No. 22-418

In the Supreme Court of the United States

GENE DEVERAUX, PETITIONER
v.
STATE OF MONTANA

ON PETITION FOR A WRIT OF CERTIORARI TO THE MONTANA SUPREME COURT

BRIEF OF AMICUS CURIAE MONTANA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, IN SUPPORT OF PETITIONER

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INTRODUCTION

Pursuant to Sup. Ct. R. 37.1, the Montana Association of Criminal Defense Lawyers (herein "MTACDL") respectfully files this Amicus Curiae Brief to bring to the attention of the Court relevant matter not already brought to its attention by the parties which may be of considerable help to the Court in deciding whether to grant a Writ of Certiorari.[1],[2]

Specifically, the Montana Supreme Court's underlying decision, which allows a trial court to unduly interfere with a defendant's exercise of peremptory strikes, might serve to place defense counsel in an untenable ethical position or create a conflict of interest with the defendant, or both. The resulting effect on jury trials in Montana will make any possible future review by this Court of the issue presented by Petitioner Deveraux extremely unlikely.

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[1]In compliance with Sup. Ct. R. 37.2(a) MTACDL gave notice of its intention to file an *amicus* brief at least 10 days prior to the deadline to file this brief. MTACDL has filed this brief after obtaining the written consent of all parties. Pursuant to Rule 37.6. Counsel affirmatively states that: (1) Counsel for a party did not author this brief (in whole or in part) and (2) no party made a monetary contribution intended to fund the preparation or submission of this brief. Nor has any person, other than the Amicus Curiae, its members or counsel made such a monetary contribution.

[2]In compliance with Sup. Ct. R. 5 and Rule 34.1(f), Michael J. Sherwood, the undersigned attorney appearing on behalf of MTACDL, applied for admission and was admitted to practice before the United States Supreme Court on September 3, 2004.

I. INTERESTS OF MTACDL, MTACDL'S MEMBERS AND THE ACCUSED CITIZENS MTACDL'S MEMBERS REPRESENT.

A. MTACDL

MTACDL is a non-profit association organized in 1997 under the laws of the State of Montana. MTACDL is comprised of approximately one hundred fifty-three members, including nearly all criminal defense lawyers in private practice, a substantial number of attorneys employed by the Montana Office of State Public Defender, Federal Defenders and some non-lawyer Tribal Advocates. MTACDL is an affiliate of the National Association of Criminal Defense Lawyers (herein "NACDL"), a nationwide organization of more than ten thousand criminal defense attorneys.

Recognizing that a strong criminal defense bar is an integral part of our criminal justice system, MTACDL'S activities include filing Amicus Curiae Briefs before appellate courts representing the interests of MTACDL, its members and the interests of its members' clients.

B. MTACDL members

In compliance with the Preamble to the Montana Rules of Professional Conduct (herein "M.R. Pro. C.") and Tribal Court Rules, MTACDL members have a professional and ethical obligation to always pursue the truth and to diligently represent their clients. In pertinent part, the Rules require

MTACDL's members not only to act diligently, but also to deal candidly with any tribunal, to abide by a client's decisions concerning the objectives of representation, to consult with the client as to the means by which they are to be pursued and to refrain from revealing attorney-client communications without the client's informed consent. M.R.Pro.C. 3.3, 1.1, 1.2, 1.4, and 1.6, respectively.

C. MTACDL members' clients who elect to proceed to jury trial in a Montana District Court

A citizen charged with a felony in a Montana District Court is entitled to a jury trial. U.S. Const. amend. VI and XIV*, Duncan v. State of Louisiana,* 391 U.S. 145, 161-62 (1968). When an accused elects to proceed to trial, that person is entitled to the Federal Due Process protection that she or he be tried by a fair and impartial jury. *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1075 (1991). The State of Montana affords the accused those same protections. Mont. Const. art. II, §§17 and 24.

Because representation by counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment the accused also enjoys the right to be effectively represented by a lawyer. *Strickland v. Washington,* 466. U.S. 668, 669 (1984); *Gideon v. Wainright*, 372 U.S. 335, 344-45 (1963). In conjunction with this right, an accused citizen has the right to assist his counsel at trial. *White v. Estelle*, 459 U.S. 1118, 1121 (1983).

In addition to the foregoing Constitutional protections, the State of Montana also affords a defendant in a felony trial the statutory right to exercise six peremptory challenges to prospective members of the jury (eight if charged with a capital offense). §46-16-116, MCA.

II. SUMMARY OF ARGUMENT

MTACDL respectfully asks this Court to grant Deveraux's Petition for Writ of Certiorari for three reasons:

> First, the *Deveraux* decision leaves defense counsel in the untenable position of attempting to comply with an ethical duty to diligently represent her or his client and still comply with an ethical duty of candor toward a tribunal;
>
> Second, application of the *Deveraux* holding may create a conflict of interest between trial counsel and her or his client; and
>
> Third, if this Court does not grant Deveraux's Petition for Writ of Certiorari, it may be years, if ever, before this issue will be raised again.

III. ARGUMENT

A. The *Deveraux* decision leaves defense counsel in the untenable position of attempting to comply with an ethical duty to diligently represent her or his client and still comply with an ethical

duty of candor toward a tribunal

In *United States v. Akbar*, the United States Court of Appeals for the Armed Forces cites multiple cases and authoritative treatises and articles supporting the premise that a case can often be won or lost in voir dire, noting that "[e]xperienced trial lawyers agree that the jury selection process is the single most important aspect of the trial proceedings." *United States v. Akbar*, 74 M.J. 364, 423 at n. 12 (C.A.A.F. 2015)(dissent, quoting Margaret Covington, Jury Selection: Innovative Approaches to Both Civil and Criminal Litigation, 16 St. Mary's L.J. 575, 575–76 (1984)).

Although there is nothing in the Constitution of the United States which requires the Congress (or the States) to grant peremptory challenges, *Stilson v. United States*, 250 U.S. 583, 586 (1919), nonetheless this Court has recognized that the challenge is "one of the most important of the rights secured to the accused," *Pointer v. United* States, 151 U.S. 396, 408 (1894). The right to peremptorily strike a juror is, "as Blackstone says, an arbitrary and capricious right, and it must be exercised with full freedom, or it fails of its full purpose." *Lewis v. United States*, 146 U.S. 370, 378 (1892). Montana treats the denial of a peremptory challenge, when used to cure a trial court's erroneous denial of a for-cause challenge, as structural error requiring reversal. *Montana v. Good*, 43 P.3d 948, 960 (Mont. 2002).

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. 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." *Swain v. State of Alabama*, 380 U.S. 202, 219 (1965)(overruled on other grounds by *Batson v. Kentucky*, 476 U.S. 79, 98 (1986), quoting *In re Murchison*, 349 U.S. 133, 136 (1955)). Indeed the very availability of peremptory challenges allows counsel to ascertain the possibility of bias through probing questions and facilitates the judicious exercise of challenges for cause by removing the fear of incurring a juror's hostility through examination and challenge for cause. The essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court's control. *Lewis*, 146 U.S. at 378.

While challenges for cause permit rejection of jurors on a narrowly specified, provable and legally cognizable basis of partiality, the peremptory permits rejection for a real or imagined partiality that is less easily designated or demonstrable. *Hayes v. State of Missouri*, 120 U.S. 68, 70 (1887).

Counsel and a criminally accused might have myriad reasons to peremptorily strike a prospective juror. As noted in *Swain*, those include sudden impressions and unaccountable prejudices counsel or the defendant are apt to conceive upon the bare looks and gestures of an individual, an individual's

occupation, habits and associations, or even the feeling that counsel's bare questioning of a prospective juror's indifference might provoke a resentment. *Swain,* 380 U.S. at 220-223. Other reasons include the individual's socioeconomic status and family, social, political and personal associations. Gobert, J.*, In Search of the Impartial Jury* , Journal of Criminal Law and Criminology, Volume 79, Issue 2, (Summer 1988) at pp. 321-23.

Contrary to the mandate that a peremptory challenge should be one exercised without a reason stated, without inquiry and without being subject to the court's control, in *Montana v. Deveraux*, 512 P.3d 1198 (Mont. 2022), the Court required justification and then found it wanting:

> Deveraux justifies not exercising a peremptory to remove R.G. by explaining he "was compelled to use peremptory challenges on other less desirable individuals." He provides reasoning for only four of the six individuals he removed, and, therefore, there is no demonstration that Deveraux could not have elected to remove R.G., as was defense counsel's predicament in *Anderson*.

Deveraux, 512 P.3d at 1206-07 (Mont. 2022). *See*, App. 16a.

In violation of the axiom that a peremptory strike "must be exercised with full freedom or it fails

its purpose," the Court opined that Deveraux had not satisfied his obligation to explain why his peremptory strikes were better utilized upon other prospective jurors. *Id.* By requiring justification, the Court stripped the fundamentally "arbitrary and capricious" nature of Deveraux's peremptory strikes, thereby causing them to fail in purpose. *Lewis,* 146 U.S. at 378.

The *Deveraux* holding poses a real risk that defense trial counsel will find themselves in an untenable position. If in the future trial courts are allowed to inquire into defense counsel's reason for peremptorily striking a juror, defense counsel could be torn between the ethical obligation to be candid with a tribunal, M.R.Pro.C. 3.3, and counsel's ethical obligation to not disclose confidential client communications, M.R.Pro.C. 1.4. If the peremptory strike was exercised after confidential communications with the accused which the accused does not wish disclosed, must Defense Counsel then choose between honoring her or his ethical duty of confidentiality to his client and counsel's duty to effectively represent the client by responding to the Court's inquiry?

Defense counsel would need to decide whether to refuse to answer the question and thereby waive any argument that the Court committed structural error by improperly seating a biased juror or to preserve that argument by violating his client's confidence. The same would be true when defense counsel has peremptorily struck a prospective juror

based upon confidential communications with another client not associated with the trial.

Application of *Deveraux* will also serve to allow trial courts to improperly interfere with the considered course of action taken by competent trial counsel. What if trial counsel responds to the Court's inquiry as to the reason for striking a given prospective juror, by saying, that counsel struck the prospective juror based upon the individual's bare looks and gestures, the individual's occupation, or simply upon counsel's feeling that Counsel's mere questioning of the prospective juror's indifference might provoke a resentment?

The *Deveraux* decision suggests that a trial Court would then be allowed to impose its own determination as to whether the stated reason for peremptorily striking each juror outweighed the value of peremptorily striking a different juror unsuccessfully challenged for cause. Such a qualitative assessment of a defendant's peremptory challenge would fly in the face of this Court's holdings that "[t]he essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court's control." *Lewis*, 146 U.S. at 378.

B. The *Deveraux* decision may create a conflict of interest between trial counsel and her or his client.

Additionally, failure to reverse the *Deveraux* decision might create an inherent conflict of interest

for defense counsel. A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction requires that the defendant show, first, that counsel's performance was deficient and, second, that the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial. *Strickland,* 466 U.S. at 669.

In pertinent part, Jury Principle 11(c) 3., ABA PRINCIPLES FOR JURIES & JURY TRIALS provides:

> In ruling on a challenge for cause, the court should evaluate the juror's demeanor and substantive responses to questions. If the court determines that there is a reasonable doubt that the juror can be fair and impartial, then the court should excuse him or her from the trial.

If, as was the case in *Deveraux,* a trial Court should fail to comply with the foregoing standard then what course of action should a Defense Attorney take if, in defense counsel's considered opinion (as was clearly the trial counsel's opinion in *Deveraux)* peremptory strikes would be better exercised on other jurors? Does defense counsel follow his ethically mandated duty to diligently represent his client by striking those jurors? If so, the continued application of the *Deveraux* holding exposes counsel to a potential ineffective assistance of counsel claim for leaving a person whom counsel had asserted could not be fair and impartial on the jury. If *Deveraux* remains the

law in Montana, counsel will have done so knowing that the client would not be entitled to any appellate relief.

C. If the Court does not grant Mr. Deveraux's Petition for Writ of Certiorari, it may be years, if ever, before this issue will be raised again.

If the *Deveraux* decision is not reversed, given any reasonable defense attorney's wish to avoid having counsel's representation labelled "ineffective" as well as to preserve the client's appeal regarding the biased juror it is likely that defense counsel will remedy the trial Court's error by peremptorily striking a clearly biased juror whom counsel had unsuccessfully challenged.

Thus going forward, *Deveraux*'s Sixth Amendment error of allowing a biased juror to be empaneled will in the future simply create the same factual scenario present before this Court in *Ross* v. *Oklahoma*, 487 U.S. 81 (1988). The result will be that *Deveraux* will self-insure against future review by this Court: competent counsel's likely course of action will only serve to evade further review of the Sixth Amendment error, an error that allowed a biased juror to sit in judgment of Gene Deveraux.

IV. CONCLUSION

For the foregoing reasons, MTACDL files this brief in support of Deveraux's Petition for Writ of Certiorari. MTACDL respectfully asks the Court to grant the Petition.

Respectfully submitted,

/s/ Michael J. Sherwood

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