms a fixed opinion on the guilt or innocence of the defendant; or

(2) if a serious question arises about a juror's ability to be fair and impartial. *Russell*, ¶ 14. Under the totality of voir dire, Champagne fails to show that Herdina demonstrated the fixed opinion that Champagne was guilty of the crime or that a serious question arose regarding his ability to be fair and impartial during the trial.

Although Herdina's June affidavit portrayed a possible bias when he equivocally stated that he "may be biased in a criminal trial" (State's App. 1 at 2), his subsequent July affidavit stamped out any ambiguity regarding his possible prejudice towards Champagne. Importantly, Herdina's July affidavit, which was completed closer to trial than his June affidavit, affirmed in multiple places that he could be a fair and impartial juror. (State's App. 2 at 5, 6, 9.) Specifically, under question 23 of his July affidavit, Herdina affirmatively answered that there was no reason that he could not be a fair juror in the case. (*Id.* at 6.) Further, under question 37, Herdina also stated that there was no reason he could not be fair to both the prosecution and the defense. (*Id*. at 9.) Herdina's July affidavit thus erases any doubt that he formed a fixed opinion that Champagne was guilty before the presentation of evidence or that there was a serious question about his ability to be a fair and impartial juror.

In addition to his July affidavit, Herdina also expressed his impartiality when questioned during voir dire. When he was examined by the parties in the trial court's chambers, Herdina clearly expressed that he could be fair to both the State

and Champagne, and that he was not making any assumptions about Champagne. (Tr. at 221-22.) These answers hold greater weight and are more reliable than his statement of possible bias in his June affidavit because they were spontaneous and were not elicited by the State or the trial court. *Russell*, ¶ 14.

Nevertheless, Champagne maintains that Herdina's statements in chambers were limited to whether he could remain impartial after hearing from another juror that Champagne had a previous conviction for assault and "not in reference to his ability to be impartial to criminal defendants generally." (Petr.'s Br. at 21.) However, Champagne's argument ignores that "courts must look to the totality of the circumstances of the witness's voir dire examination" when determining if a juror should be excused for cause. *Jay*, ¶ 19. Thus, even though Champagne did not explicitly state he could be impartial to criminal defendants generally, under the totality of the circumstances, Champagne never expressed an unequivocal bias towards criminal defendants that would raise a serious question about his ability to be fair and impartial. *Russell*, ¶ 14.

Furthermore, Champagne's argument that Herdina should have been excused for cause because Herdina did not expressly state he could be impartial to criminal defendants generally, fails when examined against the circumstance of the trial court's specific finding that Herdina was fair and impartial. As mentioned, prior to the seating of the jury, Minnis moved for a mistrial because some of the jurors had

researched Champagne's name and discovered he had a criminal history. (Tr. at 247-48.) However, the trial court found that Herdina voluntarily came forward after overhearing this information and "was very clear that he could be fair and impartial." (Tr. at 249-50.) Accordingly, it would defy common sense that Herdina voluntarily came forward and told the trial court that he could remain impartial after overhearing this information, but then withhold from the parties that he was actually biased against individuals accused of crimes to the point that he could not remain impartial during trial. Champagne's argument is simply not logical.

Also, during voir dire, the State recited the basic facts of the case and questioned the prospective jurors regarding whether, based on those facts, anyone "would not be able to sit as a juror on this case?" (Tr. at 54-55.) Following this question, Herdina did not volunteer that he could not sit as a juror. (*Id*. at 55.) Herdina's choice not to speak up shows that he believed that he could serve as an impartial and fair juror.

Lastly, Herdina's occupation as a law enforcement officer, by itself, is not grounds for his removal for cause. This Court has consistently held that a juror's connection to law enforcement does not, without more, establish that the juror would be unable to be impartial. *E.g.*, *State v. Dewitz*, 2009 MT 202, ¶ 33, 351 Mont. 182, 212 P.3d 1040. However, the Court has found that a juror's connection to law enforcement may be grounds for removal when the prospective juror is in

the employment of the entity upon whose complaint the prosecution was instituted. *State v. Kebble*, 2015 MT 195, ¶ 31, 380 Mont. 69, 353 P.3d 1175 (district court erred by not removing a prospective juror for cause when the juror was employed by the same entity that instituted the prosecution).

Here, Champagne's prosecution was initiated by the State of Montana, specifically the Havre Police Department. (*See* Tr. at 481.) In contrast, Herdina was an employee with the federal government, specifically the U.S. Border Patrol. (State's App. 2 at 3.) Thus, there was no evidence presented that Herdina was employed by the same entity that instituted the prosecution against Champagne. Accordingly, a motion for cause based on Herdina's employment as a law enforcement officer would not have been granted.

Champagne has not met his heavy burden to show that Herdina was impartial and Minnis was required to move to remove him for cause. A review of the totality of the circumstances underlying voir dire shows that, apart from his June affidavit, Herdina consistently and clearly showed that he did not have a fixed opinion regarding Champagne's guilt, or that there was a serious question regarding his ability to be fair and impartial. Thus, even if Minnis moved to remove Herdina for cause, Champagne has not shown that the trial court would have been required to grant the motion. *See Foston*, ¶ 13.

2. Champagne has not met his burden that his counsel's acts or omissions during voir dire fell outside the wide range of professional and competent assistance.

This Court has repeatedly emphasized that a court reviewing a claim of ineffective assistance '"must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance' and the defendant 'must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.'" *Whitlow*, ¶ 21 (quoting *Strickland*, 466 U.S. at 689; *see also State v. Hamilton*, 2007 MT 223, ¶ 16, 339 Mont. 92, 167 P.3d 906 ("There is a strong presumption with regard to the first prong of the Strickland test that trial counsel's performance was based on sound trial strategy and falls within the broad range of reasonable professional conduct."). "This presumption likewise undergirds the long-standing appellate standard that a petitioner seeking to reverse a district court's denial of a petition for postconviction relief based on a claim of ineffective assistance of counsel bears 'a heavy burden.'" *Whitlow*, ¶ 21. Furthermore, "self-proclaimed inadequacies on the part of trial counsel in aid of a client on appeal do not hold great persuasive value with this Court." *State v. Trull*, 2006 MT 119, ¶ 22, 332 Mont. 233, 136 P.3d 551. "[E]ven if an omission is inadvertent, relief is not automatic. The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003).

Champagne contends that Minnis provided ineffective assistance because he failed to articulate a tactical reason for not questioning Herdina about his June affidavit and his employment as a border patrol officer. (Petr.'s Br. at 13-14.) However, Champagne's argument attempts to flip the *Strickland* standard on its head. The question is not whether Minnis could provide a tactical reason for his questioning during voir dire; rather, the standard is whether Champagne can overcome the presumption that, under the circumstances, Minnis's performance "fell below an objective standard of reasonableness measured under prevailing professional norms and in light of the surrounding circumstances." *Whitlow*, ¶ 20. Champagne fails to overcome this presumption.

Importantly, Champagne fails to cite to any authority or expert testimony for the proposition that Minnis was ineffective for not questioning Herdina about his law enforcement background. *Whitlow*, ¶ 21 Further, Champagne does not offer any authority for the argument that Minnis was required to question Herdina regarding his equivocal statement of bias in his June affidavit, particularly after it was supplanted by his July affidavit where he repeatedly affirmed that he could be fair, unbiased, and impartial as a juror. Instead, Champagne relies entirely on a portion of Minnis's affidavit where he states that if he did not question Herdina, "it would have been a mistake." (State's App. 3 at 2.)

However, reading this document, it is apparent that Minnis can barely recall the details of the trial. (*E.g. id.* at 2 ("I do not recall any specific reason why I did not ask the question about law enforcement involvement.").) Additionally, Minnis states that when he came to the realization that he made a mistake, it was only after trial. (*Id*. at 2.) This form of retrospective analysis is exactly what the *Strickland* standard prohibits. *Strickland*, 466 U.S. at 689 ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.").

In contrast, this Court should look to the surrounding circumstances at the time of trial to determine whether Minnis's conduct fell below an objective standard of reasonableness. *Whitlow*, ¶ 20. At the time of trial, Herdina had already submitted his July affidavit, where he affirmed under penalty of perjury that he could be fair and unbiased to Champagne. (State's Ex. 2 at 6, 9.) Then, at trial, Herdina expressed to the parties and the trial court that he could be fair to both the State and Champagne, and that he was not making any assumptions about Champagne. (Tr. at 221-22.) Additionally, when the State questioned Herdina and the other prospective jurors regarding whether they could not be impartial under the basic facts of the case, Herdina did not volunteer that he would be unable to sit as a juror. (Tr. at 54-55.) If Herdina did not believe he could remain impartial he

would have spoken up. In the face of Herdina's repeated and consistent expressions of neutrality and impartiality, Champagne cannot meet his burden to show that the lack of additional questioning by Minnis was outside the broad range of reasonable professional conduct. *Whitlow*, ¶ 21.

Furthermore, over the course of voir dire, Minnis questioned the prospective jurors regarding over a dozen subjects. (Tr. at 101-61.) As a result of his actions during voir dire, Minnis moved to excuse seven potential jurors and successfully excused six. (Tr. at 16, 105, 112, 126, 156, 179, 205, 218.) If the purpose of voir dire is to determine a prospective juror's bias or prejudice, these numbers show that Champagne cannot meet his burden to show that Minnis's representation fell below "an objective standard of reasonableness." *Whitlow*, ¶ 32.

Lastly, Champagne's burden to overcome the strong presumption that Minnis's conduct during voir dire fell outside the wide range of professionally competent assistance cannot be emphasized enough. In *Whitlow*, a case very similar to the case at bar, the petitioner raised an ineffective assistance claim arguing that his counsel failed to ask two jurors follow-up questions regarding their answers during voir dire. *Whitlow*, ¶ 3. Petitioner argued that the jurors' answers during voir dire revealed that they were biased against him, and his counsel was deficient for not investigating this bias. *Id.* Following the commencement of postconviction proceedings, petitioner's attorney provided an affidavit that stated

he could not recall a tactical reason for not questioning the jurors and, in hindsight, he now believed he should have asked more questions. *See id*.

Despite counsel's failure to recall a tactical reason for his actions, the Court determined that, after examining counsel's conduct in light of the purposes of voir dire and the circumstances surrounding it, the petitioner failed to show that his counsel's performance was deficient. *Whitlow*, ¶¶ 31, 38. The Court based its decision, in part, on counsel's actions in asking one of the jurors follow-up questions regarding other subjects and counsel's statement that he did not believe that the jurors were biased at the time. *Whitlow*, ¶ 31. Also, critical to the Court's decision was the strong presumption that defense counsel's representation fell inside the wide range of professionally competent assistance. *Whitlow*, ¶¶ 32, 38.

Here, like in *Whitlow*, Minnis asked follow-up questions regarding Herdina's impartiality after he volunteered that he overheard some of the jurors discussing Champagne's alleged criminal history. (Tr. at 221-22.) Further, Minnis obviously did not believe that Herdina was biased against Champagne at the time of his trial as evidenced by his decision to pass Herdina for cause. (*See* Tr. 222-23.) Furthermore, like the petitioner in *Whitlow*, Champagne retains the heavy burden to overcome the strong presumption that Minnis's representation fell below an objective standard of reasonableness, measured under the prevailing professional norms. *Whitlow*, ¶ 37. In light of all the surrounding circumstances at

trial, Champagne cannot demonstrate that Minnis's representation was deficient under the *Strickland* test. This Court should find that Champagne failed to show that his counsel was deficient and affirm the district court's denial of his Petition.

B. Champagne fails to show that he was prejudiced.

If the Court determines that Champagne has not met his burden to show that his counsel's performance was deficient, it need not address whether Champagne was prejudiced. *Whitlow*, ¶ 11 ("A defendant must satisfy both prongs of this test in order to prevail on an ineffective assistance of counsel claim. Thus, if an insufficient showing is made regarding one prong of the test, there is no need to address the other prong."). Nevertheless, if the Court determines that Minnis was ineffective for failing to further question Herdina regarding his law enforcement background or his equivocal statement on the June affidavit, the Court should conclude that Minnis's performance did not prejudice Champagne.

1. Champagne cannot meet his burden to show that he was prejudiced because the district court correctly found that, under the totality of the circumstances, Herdina clearly expressed that he could be an impartial and fair juror.

As mentioned, under the prejudice prong of the *Strickland* test, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694; *St. Germain v. State*, 2012 MT 86, ¶ 11, 364 Mont.

494, 276 P.3d 886 ("The focus of our analysis under the second prong of *Strickland*—whether the defendant was prejudiced by counsel's deficient performance—focuses on whether counsel's deficient performance renders the trial result unreliable or the proceedings fundamentally unfair."). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

Champagne contends that the district court incorrectly concluded that he was not prejudiced by Minnis's performance during voir dire because the court erroneously determined that Herdina clearly expressed that he could be a fair and impartial juror in the case.[5] (Petr.'s Br. at 16, 21.) Champagne's argument that Herdina was not an impartial juror relies entirely on his June affidavit. However, this argument ignores the totality of the circumstances surrounding voir dire.

[5] Champagne also contends that the district court's conclusion that Champagne was not prejudiced was erroneous because the court based its finding on an incorrect legal standard. (Petr.'s Br. at 15-16 (stating that the district court incorrectly found that Champagne was required to "show that he would have been acquitted absent counsel's deficient performance in order to satisfy the prejudice prong of the *Strickland* test").) However, contrary to Champagne's argument, the district court never found that Champagne was required to show that, but for counsel's errors, he would have been acquitted. Rather, the district court found that Champagne failed to satisfy the first prong of *Strickland* and it was not necessary to review the case under the second prong. (Petr.'s App. A at 5.) However, in dictum, the district court also concluded that if it did evaluate the case under the second prong, it would conclude that Champagne failed to show that he was prejudiced by Minnis's allegedly deficient counsel because "[t]here are no facts indicating a reasonable probability that but-for Minnis['s] failure to remove Herdina, the outcome of this case would have been different." (*Id*.)

Importantly, Herdina's July affidavit, which supplanted his June affidavit, clearly indicated that he could remain fair and impartial as a juror. Furthermore, Champagne's argument also downplays Herdina's statements during individual voir dire where he affirmatively stated that he could be fair to both the State and Champagne, and that he was not making any assumptions about Champagne. Champagne's contention also overlooks the trial court's specific finding that Herdina was clear that he could be fair and impartial. Although Herdina's June affidavit contained an ambiguous statement regarding his ability to remain impartial, reviewing the circumstances underlying voir dire and Herdina's repeated statements that he could be impartial, Champagne can not meet his burden that Herdina was biased and should have been excused for cause. Accordingly, because the district court was correct in concluding that Herdina was clear that he could be fair and impartial, Champagne cannot show that he was prejudiced by counsel's decision not to strike Herdina. Critically, because Champagne cannot meet his burden to show that Herdina was biased, he also cannot not show that Herdina's presence on the jury created a reasonable probability that a court's confidence in the outcome of the trial would be undermined. *Strickland*, 466 U.S. at 694.

Additionally, Champagne cites to *State v. Good*, 2002 MT 59, 309 Mont. 113, 43 P.3d 948 and *State v. Freshment*, 2002 MT 61, 309 Mont. 154, 43 P.3d 968, for his argument that he was prejudiced by Herdina's presence on the jury.

However, these cases are clearly distinguishable from the case at bar. Importantly, in both of these cases, the Court concluded that the jurors in question should have been removed for cause because they affirmatively stated that they could not be impartial or expressed straightforward and consistent statements of bias. *Good*, ¶ 55; *Freshment*, ¶ 18. In contrast, Herdina made one equivocal statement in his June affidavit, which was followed by a series of consistent and unequivocal statements that he could be impartial and fair to Champagne. Thus, the situation presented in these cases are completely distinguishable from the situation in this case. Accordingly, Champagne has not established prejudice under *Strickland* because he has failed to show that Herdina was actually biased and that the alleged bias rendered him partial.

2. This Court should reject Champagne's request to presume prejudice in his case.

Champagne also argues that Minnis's decision not to strike Herdina resulted in structural error, which is conclusively prejudicial and requires automatic reversal. (Petr.'s Br. at 18-19 (citing *Freshment*, ¶ 14; *Good*, ¶ 62).) However, these cases dealt with the specific issue of when a court abuses its discretion and improperly denies a challenge for cause, and counsel is forced to use a preemptory challenge instead. *Freshment*, ¶ 19; *Good*, ¶ 66. Accordingly, these cases only found structural error after applying a three-part test which, if satisfied, requires automatic reversal. *Freshment*, ¶ 14 ("Therefore, we held that such an abuse of

discretion is conclusively prejudicial and requires automatic reversal if: (1) a district court abuses its discretion by denying a challenge for cause to a prospective juror; (2) the objecting party uses one of his or her peremptory challenges to remove the disputed juror; and (3) the objecting party exhausts all of his or her peremptory challenges."). However, this three-part test is not applicable to the facts of this matter and undercuts Champagne's argument that structural error must be found in this case.

Furthermore, Champagne's contention that seating Herdina was structural error and requires automatic reversal because prejudice is assumed, is not compatible with the *Strickland* test and other United States Supreme Court case law. Indeed, in *United States v. Cronic*, 466 U.S. 648 (1984), the Supreme Court stated that, in the context of a claim of ineffective assistance of counsel, prejudice may be presumed in very limited circumstances, such as when the defendant is denied the presence of counsel at a critical stage, if defense counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, or where defense counsel is called upon to render assistance under circumstance where competent counsel very likely could not do so. *Id.* 466 U.S. at 658-60; *Bell v. Cone*, 535 U.S. 685, 695-96 (2002). Additionally, in *Smith v. Robbins*, 528 U.S. 259 (2000), the Supreme Court added that prejudice may be presumed "when counsel is burdened

by an actual conflict of interest." *Id.* 528 U.S. at 287 (quoting *Strickland*, 466 U.S. at 692).

In this case, none of those circumstances are present. Minnis was not actively representing conflicting interests when he represented Champagne. Champagne was not denied counsel at a critical stage, nor was Minnis called upon to render assistance under circumstances where counsel very likely could not do so.

Also, the circumstance where counsel entirely fails to subject the prosecution's case to meaningful adversarial testing is not present here. In *Bell*, the Supreme Court explained that for a court to presume prejudice based on an attorney's failure to subject the prosecution's case to testing, the attorney's failure must be complete, and not simply at specific points of the trial. *Bell*, 535 U.S. at 697. In *Cronic*, the Supreme Court emphasized that "if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable." *Cronic*, 466 U.S. at 659.

Here, Champagne cannot show that Minnis's failure was complete because he is only challenging Minnis's performance during one given point of the trial, namely the voir dire of Herdina. Moreover, this Court cannot find that Minnis's performance at voir dire failed to subject the prosecution's case to meaningful adversarial testing because Minnis did question Herdina individually and

successfully challenged multiple prospective jurors for case. Accordingly, the Court should reject Champagne's contention that prejudice is presumed if defense counsel's performance was deficient during voir dire. Instead, this Court should require Champagne to meet his burden that an actual showing of prejudice is required before reversing his conviction.

CONCLUSION

The Court should find that Champagne has not satisfied his burden to show that his counsel was ineffective and affirm the district court's denial of his Petition.

Respectfully submitted this 26th day of February, 2020.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 7,560 words, excluding certificate of service and certificate of compliance.

/s/ Michael P. Dougherty
MICHAEL P. DOUGHERTY

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 18-0664

CLARENCE EDWARD CHAMPAGNE,

Petitioner and Appellant,

v.

STATE OF MONTANA,

Respondent and Appellee.

APPENDIX

CERTIFICATE OF SERVICE

I, Michael Patrick Dougherty, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 02-26-2020:

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