

A05-1041

STATE OF MINNESOTA
IN SUPREME COURT

State of Minnesota,

Respondent,

vs.

Jermaine Sean Brown,

Appellant.

APPELLANT'S BRIEF

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STATE OF MINNESOTA
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vs.

Jermaine Sean Brown,

Appellant.

PROCEDURAL HISTORY

1. On or after August 27, 2004: Date of charged offense.
2. September 3, 2004: Complaint is filed charging appellant with aiding and abetting a conspiracy to commit controlled substance crime in the first degree (sale).
3. October 11, 2004: Omnibus hearing before the Honorable Kurt D. Johnson.
4. January 25, 2005: Jury trial begins before Judge Johnson.
5. January 26, 2005: Court grants state's request to add charge of aiding and abetting second-degree controlled substance crime.
6. January 26, 2005: Jury returns verdicts of not guilty of original charge of aiding and abetting conspiracy to commit a first-degree controlled

substance crime and guilty of amended charge of aiding and abetting conspiracy to commit a second-degree controlled substance crime.

7. March 2, 2005: Motion for a new trial is filed by defense counsel.

8. March 3, 2005: Sentencing hearing. Appellant is sentenced to 68 months, the presumptive Guidelines sentence for a Severity Level 8 offense with a criminal history score of 2.

9. July 25, 2006: Unpublished opinion affirming appellant's conviction is filed by Minnesota Court of Appeals.

10. October 17, 2006: Appellant's petition for review is granted, solely on issue of whether this court should adopt the doctrine of implied bias.

LEGAL ISSUE

Was appellant, an African-American man, denied the constitutional right to an impartial jury because a juror who admitted that he was prejudiced against African-American people was one of the jurors sitting on his case?

Neither the trial court nor the court of appeals ruled on this issue.

Apposite Authority:

Dyer v. Calderon, 151 F.3d 970 (9th Cir. 1998)

United States v. Torres, 128 F.3d 38 (2d Cir. 1997)

United States v. Heller, 785 F.2d 1524 (11th Cir. 1986)

State v. LeFebre, 5 P.3d 295 (Colo. 2000)

STATEMENT OF THE CASE

Appellant, Jermaine Sean Brown, was convicted of aiding and abetting a conspiracy to commit a second-degree controlled substance crime, Minn. Stat. § 152.021, subd. 1(1), § 609.05, and § 152.096, following a jury trial before the Honorable Kurt D. Johnson, Judge of District Court. He was found not guilty of the original charged offense of aiding and abetting a conspiracy to commit a first-degree controlled substance crime. On March 3, 2005, he was sentenced to 68 months, the presumptive sentence for a Severity Level 8 offense with a criminal history score of 2. Appellant's conviction was affirmed by the Minnesota Court of Appeals, and this court granted review on October 17, 2006.

STATEMENT OF FACTS

According to Benjamin Rittmiller, a commander of the Minnesota River Valley Drug Task Force and member of the Mankato police department, Rittmiller was approached on August 27, 2004 by a confidential reliable informant (CRI) who told Rittmiller that she¹ had been contacted by someone named Penny Kelly about purchasing drugs (T2 18).² According to Rittmiller, the CRI was instructed to buy an 8-ball of crack cocaine and was given \$300 in marked buy money and provided with a transmitter (T2 20-21). The CRI then picked up Kelly, and the two of them drove to an apartment complex in North Mankato (T2 19).

There, according to information Rittmiller picked up from the CRI's transmitter, the CRI met with a man named Jerome Slack, and asked him for an 8-ball (T2 21). Slack then contacted a person whom he identified as the source of his cocaine (T2 22). Slack, the CRI, and Kelly all left the apartment building and went to a Burger King restaurant where Slack was dropped off (T2 24).

Rittmiller said that the taped conversation showed that Slack told the CRI and Kelly to return to his house and wait while he got the crack cocaine (T2 24).

¹ The CRI was not identified; however, the CRI is referred to as "she" several times (T.20, 37). In addition, the police officer who was assigned to search the CRI was a woman, Jessica Ellis.

² "T2" refers to the second volume of the two-volume trial transcript. "T" refers to the first volume.

Slack was seen by an unnamed member of the police force going to the Rolling Oaks apartment complex, and seen going into a building (T2 26).³

After a short time, he was seen leaving (T2 31). As Slack was driving out of the parking lot, a red Pontiac Grand Prix was seen entering the parking lot and stopping next to Slack's car (T2 31). The car was registered to Maria Esquivel, appellant's girlfriend (T. 31). The Pontiac drove into the parking lot, and Slack turned around, drove back in, and parked again (T2 32). Rittmiller instructed another agent to go into the apartment building to try to see what Slack did inside the building (T2 32). According to Rittmiller, he was told by an agent named Grochow that Grochow had received a phone call from Ginger Peterson, a narcotics agent with the Martin County Sheriff's Office, who said that Slack was seen leaving apartment #5 (T2 32-33).

After he left the apartment building, Slack was seen driving to Stadium Road (T2 34). The officers who were following Slack lost sight of him (T. 34). After three or four minutes, Slack came back to his own apartment, and, according to the tape, "crack cocaine changed hands" (T2 35). The CRI and Kelly left, Kelly was dropped off, and the CRI returned to a predetermined location, where she handed over some crack and a small amount of money left over from the purchase (T. 37).

³ The original police reports indicated that the building was at 1731, not 1371 (T2 27).

Rittmiller said that they believed that appellant and Esquivel were the source of the crack Slack had provided for the CRI, and he hoped to make another sale directly from one of them (T2 38). However, he said that the CRI learned that appellant and Esquivel had recently moved, so he didn't think they could make a purchase without using Slack (T2 39).

Agent Ginger Peterson conducted surveillance on the next alleged sale of crack cocaine, on September 1, 2004. She met the CRI, searched her, and gave her \$450 in marked bills (T2 103).⁴ She followed the CRI to Slack's apartment complex in North Mankato; the CRI entered the building and came out a short time later with Slack (T2 104). The CRI drove Slack to the same Burger King they'd previously gone to, where Slack got into his own car (T2 104). Both cars went to a Spur station and parked (T2 104). Slack got out of his own car and got into the CRI's for a few minutes, then went back to his car (T2 105). Slack's car pulled up next to a red Pontiac Grand Prix being driven by a black male, later identified as appellant (T2 105, 120).

Peterson saw Slack's car drive down Washington Street but didn't see what happened next (T2 105). Rittmiller was stationed outside a house near the intersection of Rock and Broad Streets, the house where he believed appellant and Esquivel had moved to (T. 42). Slack parked his car and went into the front door (T. 42)

⁴ Both Peterson and Ellis claimed to have searched the CRI (T2 103, 118).

Peterson said she saw Slack again when he drove back to the Spur gas station; Slack went into the CRI's car, and left (T2 105). After Slack drove away, Peterson met with the CRI and searched her (T2 106). She recovered crack cocaine and no money (T2 106). Peterson said the agreement was supposed to have been to buy one or two 8-balls, but, when Peterson got the drugs, she could tell it was not that much (T2 111).

After the CRI had turned over the drugs, Rittmiller told Jessica Ellis, another agent for the Minnesota River Valley Drug Task Force, to go to [REDACTED], the address where Rittmiller had seen Slack enter (T2 121). Ellis walked into the building, which was a duplex, and asked a woman in the lower level apartment about the "for rent" sign outside the building (T2 122). The woman told her that a black family had just moved in upstairs (T2 122). Ellis went upstairs and asked appellant, who answered the door, about the apartment (T2 122). Appellant said that he had just moved in, so the apartment was no longer available; he said he thought the landlord had other buildings available in the neighborhood and gave Ellis the landlord's phone number (T2 122).

Later in the evening of September 1, Ellis met the CRI again, searched her, gave her \$250 in marked money and an electronic monitoring device (T2 123). The CRI made a phone call to Slack and arranged to meet at the Spur gas station (T. 124). Ellis followed, and observed the CRI meet with Slack in his car; Slack got out and drove away (T2 124). He returned to the station, got in the CRI's car

briefly, and then drove away (T2 124). Ellis searched the CRI, who turned over a small amount of crack cocaine (T2 124-25).

On September 3, 2004, the police executed a search warrant on the duplex where appellant and Esquivel lived (T2 51). Rittmiller knocked on the door of their apartment, pretending to be a neighbor (T2 51). Esquivel opened the door, and Rittmiller announced that they had a warrant (T2 51). Appellant and Esquivel were taken into custody (T2 51). They found no controlled substances in the apartment. They found a black digital scale in the kitchen cupboard with a small amount of white residue on it; the amount of residue was too small to be tested (T2 51, 86). They also located a box of plastic baggies (T2 52). Finally, they recovered \$389, including three \$100 bills used in the controlled buys with Slack and the CRI, in Esquivel's purse (T2 53).

Jerome Slack was subpoenaed to testify at trial and was granted use immunity (T2 133). Slack said that he has known appellant for a few years and has been to his house once or twice (T2 136). Slack said because of his heavy drug use, he remembered very little about the time period he was supposed to have been selling drugs to the CRI (T2 136, 142). However, he said that he had never used drugs with either appellant or Maria Esquivel and that he did not buy drugs from appellant (T2 137).

Rittmiller said that all three buys were supposed to be for at least one 8-ball (3.5 grams) of crack cocaine, and the amounts of money given to the CRI for the

purchases were consistent with the going price for that amount (T2-92). However, instead of getting 14 grams, which is what they paid for, they got 1.8 grams, .9 grams, and .5 grams—a total of 3.2 grams (T2 72-73).

ARGUMENT

I.

APPELLANT WAS DENIED THE IMPARTIAL JURY
GUARANTEED TO HIM BY THE FEDERAL AND STATE
CONSTITUTION WHEN THE TRIAL COURT ALLOWED THE
SEATING OF A JUROR WHO ADMITTED THAT HE WAS
PREJUDICED AGAINST AFRICAN-AMERICAN PEOPLE.

During voir dire, the trial court asked the potential jurors if any of them had a personal belief that would make it difficult for them to perform their duty as a juror (T. 12). Prospective juror ██████ said that he was “prejudice to blacks” (T. 12). Further questioning revealed that he had had experience with black men in the army and he did not think they could be trusted to “watch [his] back” (T. 20). He added that his daughter was engaged to a black man, and that he had never invited her fiancé to his house; in fact he had told her that he “did not want any black people ... on [his] place” (T. 20). Although ██████ said he did not want any “personal contact” with African-Americans, he said he could still be fair (T. 21-22). Appellant’s attorney did not move to strike the juror for cause; nor did he exercise a peremptory challenge. The trial court did not dismiss him. Consequently, this juror, who admitted that he did not like an entire racial group to which appellant belonged, was one of the jurors who sat in judgment against him. The court of appeals ruled in an unpublished opinion that it was not ineffective assistance of counsel to fail to challenge this juror. This court granted review on the question of whether it should “expressly adopt the implied bias doctrine.”

The Right to an Impartial Jury

The Sixth Amendment to the United States Constitution requires that, “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.” U.S. Const., Amend. VI. This right to an impartial jury is applicable to the states via the Fourteenth Amendment. See Irvin v. Dowd, 366 U.S. 717, 722 (1961). “In essence, the right to a jury trial guarantees the criminally accused a fair trial by a panel of impartial, ‘indifferent’ jurors.” Id. The bias or prejudice of even a single juror would violate [a defendant’s right to a fair trial.” Dyer v. Calderon, 151 F.3d 970, 973 (9th Cir. 1998). See also Minn. Const., art. 1, § 6.

Implied Bias

In order to protect the right to an impartial jury in situations where threats to that right operate below the surface of consciousness, courts have, in certain limited circumstances, required a presumption that certain jurors will be biased. The Second Circuit, speaking through Judge Calabresi, described the doctrine of implied bias as follows:

It is well-settled in our circuit that judges *must* presume bias in certain highly limited situations where a juror discloses a fact that creates such a high risk of partiality that the law requires the judge to excuse the juror for cause.

United States v. Torres, 128 F.3d 38, 41 (2d Cir. 1997) (emphasis in original).

This doctrine of implied bias dates back to the earliest days of American jurisprudence. Writing about Aaron Burr's treason trial, Chief Justice Marshall, writing as a circuit judge, said that a person influenced by personal prejudice "is *presumed* to have a bias on his mind which will prevent an impartial decision of the case, according to the testimony. 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.*" United States v. Burr, 25 F.Cas. 49, 50 (D.Va. 1807) (emphasis added). In fact, in Dyer v. Calderon, the Ninth Circuit noted that "[n]o opinion in the two centuries of the Republic ... has suggested that a criminal defendant might lawfully be convicted by a jury tainted by implied bias." 151 F.3d at 984. In jurisdictions that recognize the implied bias doctrine,⁵ a finding of either implied or actual bias may support a challenge for cause. United States v.

⁵ See, e.g., Amirault v. Fair, 968 F.2d 1404, 1405-06 (1st Cir. 1992); United States v. Torres, 128 F.3d 38, 47 (2d Cir. 1997) (implied bias doctrine applies in "exceptional situations in which objective circumstances cast concrete doubt on the impartiality of a juror"; United States v. Calabrese, 942 F.2d 218 (3d Cir. 1991) (recognizing that doctrine may be applicable in rare circumstances; Person v. Miller, 854 F.2d 656, 664 (4th Cir. 1988) (Doctrine is "limited in application to those extreme situations where the relationship between a prospective juror and some aspect of the litigation is such that it is highly unlikely that the average person could remain impartial in his deliberations under the circumstances"); Solis v. Cockrell, 342 F.3d 392, 396 (5th Cir. 2003) ("[O]ur circuit has recognized the implied bias doctrine ... with carefully watched limits"); Zerka v. Green, 49 F.3d 1181, 1186, n. 7 (6th Cir. 1995) (noting that United States Supreme Court had not foreclosed use of implied bias in extreme circumstances); Hunley v. Godinez, 975 F.2d 316 (7th Cir. 1992); Cannon v. Lockhart, 850 F.2d 437, 440-41 (8th Cir. 1988); United States v. Eubanks, 591 F.2d 513-517 (9th Cir. 1979); Burton v. Johnson, 948 F.2d 1150 (10th Cir. 1991). But see Johnson v. Luoma, 425 F.3d 318, 326-27 (6th Cir. 2005) (questioning whether implied bias doctrine still viable).

Gonzalez, 214 F.3d 1109, 1111 (9th Cir. 2000). Actual bias is “‘bias in fact’ – the existence of a state of mind that leads to an inference that the person will not act with entire impartiality.” Torres, 128 F.3d 38, 43 (2d Cir. 1997). Implied bias, on the other hand, is a “legal determination that ‘turns on an objective evaluation of the challenged juror’s experiences and their relation to the case being tried.’” United States v. Cerrato-Reyes, 176 F.3d 1253, 1260 (10th Cir. 1999) (quoting Gonzalez v. Thomas, 99 F.3d 978, 987 (10th Cir. 1999). In other words, it is “bias conclusively presumed as [a] matter of law.” United States v. Wood, 299 U.S. 123, 133 (1936).

Examples of situations in which the doctrine of implied bias has been used include the discovery that a juror is an employee of the prosecuting authority, a close relative of a participant in the trial, or a witness or participant in the alleged criminal transaction (Smith v. Phillips, 455 U.S. 209, 222 (1982) (O’Connor., J., concurring)); a murder-burglary conviction occurring after several jurors on the panel had been burglarized themselves (Hunley v. Godinez, 975 F.2d 316, 320 (7th Cir. 1992)); a guilty verdict against a defendant announced in the presence of a jury panel convened to try the same defendant on different charges (Leonard v. United States, 378 U.S. 544 (1964)); a verdict against the defendant by a panel in which some of the same jurors had already convicted a co-defendant of the same offense (Quintero v. Bell, 256 F.3d 409 (6th Cir. 2001)); a verdict tainted by racial or religious bigotry (United States v. Heller, 785 F.2d 1524, 1527 (11th Cir.

1986)); or a murder conviction involving battered-woman's syndrome where a juror had been involved in such an abusive situation (Burton v. Johnson, 948 F.2d 1150 (10th Cir. 1991)). See generally, Gershman, Bennett L., "Contaminating the Verdict: The Problem of Juror Misconduct," 50 S.D. L.Rev. 322 (2005).

The United States Supreme Court has neither explicitly approved nor explicitly rejected the doctrine of implied bias. Both concurring opinions in McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. 548 (1984) seem to indicate that this doctrine is appropriate in "exceptional circumstances." Id. at 558 (Blackmun, J., concurring); Id. at 559 (Brennan, J., concurring). Although the Court did not find implied bias in Smith v. Phillips, 455 U.S. 209 (1982), Justice O'Connor wrote a separate concurrence to emphasize that "[n]one of [the Court's] previous cases preclude the use of the conclusive presumption of implied bias in appropriate circumstances," 455 U.S. at 223 (O'Connor, J., concurring) (citing Remmer v. United States, 347 U.S. 227 (1954), Dennis v. United States, 339 U.S. 162 (1950), and Leonard v. United States, 378 U.S. 544 (1964)). The examples of cases where implied bias might be presumed, according to Justice O'Connor, include

a revelation that the juror is an actual employee of the prosecuting agency, that the juror is a close relative of one of the participants in the trial or the criminal transaction, or that the juror was a witness or somehow involved in the criminal transaction.

455 U.S. at 222 (O'Connor, J., concurring). What these categories have in common is that no amount of reassurance on the part of the juror that he or she could be fair would be sufficient to overcome a legal presumption of bias. Or, to use different language in asking the relevant question in cases of implied bias, "Did [the juror] have such fixed opinions that she could not judge impartially?" Burton v. Johnson, 948 F.2d 1150 (10th Cir. 1991) (Anderson., J., dissenting).

Rehabilitation

Either actual bias or implied bias may support a challenge for cause. See United States v. Gonzalez, 214 F.3d 1109, 1111 (9th Cir. 2000). A prospective juror must be removed for cause if his views would prevent or substantially impair the performance of his duties as a juror. See Wainwright v. Will, 469 U.S. 424 (1985). Although it is possible that some jurors may be rehabilitated after an otherwise legitimate challenge for cause, "an impliedly biased juror is not susceptible to rehabilitation through further questioning because implied bias, once established, cannot be ameliorated by the juror's assurances that she nonetheless can be fair." State v. LeFebre, 5 P.3d 295, 300 (Colo. 2000). In fact, some writers have noted that "rehabilitation" is an inappropriate term for the kind of questioning a trial judge should do after a juror has made statements showing possible bias: "Rehabilitation is an inaccurate term, suggesting a goal of getting a juror to change the biased attitude. The questioning should actually be for the purpose of

clarification or elaboration.” Daniel J. Sheehan, Jr. and Jill C. Adler, *Voir Dire: Knowledge is Power*, 61 Tex. B.J. 630, 633, n. 11 (1998). A trial judge should

err on the side of caution by dismissing, rather than trying to rehabilitate, biased jurors because, in reality, the judge is the only person in the courtroom whose primary concern, indeed primary duty, is to ensure the selection of a fair and impartial jury.

Walls v. Kim, 20 Ga.App. 259, 260, 549 S.E.2d 797, 799 (2001). A prospective juror who has made a clear statement during voir dire “reflecting or indicating the presence of a disqualifying prejudice or bias is disqualified as a matter of law and cannot be rehabilitated by subsequent questioning, later retractions, or promises to be fair.” O’Dell v. Miller, 211 W.Va. 285, 290, 565 S.E.2d 407, 412 (2002).

In appellant’s case, the court of appeals said that the trial court would not have been required to grant a challenge of cause had one been made because the juror had been rehabilitated. State v. Brown, 2006 WL 2052962 at *10. The court noted that, although Juror [REDACTED] had acknowledged his prejudices against blacks, he also said, “I know I can be fair to ... Mr. Brown, ... whether he was white or black it would make no difference to me on that.” Id.

But this is actually a perfect example of why rehabilitation is meaningless in a case of implied bias. “A racially ... biased individual harbors certain negative stereotypes which, despite his protestations to the contrary, may well prevent him or her from making decisions based solely on the facts and law that our jury system requires.” United States v. Heller, 785 F.2d 1524, 1527 (11th Cir. 1986).

Subtle racism on juries is a serious concern, with studies showing that when white mock jurors are presented with fact patterns in which the only variable was the defendant's race, individual jurors were more likely to believe that black defendants were guilty than they were with white defendants. Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 Mich. L.Rev. 1611, 1626-28 (1985).

Guarding against such subtle and unconscious racism is difficult enough. When the racism is overt, however, as it was in this case, the possibility that a committed racist's predilections and biases will not affect his decision-making is slim indeed. This juror could not be rehabilitated unless he was struck with a bolt of lightning on the road to Damascus.

Racial Bias

Jurors who manifest racial prejudice "have no place on the jury room." Tobias v. Smith, 468 F.Supp. 1287, 1290 (D.C.N.Y. 1979). This is the conclusion that many courts have reached when they have encountered jurors who have admitted to deeply felt racial bias but still have remained on a jury. In most cases, this question arises from a challenge for cause that has been denied and not necessarily during a discussion of the implied bias doctrine; the rationale for the decisions is the same, however.

For example, in a Michigan case, a prospective juror told the trial court, in response to a question about whether there was anything else the parties should know, that he "just ... [didn't] care for colored people." People v. Roupe, 389

N.W.2d 449, 452 (Mich. App. 1986). He then told the court that he “guessed” it would not be harder for him to believe a black witness than a white one, and he thought he could serve fairly and impartially. Id. at 473. When defense counsel questioned him, he again said he guessed he could be fair and impartial. When pressed by the attorney he said,

Well, I already said I didn’t care for them because I’ve had some dealings with them already and they’ve said some stuff to people and I don’t care for ‘em, so—But not all people is like that.

Id. Because the juror had said he could be fair, the trial court denied the defense challenge for cause.

The Michigan Court of Appeals ruled that the trial court’s refusal to remove the juror for cause was an abuse of discretion, and it remanded for a new trial. Although the juror said he could be fair, the court concluded that his “bias against black people was aptly demonstrated. Twice he stated he did not care for black people.” Id. at 474. The court said that this “plainly stated bias” was not overcome by his statements that he could be fair. Id.

Similarly, in State v. Witherspoon, 919 P.2d 99 (Wash. 1996), the Washington Court of Appeals ruled that a juror who admitted being “a little bit prejudiced” and who noted that it was usually “black people who are dealing drugs” should have been removed for cause. Id. at 637. The court found that the fact that the juror ultimately agreed that he would presume the defendant innocent did “not go far enough to mitigate a categorical statement by a juror that he is preju-

diced against African Americans because of what he has seen and read.” Id. at 638.

And the New York Court of Appeals reversed the intermediate court of appeals’ conclusion that, a prospective juror, although admitting a bias toward “minorities” and “affirmative action,” was not subject to a challenge for cause because he said he thought he could be fair. People v. Blyden, 55 N.Y.2d 73, 432 N.E.2d 758 (1982), reversing People v. Blyden, 79 A.D.2d 192, 436 N.Y.S.2d 492 (1981). The Court of Appeals said that the juror’s assurance that he “thought [he] could be fair” was plainly insufficient to overcome his stated bias toward an entire group. The court noted that

the mere words [that a juror will render an impartial verdict based on the evidence] have no talismanic power to convert a biased juror into an impartial one.... They must be taken in context.... Where there remains any doubt ..., when considered in the context of the juror’s over-all responses, the prospective juror should be discharged for cause. The costs to society and the criminal justice system of discharging the juror are comparatively slight, while the costs in fairness to the defendant and the general perception of fairness of not discharging such a juror are great.

432 N.E.2d at 760. See also People v. Rodriguez, 524 N.Y.S.2d 422, 424-25, 519 N.E.2d 333, 336 (1988) (Juror’s agreement that she would try to deliberate fairly insufficient to rehabilitate juror who had been touched by a Hispanic man on the subway and held that against all Hispanics; court concluded she was “grossly unqualified” to serve on a jury and should have been dismissed).

The jurors in these cases share several characteristics with the juror in appellant's case: they flatly admitted a bias against an entire class of people and they said that they thought they could put that bias aside. In all of these cases, the appellate courts rightly distrusted the challenged jurors' actual ability to be fair and impartial to one defendant while admitting a broad and deep-seated bias against the racial group to which he belonged. The courts all concluded that a challenge for cause should have been granted, and that the failure to do so required a new trial.

Given this court's often-expressed concern about the necessity for vigilance in the battle to keep the criminal justice system as free from the taint of racial bias as possible, it is inconceivable that this court would fail to agree that such bias has no place on the jury. In fact, although not expressed in the context of an implied bias issue, this court has already said so. See, e.g., State v. Reiners, 664 N.W.2d 826, 837 (Minn. 2003) (Evidence of bias or fairness has consistently been basis this court has used to determine whether a juror was stricken for race-neutral reasons); State v. Bowles, 530 N.W.2d 521, 536, n. 22 (Minn. 1995) ("...[W]here a verdict is animated by bias in the form of racial, ethnic, or other prejudice against a minority group, it may make sense from the standpoint of the policies underlying Rule 606(b) to permit jury testimony to expose that bias"). See also State v. Buggs, 581 N.W.2ds 329, 347, (Minn. 1998) (Page, J., dissenting) ("We may set

higher standards [than Batson v. Kentucky] to ensure that racial bias does not infect the selection of jurors”).

Implied Bias in Minnesota

This court has never explicitly ruled on whether Minnesota should adopt the doctrine of implied bias.⁶ The court of appeals has done so in one published case. In State v. Anderson, 603 N.W.2d 354 (Minn. App. 2000), the court was presented with the argument that the defendant, who was charged with a residential burglary, was denied an impartial jury because nine of the jurors on his panel had been victims of similar crimes. The court noted that although the doctrine of implied bias was “philosophically sound,” it believed it was constrained from adopting such a doctrine in the absence of either approval from this court or of specific embodiment in the Rules of Criminal Procedure. 603 N.W.2d at 357.

The court of appeals cited this court’s rulings that Minn. R. Crim. P. 26.02, subd. 5, “contains the exclusive grounds on which jurors may be challenged for bias.” Id. at 356, citing State v. Roan, 532 N.W.2d 563, 568 (Minn. 1995); State v. Stufflebean, 329 N.W.2d 314, 317 (Minn. 1983). Of the eleven grounds for

⁶ Some older cases discuss “implied bias.” See, e.g., State v. Hurst, 153 Minn. 525, 193 N.W.680 (1922) (“[T]he relation of master and servant between a juror and a party is good ground for challenge of the juror for implied bias.” Before the adoption of the Rules of Criminal Procedure, “implied bias” was a basis for a challenge for cause. Causes of challenge for implied bias listed eight of the objective bases incorporated into Minn. R. Crim. P. 26.02. See Minn. Stat. § 631.31, repealed by Laws 1979, c. 233, § 42.

challenge for cause, ten are capable of relatively objective proof.⁷ The remaining ground for a challenge for cause is somewhat more subjective: “The existence of a state of mind on the part of the juror, in reference to the case or to either party, which satisfies the court that the juror cannot try the case impartially and without prejudice to the substantial rights of the party challenging.” Minn. R. Crim. P.

26.02, subd. 5 (1) 1.

This court ruled that “crime victim status” was not one of the “exclusive grounds” provided by Minn. R. Crim. P. 26.02, subd. 5 for removing a juror for cause. Roan, 532 N.W.2d at 568. Likewise, in Stufflebean, this court ruled that

⁷ 2. A felony conviction unless the juror’s civil rights have been restored; 3. The lack of any of the qualifications prescribed by law to render a person a competent juror; 4. A physical or mental defect which renders the juror incapable of performing the duties of a juror; 5. The consanguinity or affinity, within the ninth degree, to the person alleged to be injured by the offense charged, or to the person on whose complaint the prosecution was instituted, or to the defendant, or to any of the attorneys in the case; 6. Standing in relation of guardian and ward, attorney and client, employer and employee, landlord and tenant, or being a member of the family of the defendant, or of the person alleged to be injured by the offense charged, or to the person on whose complaint the prosecution was instituted, or to the defendant, or to any of the attorneys in the case; 6. Standing in relation of guardian and ward, attorney and client, employer and employee, landlord and tenant, or being a member of the family of the defendant, or of the person alleged to be injured by the offense, or on whose complaint the prosecution was instituted; 7. Being a party adverse to the defendant in a civil action, or having complained against, or been accused by the defendant, in a criminal prosecution; 8. Having served on the grand jury which found the indictment, or an indictment on a related offense; 9. Having served on a trial jury which has tried another person for the same or a related offense to that charged in the indictment, complaint, tab charge or a related indictment, complaint or tab charge; 10. Having been a member of a jury formerly sworn to try the same indictment, complaint, tab charge or a related indictment, complaint or tab charge; 11. Having served as a juror in any case involving the defendant.

the fact that a juror was an employee of a corporation owned in part by the victim's father was not a basis for a challenge for cause and did not constitute "intrinsic bias so serious as to require dismissal *per se* under Rule 26.02" 329 N.W.2d at 317. But neither of these cases mean that this court could not adopt the doctrine of implied bias. Indeed, the Stufflebean court's remark that the charged bias did not constitute "intrinsic bias so serious as to require dismissal *per se*" indicates that there are some circumstances that would be so serious that they would require a trial court to dismiss a juror; this sounds very much like the test generally used in federal courts: See, e.g., Dyer v. Calderon, 151 F.3d 970, 979 (9th Cir. 1998) (Bias may be implied in "extreme situations" where the juror's answers "give rise to an inference of implied bias."). A juror who has already admitted to unashamed racial bias is such an extreme situation. "Justice must satisfy the appearance of justice." Pederson v. State, 649 N.W.2d 161, 164 (Minn. 2002) (quoting Offutt v. United States, 348 U.S. 11, 14 (1954)). The jury empanelled in this case does not satisfy the appearance of justice, particularly in light of this court's concern about the necessity to be vigilant in guarding against racial bias in the judicial system.

Structural Error

Because the error in this case concerns the very mechanism by which guilt and innocence are determined, it is a structural defect not subject to harmless error review. See, e.g., Dyer v. Calderon, 151 F.3d at 973, n. 2. Structural defects are those that "call into question the very accuracy and reliability of the trial process

and thus are not amenable to harmless error analysis, but require automatic reversal.” McGurk v. Stenberg, 163 F.3d 470, 474 (8th Cir. 1998) (citing Arizona v. Fulminante, 499 U.S. 279 (1991)).

Justice Scalia’s opinion for a unanimous Supreme Court in Sullivan v. Louisiana, 508 U.S. 275 (1993) is helpful in distinguishing a structural defect from a trial error. In that case, the defendant had been convicted by a jury that had been erroneously instructed as to the definition of reasonable doubt. In such a situation, the Court reasoned, harmless error analysis is unworkable. To perform harmless error analysis, a court must consider “whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error.” 508 U.S. at 279, emphasis in original.

Once the jury mechanism is tainted, however—whether by a faulty instruction on reasonable doubt or an inherently biased jury composition—one cannot conclude that the verdict was unattributable to the error. “The most an appellate court can conclude is that a jury *would surely have found* [a defendant] guilty beyond a reasonable doubt—not that the jury’s actual finding of guilty beyond a reasonable doubt *would surely not have been different* absent the constitutional error. That is not enough.” 508 U.S. at 280, emphasis in original. Or, to put it another way,

The right to trial by jury reflects ... a profound judgment about the way in which law should be enforced and justice administered....
The deprivation of that right, with consequences that are necessarily

unquantifiable and indeterminate, unquestionably qualifies as “structural error.”

Id. at 281 (quotation and citation omitted).

In Sullivan, the constitutionally prescribed mechanism for determining guilt of innocent was tainted by a faulty instruction. Here it was tainted because of a juror’s obvious and admitted racial prejudice. Because both errors go to the heart of the proper functioning of the jury, neither is subject to harmless error analysis.

The Minnesota Supreme Court has noted that “when it has been shown that those charged with bringing a defendant to judgment lack objectivity, ‘a reviewing court can neither indulge a presumption of regularity nor evaluate the resulting harm.’” State v. Logan, 535 N.W.2d 320, 324 (Minn. 1995) (quoting Vasquez v. Hillery, 474 U.S. 254, 263-64 (1968)). Therefore, the court ruled that

If the members of a petit jury are selected on improper criteria or if a biased juror is improperly allowed to sit in judgment of a criminal defendant and the issue is properly raised and preserved, the error has undermined the basic “structural integrity of the criminal tribunal itself, and is not amenable to harmless-error review

Id. at 324.

This error was obviously not “properly raised and preserved.” Defense counsel failed to recognize the problem, and the trial court failed to exercise its authority to insure an impartial verdict. But a structural defect remains a defect whether or not it was objected to. See, e.g., United States v. Angel, 355 F.3d 462, 470-71 (6th Cir. 2004) (although plain error standard of review generally applies to

claims raised for first time on appeal, any racial discrimination in jury selection constitutes structural error requiring automatic reversal). Reversal is therefore the only remedy.

Waiver or Forfeiture

The state may argue that, by accepting the juror, appellant has waived or forfeited any error. Such an argument would misapprehend both the nature of the error and the nature of waiver. First, it is by no means certain that the right to an impartial fact-finder is waiveable. See United States v. Nelson, 277 F.3d 164 (2d Cir. 2002), in which listed as non-waiveable “the right to be tried by an impartial tribunal, the right to be tried by a court free from mob domination and the right not to be convicted solely upon the basis of a coerced confession.” Id. at 205 (citing United States v. Fay, 300 F.2d 345, 350-51 (2d Cir. 1962)). At the very least, if such a right could be waived, it would require a knowing and intelligent waiver. See Brookhart v. Janis, 384 U.S. 1, 4 (1966) (noting presumption against waiver of constitutional rights)). No such waiver occurred here.

Conclusion

Appellant, an African-American male, was tried by a jury that included a man who had an announced prejudice against African Americans. Such a deeply ingrained and irrational bias cannot be overcome by the juror’s assurance that it would not interfere with his judgment on this particular case. Because this juror’s sitting on his case denied appellant his constitutional right to an unbiased jury, and

because the lack of an unbiased jury is a structural error, appellant must be granted a new trial.

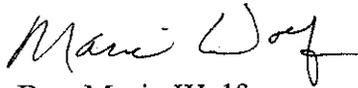
CONCLUSION

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Dated: November 16, 2006

Respectfully submitted,

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).