IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Petitioner on Review, v. JULIO CESAR VILLEDA, Defendant-Appellant, Respondent on Review.	SCA No. S070188 COA No. A175679 (Control) COA No. 175680 Washington County Circuit Court No. 20CR10192, 19CR08759

BRIEF ON THE MERITS OF *AMICUS CURIAE* OREGON TRIAL LAWYERS ASSOCIATION

On Review from the Decision of the
Oregon Court of Appeals
Opinion dated March 8, 2023
(Tookey, J., Egan, J., Kamins, J. (author))

Appeal from the General Judgment of the Washington County Circuit Court
The Honorable Oscar Garcia

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INTRODUCTION

Prospective Juror 155 expressed a clear bias in favor of the victim sufficient to remove the juror for cause. However, both the trial court and the prosecution attempted to "rehabilitate" the juror simply by getting Juror 155 to answer a "magic question" – whether she could be fair and follow the court's instructions. The trial court determined that, despite Juror 155's previously expressed clear biased, a simple affirmative answer to such a magic question was sufficient to rehabilitate the juror and therefore denied defendant's for-cause challenge. The Court of Appeals reversed, determining that in light of Juror 155's initial, revelations of express bias, her later statements that she could "follow the law" and "weigh the evidence" did not provide sufficient evidence to support the trial court's conclusion that the juror could disregard her bias. *State v. Villeda*, 324 Or App 502, 511, 526 P3d 1213 (2023).

The Court of Appeals also held that defendant was prejudiced because the denial of the for-cause challenge required defendant to use a peremptory challenge that he otherwise was entitled to have. The Court concluded that prejudice from the loss of a peremptory challenge is presumed pursuant to *State Highway Commission v. Walker*, 232 Or 478, 485, 376 P2d 96 (1962). *Villeda*, 324 Or App at 513. The state sought review and this Court accepted review.

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Because any decision by this Court regarding a trial court's erroneous denial of a for-cause challenge and its prejudicial effect will also impact civil parties, *Amicus Curiae* Oregon Trial Lawyers Association (OTLA) appears to assist this Court in reaching the correct rule of law.

Regarding for-cause challenges to jurors based on actual bias pursuant to ORCP 57 D(1)(g), OTLA urges this Court to hold that once a perspective juror has made a clear statement during *voir dire* reflecting or indicating the presence of actual bias, the prospective juror is disqualified as a matter of law and cannot be rehabilitated by subsequent questioning, later retractions, or promises to be fair.

OTLA also urges this Court to hold that an erroneous denial of a for-cause challenge causes prejudice to a party and is reviewable on appeal, because it impairs and denies a party their statutory right to a peremptory challenge, causes a disparate number of peremptory challenges between the parties, and, when a party is required to accept an objectionable juror, substantially affects the rights of the party.

ARGUMENT

I. Juror rehabilitation should be prohibited for jurors who have expressed a probability of bias sufficient to be removed for cause.

Both Article I, Section 11 of the Oregon Constitution, and the Sixth Amendment to the United States Constitution, guarantee criminal defendants

the right to an impartial jury. Civil litigants have the same constitutional right to an impartial jury. *See Warger v. Shauers*, 574 US 40, 50 (2014).

"The right to trial by fair and impartial jurors is a matter which is and should be guarded zealously by the courts, and the courts should guarantee that juries consist of impartial persons." *Lambert v. Sisters of St. Joseph of Peace*, 277 Or 223, 230, 560 P2d 262 (1977).

> "It is elementary that the parties to an action are entitled to try their issues before impartial jurors. An impartial juror is one whose state of mind is such at the commencement of the trial that he favors none of the litigants more than other, and that he will decide the cause only by a conviction based upon the evidence and law of the case."

Id.

The *voir dire* process protects a party's right to a fair trial by allowing a party to challenge and remove impartial jurors. ORCP 57 D(1)(g), applicable to criminal trials through ORS 136.210(1), allows parties to challenge any prospective juror based on actual bias.[1]

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[1] ORCP 57 D(1)(g) provides:

> "Actual bias is the existence of a state of mind on the part of a juror that satisfies the court, in the exercise of sound discretion, that the juror cannot try the issue impartially and without prejudice to the substantial rights of the party challenging the juror. Actual bias may be in reference to: the action; either party to the action; the sex of the party, the party's attorney, a victim, or a witness; or a racial or ethnic group of which the party, the party's attorney, a victim, or a witness is a member, or is perceived to be a member. A challenge for actual bias may be taken for the cause A challenge for actual bias may be taken for the cause mentioned in this

Actual bias exists if a juror's "ideas or opinions would impair substantially [the juror's] performance of the duties of a juror to decide the case fairly and impartially on the evidence presented in court." *State v. Barone*, 328 Or 68, 74, 969 P2d 1013 (1998), *cert den*, 528 US 1135 (2000).

Whether a prospective juror is actually biased is a factual question to be determined by the trial court as an exercise of its discretion. *Id.* Because the trial court has the advantage of observing the demeanor, apparent intelligence, and candor of a challenged prospective juror, a trial court's discretionary decision on such a challenge is entitled to deference and will not be disturbed absent a manifest abuse of discretion." *State v. Compton*, 333 Or 274, 285, 39 P3d 833 (2002).

In determining whether a prospective juror's views would prevent or substantially impair the performance of the juror's duties, a trial court must consider the totality of the potential juror's *voir dire* testimony to determine whether there is a "'probability of bias.'" *State v. Lotches*, 331 Or 455, 17 P3d

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> paragraph, but on the trial of such challenge, although it should appear that the juror challenged has formed or expressed an opinion upon the merits of the cause from what the juror may have heard or read, such opinion shall not of itself be sufficient to sustain the challenge, but the court must be satisfied, from all of the circumstances, that the juror cannot disregard such opinion and try the issue impartially."

ORS 136.210(1) provides that criminal juries "shall be formed, except as otherwise provided in ORS 136.220 to 136.250, in the same manner provided by ORCP 57 B, D(1)(b), D(1)(g), and E."

1045 (2000), *cert den*, 534 US 833 (2001) (quoting *State v. Nefstad*, 309 Or 523, 528, 789 P2d 1326 (1990)); *see also State v. Montez*, 309 Or 564, 575, 789 P2d 1352 (1990) ("The test of a juror's disqualification is the probability of bias or prejudice as determined by the court."); *Lambert*, 277 Or at 230 (The trial court must be "convinced that a probability of bias of the juror does not exist."). A for-cause challenge must be granted if the trial court is "satisfied, from all of the circumstances, that the juror cannot *disregard such opinion* and try the issue impartially." ORCP 57 D(1)(g) (emphasis added).

Unfortunately, determining whether a juror can disregard the juror's actual bias has led to the practice of juror rehabilitation. There is no accepted definition of juror rehabilitation, as some courts refer to the practice as mere further questioning of a juror who has expressed bias – while others refer to it as questioning with the goal of changing the juror's biased attitude. This brief refers to the practice as follows: Despite a juror's answers to *voir dire* that demonstrate a probability of bias sufficient to grant a for-cause challenge, the trial court or a party then attempt to "rehabilitate" that juror's previously expressed bias through leading questions in an effort to get the juror to affirmatively agree that the juror can be fair and follow the law. A simple answer in the affirmative to that type of "magic question" is considered to have "rehabilitated" the juror in a manner sufficient to deny a for-cause challenge

against the biased juror.[2]

Here, the trial court engaged in this type of juror rehabilitation when, after Juror 155 expressed clear bias, it asked Juror 155 the following magic question:

> "Do you think you could put those feelings aside, okay, and be neutral, fair when you hear the evidence here, okay, and then if it's creepin back, wait, I know I have these feelings, but I can't let them, no, no, I got to listen. I got to be fair to both sides, okay. *And then hear the evidence and then follow the law as I give it to you and just in essence, you know, to be fair. I mean, do you think you could do that as a – if you were a juror in this case?*"

Villeda, 324 Or App at 505 (emphasis added). And, after Juror 155 again expressed continued clear bias, the prosecutor also asked the magic question: "*The question is when the judge tells you that, you know, you're to follow the law and to weigh the evidence as it's presented, do you think that's something you could do*?" *Id.* at 506. Based on Juror 155's affirmative answer to the prosecutor's question, the trial court denied defense counsel's challenge to Juror 155 for cause. *Id.*

Although this Court historically has given trial judges significant discretion in reviewing a trial court's denial or grant of a for-cause challenge, a

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[2] The "magic question" is often phrased as: "After you hear the evidence and my charge on the law, and considering the oath you take as jurors, can you set aside your preconceptions and decide this case solely on the evidence and the law?" Not so remarkably, jurors confronted with this question from the bench almost inevitably say, "yes." *O'Dell v. Miller*, 211 W Va 285, 290, 565 SE 2d 407, 412 n 1 (2002) (quoting *Walls v. Kim*, 250 Ga App 259, 259, 549 SE 2d 797, 799 (2001), *aff'd*, *Kim v. Walls*, 275 Ga 177 (2002)).

trial court's discretion is not unlimited. *State v. Rogers*, 330 Or 282, 312, 4 P3d 1261 (2000) (trial court's discretion refers to authority of trial court to choose among several legally correct outcomes); *State v. Gollas-Gomez*, 292 Or App 285, 289, 423 P3d 162 (2018) (trial court's discretion on for-cause challenges is not "unbounded"). This Court should hold that a trial court acts outside the bounds of its discretion as a matter of law when, after the juror expresses a clear bias, it denies a for-cause challenge based solely on a juror's affirmative answer to a leading question about the juror's general ability to be fair and follow the law.

A. Biased jurors cannot be rehabilitated.

Per Lord Mansfield, jurors "should be as white as paper." *Mylock v. Saladine*, 1 W Bl 480 (1764). But that is not actually what happens. Dennis J. Devine *et al*, *Jury Decision Making: 45 Years of Empirical Research on Deliberating Group*s, 7 Psychology, Public Policy, and Law 622, 699 (2001). The stark reality is that jurors make decisions based on their preconceived opinions, and bias is a predictive factor in a juror's verdict. *See* Hanna D. Castrogiovanni, *Testing the Courts' Assumptions About Using Juror Rehabilitation in a Child Sexual Abuse Case*, Diss., Appalachian State Univ., 29 (May 2022), *available at* https://libres.uncg.edu/ir/asu/f/Castrogiovanni_Hannah_Spring%202022_Thesis.pdf (jurors more likely to issue verdicts in line with their bias). Jurors bring a "host of attitudes and assumptions with them to

the jury box and actively construct explanations for the evidence as they listen to it." Valerie P. Hans *et al.*, *The Arizona Jury Reform Permitting Civil Jury Trial Discussions: The Views of Trial Participants, Judges, and* Jurors, 32 U. Mich. J. L. Reform 349, 351 (1999). Empirical research demonstrates that people will stick to their initial attitudes and opinions, even in the face of contradictory evidence. Lee Ross *et al.*, *Perseverance in Self-Perception and Social Perception: Biased Attributional Processes in the Debriefing Paradigm*, 32 J. Personality & Soc Psychol. 880, 889 (1975).

Juror rehabilitation, however, is predicated upon on the fiction that jurors who say they can set aside their biases, be fair, and follow the law, can actually do so. This fiction was born out of Oregon's understanding of juror behavior over a century ago, as explained in *State v. Armstrong*, 43 Or 207, 73 P 1022 (1903). At that time, this Court gave great weight to a juror's ability to set aside their bias and follow the law:

> It * * * very properly accredits intelligence with the powers of discrimination and right reasoning, uninfluenced by preconceived notions and vague opinions formed upon insufficient knowledge; and that men of honest impulses, controlled by an innate sense of justice, will be able to *lay aside and disregard impressions and opinions of this character*, and to determine causes upon sworn testimony alone, governed by the rules of law applicable thereto as given by the court. It is but reasonable to believe that upright and conscientious jurors can and will thus deport themselves when called upon to administer justice.

Id. at 215 (emphasis added). *See also Kumli v. Southern Pac. Co.*, 21 Or 505,

510, 28 P 637 (1892) (explaining that human experience teaches us that jurors may lay aside their bias and hear and decide the case uninfluenced by such bias).

However, our understanding of the "human experience" and the ability to set aside bias has evolved significantly over the last century. Our court system, and society in general, now have a better understanding of how bias works and, in particular, that nearly all people have implicit bias that they are not conscious of. Jessica M. Salerno *et al*, *The Impact of Minimal versus Extended Voir Dire and Judicial Rehabilitation on Mock Jurors' Decisions in Civil Cases*, Law and Human Behavior 1, 7 (2021) (People are often "unaware of the biases that influence them" and are unable to identify them when asked). "Everyone has unconscious biases" and "unconscious bias can impact our thinking and decision-making without us knowing." Oregon Judicial Department, Jury Service Video: *Understanding the Effects of Unconscious Bias* at 0:59, *available at*: https://www.courts.oregon.gov/courts/grant/jury/pages/juryservicevideo.aspx (last visited October 3, 2023). "Even people with deeply held conscious belief that all people should be treated fairly still have unconscious bias." *Id.* at 2:21. "Without knowing it, our minds create mental shortcuts and use our past experiences to help us make quick and efficient decisions." *Id.* at 4:10. "[A]lthough many people in the United States believe it's wrong to judge people by stereotypes based on things like age, race, or gender,

studies have shown that we often react unconsciously to these differences to make decisions in our day to day lives." *Id.* at 5:50. "[U]nconscious bias acts as a sort of blinder. If [a juror] make[s] a decision based on unconscious bias, [the juror is] unaware or blind to the stereotypes or attitudes that are actually guiding [the juror's] decisions." *Id.* at 7:24. This court has recognized the trial court has a role in ensuring that jurors are not *unconsciously* biased. *Montez*, 309 Or at 575 (The trial court in exercising discretion must find from all the facts that the juror will be impartial and fair and not be consciously or *unconsciously biased*." (Emphasis added.)). Due to the difficulty of identifying implicitly biased jurors, shortcut approaches to juror rehabilitation, such as rehabilitation through the "magic question," are problematic. *See State v. Jonas*, 904 NW 2d 566, 572 (Iowa 2017) (explaining that implicit bias counsels against the "magic question" approach to juror rehabilitation).

Even though jurors often honestly *believe* they can be impartial and set aside their biases, empirical data demonstrates that people simply "are not good at ignoring their own biased perceptions." Castrogiovanni, Appalachian State Univ. at 32; *see also* Salerno, Law and Human Behavior at 40 (finding that mock jurors said they could be fair at stunningly high rates despite their actual biases).

The truth is, jurors simply are not the best judges of their own bias and, more importantly, whether it can set be aside. *See Kendall v. Prudential Ins.*

Co. of Am., 327 SW2d 174, 177 (Mo 1959) (a juror "is not a judge of his own qualifications"); Arthur H. Patterson, *et al*, *Removing Juror Bias by Applying Psychology to Challenges for Cause*, 7 Cornell J. L. & Pub. Pol'y 97, 101 (1997) ("Given that people are often unaware of the cognitive factors affecting their biases, it would appear that jurors would be unqualified to render an opinion as to their own ability to be fair."). "Determining whether a juror is biased or has prejudged a case is difficult, partly because the juror may have an intertest in concealing his own bias and partly because the juror may be unaware of it." *Smith v. Phillips*, 455 US 209, 221-22 (1982) (O'Connor, J., concurring). Because jurors are not reliable or accurate self-reporters as to their ability to be impartial, denying a motion for cause based solely on a juror's self-assessment that the juror can be fair leads to a grave risk that biased jurors will remain on the jury, or for-cause challenges will be improperly denied, leading to the prejudicial loss of a peremptory challenge.

Modern studies on juror bias reveal that juror rehabilitation is not effective in eliminating a juror's bias. *See* Salerno, Law and Human Behavior at 3 (finding that there were no significant interactions between judicial rehabilitation and any of the preexisting attitudes of mock jurors or their verdicts and damage awards). Furthermore, biased perceptions are not influenced by rehabilitative questions and biased jurors are more likely to issue a verdict in line with their bias despite rehabilitation. *See* Castrogiovanni,

Appalachian State Univ at 31. In fact, juror rehabilitation has an ironic backfire effect in that it makes jurors *feel* less biased without actually reducing the impact of such bias. Salerno, Law and Human Behavior at 38. Furthermore, asking an individual to not think about something can have the additional paradoxical effect of making the thought more cognitively accessible. David M. Wegner *et al*, *The Hyperaccessibility of Suppressed Thoughts*, 63 J. Personality & Soc. Psychol. 903, 907 (1992); Salerno, Law and Human Behavior at 11. Thus, the juror who is told to not think about a bias will find that bias to be even more accessible in the juror's processing of the trial testimony and evidence. Salerno, Law and Human Behavior at 11.

Furthermore, when *judges* ask the magic question, additional problems arise. Jurors generally defer to judges as authority figures. Modern studies demonstrate that a judge's presence evokes considerable pressure to conform to a set of perceived judicial standards among jurors. Susan E. Jones, *Judge-Versus Attorney-Conducted Voir Dire, An Empirical Investigation of Juror Candor*, 11:2 Law and Human Behavior 1, 1 (1987). The risk is that jurors may *say* they can be "fair," when in reality their statements are simply the result of pressure from an authority figure, and do not indicate true impartiality. *See* Linda L. Marshall *et al.*, *The Effects of Demand Characteristics, Evaluation Anxiety, and Expectancy on Juror Honesty During Voir Dire*, 120:3 The Journal of Psychology 205, 209 (1985) (judges have been found to be ineffective when

questioning to detect prejudice and when judges conduct the questioning, juror partiality may be less likely to be discovered); American Bar Association (ABA), *Standards for Criminal Justice Discovery and Jury Standards*, 159 (1997) (noting that jurors may be less candid in responses to the judge due to desire not to displease the trial judge and that trial judges have been criticized for conducting perfunctory *voir dire* in a desire to move *voir dire* along and seat the jurors). This means that jurors may attempt to report not what they truly think or feel about an issue, but instead what they believe the judge wants to hear. That is particularly true when judges ask cursory, pointed questions similar to those asked in this case, such as "Do you think you could put your feelings aside and be fair?" or "Can you consider the evidence and then follow the law as I give it to you?" In such a case, jurors are likely to answer in the affirmative despite their true feelings. Jones, 11:2 Law and Human Behavior at 14.[3]

This court's more recent jurisprudence on juror rehabilitation recognizes that a juror's own beliefs about their impartiality cannot be the sole factor in determining whether a juror has a probability of bias. *Montez*, 309 Or at 575 ("it is not enough that a prospective juror believes that [the juror] can be fair and impartial"). There simply is no magic phrase, affirmation, or agreement that can

[3] Of course, the Oregon Rules of Evidence recognize in general that leading questions – a question that suggests the answer – are inappropriate (at least on direct examination). ORE 611(3).

cure a juror's clearly expressed bias. As Chief Justice Marshall recognized, a biased juror's later statements professing fairness should be viewed with suspicion:

> "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. Is there less reason to suspect him who was prejudged the case, and has deliberately formed and delivered an opinion upon it? *Such a person may believe that he will be regulated by testimony, but the law suspects him, and certainly not without reason*. He will listen with more favor to that testimony which confirms, than to that which would change, his opinion; it is not to be expected that he will weigh evidence or argument as fairly as a man whose judgment is not made up in the case."

United States v. Burr, 25 F Cas 49, 50 (D. Va. 1807) (emphasis added). *See also Morgan v. Illinois*, 504 US 719, 735 (1992) (As to general questions of fairness and impartiality, jurors could in all truth and candor respond affirmatively, personally confident that their dogmatic views are fair and impartial, while leaving the specific concern unprobed, but any juror who would impose death regardless of the facts and circumstances of conviction "cannot follow the dictates of the law").

Several states have outright banned judicial rehabilitation, recognizing that once a juror has expressed disqualifying prejudice, the juror cannot be rehabilitated by subsequent questioning, later retractions, or promises to be fair. *See, e.g., Jonas*, 904 NW 2d at 575 ("Where a potential juror initially repeatedly expresses actual bias against the defendant * * *, we do not believe the district

court can rehabilitate the potential juror through persistent questioning regarding whether the juror would follow instructions from the court); *Black v. CSX Transp., Inc.*, 220 W Va 623, 628 (2007) ("Once a perspective juror has made a clear statement during *voir dire* reflecting or indicating the presence of disqualifying prejudice or bias, the prospective juror is disqualified as a matter of law and cannot be rehabilitated by subsequent questioning, later retractions, or promises to be fair."); *Kim v. Walls*, 275 Ga 177, 178 (2002) (disagreeing with practice of juror rehabilitation through the use of a talismanic question); *State v. Saunders*, 992 P2d 951, 962 (Utah 1999) ("Ruling that a prospective juror is qualified to sit simply because he says he will be fair ignores the common-sense psychological and legal reality of the situation."); *Montgomery v. Commonwealth*, 819 SW2d 713, 717 (Ky 1992) ("One of the myths arising from the folklore surrounding jury selection is that a juror who has made answers which would otherwise disqualify him by reason of bias or prejudice may be rehabilitated by being asked whether he can put aside his personal knowledge, his views, or those sentiments and opinions he has already, and decide the cased instead based solely on the evidence presented in court and the court's instructions.") As the Florida Supreme Court has explained:

> "It is difficult, if not impossible, to understand the reasoning which leads to the conclusion that a person stands free of bias or prejudice who having voluntarily and emphatically asserted its existence in his mind, in the next moment under skillful questioning declares his freedom from its influence. By what sort

> of principle is to it to be determined that the last statement of the man is better and more worthy of belief than the former?"

Johnson v. Reynolds, 97 Fla 591, 599 (1929).

Juror rehabilitation is a fiction and is not a true indicator of a juror's ability to hear the evidence in an unbiased manner. This practice allows biased jurors to continue to remain on the jury or prejudices parties by requiring them to use peremptory challenges to excuse jurors that should have been removed for cause. This practice should be abandoned.

B. Only equivocal jurors should be questioned further, but the purpose of such *voir dire* must be *investigation*, not persuasion.

Once it is established that a juror has a probability of bias sufficient to grant a for-cause challenge, any effort to "rehabilitate" the juror should not be permitted. In *State v. Miller*, 46 Or 485, 487, 81 P 363 (1905), this Court explained, "[w]hen it satisfactorily appears from the examination of a person called as a juror that he possesses such a state of mind that he cannot try the issues impartially, the introduction of further testimony would be superfluous." *See also Nefstad*, 309 Or at 533 (noting that there was nothing in the record suggesting that a juror who was properly removed for cause could have been rehabilitated).

Only if a juror's answers on the subject of bias are unclear or equivocal should *voir dire* continue. *See Barone*, 328 Or at 78 (A trial court's discretion is "most meaningful" when a potential's juror's answers are contradictory or

unclear); *compare with Gollas-Gomez*, 292 Or App at 292 (juror's statements were not contradictory but established an actual bias and there was no duty to ask "rehabilitative questions" to try to elicit a contradictory answer).

Under such circumstances, however, the purpose of *voir dire* examination must be "investigation, not persuasion." *Nefstad*, 309 Or at 533. The purpose of further questioning must be to determine whether a juror, who has been equivocal in their answers related to bias, has a probability of bias and should be excused for cause. Attempts to *persuade* a juror that the juror can set aside any potential bias through leading questions violate these principles of *voir dire* and risks improper juror rehabilitation. *Lane County v. Walker*, 30 Or App 715, 722, 568 P2d 67 (1977) (recognizing that further questioning should not "persuade" a juror to set aside bias or "elicit pro forma answers to leading questions").

C. Early statements are the best evidence of bias and later generalized statements should be given little weight.

When trial courts rehabilitate biased jurors, or allow parties to do so, they improperly ignore the totality of circumstances and overly focus on the juror's answers to the "magic question." But the trial court is required to consider the totality of the testimony – not simply one answer to a magic question regarding whether a juror can be fair and follow the law.

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Earlier statements that reveal bias are the best indicator of actual bias. "Initial reactions or answers given in voir dire without undue debate and confinement of issues should be afforded much greater weight" in determining a juror's state of mind. *Lambert*, 277 Or at 230. A mere statement by a juror that the juror will be fair and impartial becomes less meaningful in light of other testimony and facts that suggest a probability of bias. *Id.* at 230-31.

In *Lotches*, 331 Or at 476, this Court affirmed the trial court's consideration of the totality of the juror's responses and upheld the removal of a juror for cause despite the juror's later statements that she could be fair and follow the law. This court held that the trial court properly declined to give weight to the juror's later statements that she could try to set aside her beliefs when her earlier statements were "pretty clear" and "more forthright," and indicated that she would not consider imposing the death penalty due to her beliefs. *Id.*

The totality of the circumstances must demonstrate that overall, the juror is *unequivocal* in the juror's responses that the juror can be impartial. *In State v. Fanus*, 336 Or 63, 84, 79 P3d 847 (2003), *cert den*, 541 US 1075 (2004), although the juror initially stated that she had developed opinions about the case, she later averred that she *had not formed strong opinions*, and was "unequivocal" in her willingness to require the state to prove defendant's guilt beyond a reasonable doubt and "consistently" denied that she automatically

would vote for the death penalty in all circumstances or in this particular case.

When jurors demonstrate bias on *a particular subject* – further questions should inquire into *that specific topic*, probing specifically further as to the source of the potential bias, rather than simply asking whether the juror can be "fair" in general without probing into the particular issue. *Fanus*, *supra*, supports this principle, as the inquiry in that case went to the very heart of the issue – whether the juror would automatically apply the death penalty regardless of the facts. 336 Or at 84. Focusing on a general ability to be fair and impartial does not properly investigate into the juror's potential bias, but simply attempts *to persuade* the juror that the juror can disregard bias and be fair in general. Again, as explained above, the "magic question" does nothing to cure clearly expressed bias on a specific subject.

D. The trial court erred in denying defendant's for-cause challenge based on improper juror rehabilitation.

Here, the Court of Appeals was correct in holding that the trial court denied defendant's for-cause challenge of Juror 155 based on improper juror rehabilitation.

Juror 155 repeatedly expressed a clear bias in favor of victims who alleged sexual assault or rape. *See Villeda*, 324 Or App at 504 ("I tend to give credibility to the survivor"); *id.* at 505 ("my natural inclination is stand with the survivor"); *id.* (answering in the affirmative that she had a reasonable doubt

about her ability to be fair to defendant).

In light of those clear expressions of actual bias, the trial court then engaged in improper juror rehabilitation, declining to investigate into Juror 155's bias related to sexual assault and rape, but attempting to persuade Juror 155 that she could be fair in general and follow the law. *See id.* (instructing Juror 155 about the role of a juror, and then asking whether she could put her feelings aside, hear the evidence and be fair).

Although a response in the affirmative to that question would not have rehabilitated Juror 155, Juror 155 doubled down on her bias for the victim. *Id.* ("I think so. I think, again, *that my natural inclination would be to lend support to the victim survivor*, but I think I could check my biases and my past understanding of these issues.").

Juror 155 again expressed clear bias when she answered in the affirmative that "a woman in a relationship would not lie about being raped." *Id.* She expressed that she didn't think she could keep her emotions to the side and that just being in the room was difficult and would not allow her to be fair. *Id.* at 506. At that point, she became tearful. *Id.* The prosecutor then asked the magic question: "[W]hen the judge tells you that, you know, you're to follow the law and to weigh the evidence as its presented, do you think that's something you could do?" *Id.* Juror 155 answered in the affirmative. Based on Juror 155's affirmative answer to that magic question, the trial court denied

defendant's for-cause challenge. *Id.*

The circumstances here demonstrate the dangers of juror rehabilitation. Juror 155 was not rehabilitated – she merely caved to pressure from both the trial judge and the prosecutor, both who did not actually investigate properly into the subject of her actual bias – her statements that she would tend to believe alleged victims of sexual assault and rape. Rather, in the face of clear statements of bias, evidence that she was not an appropriate juror for this case, and *actual tears*, they consistently placed pressure on Juror 155 to say she could follow the law and the judge's instructions. Her ultimate capitulation was not sufficient evidence that she was a fair and impartial juror.

For all the reasons above, this Court should reject the state's invitation that it could rehabilitate Juror 155 and hold instead that Juror 155's expressions of clear actual bias in favor of the victim, when considered as a whole, disqualified her due to actual bias and that her later affirmative answer to the "magic question," could not rehabilitate her. The Court of Appeals correctly held that the trial court erred in denying defendant's for-cause challenge based on improper juror rehabilitation, and this Court should affirm in that regard.

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II. A trial court's erroneous denial of a for-cause challenge, resulting in the impairment of the statutory right of a peremptory challenge results in prejudice, and requires reversal on appeal.

A. Peremptory strikes are necessary to ensure the right of a fair and impartial jury.

It has long been widely accepted that the peremptory challenge is a chief means of securing an impartial and fair jury. *See Barone*, 328 Or at 72 (peremptory challenges exist for the very purpose of achieving the goal of ensuring an impartial jury); *Edmonson v. Leesville Concrete Co.*, 500 US 614, 624 (1991) (The purpose of a peremptory challenge is to assist in the selection of an impartial trier of fact); *Georgia v. McCollum*, 505 US 42, 57 (1992) ("The peremptory challenge is a necessary part of trial by jury."

The peremptory challenge endows the litigant with an important role in the process and adds to the public perception of justice and fairness. *See Edmonson*, 500 US at 630 (*voir dire* provides litigants an important role to play in the acceptance of the jury system and its verdicts); *see also Gray v. Mississippi*, 481 US 648, 668 (1987) (The impartiality of the adjudicator goes to the very integrity of our jury system). As Sir William Blackstone recognized, one of the primary purposes of a peremptory challenge is that a criminal defendant should have a good opinion of his jury, the want of which might totally disconcert him and that "the law wills not that he should be tried by any one man against whom he has *conceived* a prejudice, even without being able to

assign a reason for such dislike." Sir William Blackstone, *Commentaries on the Laws of England*, 1024 (1765) (emphasis added).

"The unique function of the peremptory challenge is that it permits a juror to be excused on the basis of bias which does not rise to an articulable level, the bias that is so subtle that even the juror may not recognize that it exists." ABA, *Standards for Criminal Justice Discovery and Jury Standards* at 166. "The function of the challenge is not only to eliminate extremes of partiality on both sides, but to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise." *See also* ABA, *Principles for Juries and Jury Trials* § 11(D) comment 11(D) (rev 2016) (Peremptory challenges are essential to achieving a fair trial by jury because they enable parties to eliminate extremes of partiality and result in juries more likely to decide cases on the basis of the evidence). In this way the peremptory satisfies the rule that 'to perform its high function in the best way 'justice must satisfy the appearance of justice." *In re Murchison*, 349 US 133, 136 (1955); *see also Holland v. Illinois*, 493 US 474, 484 (1990) (same).

Peremptory challenges are not without their critics. Commentators suggest that once peremptory challenges were provided to the state, the prosecution historically used them for the improper purpose of excusing jurors based on race. *See* John J. Francis, *Peremptory Challenges, Grutter, and*

Critical Mass: A Means of Reclaiming the Promise of Batson, 29 Vt L Rev 297, 307 (2005) (Noting that once peremptory challenges were in the hands of the unscrupulous prosecutor, the peremptory became another tool to deny African Americans justice). Critics argue that *Batson v. Kentucky*, 476 US 79, 89 (1986) (holding that peremptory challenges may not be exercised on the basis of race), has not fixed this problematic and racially motivated practice, and the only solution is to eliminate peremptory challenges.[4] *See* Willamette University College of Law Racial Justice Task Force, *Remedying* Batson's *Failure to Address Unconscious Juror Bias in Oregon*, 57 Willamette L Rev 85 (2021) (recommending a repeal or ORS 136.230 and elimination of the peremptory challenge). Other critics suggest a more moderate approach of changing or overhauling the system without complete eradication. *See State v. Vandyke*, 318 Or App 235, 246, 507 P3d 339 (Mar 9, 2022) (Aoyogi, J., concurring) (noting that the time has come to revisit the procedural mechanism created in *Batson*); Abbe Smith, *A Call to Abolish Peremptory Challenges by Prosecutors*, 27 Geo J Legal Ethics 1163, 1175 (2014) (advocating for a return to a defendant-only peremptory system as there is no evidence of a similar systemic abuse of peremptory challenges by defense counsel).

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[4] Arizona recently eliminated the peremptory challenge in jury trials, but only in conjunction with significant changes to the *voir dire* process, including robust *voir dire* with open-ended questions and a prohibition on the trial court's attempts to rehabilitate prospective jurors though leading questions. Ariz. Sup. Ct. R-21-0045 (Dec 8, 2021).

However, while recognizing their imperfections, the majority of courts continue to emphasize the importance of the peremptory challenge as a tool to ensuring a fair trial. For example, in a recent extensive study by a jury task force in Connecticut, the task force determined that there were several reasons that militated against the elimination of peremptory challenges. Report of the Jury Selection Task Force, State of Connecticut Judicial Branch, 29-31 (Dec 31, 2020). The task force concluded that peremptory challenges fulfill important goals, including giving parties and their lawyers a sense of control over the proceedings, enhancing the public's perception of procedural fairness, hedging against unrestrained judicial power, and preventing some biased jurors from serving on juries. *Id.* at 30-31.

B. The denial or impairment of the statutory right of peremptory challenges cause prejudice.

Peremptory challenges are a statutorily created right in Oregon, ORCP 57 D(2); ORS 136.210(1), which this Court has described as a "legal right." *Nefstad*, 309 Or at 526. "A peremptory challenge is an objection to a juror for which no reason be given, but upon which the court *shall* exclude such juror." ORCP 57 D(2) (emphasis added). Each party is entitled to an equal number of peremptory challenges. ORCP 57 D(2); ORS 136.230(1).

Compelling a party to use any number of statutorily mandated peremptory challenges to strike a juror who should have been removed for

cause is tantamount to giving that party less than its full allotment of statutorily mandated peremptory challenges.

> "If one of an accused's peremptory challenges could be taken away from him, why not five be taken, and if five, why not ten, leaving none, and all jurors be acceptable save unfair and partial ones."

Wolfe v. State, 147 Tex Crim 62, 72, 178 SW 2d 274, 280-81 (1944).

When a party has been denied their full allotment of peremptory challenges, this Court consistently has held that the impairment of the statutory right to a peremptory challenge is prejudicial and requires reversal. In *Walker*, 232 Or at 485 the court expressly acknowledge that reversal of error on appeal *must substantially affect the rights of the parties* under ORS 19.125(2). However, it held that due to the *type of error*, the failure to reverse would mean that "the right that was given by the statute is an empty one" and that therefore, the error should be deemed prejudicial automatically. 232 Or at 485; *see also Baker v. English*, 324 Or 585, 592 n 6, 932 P2d 57 (1997) (citing *Walker* and noting that this Court has developed a "prophylactic, *per se* rule specifically for peremptory challenges).[5]

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[5] In *State v. Shipley*, 195 Or App 429, 430, 98 P3d 407 (2004), the defendant argued that the trial court denied him all of the peremptory challenges that the law permitted him to exercise during *voir dire*. The state conceded the error based on *Walker*, and the Court of Appeals concluded that the state's concession was correct. *Id.*

In *State v. Durham*, 177 Or 574, 581, 164 P2d 448 (1945), this court also held that it was "reversible error" to deny the defendant his "right of peremptory challenge," reasoning that since 1864, a defendant in a criminal action has always had the right of peremptory challenge and that it was "far more in keeping with the proper administration of justice that there be no such impairment of the right of trial by jury." *Id.* at 581.

The above opinions are consistent with federal cases recognizing that denial of the *statutory* right of peremptory challenge is prejudicial and requires reversal. In *Harrison v. United States*, 163 US 140, 142 (1896), the defendant was limited to three peremptory challenges, when he was entitled to ten by statute. The court reversed and held that the defendant was entitled to a new trial, reasoning that "if plaintiff in error was entitled to ten peremptory challenges, five persons *unlawfully took part as jurors in his conviction*." *See also Pointer v. United States*, 151 US 396, 407 (1894) ("Any system for the impaneling of a jury that prevents or embarrasses the full, unrestricted exercise of the accused of [the right of a peremptory challenge] must be condemned."); *Gulf, C. & S. F. Ry. Co. v. Shane*, 157 US 348, 351 (1895) ("to thus impanel a jury in violation of [statute], and in such a way as to deprive a party of his right to peremptory challenge, constitutes reversible error, is clear.").

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The state nonetheless argues that the United States Supreme Court's subsequent decision in *Ross v. Oklahoma*, 487 US 81, 88 (1988), is controlling. There, the Court held that the deprivation of a peremptory challenge is not an error of constitutional significance and therefore, the loss of a peremptory challenge did not constitute a violation of the federal constitutional right to an impartial jury. The state also relies on *Barone*, 328 Or 68, and *State v. Megorden*, 49 Or 259, 88 P 306 (1907). In *Barone*, 328 Or at 72-73, the Court followed *Ross* to determine that the fact that defendant was forced to use a peremptory challenge to achieve an impartial jury did not violate the federal or state constitutions. In *Megorden*, 49 Or at 263-64, this Court also looked to whether defendant's *constitutional right* to an impartial jury was violated and determined that the denial of a for-cause challenge was not prejudicial because the ultimate panel was not impartial. Those cases are limited, however, to *constitutional* violations – not *statutory* violations.

The Court in *Ross* expressly limited its holding to constitutional violations, recognizing that a state-law violation may occur when a defendant's state-law peremptory rights are denied or impaired:

> "It is for the State to determine the number of peremptory challenges allowed and to define their purpose and the manner of their exercise. * * * As such, the 'right' to peremptory challenges is denied or impaired only if the defendant *does not receive that which state law provides*."

Id. at 89; *see also id.* at 91 n 4 (declining to decide whether a statutory violation

occurred in that case). Later, in *Rivera v. Illinois*, 556 US 148, 152 (2009), the Supreme Court again affirmed that state law controls the existence and exercise of peremptory challenges, and state law therefore determines "the consequences of an erroneous denial of such a challenge."

Here, Villeda's statutory right to his peremptory challenge was "denied or impaired," when did not receive his full allotment of peremptory challenges to which he was entitled pursuant to ORS 136.230(1). And as the state acknowledges, Villeda does not argue that his loss of his peremptory challenge resulted in injury of a constitutional magnitude. Rather, "the only error [Villeda] complains of is a possible *statutory* violation." Pet Br at 27. Thus, *Ross, Barone, and Megorden* are not applicable. *See Kirk v. Raymark Ind., Inc.*, 61 F3d 147, 160 (3d Cir. 1995) (*Ross* only holds that there is no *constitutional* violation mandating reversal unless a party can show that the jury was not impartial; however, *Ross* is not controlling because the defendant alleges a *statutory*, not a constitutional, injury).

This Court should therefore affirm *Walker*, which is not inconsistent with *Ross, Barone*, or *Megorden*.

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C. Denial or impairment of the statutory right of a peremptory challenge affects a party's substantial rights when forced to accept an objectionable juror.

The state and *amicus* Higgs argue that *Walker* must be reversed in light of the requirement that no error may be reversed on appeal unless it affects a substantial right of the party. *See* Or Const. Art VII (Amended), section 3; ORS 131.035; *see also* ORS 19.415 (in civil cases no judgment shall be reversed or modified except for error substantially affecting the rights of a party). Should this Court reverse *Walker* and determine that a *per se* reversal rule is not warranted, it should still hold that Villeda was prejudiced here, because he exhausted his peremptory challenges and made a record that he was then forced to accept an objectionable juror.

The purpose of a peremptory challenge is to allow the party to remove a juror *for which no reason need be given*. ORCP 57 D(2). As the ABA has recognized, the peremptory challenge permits a juror to be excused on the basis of bias *which does not rise to an articulable level*, the bias being "so subtle that even the juror may not recognize that it exists." ABA, *Standards for Criminal Justice Discovery and Jury Standards* at 166. Eliminating the extremes of partiality on both sides results in juries that are more likely to decide cases based on the evidence. ABA, *Principles for Juries and Jury Trials* § 11(D) comment 11(D) (rev 2016).

The state nonetheless contends that "a party does not have the right to pick who serves on the jury," Pet. Br. at 38. However, that is not what Villeda contends – he is not stating he had a right to pick who ultimately served. Rather, ORCP 57 D(2) is a rule of *exclusion*. It gives parties the right to *exclude* jurors for *any reason whatsoever*. The legislature decided that such a right was important enough to be given to parties in the first instance, and deprivation of that right is substantial, particularly when it results in an objectionable juror for whom defendant was entitled to exclude per statute.

Several states, post-*Ross*, take the position that the substantial rights of a party are affected when a for-cause challenge is denied, the party exhausts their peremptory challenges, and an objectionable juror is seated (without requiring proof of incompetence). *See, e.g.*, *Shane v. Commonwealth*, 243 SW 3d 336, 340 (Ky 2007); *Cortez ex rel Estate of Puentes v. HCCI-San Antonio, Inc.*, 159 SW 3d 87, 91 (Tx 2005); *Merritt v. Evansville-Vanderburgh School Corp.*, 765 NE 2d 1232, 1236 (Ind 2002); *Trotter v. State*, 576 So2d 691, 693 (Fla 1991). *See* Resp. Br. at 38-39 (outlining cases).

Villeda's rights were substantially affected in particular because the state was allowed to exercise its full number of peremptory challenges without having to accept an objectionable juror. This created an unlevel playing field. If Villeda was forced to accept an objectionable juror for which he had a statutory right to exclude, particularly when the state was able to freely exercise its full

rights to exclude jurors for any reason, violation of defendant's rights affected the equity of the proceedings.

In Shane, the Supreme Court of Kentucky held that denying a peremptory challenge denied the defendant the right of an unbiased proceeding and affected the integrity of the entire trial process. 243 SW at 340. The court explained:

> "It is fundamentally inconsistent for the Court to give with one hand and take away with the other, a position that does not invite public trust in the integrity of the judicial system.
>
> * * * To shortchange a defendant [by taking away from the number of peremptories given to the defendant by rule] is to effectively give the Commonwealth more peremptory challenges than the defendant. * * *. *A trial is not fair if only parts of it can be called fair*."

Id. at 339 (emphasis added).

When the jury selection process is unlawful at its outset, there are additional harms at play. In *Batson*, the court explained that harm in certain jury selection procedure extends beyond that inflicted on the defendant and touches the entire community. 476 US at 87. There, although the issue was the unlawful use of the peremptory challenge to excuse jurors on the basis of race, the Court explained that such unlawful jury section procedures "undermine public confidence in the fairness of our system of justice." *Id.*; *see also Powers v. Ohio*, 499 US 400, 410, 413 (1991) (unlawful jury selection on basis of race casts doubt on the integrity of the judicial process and places the fairness of a criminal proceeding in doubt" and "[t]he verdict will not be accepted or

understood [as fair] if the jury is chosen *by unlawful means at the outset*."); *JEB v. Alabama ex rel TB*, 511 US 127, 140 (1994) (noting harm when unlawful jury selection creates the impression that the "deck has been stacked" in favor of one side); *State v. McWoods*, 320 Or App 728, 730, 514 P3d 1151, *rev den*, 370 Or 602 (2022) (recognizing that racial discrimination in jury selection harms the community by the inevitable loss of confidence in the justice system that follows); *Turner v. Murray*, 476 US 28, 36-37, (1986) (failure to allow a party to conduct adequate *voir dire* on issue of a juror's bias caused prejudice due to the *mere risk* of bias impacting the defendant's right to an impartial and fair trial); *Ham v. South Carolina*, 409 US 524, 533 (1973) (Marshall, J., concurring) (preservation of the *opportunity* to prove actual bias is a guarantee of a defendant's right to an impartial jury and outlining cases).[6]

Here, the jury selection process was unlawful at the outset – even if only statutorily so. That created an unlawful jury selection process as it denied defendant his statutory right to exercise his full amount of allotted peremptory challenges and resulted in a disparate amount of peremptory challenges and an advantage for the state. That could create the impression that the "deck was stacked" for one side, undermining public perceptions of fairness and justice.

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[6] *In State v. Ramos*, 367 Or 292, 478 P3d 515 (2020), this Court described the type of prejudice in *Batson* as structural error, but declined to adopt it in that case because the issue in *Ramos* was instructional error, which it determined was not subject to structural error.

The importance of fostering fairness in court is critical to validate the verdict in the eyes of the parties, the jurors, and the community. If a party does not have an *equal right* at the outset to eliminate those jurors for which he deems partial, then the perception of the guarantee to the right to a fair jury is certainly impaired, trust in the system is undermined, and the community is harmed.

The state and *amicus* Higgs nonetheless argue that defendant must establish that the trial court's error impacted *the outcome of the trial*, and that therefore the objectionable juror seated on the jury must be incompetent. Not every type of error must affect *the outcome* of the case below to have substantially affected a party's rights. Rather, the standards for prejudicial error depend on the nature of the error. This Court recognized as much in *Baker*, 324 Or at 590-91.[7] In that case, the issue was the denial of a motion to compel discovery. The Court recognized that

> "in applying ORS 19.125(2), this court often examines whether it is likely that a trial court's error affected the outcome of the case below. For example, in cases in which a trial court's error either did or may have affected the outcome, such as an error

[7] Respondent on Review Villeda outlines cases in the criminal context where this Court has been satisfied with a lesser showing of prejudice when it comes to procedural trial rights which are not susceptible to an easy causal analysis. *See Ryan v. Palmateer*, 338 Or 278, 297, 108 P3d 1127 (2005) (in criminal context, noting that "nature of an error will dictate how much or how little it will take to satisfy us that the error affected the verdict."); *State v. Cole*, 323 Or 30, 36-37, 912 P2d 907 (1996) (error not harmless despite no chance that defendant could win suppression ruling); *State v. Cavan*, 337 Or 443, 447-49, 98 P3d 381 (2004) (inherent prejudice where trial held in prison).

> concerning a key issue before the jury, this court has concluded that the error substantially affected the rights of a party and, therefore, was prejudicial. The rationale behind such a conclusion is obvious: The rights of an aggrieved party are substantially affected if the outcome either would have or may have been different had the error not occurred."

Id. at 591. The Court explained that "an inquiry into the likelihood whether a trial court's error affected the outcome of the case below can serve as a useful tool in determining whether the error resulted in prejudice to a party. However, "such an inquiry, albeit helpful in some cases, *is not the test for determining prejudice*." (Emphasis added). Rather, the test is whether the trial court's error substantially affected the defendant's rights. *Id.* at 592. Because the issue in *Baker* involved a motion for denial of a motion to compel, rather than a key issue before the jury, the court did not consider whether *the outcome of the case would have been different*, but instead focused on whether the defendant already knew or had possession of qualitatively the same information as that contained in the denied discovery. If such information were known before trial through other sources, the denial of discovery could not substantially have affected defendant's rights under ORS 19.125(2).

Shoup v. Wal-Mart Stores, Inc., 335 Or 164, 176, 61 P3d 928 (2003), did not change the analysis under ORS 19.415(2). There, this Court overruled the "we-can't tell" rule from *Whinston v. Kaiser Foundation Hosp*, 309 Or 350, 788 P2d 428 (1990), determining that it was inconsistent with ORS 19.415(2).

Shoup applies to the narrow circumstance where there is an alternative basis that could support a jury's verdict and the record contains sufficient evidence to support that alternative basis. *See Jensen v. Medley*, 336 Or 222, 240, 82 P3d 149 (2003) (Where "the jury instructions gave the jury two possible grounds for imposing liability," one based on an erroneous instruction and the other not, defendant "c[ould] not demonstrate that the verdict was based on the erroneous instruction * * *, rather than on the correct * * * instruction.")

In *Purdy v. Deere and Co.*, 355 Or 204, 229, 324 P3d 455 (2014), the Court clarified that *Shoup* constituted *a particular application* of the standard in ORS 19.415(2) based on the record before the court. The error did not substantially affect the defendant's rights in that case, *because the same evidence applied to all three theories of liability*, and the defendant had actively prevented the use of a verdict form that would have shown whether the jury had based its verdict on the invalid theory of liability. The court explained that *Shoup* was limited to the circumstances in that case and did not apply to the instructional error in *Purdy*. Instead, the Court again affirmed that *Shoup* does not require an appellant to prove that trial error *actually affected the jury's verdict*. Rather, for instructional error, the appellant is only required to show *some* likelihood that the jury reached a legally erroneous result, *even if it cannot be definitively shown that the jury did base its verdict on the erroneous instruction*. *Id.* at 232; *see also id.* at 234 n 1 (Balmer, CJ, concurring) (*Shoup*

stands for the "unsurprising point" that an appellate court must conduct the ORS 19.415 review on the record before it to determine whether the error affects the appellant's substantial rights).

Here, this case is similar to *Baker*, *supra*, in that it does not involve instructional error or some key issue before the jury. Thus, contrary to the state and *Amicus* Higgs' contention, this Court need not determine whether the outcome below would have been different. Rather, as this Court recognized in both *Purdy* and *Baker*, the test is whether there was a substantial effect on the defendant's rights.

D. This Court should reject the state's invitation to require compound error before prejudice may be found.

The state and *amicus* Higgs argue that no prejudice may exist from a denial of a for-cause challenge unless a *second*, for-cause challenge is erroneously denied and another, second impartial juror ends up on the jury panel. This position, which suggests that there is no prejudice unless the trial court engages in compound error, should be rejected. Such a position would have the effect of fully insulating a judge's erroneous denial of a for-cause challenge except in the most rare of circumstances.

The state and *amicus* Higgs argue that it is insufficient prejudice that a party exhaust peremptory challenges and accept an objectionable juror. Rather, they argue that a party must exhaust their peremptory challenges, and that a *second* juror must be challenged for cause, that challenge must be denied, and

an *impartial* juror must end up on the panel. Ultimately, their position is that the trial court must engage in *two* errors – the error that the party appeals (the for-cause challenge that is erroneously denied but the party cures by removing the juror with a peremptory challenge), and a *second* error that causes the party harm (a for-cause challenge that is erroneously denied but where the juror ends up on the panel).

This position is problematic for one simple reason: it requires compound error. A party cannot challenge a denial of a for-cause challenge without an additional, *second*, erroneous denial of a for-cause challenge. In no other situation does this court insulate trial court error by first requiring compound trial court error before determining that the trial court error has caused prejudice to the party.

Given the Court's role in protecting the right of an impartial jury, this Court should decline the invitation by the state and *amicus* Higgs to insulate such an important right from appellate review.

CONCLUSION

For the reasons expressed above, as well as in defendant Villeda's response brief, *Amicus Curiae* OTLA urges the Court to hold that defendant's loss of his statutory right to a peremptory challenge affected a substantial right, that the trial court erroneously denied his for-cause challenge on the basis of improper juror rehabilitation, and affirm the Court of Appeals.

DATED this 5th day of October, 2023.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND FILING

I certify that on this 5th day of October, 2023, I served a true copy of the foregoing **Brief on the Merits of *Amicus Curiae* Oregon Trial Lawyers Association** on the following by using the electronic service function of the court's e-Filing system (for registered e-Filers):

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