IN THE SUPREME COURT OF THE STATE OF MONTANA

CASE NO. DA-06-0283

STATE OF MONTANA,

Plaintiff and Respondent,

-v-

FRANK LEROY ROBINSON

Defendant and Appellant.

FILED
JUL 26 2006
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STATE OF MONTANA

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APPELLANT'S OPENING BRIEF

ON APPEAL FROM THE MONTANA TWENTY-FIRST JUDICIAL DISTRICT COURT, RAVALLI COUNTY, THE HONORABLE JEFFREY H. LANGTON PRESIDING

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A. Application of the facts of this case to the basic test applied by this Court (regarding reversal for failure to remove for cause) clearly merits a ruling in Appellant's favor.

B. The fact that the prospective juror in question nominally retreated from her initially aggressive assertions (that she presumed Robinson guilty) ultimately bears no relevance to this case.

C. In this case at bar, "rehabilitation" of the prospective juror took the form of an improper "coaxed recantation," and was nevertheless ineffective at validating the impartiality of said prospective juror.

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ISSUES PRESENTED

I. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT FAILED TO EXCUSE FOR CAUSE, UPON ROBINSON'S MOTION, A PROSPECTIVE JUROR WHOSE PARTIALITY WAS BRAZEN, AND THE REHABILITATION OF WHOM WAS IMPROPER AND OTHERWISE INEFFECTIVE.

II. THE DISTRICT COURT ILLEGALLY SENTENCED APPELLANT (WITH RESPECT TO THE TERM OF THE SENTENCE IMPOSED) AS RELATES TO HIS DESIGNATION AS A PERSISTENT FELONY OFFENDER.

STATEMENT OF THE CASE

Defendant-Appellant Robinson (hereinafter "Robinson") has been prejudiced by the District Court's failure in two respects. First, Robinson claims the District Court failed to remove a prospective juror for cause, in spite of clear and admitted prejudice on the part of said prospective juror, and after improper and ineffective attempts on the part of said Judge to rehabilitate said juror. At sentencing, said Judge imposed an illegal sentence in connection with Robinson's status as a persistent felony offender.

STATEMENT OF THE FACTS

On January 25, 2005, an INFORMATION was filed in Montana's Twenty-First Judicial District Court (Ravalli County), charging Frank Leroy Robinson with ASSAULT ON A PEACE OFFICER (Fel. – Three Counts), FAILURE TO REGISTER AS A SEXUAL OFFENDER (Fel.), and RESISTING ARREST (Misd.) (Exhibit 1). On July 18, 19, and 21, 2005, a jury trial was held in said Court. The jury found Robinson guilty of all counts but one count of ASSAULT ON A PEACE OFFICER (dismissed on

motion for directed verdict). (see attached JUDGMENT AND COMMITMENT)

At trial, counsel for Robinson requested removal, for cause, of a prospective juror whom Robinson believed to be clearly incapable of honoring the presumption of innocence. The District Court Judge denied the motion. Robinson's guilty verdicts resulted in sentencing on September 21, 2005. At sentencing, the District Court Judge imposed sentences for Robinson's felony convictions. Said Judge imposed ***additional*** sentences due to Robinson's designation as a persistent felony offender. (Id.)

Robinson now appeals the validity of his underlying convictions due to claimed reversible (structural) error at trial in connection with his request for removal of said juror for cause. In the alternative, Robinson appeals for re-sentencing as relates to his sentence for being designated a persistent felony offender.

SUMMARY OF THE ARGUMENT

In *State v. Golie*, 2006 MT 91, ¶ 29, 332 Mont. 69, ¶ 29, 134 P.3d, ¶29, this Court took special care to emphasize, to District Court judges, the following:

> We take this opportunity to remind trial courts that our decisions favoring dismissals for cause-when a nonspeculative "serious question" arises about a prospective juror's ability to be fair and impartial-are premised upon both the constitutional right to a trial by an impartial jury and the significant expense and inconvenience that results from retrial. **When a district court abuses its discretion in denying a defendant's challenge for cause, the defendant uses a peremptory challenge to remove the disputed prospective juror, and the**

> **defendant exhausts all peremptory challenges, <u>structural error requiring automatic reversal results.</u>** It is fair to say that the failure to grant a valid challenge for cause negatively impacts the overall administration of justice. We hold the District Court abused its discretion in denying Golie's challenge for cause. Because it is undisputed that Golie exercised a peremptory challenge to remove Lundt and exhausted all of her peremptory challenges, we further hold this structural error mandates automatic reversal. Reversed and remanded for further proceedings consistent with this opinion.

In the case at bar, the District Court abused its discretion by failing to remove a juror for cause upon timely motion by Robinson. Robinson used all six peremptory challenges; he used the first on the prospective juror in question. Said prospective juror emphasized, seven times, that she presumed Robinson guilty. She did so, initially, through spontaneous statements, and not through direct questioning of either State's counsel, Robinson's counsel, or the Court. Rehabilitation of said juror was improper, and took the form of "coaxed recantations" repeatedly warned against by this Court. Moreover, said "rehabilitation" proved entirely insufficient to establish that said prospective juror could proceed "without entire impartiality and without prejudice" to Robinson's substantial rights. The mistake constitutes structural error, and requires an automatic reversal and a remand to the District Court for a new trial. In addition, at sentencing, the Court imposed an illegal sentence upon Robinson with respect to his designation as a persistent felony offender.

<u>BASIC LAW</u>

The bases for challenging potential jurors for cause in Montana are set forth in § 46-16-115(2), MCA. One specified basis is that a 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." § 46-16-115(2)(j), MCA. A challenge under § 46-16-115(2)(j), MCA, must be determined pursuant to both the statutory language and the totality of the circumstances presented, *State v. Heath*, 2004 MT 58, ¶ 16, 320 Mont. 211, ¶ 16, 89 P. 3d 947, ¶ 16. If voir dire examination raises a serious question about a prospective juror's ability to be fair and impartial, dismissal for cause is favored. *State v. Richeson*, 2004 MT 113, ¶ 14, 321 Mont. 126, ¶ 14, 89 P. 3d 958, ¶ 14. In determining whether a serious question has arisen regarding a prospective juror's ability to be fair and impartial, we review his or her responses as a whole. *Golie*, ¶ 10, 134 P.3d 95.

STANDARD OF REVIEW

This Court will review a trial court's denial of a challenge for cause to determine whether the trail court abused its discretion. *State v. Golie*, 2006 MT 91, ¶ 6, 332 Mont. 69, ¶ 6, 134 P.3d, ¶ 6. Denials of challenges for cause require automatic reversal. *State v. Good*, 2002 MT 59, ¶ 66, 309 Mont. 113, ¶ 66, 43 P.3d 948, ¶ 66.

ARGUMENT

I. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT FAILED TO EXCUSE FOR CAUSE, UPON ROBINSON'S MOTION, A PROSPECTIVE JUROR WHOSE PARTIALITY WAS BRAZEN, AND THE REHABILITATION OF WHOM WAS IMPROPER AND OTHERWISE INEFFECTIVE.

In the case at bar, the following exchange occurred between Robinson's attorney and prospective juror Parker during the voir dire phase

of trial. The transcript overhwhelmingly evidences the necessity of granting Robinson's motion to remove said prospective juror for cause (I Trans., p. 125-130)

Mr. Stevenson: Does anyone differ from that attitude; ***that they kind of think he's probably guilty since he's sitting here?*** Anybody? Anybody want to be brave enough to weigh in on that?

Prospective Juror Parker: ***I would assume.***

Mr. Stevenson: I'm sorry?

Prospective Juror Parker: ***Well, it would look that way.***

Mr. Stevenson: ***It appears to you he's probably guilty because he's sitting here?***

Prospective Juror Parker: ***Yeah.***

Mr. Stevenson: Are you in agreement with the concept of innocent until proven guilty?

Prospective Juror Parker: Well, yes I am.

Mr. Stevenson: ***Are you assuming he's innocent now or are you not?***

Prospective Juror Parker: ***Well it would seem rather strange to assemble all these people if there was not some reason for him to be sitting there.***

Mr. Stevenson: ***So in that sense, are you sort of assuming he's guilty before you hear the evidence?***

Prospective Juror Parker: ***Yeah.***

Mr. Stevenson: (several lines later) Fair enough. And I don't want to pick on you, because I respect your opinion, but ***do you think maybe you're not fully incorporating the idea of innocent until proven guilty in this case?***

Prospective Juror Parker: ***Well, that could be.***

Mr. Stevenson: ***Do you feel maybe in some respect you are presuming he's guilty?***

Prospective Juror Parker: ***Yeah.***

Mr. Stevenson: ***Do you think this maybe isn't the best trial for you then?***

Prospective Juror Parker: ***Well, no, because I sat through another one with the same attitude, but –***

Mr. Stevenson: Let's put that one aside.

Prospective Juror Parker: Okay.

Mr. Stevenson: Since you've already – and I do appreciate your candor. ***You've already told the Court that you're really not going into this case with an attitude of impartiality and you're really not going in with the idea of innocent until proven guilty, that maybe – maybe it's not entirely fair for Mr. Robinson to have you on the jury?***

Prospective Juror Parker: ***Well, that could be, but I kind of wonder how many other people*** **just figure he's guilty because he's here, too.**

Mr. Stevenson: Well, that may be, but ***you are the one who has been candid enough to say so.***

Prospective Juror Parker: ***Right.***

Mr. Stevenson: ***<u>On those grounds, I'd ask for Miss Parker to be excused.</u>***

The Court: Cross?

The cross examination (rehabilitation) by State's counsel of Ms. Parker produced no recantations, nor any significant assurances that she could overcome her admitted biases. In fact, few questions were asked. The only portion relevant to actual "rehabilitation" was the following:

Mr. Mahar: All we're asking is, despite your suspicions, if you please, do you think that you are willing to listen to al of the evidence, both sides –

Prospective Juror Parker: Yes, I can do that.

Mr. Mahar: -- before you confirm your suspicion that Mr. Robinson may be guilty.

Prospective Juror Parker: I can do that.

Mr. Mahar: ***You understand that he's not guilty just because he's sitting there.***

Prospective Juror Parker: ***<u>No,</u>*** but I'm not sitting there.

Mr. Mahar: Your honor, again, we – Miss Parker has indicated that she's willing to listen to all of it. She does have some suspicions, and considering everything that's been stated here in the nature of the charges, that's somewhat understandable. ***But I'm afraid that all of the jurors at this point in time, if queried enough, might have the same concerns that***

Miss Parker has, and we wouldn't have a jury at all. So, Your honor, we don't feel that she should be excused for cause.

Mr. Stevenson: Your honor, Miss Parker is the only one who has been candid enough to say she doesn't feel she would be impartial in this case.

Prior to the examination of prospective juror Parker, Robinson's counsel successfully convinced the Court to excuse two other jurors for cause. Both prospective jurors were removed for cause as a result of demonstrated partiality and bias. (See I Trans., p. 113, 120) With respect to State's counsel's opposition to the removal for cause of prospective juror Parker, the only ascertainable grounds offered by State's counsel to justify keeping her on the jury was ***his fear***. He feared that all of the people too prejudiced to remain on the jury would be excused, and not enough prospective jurors would remain to permit the trial to go forward. The State's fear of removal of all prejudiced prospective jurors does not constitute an adequate reason to keep one clearly prejudiced prospective juror on the jury panel. Moreover, State's counsel made no meaningful progress toward rehabilitating Ms. Parker, nor was any substantive ground claimed by State's counsel to justify keeping her in the jury pool. Ms. Parker should unquestionably have been removed for cause at this moment in the voir dire process.

Nonetheless, the District Court Judge proceeded to conduct his own voir dire and rehabilitation of Ms. Parker. (I Trans. p. 130-135) The questions were interspersed with general questions aimed at the jury pool. Those directed to Ms. Parker were generic questions about following the law and jury instructions, and the burden of proof. The District Court

Judge's questions effectively solicited yes and no answers. Ms. Parker never recanted her previously divulged prejudices, her presumption of Mr. Robinson's guilt, or her stated feeling that it might be unfair to Robinson to have her on the jury.

At the conclusion of the Judge's questions of Ms. Parker, and prior to a ruling, defense counsel renewed his objection:

Mr. Stevenson: Your Honor, I would just like to reiterate that it's my opinion that Miss Parker has been candid and I appreciate it, but it just seems to me it's been made clear to the Court that she's not – she doesn't feel this a good jury trial for her and that she does question the reasonable doubt presumption in this particular case. And I admire her willingness to attempt impartiality nonetheless, but I think she's made it clear to the Court, her position. (I Trans., p. 133-134, l. 20-25, 1-3)

Ultimately, the District Court Judge ruled against removing Ms. Parker for cause, stating only that "The request to discharge Miss Parker is denied." (I Trans., p. 136, l. 1-2)

Ms. Parker's responses establish that she had a state of mind in reference to the case that would prevent her "from acting with entire impartiality and without prejudice to Robinson's substantial rights," as set forth in § 46-16-115(2)(j), MCA.

Due to the trial court's refusal to remove Ms. Parker for cause, Robinson's counsel was forced to use a peremptory challenge to have Ms. Parker removed from the jury. In fact, prospective juror Parker was the first prospective juror removed by peremptory challenge, by Robinson's

counsel, during jury selection. (Exhibit 2) All of the elements have been met in this case, necessary to trigger structural error, automatic reversal, and a remand for a new trial.

A. APPLICATION OF THE FACTS OF THIS CASE TO THE BASIC TEST APPLIED BY THIS COURT (REGARDING REVERSAL FOR FAILURE TO REMOVE FOR CAUSE) CLEARLY MERITS A RULING IN APPELLANT'S FAVOR.

In *Golie*, ¶ 17, 134 P.3d 95, this Court observed that irrespective of any factual distinctions from prior cases that the State may attempt to make regarding this issue, "the questions remain whether the prospective juror has a state of mind preventing him or her from acting impartially and without prejudice to a party's substantial rights, or whether the prospective juror's statements have raised a serious question about his or her ability to be impartial." In *Golie*, this Court rejected the State's attempt to draw factual distinctions from other cases, and chose rather to determine the issue of the prospective juror's impartiality based on the facts of that particular case. This Court reasoned "those cases provide guidance to litigants and trial judges, but a 'one size fits all' rule defining all possible factual circumstances justifying a challenge for cause simply is not feasible." *Golie*, ¶ 18, 134 P.3d 95. Ultimately, in *Golie*, this Court found that the District Court abused its discretion when it failed to remove the prospective juror for cause. The Court found that in spite of all attempts to draw factual analogies or distinctions from other cases, the rule to apply regarding whether the District Court abused its discretion by failing to remove a juror for cause is the following:

"Ultimately, despite factual distinctions, the issues in 'challenge for cause, cases under § 46-16-115(2)(j), MCA, remain constant:

[1] Whether a prospective juror's statements have demonstrated a 'state of mind' affecting his or her ability to be impartial and act without prejudice to either party, and

[2] Whether a 'serious question' has arisen in that regard."

"Where the answer to *either or both* inquiries is in the affirmative, dismissal for cause is favored." *Golie*, ¶ 18, 134 P.3d 95. In the case at bar, it is seemingly incontrovertible that prospective juror Parker met not just one, but both prongs of this test, and should have been removed for cause, as moved by Robinson's counsel during voir dire. Prospective juror Parker clearly established that she qualified for removal for cause, as required under § 46-16-115(2)(j), MCA, when she demonstrated, overtly and repeatedly, that her "state of mind in reference to the case" prevented her from "acting with entire impartiality and without prejudice to the substantial rights of either party." She overtly stated, or implied, repeatedly, that:

1) She presumed Robinson Guilty (seven times);

2) She believed it would be unfair for she (herself) to sit on Robinson's jury;

3) She had sat through another trial with the same attitude; and

4) She presumed that other prospective jurors presumed Robinson guilty, ***too***.

The State can have no legitimate argument that in spite of these words, one can yet deduce that prospective juror Parker, nonetheless, could somehow act with "entire impartiality," as required by the controlling

statutes, and all other forms of test or analysis applied by this Court in similar cases.

B. THE FACT THAT THE PROSPECTIVE JUROR IN QUESTION NOMINALLY RETREATED FROM HER INITIALLY AGGRESSIVE ASSERTIONS (THAT SHE PRESUMED ROBINSON GUILTY) ULTIMATELY BEARS NO RELEVANCE TO THIS CASE.

The controlling rule regarding the "fixed opinion" of a prospective juror is the following: that "It is only where [prospective jurors] form fixed opinions on the guilt or innocence of the defendant which they would not be able to lay aside and render a verdict based solely on the evidence presented in court that they become disqualified as jurors." *Great Falls Tribune v. District Court* (1980), 186 Mont. 433, 439-40, 608 P.2d 116, 120 (citations omitted). Therefore, the State will no doubt point out that prospective Juror Parker's opinion was clearly *not* fixed, as demonstrated by tepid questioning by State's counsel, and a resulting, superficial vacillation of her attitude regarding Robinson's guilt. However, this Court's emphasis on initial, spontaneous statements extends to its analysis of whether such spontaneous statements are a clear indication of a fixed opinion regarding a defendant's guilt, *in spite of* the State's (or Court's) ability to systematically and pointedly steer a prospective juror away from their initial, candid statements. Moreover, this Court rejected the "fixed opinion" argument in *Golie* (*Golie*, ¶ 25, 134 P.3d 95), and pointed out that the "fixed opinion rule is only one argument that may be made under the 'state of mind' basis for a challenge for cause set forth in § 46-16-115(2)(j), MCA." Based on this reasoning, this Court ruled in *State v. Heath*, ¶ 16, 89 P.3d 947, that "challenges for cause asserted under § 46-16-115(2)(j),

MCA, must be determined pursuant to both the statutory language and the totality of the circumstances presented."

Finally, regarding the "fixed opinion" rule, this Court has previously rejected the State's argument that this Court's review of rulings on challenges for cause is "limited only to whether the juror has stated a specific belief that the defendant is guilty as charged." *State v. DeVore*, 1998 MT 340, ¶¶, 14, 21, 292 Mont. 325, ¶¶ 14, 21, 972 P.2d 816, ¶¶ 14, 21. Rather, this Court found that if a prospective juror "demonstrated another form of bias by stating beliefs that people charged with criminal offenses must be guilty of something," and "by having difficulty understanding and applying the presumption of innocence." Again, in the case at bar, the following exchange took place:

Mr. Stevenson: Does anyone differ from that attitude; ***that they kind of think he's probably guilty since he's sitting here?*** Anybody? Anybody want to be brave enough to weigh in on that?

Prospective Juror Parker: ***I would assume.***

Mr. Stevenson: I'm sorry?

Prospective Juror Parker: ***Well, it would look that way.***

Mr. Stevenson: ***It appears to you he's probably guilty because he's sitting here?***

Prospective Juror Parker: ***Yeah.***

Mr. Stevenson: Are you in agreement with the concept of innocent until proven guilty?

Prospective Juror Parker: Well, yes I am.

Mr. Stevenson: ***Are you assuming he's innocent now or are you not?***

Prospective Juror Parker: ***Well it would seem rather strange to assemble all these people if there was not some reason for him to be sitting there.***

Mr. Stevenson: ***So in that sense, are you sort of assuming he's guilty before you hear the evidence?***

Prospective Juror Parker: ***Yeah.***

These are the initial thoughts and reactions, regarding this or any matter, as expressed by prospective juror Parker. Moreover, these statements were not solicited directly from her. Rather, she spontaneously volunteered her initial declarations of Robinson's guilt in response to a general question to the jury pool. Regardless of whether this opinion appeared to remain "fixed" throughout voir dire, this Court has ruled that bias can be proved through a demonstration that "people charged must be guilty of something." Ms. Parker was never "rehabilitated" from this precise opinion during Robinson's voir dire. Neither the State, nor the Judge, nor was she herself able to effectively distance herself from this position. Thus, on this ground alone, a prima facie case is made that "rehabilitation" was unsuccessful, and removal for cause was therefore mandatory. Prospective juror Parker made plain her belief that the congregation of people in the courtroom is proof that a defendant is "guilty of something." It also demonstrates, at the absolute minimum, her *difficulty* at "understanding and applying the presumption of innocence."

Again, these factors will be considered by this court, under the "other forms of bias rule," irrespective of any argument the State may make about whether Ms. Parker had formed a "fixed opinion" of Mr. Robinson's guilt, per se. *State v. Heath*, ¶ 25, 89 P.3d 947, this Court rejected appellant's claim of juror bias, even though the prospective juror at issue "agreed that

another juror 'possibly' could be 'more fair and impartial,' that if she were Heath she might not want herself as a juror, and that 'maybe' she was not the "best juror" for this case." This Court rejected this argument in *Heath*, precisely because "at no time did she (prospective juror) state she was unwilling or unable to consider the case objectively or fairly." In the case at bar, to the contrary, prospective juror Parker did make plain, repeatedly, that "she we was unwilling or unable to consider the case objectively or fairly" and she did so spontaneously, and without (initially) being specifically targeted by Robinson's counsel.

In *DeVore,* this Court concluded a district court "shifted the focus" from prospective jurors' expressed inability to presume innocence, and coaxed recantations by asking whether they could follow the law and court instructions. *DeVore,* ¶¶ 20, 27-28. The rule from *De Vore* was specifically breached in the case at bar. The facts in the case at bar may serve as an even more forceful example of an attempt to coax recantations. The case at bar also demonstrates the ultimate failure, regardless of such efforts, to rehabilitate a prejudiced prospective juror.

In the case at bar, Ms. Parker never substantively recanted her stated prejudice, attempted rehabilitation notwithstanding. Strikingly, "bias can be revealed by a juror's express admission of that fact, but, more frequently, jurors are reluctant to admit actual bias, and the reality of their biased attitudes must be revealed by circumstantial evidence." *State v. Heath*, ¶ 30, 89 P.3d 947. Ironically, even in a case where no need existed to reveal Ms. Parker's biases through circumstantial evidence, and where she stated them brazenly, unequivocally, and without compunction, and where no recantation or substantive rehabilitation took place, such a juror, in the case

at bar, was not removed for cause. The violation of this body of Montana's law is clear.

C. IN THE CASE AT BAR, "REHABILITATION" OF THE PROSPECTIVE JUROR TOOK THE FORM OF AN IMPROPER "COAXED RECANTATION," AND WAS NEVERTHELESS INEFFECTIVE AT VALIDATING THE IMPARTIALITY OF SAID PROSPECTIVE JUROR.

While the State will no doubt argue that prospective juror Parker was properly "rehabilitated" during the voir dire process, this Court has repeatedly placed great "emphasis on a prospective juror's spontaneous, and usually initial, statements in evaluating whether he or she has expressed a 'fixed opinion' regarding a defendant's guilt or innocence," specifically with respect to challenges under § 46-16-115(2)(j), MCA *State v. Falls Down*, 2003 MT 300, ¶¶ 27, 30, 32, 35, 318 Mont. 219, ¶¶ 27, 30, 32, 35, 79 P.3d 797, ¶¶ 27, 30, 32, 35. In the case at bar, while prospective juror Parker somewhat retreated from her initially brazen position regarding her presumption of Robinson's guilt (after brief questioning by State's counsel, and attempts to rehabilitate by the District Court Judge), this Court has traditionally viewed such superficial retreats from one's original position (after attempts to rehabilitate) with suspicion (again in favor of initial and / or spontaneous statements regarding the presumption of innocence).

In *State v. Freshment*, 2002 MT 61, ¶ 18, 309 Mont. 154, ¶ 18, 43 P.3d 968, ¶ 18, this Court analyzed the propriety of the prosecution's rehabilitation of prospective jurors under § 46-16-115(2)(j), MCA, based, in part, on the following logic:

> ***Coaxed recantations in which jurors state they will merely follow the law, whether prompted by the trial court, the prosecution, or the defense, do not cure or erase a clearly stated bias which demonstrates actual prejudice against the substantial rights of a party.***

In *Heath*, ¶ 26, 89 P.3d 947, this Court emphasized the same point:

> ***We have frequently observed that most people will agree to follow the law in the face of repeated questioning in a courtroom, and we have advised judges and lawyers to refrain from engaging in such repeated questioning.***

The issue of whether improper rehabilitation has occurred in this case, therefore, hinges on whether the District Court Judge has, once again, ignored a prospective jurors presumptively more reliable (initial, and / or spontaneous) statements in favor of those solicited in response to generic questioning, aimed at producing a predictable change in the prospective juror's tone, and seemingly aimed to "bring the juror around," so to speak. In other words, did a serious question about a juror's impartiality exist prior to attempts at rehabilitation?

> ***In determining whether improper rehabilitation has occurred, we focus on whether a juror's "spontaneous, and thus most reliable and honest, responses" raised a serious question about his or her ability to be fair and impartial.*** *Heath*, ¶ 26, 89 P.3d 947.

In *De Vore*, ¶¶ 20, 27-28, 89 P.3d 947, this Court "concluded that improper rehabilitation took place when the district court "shifted the focus" from prospective jurors' expressed inability to presume innocence, and coaxed recantations by asking whether they could follow the law and court instructions." In *Heath*, ¶ 28, 89 P.3d 947, this Court observed that the prospective juror's statements (at issue) "did not appear biased until defense

counsel manipulated them." In the case at bar, it appears that the opposite occurred. Prejudice was clear until the prospective juror was coaxed to take a contrary (though superficially so) position. Either way, this Court has consistently looked to a prospective juror's initial statements in an effort to ascertain the truth about his or her impartiality.

Ultimately, it appears clear that there has been a presumption from within this court, based on an observation of human nature, that virtually all attempts to rehabilitate a juror from their initial and spontaneous statements regarding their attitude about the presumption of innocence. Such attempts will generally lead prospective jurors to change their position for fear of appearing disrespectful to the Court, or the law.

> ***When a juror is sitting in an unfamiliar and imposing courtroom surrounded by her peers, attorneys, possibly other members of the community, and the trial judge, it strains credulity to believe that a prospective juror is going to persevere in her personal concerns about her ability to fairly hear the case.*** *De Vore*, ¶ 28, 89 P.3d 947 (Justice Nelson, J., specially concurring).

This observation from *De Vore* could not be more appropriate to the case at bar. An examination of the record illuminates the clear and unmistakable admission of prospective juror Parker regarding her own attitude about the presumption of innocence. Only after a "shift of the focus," "repeated questioning," "coaxed recantations," and other terminology repeatedly used by this Court regarding improper rehabilitation did the prospective juror soften her previously brazen attitude about the presumption of innocence and her ability to be impartial under clear pressure. This Court has repeatedly predicted such results under these circumstances, and this Court has traditionally viewed such "coaxed

recantations" with disfavor. As this Court stated in *Williams*, "few people would show the kind of contempt for a judicial officer that would have been necessary to persist in her admissions of bias under those circumstances." *Williams*, 262 Mont. at 536, 866 P.2d at 1103.

In *Good*, ¶ 55, 43 P.3d 948, this Court admonished the District Court for failing to remove a juror for cause under precisely these circumstances:

> ***The District Court abused its discretion when it chose to ignore prospective jurors' spontaneous and honest statements indicating they could not be impartial in favor of its own attempt to rehabilitate the jurors. While we review a trial court's decision regarding a juror's fitness to serve deferentially, we cannot turn a blind eye to human nature and the fact that the jurors' deference to the trial judge's civics speech may well be at the expense of juror impartiality.***

In the case at bar, the District Court Judge engaged in much the same dialogue in "civics" that produced a predictable litany of "yes" answers from the prospective juror, in a fashion predictable under the circumstances, and discussed and warned against by this Court in *State v. Good*. Prospective juror Parker predictably took the bait to avoid the appearance of disrespecting the constitution, the law, and the court, but the taint of her initial statements was not removed. Nor, at any point in time, did she recant her assertions that she presumed Robinson to be guilty. She simply, and predictably, continued to answer "yes" to somewhat leading and generic questions about whether she could follow jury instructions and follow the law. Ultimately, the trial transcript (as relates to prospective juror Parker) reads as the quintessential example of what this Court has warned against in terms of rehabilitation generally. Attempts at rehabilitation, and Parker's responses to them also read as a classic example

of the insufficiency of such attempts to purge the taint of a prospective juror's initial admissions to their biases and prejudices.

Incidentally, Robinson was not required to object to the Court's attempt to rehabilitate as part of the overall challenge for cause (of prospective juror Parker). *Good*, ¶ 56, 43 P.3d 948.

In *State v. Falls Down*, 2003 MT 300, ¶ 20-21, 318 Mont. 219, ¶ 20-21, 79 P.3d 797, ¶ 20-21, this court held that a district court did not abuse its discretion when it denied four challenges for cause, "in part because only after ··· manipulation of the potential jurors' initial responses did their responses become unclear and seemingly biased." This ruling emphasizes two important points with respect to analysis under § 46-16-115(2)(j), MCA. First, it underscores this Court's repeated emphasis on the greater reliability (generally) of spontaneous statements made by a prospective juror regarding his or her own bias. Second, and more relevant to the issue of attempts to "rehabilitate" in this case, *Falls Down* underscores this Court's recognition that repeated questioning (such as occurred in the case at bar) by counsel generally will have the effect of steering a prospective juror away from statements previously made to opposing counsel, and thus, the validity of responses rendered under the fire of such questioning are to be viewed with great suspicion. Therefore, when calculating the existence of a "fixed opinion" regarding a juror's presumption of innocence, statements regarding juror bias, rendered under the crucible of cross examination, have traditionally been presumed unreliable either for the state or a criminal defendant.

II. THE DISTRICT COURT ILLEGALLY SENTENCED APPELLANT (WITH RESPECT TO THE TERM OF THE SENTENCE IMPOSED) AS RELATES TO APPELLANT'S DESIGNATION AS A PERSISTENT FELONY OFFENDER.

The sentencing portion of proceedings against Robinson resulted in the imposition of an illegal sentence against him. The persistent felony offender statute (sentencing) reads very clearly:

46-18-502. Sentencing of persistent felony offender

(1) Except as provided in 46-18-219 and subsection (2) of this section, a persistent felony offender shall be imprisoned in the state prison for a term of not less than 5 years or more than 100 years or shall be fined an amount not to exceed $50,000, or both, if the offender was 21 years of age or older at the time of the commission of the present offense.

(2) Except as provided in 46-18-219, an offender shall be imprisoned in a state prison for a term of not less than 10 years or more than 100 years or shall be fined an amount not to exceed $50,000, or both, if:

(a) the offender was a persistent felony offender, as defined in 46-18-501, at the time of the offender's previous felony conviction;

(b) less than 5 years have elapsed between the commission of the present offense and:

(i) the previous felony conviction; or

(ii) the offender's release on parole, from prison, or from other commitment imposed as a result of the previous felony conviction; and

(c) the offender was 21 years of age or older at the time of the commission of the present offense.

(3) Except as provided in 46-18-222, the imposition or execution of the first 5 years of a sentence imposed under subsection (1) of this section or the first 10 years of a sentence imposed under subsection (2) of this section may not be deferred or suspended.

(4) Any sentence imposed under subsection (2) must run consecutively to any other sentence imposed.

Appellant does not contest whether or not he should have been designated a persistent felony offender by the Court. He does specifically object to the imposition of an additional sentence (a sentence in addition to the one imposed for his felony convictions) due to his designation as a persistent felony offender. Robinson was sentenced, on each of his felony sentences, to additional years for being a persistent felony offender (rather than permitting the PFO designation to ***replace*** the sentence imposed upon Robinson as required by statute, and *State v. Fitzpatrick*, although one of the additional sentences ran concurrent to another). (see Judgment and Commitment, p. 3-4) Rather, the law remains that a persistent felony offender designation forces the sentencing court to impose a sentence, with respect to the persistent felony offender, that ***takes the place of*** the sentence imposed in connection with the underlying felony. The sentencing court failed to follow this law in the case at bar, though the specific case, *State v. Fitzpatrick*, 247 Mont. 206, 805 P.2d 584 (1991) was quoted by Robinson's counsel at sentencing as the basis for his objection to the legality of the sentence imposed. (III Trans., p. 29-30, l. 9-25, 1-5) The precise and controlling language from *Fitzpatrick* reads as follows:

> **Clearly, § 46-18-502, MCA, provides for a maximum term of 100 years for a persistent felony offender, not an additional term of 100 years, as imposed by the District Court in this case. The sentencing parameters of § 46-18-**

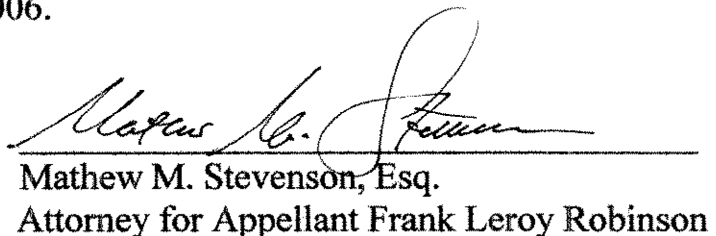
502, MCA, replace the maximum sentence prescribed for the offense. It is not a sentence in addition to the sentence for the offense. *Fitzpatrick*, 247 Mont. at 208.

Fitzpatrick remains good law with respect to this point of law, and the annotated annotations of § 46-18-502, MCA, still refer to *Fitzpatrick* for the rule that the P.F.O. statute is intended to replace rather than accentuate a sentence for a felony conviction. For this reason, in the event that this Court denies Robinson's plea for a new trial on ISSUE I, Robinson pleads that he should be remanded for re-sentencing due to the illegal sentence imposed per his P.F.O. designation.

CONCLUSION

The need for removal for cause of prospective juror Parker is clear. Therefore, the Court's error in failing to so remove said prospective juror is equally clear. The remedy is a finding of structural and reversible error, and a reversal and remand to the District Court for re-trial. In the alternative, Robinson's sentence should be remanded to the same District Court for imposition of a legal sentence pursuant to the persistent felony offender statute.

Dated this 23rd day of July, 2006.



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Brief of Defendant and Appellant was served on counsel of record by depositing a true and correct copy in the U.S. mail, postage prepaid, on the 25th day of July, 2006, and addressed as follows:

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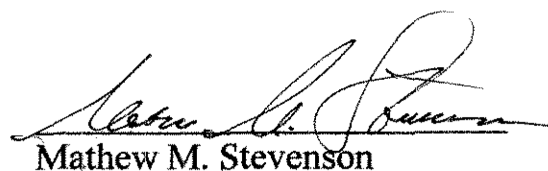
CERTIFICATE OF COMPLIANCE

Pursuant to Rule 27 of the Montana Rules of Appellate Procedure, I certify that this Appellant's Brief is printed with a proportionally spaced Times New Roman non-script typeface of 14 points; is double spaced except for footnotes and quoted and indented material; and the word count calculated by Microsoft Word totals 5,921 words, excluding table of contents, table of authorities, certificate of service and certificate of compliance.

Dated this 23rd day of July, 2006.



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