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Denver, Colorado 80203

CERTIORARI TO THE COURT OF APPEALS
Case No. 2019CA0340
Opinion by Fox, J.
Dailey, J., concurring in judgment
Schutz, J., dissenting

GILPIN COUNTY DISTRICT COURT
Honorable Dennis J. Hall
Case No. 2017CR193

Petitioner:

REGINALD KEITH CLARK

v.

Respondent:

THE PEOPLE OF THE STATE OF COLORADO

▲ COURT USE ONLY ▲

Case No. 2022SC313

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 29 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with the applicable 4,750 word limit set by C.A.R. 29(d) because it contains 4,684 words. The amicus brief complies with the content and form requirements set forth in C.A.R. 29(c). I acknowledge my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 29 and C.A.R. 32.

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INTRODUCTION

Reginald Keith Clark was the only Black man in the courtroom. He was charged with sexually assaulting a white woman. When a racially biased juror stated he "can't change" his bias, the trial court refused to remove him from the jury pool, leaving Clark no choice but to use a peremptory strike. The Division below held this was acceptable. It was not.

The inseparable connection between liberty and trial by jury is enshrined in the Sixth Amendment and is guaranteed by the Fourteenth Amendment's promise of equal protection under the law. A defendant has the right to an impartial jury selected through nondiscriminatory means. The trial court abdicated its role to protect this basic safeguard of American liberty. The Division ratified this.

These decisions place a cost on jury impartiality—to be purchased, if Clark "chose," with a peremptory strike. They threaten the framework within which Clark was tried and convicted. Forcing Clark to purchase jury impartiality at his own expense was not harmless. It was, in fact, structural error, that infected the entire trial process and

rendered Clark's trial fundamentally unfair. This Court should hold that, where, as here, a trial court permits an admittedly racially biased juror to remain in the jury pool, the only acceptable remedy is reversal.

STATEMENTS OF IDENTITY AND INTEREST

The **Colorado Hispanic Bar Association** serves Colorado and promotes justice by advancing Hispanic interests and issues in the legal profession and seeking equal protection for the Hispanic Community before the law.

The **Asian Pacific American Bar Association** represents the interests of the Asian Pacific American community, speaks on behalf of, and advocates for that community's interest, and provides a vehicle for unified expression of opinions and positions by the organization's members upon current social and legal matters or events of concern to its members.

The **South Asian Bar Association of Colorado** serves Coloradans and promotes equity by advancing South Asian interests—alongside the interests of other minority voices—through substantive programming, community outreach, diverse allyship, and advocacy. It

has a vested interest in ensuring that all Coloradans, diverse or otherwise, are treated equally under the law.

The **Sam Cary Bar Association** serves to promote the administration of justice; to promote the well-being of the Black community; to secure proper legislation; and to promote professionalism, fellowship and harmony within the Black legal profession in Colorado and beyond.

Collectively, these organizations are committed to ending racial prejudice in Colorado's judicial system. The Division's Opinion below threatens that commitment. It excuses courts from ensuring *Batson*'s promise of an impartial jury pool is fulfilled.

BACKGROUND

A. A defendant has a constitutional right to a jury free of racial bias.

Criminal trial by jury is a bulwark of American democracy. James Forman, Jr., *Juries and Race in the Nineteenth Century,* 113 YALE L.J. 895, 909 (2004). But for a jury to safeguard as intended, it must be unbiased. *Batson v. Kentucky*, 476 U.S. 79, 86 (1986). Particularly important is the absence of racial bias, which "implicates unique

historical, constitutional, and institutional concerns." *Peña-Rodriguez v. Colorado,* 580 U.S. 206, 224 (2017). It is "a familiar and recurring evil that, if left unaddressed, would risk <u>systemic injury</u> to the administration of justice." *Id*. (emphasis added).

"[A] defendant has the right to an impartial jury that can view him without racial animus, which so long has distorted our system of criminal justice." *Georgia v. McCollum*, 505 U.S. 42, 58 (1992). A defendant therefore has a right to explore the potential racial bias of their jury. *See Ham v. South Carolina*, 409 U.S. 524, 527 (1973). Peremptory challenges provide an important mechanism to act on any racial bias uncovered during that exploration. *McCollum*, 505 U.S. at 59. A defendant could form an impression as to the racial bias of a venireperson bereft of specifics. But a defendant should not need to exercise a peremptory challenge if a juror's racial bias is explicit and unapologetic, plain for the court to see. *Cf. Pena-Rodriguez*, 580 U.S. at 225. Such circumstances instead implicate a trial court's for-cause dismissal. *Rosales-Lopez v. United States*, 451 U.S. 182, 193 (1981).

B. Removing a juror for admitted racial bias is an obligation, not a choice.

Clark "was the only Black individual in the room" during voir dire. *People v. Clark*, 2022 COA 33, ¶ 8. Perhaps Clark's solitariness emboldened prospective Juror K to proclaim that his vote would be influenced by racial animus—a reality that, in open court, he made clear he "can't change." *Id.*, ¶ 8. Indeed, Juror K explained, he moved to Gilpin County specifically because he "didn't want [racial] diversity" in his life. *Id.* Juror K further made clear before the jury pool "that he would not set aside any bias or preconceived notion and render an impartial verdict as he was required to." *Id.*, ¶ 17. Still the district court refused to dismiss Juror K for cause, forcing Clark to exercise a peremptory challenge.

The Division agreed this was error, yet affirmed Clark's conviction. Clark's "choice" to exercise a peremptory challenge to remove the <u>admittedly</u> biased juror, the Division believed, meant he suffered no prejudice under *People v. Novotny*. *Id.*, ¶¶ 32–33.

But the Division's characterization of Clark's exercise of his right to a <u>racially</u> impartial jury as a "choice"—such that he could suffer no

prejudice by having made it—takes *Novotny* too far. It sanctions that a person of color[2] must "purchase" an impartial jury. *Novotny* dictates no such result.

ARGUMENT

I. RACIAL BIAS IS A TOXIN IN THE JUDICIAL SYSTEM.

Racial bias in the judicial system threatens the integrity of this institution. Respectfully, its open acceptance by the trial court in rejecting Clark's for-cause challenge is necessarily prejudicial and reversible without more. Amici ask that this Court clarify that *Novotny* does not instruct differently.

A. Trial by jury is a bulwark of American liberty.

A criminal defendant's right to be tried by an unbiased jury is a "barrier to the tyranny of popular magistrates in a popular government." THE FEDERALIST NO. 83, at 451 (Alexander Hamilton).

America's trust in the jury system can be traced back to the nation's origin. *See* Albert W. Alschuler & Andrew G. Deiss, *A Brief History of Criminal Jury in the United States*, 61 U. CHI. L. REV. 867,

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[2]Amici use "persons of color" to refer to individuals with minority-race heritage.

871 (1994). With the Sixth Amendment's guarantee of community participation in determining criminal culpability, "[f]ear of unchecked power, so typical of our State and Federal Governments in other respects, found expression." *Duncan v. State of Louisiana*, 391 U.S. 145, 156 (1968). The jury's role as a sentinel of freedom only crystalized in the centuries that followed.

In the antebellum era, the right to jury trial was significant to abolitionists seeking to check the power of the federal government over enslaved persons. Forman, 113 YALE L.J. at 909. Abolitionists believed that "jurors would understand that the law of God opposed slavery, even if the federal government did not." *Id.*

The jury is at the center of our democracy, "a tangible implementation of the principle that the law comes from the people." *Peña-Rodriguez*, 580 U.S. at 210. It is a venerable and evolving institution that this Court has a responsibility to protect.

B. Racial bias threatens that bulwark.

Public trust in the judiciary is unraveling: "[M]any . . . believe that the nation's courts favor the wealthy and politically connected, that

judges are motivated by political and personal biases, and that they are influenced by campaign fundraising." Kathleen Hall Jamieson & Michael Hennessy, *Public Understanding of and Support for the Courts: Survey Results*, 95 GEO. L.J. 899 (2007); Hon. Bruce M. Selya, *The Confidence Game: Public Perceptions of the Judiciary*, 30 NEW ENG. L. REV. 909, 911 (1996).

Jury verdicts are not immune from this crisis in perception: racial bias in the administration of criminal justice presents a singular challenge to preserving it. Such bias systemically undermines public confidence in jury verdicts. *See Peña-Rodriguez* at 224.

In *Batson,* the United States Supreme Court attempted to combat this. 476 U.S. at 99. *Batson* remains a bastion against public mistrust, assuring that a jury reaches its verdict "with impartiality, without prejudice, and in good faith." Ralph Gregory Elliot, *Public Trust Is A Fragile Bond*, 77 CONN. B.J. 41, 43 (2003); *cf. Peña-Rodriguez,* 350 P.3d at 294 (arguing that prohibiting defendants from introducing specific evidence of racial bias affecting their verdict detrimentally impacts public confidence in Colorado's jury trial system).

Batson's promise is rote if the system fails to ensure that defendants of color may vindicate it. And, in Colorado, such defendants are already more likely to be referred to the state for potential criminal charges than their white counterparts. *See* Disparity analyses by Colorado DA districts https://data.dacolorado.org/1st-disparity-analysis (accessible at https://data.dacolorado.org/). These defendants are also more likely to be convicted by an all-white jury. Forman, 113 YALE L.J. at 909; Peter A. Joy, *Race Matters in Jury Selection*, 109 NW. U. L. REV. ONLINE 180, 182 (2015).

Studies have shown that the presence of even "one African-American . . . in the jury pool" eliminates this injustice. Joy, 109 NW. U. L. REV. ONLINE at 182 (emphasis added). It logically follows that one racially biased juror can equally impact the verdict to the detriment of defendants of color.

Where, as here, the trial court refuses to fulfil its obligation to the state, public, and defendant by removing for-cause a juror who admits both his racial bias and that it cannot be changed, the defendant's purchase of an impartial jury is not a non-prejudicial "choice"—it is a

last attempt to salvage his liberty.

C. This Court—and Colorado's judiciary—is charged with upholding Colorado's commitment to the right to an unbiased jury.

Colorado's early political leadership recognized the right of every citizen to sit on a jury, regardless of race. Cong. Globe, 42d Cong., 2d Sess. 157 (1867) (letter from President Andrew Johnson explaining he would grant Colorado statehood, in part, because governor had vetoed bill prohibiting Black persons from sitting on juries).[3] Coloradans in general have long understood the important role an unbiased jury plays in protecting their freedom. *See* Duane A. Smith, *The Birth of Colorado* 124–25 (1989) (discussing Coloradans' demand for a grand jury process to obtain indictment).

Colorado continues to demonstrate this long-established commitment. Colorado was ahead of the curve in protecting the right for individuals with criminal convictions to sit on juries. Anna Roberts, *Casual Ostracism: Jury Exclusion on the Basis of Criminal Convictions*,

[3] (available at https://memory.loc.gov/cgi-bin/query/D?hlaw:1:./temp/~ammem_jJxk::).

98 MINN. L. REV. 592, 595–99 (2013) (noting Colorado and Maine as the only two out of forty-eight surveyed states without policies excluding jurors based on criminal convictions). This reform positively impacted jurors who are persons of color. Alexis Hoag, *An Unbroken Thread: African American Exclusion from Jury Service, Past and Present*, 81 LA. L. REV. 55, 73 (2020).

And just last year Colorado lawmakers introduced legislation listing presumptively invalid reasons for peremptory challenges linked to a juror's race. Col. Senate Bill 22-128 (2022).

D. ***Batson*'s robust enforcement is still needed to ensure its promise is realized.**

This state—like every other—has struggled with the intersection of race, criminal justice, and juries. Persons of color in Colorado have long complained that they "were punished more severely [by the criminal justice system] than Anglo offenders." Eugene H. Berwanger, *Rise of the Centennial State* 113, 113 (2007). The disparity was particularly stark during the antebellum period, when people of color accused of crimes were "tried" by ad hoc "People's Courts"—which meted out sentences via gallows—rather than the nascent criminal

courts established by the territory's legislature. *Id.* at 3, 103; Irving W. Stanton, *Sixty Years in Colorado* 160, 160 (1922).

By the 1920s, Colorado boasted one of the largest Klan organizations in the United States. Richard Delgado and Jean Stefancic, *Home-Grown Racism: Colorado's Historic Embrace—And Denial—of Equal Opportunity in Higher Education*, 726–35 (1999) (discussing historical reputation of Colorado and describing historical exclusion of minority members)[4]; *see* Brian Willie, et al., Rocky Mtn. PBS, Chilling interactive map shows 1920s Denver was rife with KKK members (Apr. 28, 2021).[5]

The Klan had a direct effect on defendants of color's right to impartial juries. Its supporters attacked the institution, tampering with juries to "clean up" Colorado by incarcerating and forcibly removing people of color. Delgado, *supra* at 726–35; *see* Geoffrey Hunt, *The Civil*

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[4] (available at https://scholarship.law.ua.edu/cgi/viewcontent.cgi?article=1546&context=fac_articles).

[5] (available at https://www.rmpbs.org/blogs/rocky-mountain-pbs/ku-klux-klan-ledgers-at-history-colorado/).

War in Colorado, COLORADO ENCYCLOPEDIA (October 26, 2022) (recognizing several Colorado towns as "'Sundown towns'—places where Black people were not welcome and would be run out of town at sundown"[6]).

This period "left a lasting legacy" in certain areas of Colorado, where racial animus hardened. Delgado, *supra* at 773. In fact, in the decades that followed, Colorado courts continued to find a pattern of systematic exclusion of persons of color from Colorado's jury rolls. *Id.* at 772, n.463.

In 2017, Colorado's complicated relationship with race and jury rolls was on display in *Peña-Rodriguez*. A jury found Peña-Rodriguez guilty of sexually assaulting two teenage girls. *Peña-Rodriguez*, 580 U.S. at 211. Affidavits offered by two jurors post-verdict revealed that Peña-Rodriguez's race and ethnicity—Latino/Hispanic—was explicitly considered and weighed heavily in the jury's calculus. *Id.* at 212. Jurors also called Peña-Rodriguez's credibility into question based on his

[6] (available at https://coloradoencyclopedia.org/article/civil-war-colorado).

immigration status. *Id.* at 213.

This Court affirmed Peña-Rodriguez's conviction, over a vigorous dissent raising many of the same points above. *Peña-Rodriguez*, 350 P.3d at 294 (Marquez, J., dissenting). The United States Supreme Court reversed, holding that, faced with a "clear statement that indicates [a juror] relied on racial stereotypes or animus to convict a criminal defendant," the Sixth Amendment requires consideration of that evidence and "any resulting denial of the jury trial guarantee." *Peña-Rodriguez*, 580 U.S. at 225.

Peña-Rodriguez and this case demonstrate that Colorado still needs robust enforcement of the right to an impartial jury, where a complicated history of race relations reverberates. The Division's Opinion sanctions that a juror's racial animus is a defendant's, rather than an institutional, problem. This undercuts the promises of Colorado's early political leadership, and sullies the trust of Colorado's contemporary citizens, rocking the foundation of democracy at a time when its delicate balance is tenuous.

II. THIS COURT SHOULD INSTRUCT TRIAL COURTS ON HOW TO ADDRESS JURORS WITH EXPLICIT RACIAL BIAS.

Below, the trial court conflated the question of whether Juror K could apply the burden of proof with his ability to set aside his own explicit racial bias. It interpreted an affirmative response to the former as indicative of an ability to accomplish the latter. And because Juror K's responses committing to his racist views were given in front of the entire jury pool, the trial court's refusal to remove him gave public approval to racism in the judicial system that is fatal to its continued integrity. *See* section II(B), *infra.*

Moving forward, trial courts need direction from this Court on how to manage racially biased jurors to ensure that *Batson*'s promise remains realized.

A. Jurors struggle to identify their biases—it is futile to ask them to set them aside.

Jurors—like the majority of people—struggle to identify their biases.[7] *See, e.g.*, David Yokum, Christopher T. Robertson, & Matt

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[7] This problem is amplified by implicit biases. Jurors cannot to set aside biases which they do not know they hold.

Palmer, *The Inability to Self-Diagnose Bias*, 96 DENV. L. REV. 869, 913 (2019). Even assuming that jurors could accurately and reliably identify their biases, it is a fallacy to assume that jurors can then set them aside. Richard Gabriel, John G. McCabe, & Rebecca C. Ying, *Redefining Bias in Criminal Justice*, 36-SUM CRIM. JUST. 18, 18–23 (2021). Most jurors will say they can set them aside. But there is no way of knowing this is true. *See* Patricia D. Devine, et al., *Long-Term Reduction in Implicit Race Bias: A Prejudice Habit-Breaking Intervention*, 48 J. EXPER. SOC. PSYCHOL. 1267, 1268 (2012) (overcoming biases requires "the application of considerable goal-directed effort over time.").

A juror's self-assessed ability to set aside bias cannot and should not be the basis upon which a trial court refuses to dismiss a juror for cause. And where, as here, a juror expressly proclaims that he cannot and will not set aside his racial views, the exercise is futile. The preservation of the judicial institution, and Colorado's repeated promise of racial equity, demands that the trial court act in such circumstances.

B. This Court should give explicit instructions on how trial courts should address jurors who have explicitly expressed racial bias.

Allowing each trial court to chart its own path on these issues will compound the lack of public trust in the judiciary. This is untenable. To ensure the integrity of this process, this Court must provide strict parameters as to how trial courts should address jurors who explicitly demonstrate racial bias.

Trial courts must begin their questioning with the goal of understanding the nature of the bias. Gabriel, et al., 36-SUM CRIM. JUST. at 21. Questions should focus on the length of time a juror has held a bias, or the strength of that conviction. *Id.* "Additionally, judges and lawyers need to evaluate the self-awareness of jurors—their ability to identify and discern between the evidence or law and their own bias." *Id.*

These inquiries must be open-ended questions, allowing the juror to fill in the details. "The questioning should actually be for the purpose of clarification or elaboration[,]" instead of with "a goal of getting a juror to change the biased attitude." *See O'Dell v. Miller*, 565 S.E.2d 407, 411

(W. Va. 2002) (internal quotations omitted) (citing Daniel J. Sheehan, Jr. & Jill C. Adler, *Voir Dire: Knowledge is Power*, 61 TEX. B. J. 630, 633, n.11 (1998)).

It is fundamental that this process does not unfold in open court. A court's questioning of a prospective juror in front of the entire jury pool naturally triggers the social desirability bias. Gabriel, et al.,36-SUM CRIM. JUST. at 20 (social desirability bias is "people's tendency to present themselves in a way that will be viewed favorably by others."). This makes it impossible to know whether the juror truly believes the bias may be set aside, or whether they are simply attempting to be perceived more favorably by others in the courtroom. *See* John L. Carroll, *Speaking the Truth: Voir Dire in the Capital Case*, 3 AM. J. TRIAL. ADVOC. 199, 200 (1979) ("Others refuse to reveal their own prejudice either because they are unaware that it exists or because the verbal acknowledgement of their prejudice would be embarrassing or socially unacceptable.").

Additionally, expression of racial animus in open court is a bell that cannot be unrung. Trial courts should not compound this problem

by digging into the juror's convictions in front of the entire jury pool, allowing the viewpoint to permeate. "[W]hatever legitimacy the courts do have, it rests on a premise that the courts are trying to get to a just, fair, and accurate result[.]" Kenneth S. Klein, *Truth and Legitimacy (In Courts)*, 48 LOY. U. CHI. L.J. 1, 65 (2016). People also view courts as "responsible for protecting their freedom and civil rights[.]" David Cann & Jeff Yates, *Homegrown Institutional Legitimacy: Assessing Citizens' Diffuse Support for Their State Courts*, 36 AM. POL. RES. 297, 314 (2008). When courts discover, and do not remove, racial bias, they violate this charge.

Trial courts must also be explicitly instructed not to use a juror's stated ability to apply the burden of proof as curative or rehabilitative of that juror's expressed racial bias. "It is not for the juror to decide whether he can render a verdict solely on the evidence." *O'Dell*, 565 S.E.2d at 411. "It is not enough if a juror believes that he can be impartial and fair." *Id.* That determination must be made by the court that the "juror will be impartial and fair and not be biased consciously or subconsciously." *Id.* "A mere statement by the juror that he will be

fair and afford the parties a fair trial becomes less meaningful in light of other testimony and facts which at least suggest the probability of bias." *Id.* (emphasis added). The court "must be convinced that a probability of bias"—that it is more probable than not—does not exist. *Id.* (emphasis added).

Absent such bright-line instruction, the error here will be repeated. Justice Dailey's concurrence below demonstrates as much. Its belief that one person's racial bias is another's political view exemplifies the dangers of engaging in this discourse in open court (where other jurors may attempt to characterize their own bias as a mere political view). *See Clark*, 2022 COA at ¶ 62 (Dailey, J., concurring). Its concern that opposition to diversity is not tantamount to racial basis (despite the Assistant Attorney General's concession that it is) justifies the need for the guidance for which amici now advocate. *Id.* at ¶ 64, n.1. Absent such guidance, the disparity in judicial officers' approaches poses too great a risk to defendants' rights.

C. A racially biased juror cannot be rehabilitated.

As Chief Justice Marshall articulated over two centuries ago, a

juror's biases constitute a just challenge for cause because "the individual who is under their influence is presumed to have a bias on his mind which will prevent an impartial decision of the case, according to the testimony." *United States v. Burr*, 25 F. Cas. 49, 50 (C.C.D. Va. 1807). "He may declare that notwithstanding these prejudices he is determined to listen to the evidence, and be governed by it; but the law will not trust him." *Id.* (emphasis added).

Under Colorado law, trial courts must sustain challenges for cause on the mere appearance or assumption of certain biases—including employment with a public law enforcement agency or public defender's office, or relationship to a party. Colo. R. Crim. P. 24(b)(II),(XII); C.R.S. § 16-10-103(1)(b),(j). It is irrational to think that jurors who have explicitly stated they are affirmatively racially biased—a far greater danger to *Baston*'s promise than presumed biases resulting from employment or personal friendships—may be rehabilitated to set that bias aside.

Put differently, a court should never "be satisfied that the juror will render an impartial verdict based solely upon the evidence and the

instructions of the court," *see* Colo. R. Crim. P. 24(b)(X), because a solidified racial bias can never be set aside. *See also* C.R.S. § 16-10-103(1)(j). Trial judges should not attempt to "rehabilitate" prospective jurors with expressed racial animus with questions designed to elicit a response that a juror promises to be fair and impartial, when all of the facts and circumstances demonstrate the contrary. *See O'Dell*, 565 S.E.2d at 412.

"Two major concerns arise in the rehabilitation of a juror who has already admitted to a prejudice against one of the parties." Christopher A. Cosper, *Rehabilitation of the Juror Rehabilitation Doctrine*, 37 GA. L. REV. 1471, 1497 (2003). First, the juror "recants his prejudice for a reason other than the true ability to judge the case fairly." *Id.* Often, this can happen because potential jurors simply do not want to upset the judge. *See id.* at 1498. This pressure is amplified when a judge pressures a juror by interrupting an attorney's voir dire, in open court, to try and rehabilitate them. *See id.* "The juror's ultimate response may be viewed as an effective rehabilitation when actually the juror was merely intimidated by the circumstances." *Id.*; *see* Neal Bush, *The Case*

for Expansive Voir Dire, 2 LAW & PSYCHOL. REV. 9, 17 (1976) (noting that potential jurors view judges as authority figures and tend to offer responses with the goal of pleasing the judge, instead of focusing on truthfulness). Other times, a juror may change his position in order to avoid a negative perception from the strangers in the courtroom. *See* section II(B), *supra*.

"Second, even if the juror honestly believes he can decide the case from the evidence, the effects of bias may still play a part in his decision making." Cosper, 37 GA. L. REV. at 1497. A juror's racist beliefs are the lens through which the juror will view the evidence presented and will inhibit their ability to be fair and impartial. *See Burr*, 25 F. Cas. at 50 (a biased juror will "listen with more favor to that testimony which confirms, than to that which would change his opinion; it is not expected that he will weigh evidence or argument as fairly as a man whose judgment is not made up in the case."). Those beliefs will permeate into the deliberation process. A juror bold enough to openly admit his racial prejudices at the beginning of a trial, in front of a room full of strangers and to attorneys he has never met, will certainly have

no reservations with expressing them to his fellow jury-members in the privacy of the deliberation room.

This Court must consider whether it is truly possible to rehabilitate a juror with explicitly expressed racial animus. Indeed, "[i]mpartiality is not a technical conception. It is a state of mind." *United States v. Wood*, 299 U.S. 123, 145 (1936). It is a "preposterous conclusion that the human capacity for rational reflection is but a light switch that can be flipped on or off, and a trial court may thereby procure a juror who mere minutes before expressed unacceptable bias and partiality, is suddenly objective and neutral[.]" *Mattaranz v. State*, 133 So. 3d 473, 488 (Fla. 2013) (internal alterations and citations omitted).

III. *NOVOTNY'*S OUTCOME-DETERMINATIVE ANALYSIS SHOULD BE LIMITED TO ITS FACTS.

Novotny holds that "allowing a defendant fewer peremptory challenges than authorized, or than available to and exercised by the prosecution, does not, in and of itself, amount to structural error." 320 P.3d 1194, 1203 (Colo. 2014). Instead, appellate courts must apply an outcome-determinative analysis to evaluate whether a court's failure to

grant a challenge for cause was reversible error. *Id.*

Novotny is distinguishable on its face. There, the challenge for cause was to an assistant attorney general. Here, the challenge was for explicit racial prejudice—in the trial of a Black man charged with sexually assaulting a white woman. For the reasons already discussed, racial bias is a unique threat to the integrity of the judicial system. The distinction is self-evident and, on that ground alone, *Novotny* should not control here.

Even if applied, *Novotny* does not preclude this Court from determining that it is structural error when a trial court refuses to strike a juror after the juror has expressed racial bias. Amici respectfully submit that such an error is, in fact, structural. *See id.* at 1201; *cf. State v. Zamora*, 512 P.3d 512, 520 (Wash. 2022) (overturning harmless error analysis and adopting rule of automatic reversal when a prosecutor "flagrantly or apparently intentionally appeals to a juror's potential racial or ethnic prejudice, bias, or stereotypes[.]").

While Clark was prejudiced by using a peremptory challenge to correct the trial court's error, the true harm lies in the trial court's

decision to allow Juror K to remain in the jury pool. That is the violation of the Fourteenth and Sixth Amendments.

As Judge Schutz persuasively articulates, this is the flip-side of *Batson*'s coin:

> If the injection of assumed bias into the jury selection process through the exercise of a peremptory challenge creates structural error, then surely the trial court's tolerance of a prospective juror's express racial bias after that bias has been brought to the court's attention through a challenge for cause also constitutes structural error.

Clark, ¶ 95 (Schutz, J., concurring). If it is unconstitutional for a litigant to leverage his peremptory strikes to create a racist jury, then it defies logic that it is constitutional when a litigant is forced to leverage his peremptory strikes to dismantle one. *See, e.g.*, *State v. Witherspoon*, 919 P.2d 99, 101 (Wash. App. 1996) (determining reversible error when trial court denied challenge for cause after juror "unequivocally concede[d] a prejudice against African Americans[.]").

CONCLUSION

This Court should reverse the Division, ensure *Batson*'s promise remains fulfilled, and conclude structural error applies here.

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CERTIFICATE OF SERVICE

I hereby certify that on April 25, 2023 a true and correct copy of the foregoing was served upon all counsel having entered an appearance herein via Colorado Courts E-Filing electronic filing and service.

s/ Kendra N. Beckwith
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