IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 20-0384

MICHAEL GILBERT ILK,

Petitioner and Appellant,

v.

STATE OF MONTANA,

Respondent and Appellee.

REPLY BRIEF OF APPELLANT

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

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I. Juror Brown fervently expressed an actual prejudice—"*I am very prejudiced*"—regarding an issue central to Ilk's trial; therefore, Hinchey's purported strategy was not objectively reasonable.

At the outset, it bears repeating, Hinchey readily concurred Juror Brown stated an "**actual prejudice**" against perpetrators of domestic violence; indeed, "[Juror Brown] was **very prejudiced** against people that abuse other people." (PCR at 30-31, 34 (emphasis added).) Hinchey did not pose a single question to Juror Brown regarding the concept of self-defense; he did not pose a single question to Juror Brown regarding "split-second" decisions. (PCR at 69.) Hinchey's inquiry of Juror Brown was strictly limited to his personal experience and opinions regarding domestic violence and perpetrators of domestic violence. (Trial at 139-44; PCR at 57.) The State does not dispute any of the foregoing statements of fact.

Although the State now insists, "[t]his was not a domestic violence case where the State presented evidence of repeated instances of physical abuse that Ilk inflicted upon [Pereslete]," its argument is less than genuine and utterly unsupported by the record. (Appellee's Br. at 28-29.) Again, 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**." (D.V. Doc. 26 at 4 (emphasis added).) Indeed, pursuant to Ilk's direct appeal, this Court found, *inter alia*, Ilk and Pereslete had been in a long-term relationship that Pereslete ended "after **Ilk physically assaulted her**," and Ilk later "sent her a letter **apologizing for the 'domestic abuse.'**" *State v. Ilk*, 2018 MT 186, ¶ 2, 392 Mont. 201, 422 P.3d 1219 (emphasis added).

Finally, although the State correctly notes it dismissed the PFMA charge prior to trial (Appellee's Br. at 1 n. 2), it cannot be seriously disputed its case against Ilk was plainly, by its very nature, one of extreme and potentially lethal domestic violence. This should be obvious where it alleged, *inter alia*, Ilk purposely or knowingly "attempted to cause the death of [Pereslete], by discharging a 9mm handgun and striking [Pereslete], multiple times with rounds from said handgun" and "caused serious bodily injury to [Pereslete] with the use of a firearm." (D.C. Doc. 4 at 1-2.) Of course, although Ilk relied upon the defense of justifiable use of force, there was not a scintilla of evidence presented at trial suggesting Pereslete posed a danger of

harm, or threatened any force against Ilk, while she was merely a passenger in Wilson's pickup during the encounter of April 14, 2015.

Next, to be clear, "Ilk's claim of ineffective assistance of counsel is [*not*] based upon a speculative theory that another attorney would have viewed things differently during jury selection." (Appellee's Br. at 22 (alteration/emphasis added).) Defense counsel has 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.

Here, again, Hinchey readily concurred Juror Brown stated an "actual prejudice" against perpetrators of domestic violence: "[Juror Brown] was very prejudiced against people that abuse other people." (PCR at 30-31, 34.) The State's claim to the contrary, the interrelated questions presented by Ilk's appeal are whether Hinchey's estimation of Juror Brown's "actual prejudice" was sound and whether his failure to thereafter remove him for cause or by way of a peremptory challenge

was objectively reasonable. The obvious answer to both questions: No. Period.

Again, the most often utilized challenge for cause 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." This Court has repeatedly stated the dispositive question 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.*, *State v. Johnson*, 2019 MT 68, ¶ 11, 395 Mont. 169, 437 P.3d 147.

Here, neither the State nor Hinchey suggest Juror Brown's statements regarding perpetrators of domestic violence, and his zealous willingness to "pull the trigger on somebody like that," were not truthful, accurate, or reliable. (Appellee's Br.; PCR at 30.) Accordingly, Juror Brown's averred prejudice against perpetrators of domestic violence, and his stated willingness to "pull the trigger on somebody like

that," was the most truthful, accurate, and reliable, indicator of his bias and inability to be fair and impartial. *State v. Russell*, 2018 MT 26, ¶ 14, 390 Mont. 253, 411 P.3d 1260; *State v. Allen*, 2010 MT 214, ¶¶ 26-28, 357 Mont. 495, 241 P.3d 1014.

Although the State insists ad nauseam Hinchey reasonably concluded Juror Brown's statements concerning domestic violence actually indicated he would be "receptive to Ilk's defense of justifiable use of force" (Appellee's Br. *passim*), its arguments, like Hinchey's claim in that regard, are unfounded, speculative at best, and not supported by any substantial evidence of record. The State's claim to the contrary, there is nothing in the record to suggest Juror Brown's statements concerning perpetrators of domestic violence, and actual prejudice in that regard, evidenced a willingness to "pull the trigger to defend another person or, presumably, himself." (Appellee's Br. at 29.)

Again, Hinchey confessed nothing in the State's interaction with Juror Brown informed his assessment as to whether Juror Brown would be sympathetic to Ilk's theory of self-defense. (PCR at 64-66.) And, although Hinchey acknowledged Juror Brown expressed an actual prejudice—"very"—against perpetrators of domestic violence, he

nevertheless 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. (D.V. Doc. 26.) The record plainly demonstrates, however, 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.)

Hinchey 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.)

Hinchey's claim notwithstanding, 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 apparent 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 State's claim Juror Brown's statement, professing his willingness to "pull[] the trigger on somebody like that," actually evidenced a "willingness to use a gun in defense of another or, presumably, himself" is, thus, not supported by any substantial

evidence of record. The State, like the court below, clearly misapprehends the effect of Juror Brown's statements regarding perpetrators of domestic violence and his zealous willingness to "pull[] the trigger on somebody like that to tell you the damn truth about it."

It also bears repeating, Hinchey conceded he did not thereafter pose a single question to Juror Brown regarding the topic of self-defense, nor did he pose a single question regarding "split-second" decisions. (PCR at 69.) Moreover, and equally important, 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; he did not pose a single question to Juror Brown as to whether this actual prejudice would affect his ability to objectively consider the evidence. (PCR at 67-68.) Accordingly, there is nothing in the record to suggest Juror Brown's statements regarding perpetrators of domestic violence, and his actual prejudice in that regard, was remotely consistent with or favorable to Ilk's self-defense theory.

To be sure Juror Brown did not, as the State suggests, merely "express bias against people who abuse other people." (Appellee's Br. at

29.) Moreover, that Juror Brown "never expressed a bias against Ilk" is a red herring and beside the point, given the actual prejudice he expressed regarding perpetrators of domestic violence and his zealous willingness to "pull[] the trigger on somebody like that." (Appellee's Br. at 29.) This should be obvious where the State ignores the fact Hinchey did not inform the venire the State would offer evidence Ilk allegedly, *inter alia*, physically assaulted and abused Pereslete, threatened her life and, ultimately, authored a letter apologizing for this "domestic abuse." (Trial at 139-44; 698-700.)

Next, of the five opinions from this Court Ilk has cited in support of the instant claim (Appellant's Br. at 18-25), the State singles out *State v. Normandy*, 2008 MT 437, 347 Mont. 505, 198 P.3d 834, upon which to hang its hat that Hinchey's failure to challenge Juror Brown for cause, or otherwise utilize a peremptory challenge to remove him, was objectively reasonable. (Appellee's Br. at 30.) Ilk will not belabor how and why the other cited authorities plainly support his claim of ineffective assistance. His arguments and analysis in that regard, as demonstrated in his opening brief, should lead this Court to conclude Hinchey's performance was deficient. (Appellant's Br. 18-15; 30-36.)

The State's attempt to analogize *Normandy* to the present case is unconvincing. This Court should find *Normandy* is readily distinguishable and, to the extent it is analogous, supports Ilk's claim of ineffective assistance.

Again, in *Normandy*, defendant was charged with PFMA, a felony. *Normandy*, ¶ 1. On appeal, defendant argued the court erred in refusing to dismiss a prospective juror for cause. *Normandy*, ¶¶ 4, 20. This Court found said juror stated during *voir dire* he had a "*predisposition* against domestic violence" because it had "*affected*" his wife in her first marriage. *Normandy*, ¶ 23 (emphasis added). This Court noted he did not, however, "voice a predisposition regarding the guilt or innocence of Normandy, and asserted he could be fair and impartial." *Normandy*, ¶ 23.

This Court found in "discussing the *potential bias*," the following conversations occurred:

> Defense: So would you agree there is a bias?
>
> Juror: Yes. But the bias would be mainly toward probably sentencing rather than guilt or innocence.

Defense: You understand in Montana the jury has nothing to do with sentencing; you only find whether or not—

Juror: No, I didn't understand that.

Defense: So it only applies to whether or not the facts fit. So you are saying you have a bias toward sentencing, which means you're already looking at getting to a guilty verdict?

Juror: No, but if it came in guilty, I would lean toward a heavier sentence than a lighter sentence if I did not have this bias.

***

Court: All right. Well, sir, now you do understand, then, the jury's task in this case is merely to determine whether or not this Defendant committed this particular offense and you will not be involved in any of the sentencing phase?

Juror: Okay. I did not understand that. Okay.

Court: And do you, at this point in the trial, do you feel you could give the Defendant a fair trial as to whether or not he committed the offense of domestic violence?

Juror: I could.

Court: So the bias you have, as I understand it, is merely against that type of an offense, and that's natural and logical. It is a crime. But you're saying you have no bias against this Defendant merely because he's been charged with that offense.

Juror: No, no, not that.

Court: And do you feel you could base any verdict solely on the evidence presented in the courtroom and the jury instructions and nothing else?

Juror: Yes, sir.

Normandy, ¶ 23 (emphasis added). Again, this Court found: "At no time during the *voir dire* did the juror state or infer that he had a fixed opinion on the guilt or innocence of Normandy." *Normandy*, ¶ 23.

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

Pursuant to its attempt to analogize *Normandy* to the present case the State, again, notes, "Juror Brown never expressed a bias against

Ilk." (Appellee's Br. at 30.) The State also singles out the following language from *Normandy*: "'At no time during the voir dire did the juror state or infer that he had a fixed opinion on the guilt or innocence of Normandy.'" (Appellee's Br. at 30, *quoting Normandy*, ¶ 23.) The merit of the State's claim concerning Juror Brown's purported lack of bias against Ilk has been addressed *supra*, and requires no further discussion. That the State implies Hinchey's performance relative to Juror Brown was objectively reasonable, because Juror Brown did not "'state or infer that he had a fixed opinion on the guilt or innocence'" of Ilk, is irrelevant and beside the point.

This Court, in *State v. Heath*, 2004 MT 58, ¶ 16, 320 Mont. 211, 89 P.3d 947, observed, "it appears that the 'fixed opinion of guilt' rule is oft-repeated but seldom applied, and clarification is necessary." Upon reviewing its recent decisions addressing challenges for cause, this Court found, "our prior cases addressing juror impartiality did not necessarily involve jurors who had stated a fixed opinion regarding the defendant's guilt; rather, 'circumstantial evidence of bias was apparent in relation to the particular circumstances of the defendant's case.'" *Heath*, ¶ 16 (citations omitted). Therefore, it concluded, "the 'fixed

opinion of guilt' rule is *but one argument* which can be asserted under the statutory 'state of mind' basis for a challenge for cause." *Heath*, ¶ 16 (emphasis added).

Again, here, the dispositive question presented by Ilk's appeal is whether the totality of Juror Brown's statements and referenced circumstances raised a "serious question" or doubt about his 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.

To be sure, the record plainly demonstrates domestic violence did not merely "affect" Juror Brown's wife in her first marriage. *Normandy*, ¶¶ 23, 25. Unlike the juror at issue in *Normandy,* Juror Brown shared the following, graphic and grisly account of his wife's abuse: "my wife come from a **very abusive marriage**;" specifically, "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 . . . It was a bad situation**." (Trial at 142-43 (emphasis added).) Thus, to find domestic violence merely "affected" his wife's first marriage, this Court would have to turn a blind eye to Juror Brown's painful account of his wife's abuse at the hands of her ex-husband.

The State also suggests Juror Brown merely expressed "disdain" for "his wife's ex-husband who routinely physically abused her" and "anyone who would abuse another person in that manner." (Appellee's Br. at 32.) Moreover, it argues "every prospective juror had a bias against domestic violence" and "Juror Brown *merely articulated it bluntly*." (Appellee's Br. at 32 (emphasis added).) The State's arguments strain credulity to the breaking point.

The record plainly demonstrates Juror Brown did not merely express "disdain" for "his wife's ex-husband" and "anyone who would abuse another person in that manner." He did not "merely" articulate his actual prejudice in that regard, "bluntly." The State's attempt to downplay and whitewash his statements notwithstanding, Juror Brown vehemently averred, "I am **very prejudiced** against people that abuse other people." (Trial at 143 (emphasis added).) And, regarding those who perpetrate acts of domestic violence, he fervently pledged: "**I was going to kill the SOB . . . they should be took out and shot as far as I am concerned . . . I don't think I'd have any problem pulling the trigger on somebody like that to tell you the damn truth about it.**" (Trial at 143-44 (emphasis added).) Clearly, the foregoing,

passionate statements reflected more than a mere general "disdain" for "anyone who would abuse another person." Indeed, unlike the juror at issue in *Normandy*, Juror Brown stated an unequivocal and actual prejudice against perpetrators of domestic violence, and vehemently averred such abusers should be literally "took out and shot."

Finally, unlike the juror at issue in *Normandy*, it cannot be said Juror Brown was, "unequivocal in his assertion that he could be fair in assessing whether the defendant was guilty of the charged offense." *Normandy*, ¶ 25. Thus, this was not a case where Juror Brown, despite his actual prejudice and honest belief domestic abusers should be summarily shot, "convincingly affirmed 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 (alterations omitted). In sum, unlike *Normandy,* the State cannot cite anything from the record indicating Juror Brown renounced his stated, actual prejudice against perpetrators of domestic violence. Moreover, unlike *Normandy*, it cannot be said Juror Brown's 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 spontaneously volunteered he was the spouse of a domestic violence survivor. He then expressly averred an actual prejudice against perpetrators of domestic violence—"I am very prejudiced against people that abuse other people." Finally, he thrice repeated his honest belief to the effect that such abusers, "should be took out and shot." The State's unconvincing arguments to the contrary, this Court should find the foregoing statements clearly raised obvious and "serious questions" about Juror Brown's ability to be fair and impartial. To suggest otherwise, defies logic and common sense, *i.e.*: "That men 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." *Heath*, ¶ 30 (citation omitted).

This Court should conclude Hinchey's failure to remove Juror Brown by way of a for-cause or peremptory challenge was not objectively reasonable and constituted ineffective assistance.

II. Hinchey's failure to further examine Juror Brown regarding his actual prejudice against perpetrators of domestic violence was not objectively reasonable.

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. Again, 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. *State v. Lamere*, 2005 MT 118, ¶ 15, 327 Mont. 115, 112 P.3d 1005.

In the present case, the State cites *Whitlow v. State*, 2008 MT 140, 343 Mont. 90, 183 P.3d 861, and argues: "Here, like in *Whitlow*, Ilk offers only hindsight and speculation to support his assertion that Hinchey's conduct fell below an objective standard of reasonableness." (Appellee's Br. at 30-31.) Ilk will not belabor how and why *Whitlow* is readily distinguishable from the case *sub judice*. His arguments and analysis in that regard, as demonstrated in his opening brief, should lead this Court to conclude Hinchey's failure to further examine Juror Brown was not objectively reasonable. (Appellant's Br. 39-42; 47-48.)

That the State claims Ilk "offers only hindsight and speculation," however, requires further discussion. Again, the State produced evidence in discovery regarding previous acts of domestic violence Ilk had allegedly perpetrated against Pereslete. (PCR at 16.) The court

summarily denied Hinchey's motion *in limine* to exclude this evidence and, thus, he "assumed that it was all potentially admissible" and "[he] was prepared for it." (PCR at 19, 25.) Moreover, pursuant to the State's theory of prosecution, the shooting on April 15, 2015, was the culminating act of domestic violence in a relationship that was punctuated with episodes of abuse. (D.C. Doc. 2.) The State fails to explain how the foregoing, indisputable facts, known to Hinchey when Juror Brown fervently expressed an actual prejudice against perpetrators of domestic violence, constitute "hindsight and speculation."

Additionally, in arguing Ilk "offers only hindsight and speculation," the State completely ignores his argument and analysis analogizing the present case to this Court's opinion in *Lamere*. (Appellant's Br. at 42-47; 48-51.) That the State does not even attempt to distinguish *Lamere* from the facts and circumstances of the present case is telling. (Appellee's Br.)

Again, here as in *Lamere*, Juror Brown's stated actual prejudice against perpetrators of domestic violence, "raised legitimate questions as to [his] ability to serve as an impartial juror." *Lamere*, ¶ 16.

Therefore, it cannot be seriously disputed Hinchey was "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 that [Ilk's] jury was impartial." *Lamere*, ¶ 16. To be sure, "proper questioning would have allowed [Hinchey] to make informed decisions regarding the use of challenges in determining the makeup of [Ilk's] jury." *Lamere*, ¶ 16.

Juror Brown shared his experience as the spouse of a domestic violence survivor, and vehemently averred, "I am very prejudiced against people that abuse other people . . . they should be took out and shot as far as I am concerned." Accordingly, Hinchey was obviously obligated to question, "whether that would affect [Juror Brown's] ability to remain impartial." *Lamere*, ¶ 17. Thus, there can 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 and ineffective. *Lamere*, ¶ 21.

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 counsel's oversight precluded him from making properly informed choices in challenging prospective jurors." *Lamere*, ¶ 18. Hinchey had a "duty" to consider Juror Brown's disclosures, "and take notice of [Juror Brown's] answers which merited further inquiry." *Lamere*, ¶ 21. In that regard, "counsel 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. Pursuant to *Lamere*, 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.

Finally, the State discusses at length how the prospective jurors were instructed and extensively counseled regarding the importance of selecting a fair and impartial jury. (Appellee's Br. at 31-32.) It then notes, "Juror Brown did not indicate a concern about his ability to serve impartially at any of these junctures." (Appellee's Br. at 32.) That Juror Brown did not "indicate a concern about his ability to serve impartially," however, is beside the point and does not satisfactorily address or answer the "serious questions" raised by his statements concerning perpetrators of domestic violence. The concept of selecting a fair and impartial jury may have been implicit in counsel's questioning; however, it cannot be said the questions posed to Juror Brown adequately dispelled the "serious question" raised by his explicit statement—"I am very prejudiced against people that abuse other people."

Again, in response to a question regarding his experience with domestic violence, Juror Brown stated an actual prejudice: "I am very prejudiced against people that abuse other people." Unprompted by counsel, Juror Brown then vehemently averred, "I was going to kill the SOB . . . they should be took out and shot as far as I am concerned . . . I

don't think I'd have any problem pulling the trigger on somebody like that to tell you the damn truth about it." Although Juror Brown's statements explicitly evidenced an actual prejudice against perpetrators of domestic violence, Hinchey did not pose a single question regarding his willingness or ability to set aside this actual prejudice to fairly and impartially render a verdict based solely on the evidence presented and instructions given.

Here, it cannot be said Hinchey could intelligently exercise a challenge for cause or peremptory challenge based upon the questions posed to Juror Brown and, therefore, it cannot be said the purpose of *voir dire* was fulfilled. *State v. Kolberg*, 241 Mont. 105, 108, 785 P.2d 702, 704 (1990). More importantly, it cannot be said Hinchey fulfilled his duty to ensure Ilk's right to a fair trial by a panel of impartial jurors. *Lamere*, ¶ 15. This Court should conclude counsel 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.

III. Ilk did not proceed to trial *pro se*; he relied upon Hinchey to ensure his right to a fair and impartial jury.

The State correctly notes, "Ilk had no recollection of Juror Brown." (Appellee's Br. at 21, *citing* PCR at 102.) It then attempts to lay the blame for Juror Brown's ultimate placement as juror number eight at Ilk's feet. (Appellee's Br. at 23; 29-30.) Indeed, the State argues: "While Ilk testified that he did not recall asking Hinchey to keep Juror Brown on the panel, he also apparently did not advocate for removing Juror Brown from the panel." (Appellee's Br. at 30.)

The State's argument, implying Ilk should bear some responsibility for Hinchey's performance in *voir dire*, is utterly disingenuous and irrelevant. It must be remembered Ilk is a layman, untrained in the skill or science of the law. (PCR at 100-02.) He relied upon Hinchey to conduct *voir dire* and, more importantly, to select a fair and impartial jury. (PCR at 101-02.) Ilk did not advise Hinchey he wanted Juror Brown to serve as a juror in this case.

Counsel has a duty to ensure a defendant's right to a fair trial by a panel of impartial jurors. *Lamere*, ¶ 15. Hinchey, not Ilk, failed in that regard.

IV. Errors in the jury selection process are structural and prejudice is presumed.

This Court has repeatedly held errors in the jury selection process are structural errors. *E.g.*, *Lamere*, ¶ 26. Having determined a structural error exists, courts need not engage in speculation or refer to evidence of record in order to support a determination of prejudice. *Lamere*, ¶ 29. Indeed, this Court has concluded the presence on the jury of even one juror who could not fairly assess the credibility of the witnesses must be presumed prejudicial and will result in the reversal of the conviction. *Chastain,* 285 Mont. at 65, 947 P.2d at 60; *Herrman*, ¶ 22.

Moreover, in *Lamere*, this Court concluded because a structural error existed at the outset of his trial, "we must presume prejudice *regardless of the evidence against Lamere*." *Lamere*, ¶ 29 (emphasis added). "The strength and magnitude of the evidence against Lamere ha[d] no bearing on the determination of whether structural error existed, nor [did] it invalidate the presumption of prejudice that accompanies structural error." *Lamere*, ¶ 29.

Below, the State readily conceded "errors in *voir dire*, as alleged here, are considered structural errors, for which prejudice is presumed."

(D.V. Doc. 8 at 15.) The State's baseless about-face on appeal must be rejected out of hand. (Appellee's Br. at 33.) Juror Brown's participation in this case constituted structural error, and prejudice is presumed. *State v. Golie*, 2006 MT 91, ¶ 30, 332 Mont. 69, 134 P.3d 95.

Conclusion

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 26th day of March 2021.

/s/ Joseph P. Howard
Joseph P. Howard
Joseph P. Howard, P.C.
Attorney for Appellant

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this reply 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 4998 words, not averaging more than 280 words per page, excluding certificate of service and certificate of compliance.

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I, Joseph Palmer Howard, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Reply to the following on 03-26-2021:

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