
MICHAEL GILBERT ILK,

Petitioner and Appellant,

v.

STATE OF MONTANA,

Respondent and Appellee.

BRIEF OF APPELLANT

On Appeal from the Montana Nineteenth Judicial District Court,
Lincoln County, The Honorable Matthew J. Cuffe, Presiding

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Issue presented

Whether the district court erred in concluding trial counsel's performance was objectively reasonable in failing to challenge, or further inquire of, a prospective juror who fervently averred, *inter alia*, an actual prejudice regarding an issue central to Appellant's case.

Statement of the case

In *State v. Ilk*, Michael Ilk (Ilk) was charged by Information with: two counts of attempted deliberate homicide, felonies (Counts I & II); two counts of aggravated assault, felonies (Counts III & V); two alternative counts of assault with a weapon, felonies (Counts IV & VI); partner or family member assault (PFMA), a misdemeanor (Count VII); and, fleeing from or eluding a peace officer, a misdemeanor (Count VIII). (DC 15-35 (D.C.) Doc. 4.) The State later moved to dismiss the PFMA and fleeing or eluding charges. (D.C. Doc. 74.)

The State alleged Ilk had a relationship with Hadassah Pereslete (Pereslete); however, "[t]he relationship ended early this year after Ilk assaulted her. At the time he told her he would kill her if she was with any other guy." (D.C. Doc. 2 at Ex. A.) The State further alleged Ilk, on April 15, 2015, confronted Pereslete and Tyler Wilson (Wilson), at

Pereslete's jobsite, and "started shooting at them with a 9mm handgun. Pereslete and Wilson fled the scene, in Wilson's vehicle, having to drive past Ilk as their only way out. Ilk continued shooting at them as they drove by." (D.C. Doc. 2 at Ex. A.)

Ilk retained Sean Hinchey (Hinchey) as counsel. Although Hinchey opined, "I wouldn't look at it as a domestic violence case" (PCR at 14-15, 25), he nevertheless raised the topic of domestic violence in *voir dire*.¹ In response, prospective juror James Brown (Juror Brown) volunteered, *inter alia*: "**I am very prejudiced against people that abuse other people . . . they should be took out and shot as far as I am concerned.**" (Trial at 143 (emphasis added).)

Hinchey later passed the jury for cause. (Trial at 179.) Juror Brown was ultimately seated as juror number eight. (Trial at 190; D.C. Doc. 81 at 5.)

Following a four-day jury trial, Ilk was convicted of Counts I, II, III and V. (Trial at 1059; D.C. Doc. 86.) The Court imposed the following sentences: pursuant to Counts I and II, it imposed

¹ The trial transcript from DC 15-35 will be cited as "Trial;" the PCR hearing transcript will be cited as "PCR."

² The Sentence Review Division modified Ilk's sentence: pursuant to Counts I and II, it imposed concurrent, 80-years sentences; pursuant to Counts III and V, it imposed concurrent, 20-years sentences, concurrent to

consecutive, 80-year sentences, without the possibility of parole; pursuant to Counts III and V, it imposed concurrent, 20-year sentences. (Sent. Tr. at 1123; D.C. Doc. 94.)²

Ilk appealed his convictions and, relevant to the instant appeal, this Court made certain factual findings. *State v. Ilk*, 2018 MT 186, 392 Mont. 201, 422 P.3d 1219. This Court found, *inter alia*, Ilk and Pereslete had been in a long-term relationship that Pereslete ended “after Ilk physically assaulted her.” *Ilk*, ¶ 2. Following the break-up, Ilk continued to pursue Pereslete, “and sent her a letter apologizing for the ‘domestic abuse.’” Pereslete and Ilk spent some time together in the following months, but Pereslete ultimately called 911 for assistance when Ilk refused to leave her house. *Ilk*, ¶ 2. Additional facts and background underlying the original proceeding, but not pertinent to the instant appeal, are set forth in *Ilk*.

Ilk timely pursued postconviction relief. (DV 19-209 (D.V.) Doc.

1.) Relevant to the instant appeal, Ilk argued Hinchey rendered ineffective assistance (IAC) by: (1) failing to ensure his right to a fair

² The Sentence Review Division modified Ilk’s sentence: pursuant to Counts I and II, it imposed concurrent, 80-years sentences; pursuant to Counts III and V, it imposed concurrent, 20-years sentences, concurrent to Counts I and II. Finally, it determined Ilk shall be eligible for parole.

trial by a panel of impartial jurors; and, (2) failing to properly investigate a prospective juror's averred prejudice and state of mind regarding perpetrators of domestic violence. (D.V. Doc. 1 at 28-29.)

The court denied Ilk's petition. It is from this Order Ilk now appeals. (D.V. Doc. 26, attached as Ex. A.)

Statement of the facts

The State produced evidence in discovery regarding previous acts of domestic violence Ilk had allegedly perpetrated against Pereslete. (PCR at 16.) In that regard, Hinchey filed a motion *in limine* to exclude evidence of, *inter alia*: "allegations regarding and all prior assaults by Defendant of Hadassah Pereslete; including alleged prior threats of Pereslete and alleged 'threats to kill' Tyler Wilson" and "an allegation of a prior call to 911 occurring two days prior to the events in question." (D.C. Doc. 45.)

The court summarily denied the motion. (D.C. Doc. 73.) Thus, Hinchey, "assumed that it was all potentially admissible" and "I was prepared for it." (PCR at 19, 25.) Regarding the allegations of previous domestic violence, Hinchey planned to discredit Pereslete and expose her as a "manipulator, and not honest." (PCR at 32, 84-85.)

Hinchey defended Ilk pursuant to a justifiable use of force defense. (PCR at 83.) Specifically, he theorized Pereslete manipulated Ilk and orchestrated the armed confrontation with Wilson, wherein Ilk was forced to fire in self-defense. (PCR at 32, 84-85.) Accordingly, Hinchey sought to select jurors who would be “friendly” to Ilk and his defense, *i.e.*, comfortable with making “split-second” decisions and using firearms in self-defense. (PCR at 87.)

Although the State originally charged Ilk with, *inter alia*, PFMA, Hinchey repeatedly rejected the notion this was a “domestic violence situation;” rather, he insisted Ilk was the “victim” of “this manipulative woman setting up a scene where Mr. Ilk was forced to use a firearm in self-defense.” (PCR at 14-15, 25, 85-86.) He begrudgingly conceded, however, yes, “generally speaking shooting a gun at someone, at a partner would constitute an act of domestic violence.” (PCR at 15, 31.)

The venire consisted of 63 prospective jurors and Juror Brown was initially seated as juror 19. (Trial at 15-16, 28-29.) Pursuant to the State’s *voir dire*, Juror Brown volunteered, “when I’ve got to go to the restroom I’ve got to go.” (Trial at 59.) Later, he acknowledged being neighbors with two other prospective jurors, and maintained these

relationships would not affect his ability to independently consider the evidence or reach a verdict. (Trial at 114-15.) Finally, Juror Brown volunteered some remarks regarding his shaving habits. (Trial at 114-15.)

Hinchey confessed nothing in the foregoing exchanges with the State informed his assessment as to Juror Brown's ability to serve as a fair and impartial juror. (PCR at 64-66.) Similarly, nothing in the foregoing exchanges informed his assessment as to whether Juror Brown would be sympathetic to Ilk's theory of self-defense. (PCR at 64-66.)

The State passed the jury for cause without discussing or otherwise posing a single question regarding the topic of domestic violence. (Trial at 35-117; PCR at 24-25.)

Hinchey acknowledged concern regarding jurors who may have had some personal experience with domestic violence—"I would want to know what they would have to say about the situation." (PCR at 23.) Accordingly, and in anticipation of the State presenting evidence Ilk had allegedly assaulted Pereslete in the past, Hinchey raised the

subject of domestic violence in *voir dire*. (Trial at 139-40; PCR at 26-27.)

Hinchey announced to the venire: “You might hear in the course of this case some **allegations of physical assault or physical abuse.**”

(Trial at 139-40 (emphasis added). Three jurors volunteered their personal experiences with domestic violence. (Trial at 140-42.)

The record demonstrates Hinchey then inquired, “Mr. Brown, I think you might have had your hand up.” (Trial at 142.) Hinchey’s inquiry prompted the following:

Brown: Yeah, you asked if a person had been abused?

Hinchey: Yes.

Brown: Yeah, **my wife come from a very abusive marriage**, not with me, of course. She’s been at bliss with me.

Hinchey: You are the silver lining out of all of that.

Brown: Yeah, but I mean she was, her ex would come in drunk and **beat her and knock her teeth out, kicked her in the belly when she was pregnant**, lost her kid, tried to molest her two daughters. **It was a bad situation.**

Hinchey: Oh my goodness.

Brown: Yeah, **I was going to kill the SOB**, but uh, he would only mess with me one time and that was

over the phone and I never seen him since—never seen him. But, yeah, **I am very prejudiced against people that abuse other people**, whether they are male or female and **they should be took out and shot as far as I am concerned**.

Hinchey: Okay. **So you wouldn't have any trouble doing that?** Defending . . .

Brown: **I don't think I'd have any problem pulling the trigger on somebody like that to tell you the damn truth about it.**

Hinchey: That's what I am asking.

Brown: Okay, **that's the truth.**

Hinchey: Thank you.

Brown: Okay.

(Trial at 142-44 (emphasis added).) The foregoing exchange was the only personal interaction Hinchey had with Juror Brown. (PCR at 66.)

Hinchey did not pose a single question to Juror Brown as to whether his prejudice against perpetrators of domestic violence would affect his ability to serve as a fair and impartial juror. (PCR at 67-68.) Similarly, he did not pose a single question to Juror Brown as to whether his prejudice against perpetrators of domestic violence would affect his ability to objectively consider the evidence. (PCR at 67-68.)

Nevertheless, Hinchey insisted, “I thought I had all the information that I needed to use my for cause challenges.” (PCR at 73-74.)

Hinchey confirmed, at the time, he had no reason to question the truthfulness of Juror Brown’s statements. (PCR at 30.) Likewise, he had no reason to doubt Juror Brown’s statements were accurate and reliable. (PCR at 30.)

Hinchey agreed Juror Brown stated an “**actual prejudice**” against people who perpetrate acts of domestic violence; indeed, “he was **very prejudiced** against people that abuse other people.” (PCR at 30-31, 34 (emphasis added).) Hinchey could not recall whether Juror Brown’s actual prejudice was outweighed by some more favorable, off the record information he had at the time. (PCR at 55-56.) Juror Brown’s actual prejudice notwithstanding, Hinchey insisted this did not raise a “serious question regarding his ability to be fair and impartial[.]” (PCR at 34.)

Hinchey did not pose a single question to Juror Brown regarding the concept of self-defense. (PCR at 69.) Similarly, he did not pose a single question to Juror Brown regarding his views on making “split-second” decisions. (PCR at 69.) And, although Juror Brown’s

statement—“I don’t think I’d have any problem pulling the trigger on somebody like”—was clearly in response to the inquiry concerning domestic violence, Hinchey admittedly speculated: “I don’t know. In my mind he was a good juror to have because we needed people that were comfortable with firearms and weren’t afraid to use them.” (PCR at 57-58.) Again, Hinchey speculated: “In my mind Mr. Brown was open to the idea of using a firearm, defend, in self-defense, and was comfortable with firearms, comfortable in using them in defending.” (PCR at 90.)

Hinchey passed the jury for cause and exercised all of Ilk’s peremptory challenges. (Trial at 179; D.C. Doc. 81 at 5-6.) Regarding the jurors he struck by way of Ilk’s fourth, fifth, and sixth peremptory challenges, Hinchey could not cite anything from the record demonstrating these jurors made any comments that were overly concerning. (PCR at 49-55.) Indeed, he could not recall why he struck these three particular jurors. (PCR at 51-55.)

Of the six jurors he struck by way of peremptory challenges, Hinchey could not recall any who expressed an actual prejudice against perpetrators of domestic violence. (PCR at 55.) None of these six jurors

expressed a personal willingness to summarily execute perpetrators of domestic violence. (PCR at 55.)

Juror Brown was ultimately seated as juror number eight. (Trial at 190.)

Summary of the argument

The totality of Juror Brown's statements and referenced circumstances clearly raised serious questions regarding his ability to fairly and impartially render a verdict based solely on the evidence. Indeed, he expressed an actual prejudice regarding a subject that was central to the State's case against Ilk. Hinchey's failure to challenge or further inquire of Juror Brown thus constituted IAC, and the court erred in concluding his performance and purported strategy was objectively reasonable.

Standard of review

This Court reviews the denial of a postconviction relief petition to determine whether the court's findings of fact are clearly erroneous and whether its conclusions of law are correct. *Whitlow v. State*, 2008 MT 140, ¶ 9, 343 Mont. 90, 183 P.3d 861. Claims of IAC present mixed

questions of law and fact, which this Court reviews *de novo*. *Whitlow*, ¶ 9.

This Court has adopted the two-part *Strickland* test for measuring IAC claims. *State v. Boyer*, 215 Mont. 143, 147, 695 P.2d 829, 831 (1985), *citing Strickland v. Washington*, 466 U.S. 668 (1984). First, petitioners must show counsel’s performance was deficient. They must demonstrate counsel made such serious errors that counsel was not functioning as the “counsel” guaranteed under both the United States and Montana Constitutions. *State v. Henderson*, 2004 MT 173, ¶ 5, 322 Mont. 69, 93 P.3d 1231.

Regarding the prejudice-prong of the *Strickland* test, this Court has held jury impartiality goes to the very integrity of our justice system; specifically, the right to an impartial jury is so essential to our conception of a fair trial its violation cannot be considered harmless error. *E.g., State v. LaMere*, 2000 MT 45, ¶ 50, 298 Mont. 358, 2 P.3d 204. Accordingly, this Court has held errors in the jury selection process are structural errors. *State v. Lamere*, 2005 MT 118, ¶ 26, 327 Mont. 115, 112 P.3d 1005. Having determined a structural error exists,

courts need not speculate or refer to evidence of record to support a determination of prejudice. *Lamere*, ¶ 29.

Argument

In all criminal prosecutions, the accused shall enjoy the right to the assistance of counsel for his defense. U.S. Const. Amend. VI; *Strickland*, 466 U.S. at 685. The right to counsel is also guaranteed under the Montana Constitution, Article II, Section 24.

Counsel’s conduct is presumed to be within the range of competence demanded of attorneys under like circumstances. *Strickland*, 466 U.S. at 687-89. Deference, however, is not absolute. As this Court has stated: “The question is not merely whether counsel’s conduct flowed from strategic decisions and trial tactics but, rather, whether it was based on ‘reasonable’ or ‘sound’ professional judgment.” *Whitlow*, ¶19 (emphasis added). “Even if [counsel’s] decision could be considered one of strategy, that does not render it immune from attack—it must a *reasonable* strategy.” *Whitlow*, ¶19, quoting *Jones v. Wood*, 114 F.3d 1002, 1010 (9th Cir. 1997) (alteration and emphasis as supplied).

The court clearly erred in concluding Hinchey’s performance and purported strategy, in failing to challenge or further inquire of Juror Brown, was objectively reasonable.

The court correctly found, “[t]here is **no dispute** the trial included aspects of domestic violence, including evidence of a prior assault and prior threats of violence.” (Ex. A at 4 (emphasis added).) Clearly, however, it erred in concluding Hinchey’s performance and purported strategy relative to Juror Brown was objectively reasonable. The court’s findings in that regard are not supported by substantial credible evidence; it clearly misapprehended the effect of Juror Brown’s statements and the record below.

I. Hinchey’s performance and purported strategy was not objectively reasonable.

Hinchey rendered IAC by failing to challenge Juror Brown for cause, or otherwise utilize a peremptory challenge to remove him, although Juror Brown fervently averred, *inter alia*, “I am very prejudiced against people that abuse other people . . . they should be took out and shot as far as I am concerned.” The statements at issue (Trial at 142-44) were in direct response to Hinchey’s inquiry regarding domestic violence and, thus, cannot be reasonably “described [as] a layman’s definition of justifiable use of force.” (Ex. A at 7.)

Juror Brown’s statements concerning domestic violence and his actual prejudice in that regard plainly evidenced a “state of mind” confirming bias—that which would prevent him from acting impartially and without prejudice to Ilk’s substantial rights. Moreover, and Hinchey’s unreasonable opinion to the contrary, Juror Brown’s statements and actual prejudice raised serious questions about his ability to be fair and impartial. Hinchey was, thus, required to challenge Juror Brown for cause or utilize a peremptory challenge to remove him. Hinchey’s failure to do so cannot be considered objectively reasonable or, as the court concluded, merely a “technical legal objection[]” he reasonably forsook pursuant to Ilk’s self-defense theory. (Ex. A at 4.)

Criminal defendants have fundamental federal and state constitutional rights to an impartial jury. U.S. Const. amend. VI; Mont. Const. art. II, § 24; *e.g.*, *State v. Russell*, 2018 MT 26, ¶ 12, 390 Mont. 253, 411 P.3d 1260. The Montana Legislature has enumerated ten specific reasons for which a challenge for cause may be taken to protect the fundamental fairness of the jury selection process. Mont. Code Ann. § 46-16-115(2)(a-j). The most often utilized challenge is found at Mont.

Code Ann. § 46-16-115(2)(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.” The statutory grounds underlying challenges for cause implicitly recognize: “Impartiality is not a technical conception. It is a state of mind.” *Irwin v. Dowd*, 366 U.S. 717, 724-25 (1961).

This Court has recognized it is common for prospective jurors to initially express doubt or concern about their ability to be fair and impartial. *State v. Johnson*, 2019 MT 68, ¶ 10, 395 Mont. 169, 437 P.3d 147, *see, e.g., Russell*, ¶¶ 14-19; *State v. Normandy*, 2008 MT 437, ¶¶ 23-25, 347 Mont. 505, 198 P.3d 834. The dispositive question, however, is whether the totality of the juror’s statements and referenced circumstances raise a serious question or doubt about his or her willingness or ability to set aside any such matter to fairly and impartially render a verdict based solely on the evidence presented and instructions given. *E.g., Johnson*, ¶ 11.

This Court has also stated, in contrast to single-syllable answers prompted by leading questions, spontaneous and unprompted responses to open-ended questions are generally the most truthful, accurate, and

reliable indicators of bias and the ability to be fair and impartial. *E.g.*, *Russell*, ¶ 14.

A. Juror Brown’s statements concerning domestic violence, and his actual prejudice in that regard, demanded removal from the jury.

Defense attorneys have a “clear duty to ensure [the defendant’s] right to a fair trial by a panel of impartial jurors.” *State v. Chastain*, 285 Mont. 61, 65, 947 P.2d 57, 60 (1997). When an attorney fails to remove a juror who expresses evidence of bias from the jury pool, and that juror later serves on the jury, the defendant has a claim of IAC. *Chastain*, 285 Mont. at 65, 947 P.2d at 60; *State v. Herrman*, 2003 MT 149, ¶ 22, 316 Mont. 198, 70 P.3d 738.

This Court has stated the purpose of Mont. Code Ann. § 46-16-115, is to eliminate from the jury pool for cause someone who, due to, *inter alia*, a personal relationship or past experience, “cannot logically be expected to set aside [his/her] resulting state of mind and act with entire impartiality.” *State v. Kebble*, 2015 MT 195, ¶ 32, 380 Mont. 69, 353 P.3d 1175. “That [jurors] will be prone to favor that side of a cause with which they identify themselves either economically, socially, or

emotionally is a fundamental fact of human character.” *State v. Heath*, 2004 MT 58, ¶ 30, 320 Mont. 211, 89 P.3d 947 (citation omitted).

The issue in “challenge for cause” cases under Mont. Code Ann. § 46-16-115(2)(j), is whether a prospective juror’s statements demonstrate a “state of mind” affecting his or her ability to be impartial and act without prejudice to either party, and whether a “serious question” has arisen in that regard. *State v. Golie*, 2006 MT 91, ¶ 18, 332 Mont. 69, 134 P.3d 95. In determining whether a “serious question” has arisen regarding a juror’s ability to be fair and impartial, a court must review his or her responses as a whole. *Heath*, ¶ 18. However, again, a prospective juror’s spontaneous statements or responses are the most honest and reliable with respect to challenges based on Mont. Code Ann. § 46-16-115(2)(j). *Golie*, ¶ 26, *citing Heath*, ¶ 26.

In *State v. Freshment*, 2002 MT 61, ¶ 8, 309 Mont. 154, 43 P.3d 968, two prospective jurors expressed reluctance to acquit a defendant charged with sexual intercourse who asserted he reasonably believed the victim was 16 years old or older and, therefore, legally old enough to consent. These two jurors stated, among other things, adults should be “cautious” because teenagers often lie about their age. *Freshment*, ¶¶ 8-

9. This Court reversed the district court’s denial of Freshment’s challenge for cause. It concluded a serious question had arisen about the jurors’ ability to be fair and impartial because they, “stated an actual bias directly related to an issue critical to the outcome of the case, *i.e.*[,] whether Freshment could have a reasonable belief one of the victims was 16 or older.” *Freshment*, ¶¶ 16, 19.

In *Golie*, defendant was charged with felony DUI. *Golie*, ¶ 3. During *voir dire*, juror Lundt (Lundt) revealed the issue of DUI was a “sore subject” because, in 1969, he had been injured by a drunk driver who was never prosecuted. *Golie*, ¶ 4. On appeal, *Golie* argued Lundt’s statements regarding his unresolved DUI-related experience demonstrated bias and, therefore, the court abused its discretion in denying his challenge for cause. *Golie*, ¶ 9.

This Court found Lundt’s initial response characterized the issue of DUI as a “sore subject,” since 1969. *Golie*, ¶ 15. Lundt also consistently referred to his strong emotions about the subject of DUI. Asked whether what he “brought to the table” would impact his ability to be fair and impartial, Lundt stated, “he was not sure that—that it [would] entirely.” Ultimately, Lundt acknowledged he did not know if

his “passionate concern” about the subject of DUI would negatively impact Golie. *Golie*, ¶ 15.

This Court concluded Lundt’s statements raised serious questions about his ability to be fair and impartial. *Golie*, ¶ 15. Moreover, it found Lundt’s statements established he had a state of mind in reference to the case that would prevent him from acting with entire impartiality and without prejudice to Golie’s substantial rights. *Golie*, ¶ 15. The court, thus, abused its discretion in denying Golie’s challenge for cause. *Golie*, ¶ 30. Golie utilized a peremptory challenge to remove Lundt and exhausted her peremptory challenges; therefore, the error was structural and mandated automatic reversal. *Golie*, ¶ 30.

In *Russell*, ¶ 4, defendant was charged with felony DUI. During *voir dire*, one juror, Kaylie Utter (Utter), stated, *inter alia*, she had “a couple of experiences that might influence [her] opinions”—a close friend died in a drunk driving accident, and her son-in-law was recently involved in a drunk driving accident. Utter could not definitively answer whether those experiences would impact her ability to be fair or impartial; however, she admitted it, “definitely affects [her] opinions.” In response to follow-up questions regarding her ability to neutrally

evaluate potential evidence, Utter answered, “yes” when the prosecutor asked whether her life experiences would cause her to evaluate the evidence in a certain way. The court granted Russell’s challenge for cause, “based on the experiences that she’s had personally and the indication that those experiences would maybe influence her decision.”

Russell, ¶ 4.

Juror Donald Platisha (Platisha) replaced Utter, and immediately stated he, “might be in the same position as the last juror.” *Russell*, ¶ 5. In a follow-up question, Platisha explained his sister was injured, and his brother-in-law killed, by a drunk driver. When pressed directly as to whether he thought his experiences would make it hard for him to be a fair juror in a DUI case, Platisha stated, “I’m like [Utter]. I don’t know.” *Russell*, ¶ 5. Platisha also stated, *inter alia*, he had “quite a few” experiences involving drunk drivers and agreed he would feel “more comfortable” sitting on another type of case where he did not have so much personal experience. *Russell*, ¶ 6.

The court denied Russell’s challenge for cause after determining Platisha, “indicated that even with his life experiences[,] which he has discussed with us, he is still able to be fair in the case . . .’ and asking

Platisha, ‘is that correct, Mr. Platisha?’” Platisha answered in the affirmative. *Russell*, ¶ 8.

This Court found Platisha disclosed similar experiences to Russell’s case; however, he did not reveal bias or impartiality. *Russell*, ¶ 18. Although Platisha initially expressed concern about his own impartiality and told the court he “‘might be in the same position as the last juror,’” this Court noted he did not reveal a fixed opinion as to Russell’s guilt or the outcome of the proceedings. Unlike Utter, who admitted her experiences “‘definitely affect[ed] [her] opinions,’” and felt the refusal to submit to a breath test inferred guilt, Platisha did not express an opinion as to Russell’s guilt or innocence, “‘explicitly stating: ‘I don’t know. I haven’t heard the evidence so I guess I can’t answer that . . .’ and that merely having a ‘hunch’ as to whether Russell was guilty would be insufficient to convict him.” *Russell*, ¶ 18 (alterations in original).

Although Platisha had personal experiences pertinent to the case at bar, this Court found he disclosed his experiences and “‘recognized their relevance but affirmed he could be fair.” *Russell*, ¶ 19. The Court acknowledged Platisha stated he might be more “‘comfortable” sitting as

a juror on another type of case; however, it concluded his experiences and demeanor did not circumstantially show an inability to act with impartiality and without prejudice. *Russell*, ¶ 19.

In *Normandy*, ¶ 1, defendant was charged with PFMA, a felony. During *voir dire*, a juror stated he had a predisposition against domestic violence because it had affected his wife in her first marriage.

Normandy, ¶ 23. However, he did not voice a predisposition regarding Normandy's guilt or innocence and asserted he could be fair and impartial. This Court observed at no time during *voir dire* did the juror state or infer he had a fixed opinion as to Normandy's guilt. *Normandy*, ¶ 23.

This Court found the juror expressed his "concerns about the crime of domestic violence" because such violence had "affected" his wife in her first marriage. *Normandy*, ¶ 25. It noted, however, he "made it clear he was biased against the crime," not the defendant. Moreover, the juror was, "unequivocal in his assertion that he could be fair in assessing whether the defendant was guilty of the charged offense." Therefore, the court did not abuse its discretion in denying Normandy's challenge of the subject juror for cause. *Normandy*, ¶ 25.

In *State v. Rogers*, 2001 MT 165, ¶ 1, 306 Mont. 130, 32 P.3d 724, defendant was charged with two counts of felony sexual assault upon two child victims. During *voir dire*, juror Welter (Welter) revealed it would be difficult for him to be objective given that sexual assault of children was at issue. *Rogers*, ¶ 8.

On appeal, this Court concluded Welter ultimately demonstrated he did not have an improper state of mind, and no serious question existed in that regard. *Rogers*, ¶ 25. It reasoned Welter's feelings regarding sexual assault are common among parents, and the fact he had children of his own was by no means "unique" among other prospective jurors. Moreover, despite his initial response, "Welter's subsequent responses indicated he was unbiased and impartial." For example, "Welter acknowledged he would have to hear all of the evidence before he could conclude Rogers was guilty." Welter also admitted just because Rogers was the defendant, Rogers was not necessarily guilty of something, and also acknowledged kids are more susceptible to suggestion than adults and must be scrutinized. Finally, Welter recognized his ability to sit on the jury would not be impaired,

“at all, in any way, by [his] belief about sexual assault crimes.” *Rogers*, ¶ 25.

Thus, “[u]nder the totality of the circumstances,” this Court concluded Welter’s responses indicated neither a “state of mind” affecting his ability to be fair and impartial, nor a “serious question” in that regard. *Rogers*, ¶ 26.

In the case *sub judice*, the State’s case against Ilk was plainly, by its very nature, one of extreme and lethal domestic violence. And, although Hinchey utterly refused to acknowledge this reality or the significance of the State’s evidence regarding allegations of previous domestic violence, the court correctly found: “There is no dispute the trial included aspects of domestic violence, including evidence of a prior assault and prior threats of violence.” (Ex. A at 4.)

The record demonstrates the State passed the jury for cause without discussing or otherwise posing a single question regarding the topic of domestic violence. (Trial at 35-117.) And, although Hinchey appropriately raised the subject of domestic violence pursuant to Ilk’s *voir dire*, the record plainly demonstrates his interpretation of Juror Brown’s statements was unreasonable and speculative at best.

Again, clearly pursuant to a discussion regarding the topic of domestic violence, Hinchey and Juror Brown engaged in the following colloquy:

Brown: Yeah, you asked if a person had been abused?

Hinchey: Yes.

Brown: Yeah, **my wife come from a very abusive marriage**, not with me, of course. She's been at bliss with me.

Hinchey: You are the silver lining out of all of that.

Brown: Yeah, but I mean she was, **her ex would come in drunk and beat her and knock her teeth out, kicked her in the belly** when she was pregnant, lost her kid, tried to molest her two daughters. **It was a bad situation.**

Hinchey: Oh my goodness.

Brown: Yeah, **I was going to kill the SOB**, but uh, he would only mess with me one time and that was over the phone and I never seen him since—never seen him. But, yeah, **I am very prejudiced against people that abuse other people**, whether they are male or female and **they should be took out and shot as far as I am concerned.**

Hinchey: Okay. **So you wouldn't have any trouble doing that?** Defending . . .

Brown: **I don't think I'd have any problem pulling the trigger on somebody like that to tell you the damn truth about it.**

Hinchey: That's what I am asking.

Brown: Okay, **that's the truth.**

(Trial at 142-44 (emphasis added).)

Although Hinchey acknowledged Juror Brown expressed an actual prejudice—“very”—against perpetrators of domestic violence, he insisted, and the court agreed, Juror Brown’s willingness to “pull[] the trigger on somebody like that” was consistent with and favorable to Ilk’s self-defense theory. (Ex A. at 4.) Indeed, in concluding Hinchey’s failure to remove Juror Brown was objectively reasonable, the court found Juror Brown’s statements, “described a layman’s definition of justifiable use of force.” (Ex. A at 7.) Hinchey’s opinions regarding the significance of Juror Brown’s statements, and the court’s findings in that regard, are clearly erroneous. As will be demonstrated below, neither are supported by substantial credible evidence and both clearly misapprehended the effect of Juror Brown’s statements.

First, it bears repeating, the record plainly demonstrates Hinchey was posing questions to the venire regarding the topic of domestic

violence and, clearly, Juror Brown's statements were responsive and limited to that inquiry—"Mr. Brown, I think you had your hand up . . . Yeah, you asked if a person had been abused?" (Trial at 142.) Indeed, Hinchey conceded his interaction with Juror Brown had nothing to do with the topic of self-defense. (PCR at 57.) Moreover, Hinchey did not thereafter pose a single question to Juror Brown regarding the topic of self-defense, nor did he pose a single question regarding his views on "split-second" decisions. (PCR at 69.) Accordingly, there is nothing in the record to suggest Juror Brown's statements regarding domestic violence, and his actual prejudice in that regard, was remotely consistent with or favorable to Ilk's self-defense theory.

Hinchey also insisted Juror Brown's statement—"I don't think I'd have any problem pulling the trigger on somebody like that"—in response to his one-word utterance—"Defending . . ."—indicated Juror Brown was a "good juror" who would be "sympathetic" to Ilk's self-defense theory. (PCR at 58, 61.) Hinchey claimed: "Well, but my question was beginning with defending oneself. However [Juror Brown] picked up on that and was talking about offending or just shooting an abuser." (PCR at 57-58.) Again, in that regard, the court found Juror

Brown’s statement, “described a layman’s definition of justifiable use of force.” (Ex. A at 7.)

Again, however, there is nothing in the record to suggest Juror Brown’s statement was remotely related to the concept of self-defense because, *inter alia*, Hinchey did not complete the question. Indeed, Hinchey ultimately conceded, “I don’t know,” when pressed to explain: “‘Defending,’ what’s the question? Defending what? Defending who? Defending why?” (PCR at 58.)

The record plainly demonstrates Juror Brown’s, “I don’t think I’d have any problem pulling the trigger on somebody like that” statement, was in response to Hinchey’s question: “So you wouldn’t have any trouble doing that?” (Trial at 143-44.) Clearly, this question had nothing to do with self-defense; rather, it was a follow-up to confirm Juror Brown’s willingness to kill his wife’s abusive ex-husband—“I was going to kill the SOB”—and statement: “I am very prejudiced against people that abuse other people . . . they should be took out and shot as far as I am concerned.” (Trial at 143-44.) The court’s finding the foregoing constituted a “layman’s definition of justifiable use of force” is,

thus, not supported by substantial credible evidence; it clearly misapprehended the effect of Juror Brown's statements.

Hinchey admitted Juror Brown expressed an actual prejudice—"very"—against perpetrators of domestic violence. (PCR at 30-31.) The court found Ilk's trial included aspects of domestic violence, "including evidence of a prior assault and prior threats of violence." (Ex. A at 4.)

Juror Brown's fervent condemnation of domestic violence and actual prejudice against abusers thus, clearly, established he had a state of mind in reference to Ilk's case that would prevent him from acting with entire impartiality and without prejudice to Ilk's substantial rights. More importantly, and Hinchey's unreasonable opinion to the contrary, Juror Brown's statements and referenced circumstances also raised obvious and serious questions regarding his ability to be fair and impartial. Therefore, the court clearly erred in concluding Hinchey's failure to challenge Juror Brown was "objectively reasonable." (Ex. A at 7.)

To be sure, this is not a case where a prospective juror merely had an experience in common with, or similar to, the experience of the accused or victim at issue. *Russell*, ¶ 18; *Normandy*, ¶ 25; *Rogers*, ¶ 25.

Nor, is this a case where a prospective juror merely expressed concern about his or her ability to be fair and impartial but ultimately believed he or she could and pledged to try. *Russell*, ¶¶ 18-19.

This Court should find this is a far more troubling case, where a prospective juror averred an actual prejudice regarding an issue central to the trial. Moreover Juror Brown, on three separate occasions, fervently expressed a personal willingness to execute perpetrators of domestic violence: “I was going to kill the SOB” and “they should be took out and shot” and “I don’t think I’d have any problem pulling the trigger on somebody like that.” He then twice confirmed the veracity of his statements in that regard: “to tell you the damn truth about it” and “that’s the truth.”

Juror Brown’s statements and referenced circumstances clearly demonstrated he would more than likely be unable or unwilling to set his personal prejudice and bias aside and act with entire impartiality and without prejudice to Ilk’s substantial rights. Moreover, the record manifests he would more than likely be unable or unwilling to follow the court’s jury instructions, including the instructions regarding “other acts” evidence, due to his strongly-held and deeply-rooted personal bias

and prejudice to the effect perpetrators of domestic violence, including Ilk, “should be took out and shot.”

Additionally, Juror Brown’s statements concerning domestic violence, and actual prejudice against abusers, must be considered honest and reliable. *State v. DeVore*, 1998 MT 340, ¶ 28, 292 Mont. 325, 972 P.2d 816 (overruled in part on other grounds); *State v. Good*, 2002 MT 59, ¶¶ 54-55, 309 Mont. 113, 43 P.3d 948. Indeed, Hinchey conceded he had no reason to question the veracity of Juror Brown’s statements and actual prejudice. Again Juror Brown, without prompting, spontaneously volunteered, “I am very prejudiced against people that abuse other people.” He thrice expressed a personal willingness to shoot such abusers and confirmed the veracity of the foregoing hangman’s philosophy not once but twice. These statements demonstrated Juror Brown’s bias and prejudice against perpetrators of domestic violence, and plainly established he had a state of mind in reference to the case that would prevent him from acting with entire impartiality and without prejudice to Ilk’s substantial rights.

Juror Brown’s “I am very prejudiced” statement, and fervent belief domestic abusers “should be took out and shot,” is infinitely more

troubling than the “sore subject” statement that justified a dismissal for cause in *Golie*. *Golie*, ¶¶ 15, 30. Juror Brown’s statements were not just “spontaneous” responses; rather, they clearly evidenced his visceral reaction at the prospect of considering evidence of domestic violence and serving as juror in such a case. Clearly, his statements concerning domestic violence, and actual prejudice in that regard, was honest and reliable with respect to a challenge for cause pursuant to Mont. Code Ann. § 46-16-115(2)(j). *Golie*, ¶ 26.

Juror Brown’s “I am very prejudiced” statement, and his fervent belief abusers “should be took out and shot,” raised obvious and serious questions regarding his ability to be fair and impartial. Indeed, his “I am very prejudiced” statement revealed an “actual bias” against perpetrators of domestic violence, and was directly related to the nature of the case (pursuant to the State’s theory of prosecution the shooting was the culminating act of domestic violence in a relationship that was punctuated with allegations of abuse). *Freshment*, ¶¶ 16,19.

Clearly, Juror Brown’s life experience—“my wife come from a very abusive marriage . . . It was a bad situation”—and characteristics would necessarily affect his ability to remain fair and impartial in a trial

involving evidence of domestic violence. This should be obvious where this Court has repeatedly observed it is a “fundamental fact of human character” that people are, “prone to favor that side of a cause with which they identify themselves either economically, socially, or emotionally.” *E.g., Golie*, ¶ 10. Based upon his life experience and actual prejudice, Juror Brown could not be reasonably expected to set aside this, “resulting state of mind and act with entire impartiality.” *Kebble*, ¶ 32.

Juror Brown’s statements regarding domestic violence, and his actual prejudice in that regard, clearly raised serious questions about his ability to be fair and impartial, even when reviewed in light of the totality of his other responses. *Heath*, ¶ 18. Aside from the statements at issue and his actual prejudice, the record demonstrates Juror Brown did not have any other interaction with Hinchey. Regarding his interactions with the State, Juror Brown discussed his need for regular bathroom breaks (Trial at 59-60), his ability to serve on the jury with two neighbors, and his sporadic shaving habits. (Trial Tr. at 114-15.) Neither the State nor Hinchey asked Juror Brown any additional,

substantive questions regarding his state of mind or actual prejudice against domestic abusers.

To be sure this was not a case where Juror Brown, despite his actual prejudice and belief domestic abusers should be shot, “convincingly affirm[ed] his [] ability to lay aside any misgivings [in that regard] and fairly weigh the evidence.” *State v. Cudd*, 2014 MT 140, ¶ 9, 375 Mont. 215, 326 P.3d 417. Therefore, viewed in context, Juror Brown never renounced his actual prejudice against perpetrators of domestic violence, and it cannot be said his interactions with either counsel rehabilitated him as a juror or otherwise dispelled the obvious and serious questions regarding his ability to be fair and impartial.

Juror Brown unequivocally averred, “I am very prejudiced against people that abuse other people.” He also thrice expressed his honest belief perpetrators of domestic violence “should be took out and shot.” Juror Brown’s statements and referenced circumstances clearly raised serious questions regarding his ability to be fair and impartial. Hinchey agreed Juror Brown stated an actual prejudice regarding perpetrators of domestic violence, and the court found Ilk’s trial in fact involved allegations and evidence of domestic violence.

Based on the foregoing, Hinchey's failure to remove Juror Brown by way of a for-cause or peremptory challenge clearly constituted ineffective assistance. The court therefore erred in concluding his performance was "objectively reasonable."

B. Errors in *voir dire* are structural and prejudice is presumed.

Errors in the jury selection process are structural errors. *Lamere*, ¶ 26. Having determined a structural error exists, a court need not engage in speculation or refer to evidence of record in order to support a determination of prejudice. *Lamere*, ¶ 29. Hinchey's failure to challenge Juror Brown permitted an openly and admittedly prejudiced juror to sit in judgment of Ilk's fate. Juror Brown's participation in this case constituted structural error, and prejudice is presumed. *Golie*, ¶ 30. This Court should, thus, find Ilk has satisfied the *Strickland* test, and his convictions must be vacated.

II. Hinchey’s failure to further question Juror Brown regarding his experience with domestic violence and actual prejudice was not objectively reasonable.

Again, counsel has a duty to ensure a defendant’s right to a fair trial by a panel of impartial jurors. *Lamere*, ¶ 15. The purpose of *voir dire* is to determine the existence of a prospective juror’s partiality, that is, his or her bias and prejudice. *Herrman*, ¶ 23. Adequate questioning enables counsel to exercise his or her peremptory challenges intelligently. *Herrman*, ¶ 23. Adequate questioning also enables counsel to properly raise challenges for cause pursuant to Mont. Code Ann. § 46-16-115(2)(j), “which provides for such challenges where a prospective juror has ‘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.’” *Lamere*, ¶ 15.

The right to trial by an impartial jury is principally secured through the system of challenges exercised during *voir dire*; therefore, it is incumbent on counsel to develop information in the record that demonstrates a juror’s bias as to a party or an issue in the case. *Lamere*, ¶ 15.

In the present case, Hinchey did not pose a single question to Juror Brown as to whether his actual prejudice against perpetrators of domestic violence would affect his ability to serve as a fair and impartial juror. (PCR at 67-68.) He did not pose a single question to Juror Brown as to whether his actual prejudice against perpetrators of domestic violence would affect his ability to objectively consider the evidence. (PCR at 67-68.)

The foregoing notwithstanding, Hinchey insisted, “I thought I had all the information that I needed to use my for cause challenges.” (PCR at 73-74.) Clearly, the court erred in concluding Hinchey’s failure to further inquire of Juror Brown was objectively reasonable, based upon the “totality of Juror Brown’s statements during *voir dire*, including follow-up questions to Juror Brown and the entire panel.” (Ex. A at 6-7.)

A. Hinchey’s failure to further question Juror Brown regarding his experience with domestic violence and actual prejudice was not objectively reasonable.

Hinchey rendered IAC by failing to adequately investigate Juror Brown’s actual prejudice, although Juror Brown volunteered his spouse was a survivor of domestic violence, he was “very prejudiced,” and thrice

averred such abusers “should be took out and shot.” This Court has stated there is no set number of questions counsel is required to ask of jurors. *State v. Kolberg*, 241 Mont. 105, 108, 785 P.2d 702, 704 (1990). In the present case, however, there should be no question Hinchey had a duty to examine Juror Brown regarding his experience with domestic violence, his actual prejudice in that regard, and his fervent belief abusers “should be took out and shot.” Hinchey could not intelligently exercise Ilk’s challenges based upon the questions posed to Juror Brown and, therefore, it cannot be said the purpose of *voir dire* was fulfilled. *Kolberg*, 241 Mont. at 108, 785 P.2d at 704.

In *Whitlow*, ¶ 3, defendant argued counsel was ineffective in failing to ask two prospective jurors follow-up questions, after said jurors demonstrated bias against him based on answers they provided during the State’s *voir dire*. Pursuant to the State’s *voir dire*, juror J.B. expressed reservations regarding his ability to be impartial. *Whitlow*, ¶ 23. Specifically, J.B. stated it would be “hard to be impartial,” and the prosecutor responded, “I’m going to let you wrestle with that.” *Whitlow*, ¶ 23. The State also asked J.B. isolated questions about

previous jury duty, whether J.B. knew any of the witnesses, and the burden of proof. *Whitlow*, ¶ 23.

Whitlow's counsel asked the jurors a series of four questions dealing with sexual abuse, mental health treatment and associations with the mental health profession, and whether any of the jurors were aware of anything else about the case that might prejudice them against Whitlow. *Whitlow*, ¶ 24. Counsel conducted individual *voir dire* of J.B., in chambers, and questioned him regarding his experience with mental health treatment and his associations with the mental health profession. Whitlow's counsel did not, however, specifically question J.B. regarding his ability to remain impartial or his previous response wherein he stated it would be "hard to be impartial." Finally, near the end of his *voir dire*, Whitlow's counsel inquired: "Is there anyone here that doesn't think they can be objective, and their emotions are just too great about this issue to give Mr. Whitlow a fair trial?" None of the jurors, including J.B., answered in the affirmative. *Whitlow*, ¶ 24. Whitlow argued counsel rendered IAC in failing to ask J.B. follow-up questions regarding his ability to be impartial, and to determine the outcome of the "wrestling match." *Whitlow*, ¶ 27.

Regarding the second juror, E.F., this Court found the State inquired whether E.F. had heard anything about Whitlow's case. *Whitlow*, ¶ 34. E.F. had read about the case in the newspaper and discussed it with his family. The State then inquired whether there was anything that would prevent him from reserving judgment until all the evidence was presented, to which E.F. responded, "No." *Whitlow*, ¶ 24. Whitlow argued his counsel rendered IAC in failing to ask E.F. follow-up questions regarding the substance of his conversation with family. *Whitlow*, ¶ 36.

This Court concluded Whitlow's counsel was not ineffective with respect to J.B. *Whitlow*, ¶ 31. Whitlow's counsel asked J.B. follow-up questions regarding his mental health treatment and by asking him, along with the other jurors, whether there was anything that could keep him from being objective. Moreover, it found Whitlow's counsel observed the jurors during *voir dire*, reviewed the questionnaire forms, took detailed notes on each of the jurors including J.B., and attempted to establish some rapport with J.B. Finally, it was clear there were other jurors who were of greater concern to counsel in terms of being

biased against Whitlow, as evidenced by counsel’s comments in his *voir dire* notes and questioning during *voir dire*. *Whitlow*, ¶ 31.

This Court likewise concluded Whitlow failed to demonstrate his counsel’s performance was objectively unreasonable with respect to E.F. *Whitlow*, ¶ 38. In sum, Whitlow failed to show it was unreasonable for counsel to forgo questioning E.F. regarding the discussions he had with family. *Whitlow*, ¶ 38.

In *Lamere*, ¶ 3, one of the individuals who served as a juror in Lamere’s trial, Janet Whirry (Whirry), was the mother of Sarah Hollis (Hollis), a paralegal employed by the county attorney’s office. *Lamere*, ¶ 3. Hollis sat at counsel table during *voir dire*, assisting the prosecuting attorney. Whirry, prior to trial, completed a juror questionnaire form. The questionnaire inquired: “Are you or any member of your immediate family involved in law enforcement in any official capacity?” Whirry answered, “Yes’ and explained ‘Daughter Sarah Hollis is a paralegal at County Attorney’s Office—Great Falls Police Department retired.’” Lamere’s counsel did not, however, take notice of these answers. Ultimately, he did not question Whirry regarding any potential bias or prejudice that may have resulted from

her relationship with Hollis or her connection to law enforcement.

Lamere, ¶ 3.

Lamere’s counsel opened *voir dire* with an analogy, likening the trial to a race, with the verdict representing the finish line. *Lamere*, ¶ 4. His only questions to Whirry focused on her understanding of this concept. *Lamere*, ¶ 4. The only other questions posed to Whirry came from the prosecutor, who asked her about her previous service as a juror. *Lamere*, ¶ 5. Whirry did not disclose her relationship with Hollis or her connection to law enforcement at any point in the *voir dire* proceedings. She ultimately served on Lamere’s jury, as neither the State nor Lamere’s counsel raised a challenge for cause or utilized a peremptory challenge to remove her. *Lamere*, ¶ 5.

Defense counsel, during a subsequent recess, was informed of Whirry’s relation to Hollis. *Lamere*, ¶ 6. He moved to replace Whirry with the alternate juror, acknowledging his, “failure to take notice of the information in Whirry’s juror questionnaire.” The State opposed the motion, arguing Whirry had indicated she would be fair to both sides. The court denied the motion, observing the State had not committed

any wrongdoing and “Whirry had given no indication of being biased or prejudiced.” *Lamere*, ¶ 6.

Lamere argued counsel rendered IAC by failing to adequately question Whirry or raise a challenge to exclude her from the jury. *Lamere*, ¶ 13. Given Whirry’s disclosures in her juror questionnaire, Lamere argued, “defense counsel had a duty to seek information regarding any bias or prejudice Whirry may have harbored, in order to ensure an impartial jury.” Moreover, “counsel’s failure to pursue this information prohibited him from making informed decisions regarding a challenge for cause or a peremptory challenge.” *Lamere*, ¶ 13.

At the outset, this Court found Whirry’s juror questionnaire, “obviously raised legitimate questions as to Whirry’s ability to serve as an impartial juror.” *Lamere*, ¶ 16. Therefore, “counsel was obligated to do more than merely question Whirry regarding her understanding of the presumption of innocence.” At a minimum, “counsel should have pursued information regarding these answers to determine the presence or absence of bias.” The Court concluded: “Such investigation was necessary to ensure that Lamere’s jury was impartial.”

This Court reasoned, had counsel properly questioned Whirry, he may have developed information justifying a challenge for cause. Alternatively, proper questioning may have prompted counsel to remove Whirry pursuant to a peremptory challenge. Moreover, “proper questioning would have allowed counsel to make informed decisions regarding the use of challenges in determining the makeup of the jury.” *Lamere*, ¶ 16. In sum, counsel should have inquired regarding the specifics of Whirry’s familial connection to law enforcement and questioned whether that would affect her ability to remain impartial. *Lamere*, ¶ 17.

This Court also found counsel’s failure to properly question Whirry was not a tactical decision. *Lamere*, ¶ 18. Rather, “it was the consequence of a simple oversight,” as demonstrated by counsel’s admission to the court. As a result of this oversight, counsel passed the jury for cause and exercised his peremptory challenges, “without considering or investigating readily available and highly relevant information regarding Whirry’s ability to serve as an impartial juror.” Thus, “the very purpose of the *voir dire* proceeding was defeated,

because counsel's oversight precluded him from making properly informed choices in challenging prospective jurors." *Lamere*, ¶ 18.

This Court also stated, "we need not assume that proper questioning by counsel would have resulted in Whirry's removal from the jury." *Lamere*, ¶ 19. Rather, "we must determine whether counsel conducted proper questioning in light of the available information." *Lamere*, ¶ 19. In that regard, this Court observed it was, "precisely the lack of information in the record regarding bias which preclude[d] an informed decision as to whether Whirry should have been challenged for cause." *Lamere*, ¶ 20. Indeed, it was the "lack of information regarding bias" that established counsel's performance was deficient. *Lamere*, ¶ 20.

Ultimately, this Court concluded counsel had a duty to read the juror questionnaires and take notice of Whirry's answers that merited further inquiry. *Lamere*, ¶ 21. Moreover, counsel was, "obligated to develop information in the record regarding the presence or absence of any pertinent bias Whirry may have harbored, and raise challenges accordingly." Counsel's "inexcusable failure" to take notice of the pertinent information in Whirry's questionnaire resulted in inadequate

questioning during *voir dire*, which in turn led counsel to make uninformed decisions regarding challenges. Thus, this Court held counsel failed to fulfill his duty to ensure the jury was impartial, and his performance, “fell below the level reasonably required of counsel in these circumstances.” *Lamere*, ¶ 21.

The present case is readily distinguishable from the circumstances in *Whitlow* and, therefore, demands a different conclusion. Here, Hinchey did not conduct in-chambers *voir dire* of Juror Brown. Although Hinchey testified he generally observes jurors during *voir dire*, reviews their questionnaires, and takes notes, there is nothing in the record to suggest he attempted to establish some rapport with Juror Brown. (PCR at 20-22; Tr. at 142-44.)

More importantly, in the present case, Juror Brown expressed an actual prejudice against perpetrators of domestic violence, and his statements and referenced circumstances clearly established he had a state of mind in reference to the case that would prevent him from acting with entire impartiality and without prejudice to Ilk’s substantial rights. In *Whitlow*, juror J.B. merely expressed a concern about his ability to be impartial. Here, Juror Brown did not merely

express a concern about his ability to be impartial; rather, he bluntly stated “I am very prejudiced against people that abuse other people” and confirmed a ready willingness to “pull[] the trigger” on abusers. Therefore, Hinchey obviously had a heightened duty explore and develop information on the record demonstrating Juror Brown’s bias and prejudice as to Ilk, the alleged victims, or acts of domestic violence, including those charged in the Information.

Finally, unlike *Whitlow*, there is nothing in the record to suggest there were other jurors who were of greater concern to Hinchey in terms of being biased against Ilk, at least as evidenced by Hinchey’s questioning during *voir dire*. Indeed, regarding the jurors he struck by way of Ilk’s fourth, fifth, and sixth peremptory challenges, Hinchey could not cite anything from the record demonstrating they made any statements that were overly concerning. (PCR at 49-55.) In fact, he could not recall why he struck these three jurors. (PCR at 51-55.)

Here, as in *Lamere*, Juror Brown’s disclosures regarding his wife’s experience with domestic violence, his actual prejudice in that regard, and stated willingness to “pull[] the trigger” on abusers, obviously, “raised legitimate questions as to [his] ability to serve as an impartial

juror.” *Lamere*, ¶ 16. Therefore, Hinchey was clearly “obligated to do more,” *i.e.*, at a minimum: “counsel should have pursued information regarding [Juror Brown’s] answers to determine the presence or absence of bias.” *Lamere*, ¶ 16. As in *Lamere*, “[s]uch investigation was necessary to ensure [Ilk’s] jury was impartial.” *Lamere*, ¶ 16.

Again, Juror Brown stated, *inter alia*, “I am very prejudiced against people that abuse other people . . . they should be took out and shot.” Had Hinchey questioned Juror Brown further in that regard, he may have developed information justifying a challenge for cause. Alternatively, proper questioning may have prompted him to remove Juror Brown pursuant to a peremptory challenge. In any event, to be sure, “proper questioning would have allowed counsel to make informed decisions regarding the use of challenges in determining the makeup of [Ilk’s] jury.” *Lamere*, ¶ 16.

Given Juror Brown’s explicit statements and referenced circumstances, Hinchey was obviously obligated to question, “whether that would affect [Juror Brown’s] ability to remain impartial.” *Lamere*, ¶ 17. And, Hinchey’s failure to so inquire of Juror Brown was markedly more egregious than counsel’s objectively unreasonable omission in

Lamere. Unlike *Lamere*, where counsel had access only to Whirry’s questionnaire, here, Hinchey had a front-row seat to Juror Brown’s disclosures and jarring statements. Therefore, there should be no question Hinchey’s failure to question Juror Brown regarding the statements at issue, and whether the foregoing would affect his ability to remain impartial, was objectively unreasonable. *Lamere*, ¶ 21.

The court’s findings to the contrary, the record plainly demonstrates Hinchey passed the jury for cause and exercised Ilk’s peremptory challenges, “without considering or investigating readily available and highly relevant information regarding [Juror Brown’s] ability to serve as an impartial juror.” *Lamere*, ¶ 18. Thus, “the very purpose of the *voir dire* proceeding was defeated, because [Hinchey’s purported strategy] precluded him from making properly informed choices in challenging prospective jurors.” *Lamere*, ¶ 18. Hinchey had a “duty” to consider Juror Brown’s statements, “and take notice of [his] answers which merited further inquiry.” *Lamere*, ¶ 21. Moreover, he was “obligated to develop information in the record regarding the presence or absence of any pertinent bias [Juror Brown] may have harbored, and raise[d] challenges accordingly.” *Lamere*, ¶ 21.

Hinchey’s “inexcusable failure” to take notice of the “pertinent information” revealed by Juror Brown’s statements gave rise to inadequate questioning during *voir dire*, which in turn led counsel to make uninformed decisions regarding challenges. This Court should conclude Hinchey failed to fulfill his duty to ensure the jury was impartial and, therefore, his, “performance was deficient because it fell below the level reasonably required of counsel in these circumstances.” *Lamere*, ¶ 21.

B. Hinchey’s failure to further question Juror Brown regarding his statements and actual prejudice constituted structural error.

Again, this Court has repeatedly held errors in the jury selection process are structural errors. *E.g.*, *LaMere*, ¶ 26. In *Lamere*, defense counsel failed to take the steps necessary to secure an impartial jury and this Court concluded counsel’s omission constituted an error in the jury selection process, which undermined the integrity of the entire trial. Thus, “counsel’s deficient performance constituted a structural error, and prejudice [was] therefore presumed.” *Lamere*, ¶ 28. Indeed, this Court stated because a structural error existed at the outset of

Lamere’s trial, “we must presume prejudice *regardless of the evidence against Lamere.*” *Lamere*, ¶ 29 (emphasis added).

This Court should find Hinchey’s failure to further question Juror Brown regarding his statements and referenced circumstances constituted structural error. *Lamere*, ¶ 28. Accordingly, as in *Lamere*, prejudice must be presumed. *Lamere*, ¶ 29. Based on the foregoing, this Court should conclude Ilk has satisfied the *Strickland* test.

Conclusion

The district court’s clearly erroneous findings to the contrary, the totality of Juror Brown’s statements and referenced circumstances raised serious questions regarding his ability to fairly and impartially render a verdict based solely on the evidence. Indeed, he fervently expressed an actual prejudice regarding a subject—domestic violence—that was central to the State’s case against Ilk. Hinchey’s failure to challenge or further inquire of Juror Brown was, thus, neither “reasonable” nor the product of “sound professional judgment.” *Whitlow*, ¶19. His omissions constituted IAC and the court clearly erred in concluding his performance and purported strategy was objectively reasonable.

Based on the forgoing, this Court should reverse the district court's denial of Ilk's petition and remand with instructions to vacate and overturn his convictions.

Respectfully submitted this 13th day of October 2020.

/s/ Joseph P. Howard
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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 Century Schoolbook 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 9967 words, not averaging more than 280 words per page, excluding certificate of service and certificate of compliance.

/s/ Joseph P. Howard
Joseph P. Howard

APPENDIX

Order Denying Petition for Postconviction ReliefAttached

CERTIFICATE OF SERVICE

I, Joseph Palmer Howard, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 10-13-2020:

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