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

REPLY TO BRIEF IN OPPOSITION

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REPLY BRIEF OF THE PETITIONER

The question presented by this case is whether the seating of a biased juror, over a criminal defendant's challenge for cause, is structural error. The State has no answer to that question. Indeed, it acknowledges "[t]he lack of a square holding that the deprivation of an impartial jury is a structural error" (BIO 2); the "'confusion' among federal jurists" (*id.* at 23); and the "fissure" among state courts on the issue (*id.* at 20). But rather than recognizing that the Court should issue such a "square holding," clear up the "confusion," and close the "fissure," the State says the Court should just "pull[] back from [Deveraux's] frame" and look at matters from the State's point of view. *Id.* at 2. From where the State sits, things are "not so dire" and there is no real concern when its courts, "at times, fail to weed out biased jurors." *Id.* at 3, 23. But the Court should not look away from the undeniable split and persistent confusion over the structural nature of the right to an impartial jury. And it should not shrug at the failure to vindicate—even "at times"—a "vital principle, underlying the whole administration of criminal justice." *Ex parte Milligan*, 71 U.S. 2, 123 (1866).

The State correctly notes that peremptory challenges are bestowed by sovereign sufferance. States can provide as many or as few as they see fit, and—subject to the limits of due process—can impose procedural rules governing those peremptory challenges.

But this case is not about the deprivation of peremptory challenges. It is about the denial of a *for-cause* challenge, which led to the seating of a biased juror in violation of Deveraux's right to an impartial jury. *That* right "is not held by sufferance." *Ex parte*

Milligan, 71 U.S. at 123. "[T]hose who wrote our Constitution considered the right to trial by jury 'the heart and lungs, the mainspring and the center wheel' of our liberties, without which 'the body must die; the watch must run down; the government must become arbitrary.'" *United States* v. *Haymond*, 139 S. Ct. 2369, 2375 (2019) (plurality) (quoting Letter from Clerendon to W. Pym (Jan. 27, 1766), in 1 Papers of John Adams 169 (R. Taylor ed. 1977)). Thus, "[a] criminal defendant in a state court is *guaranteed* an 'impartial jury' by the Sixth Amendment" and by "[p]rinciples of due process." *Ristaino* v. *Ross*, 424 U.S. 589, 595 n.6 (1976) (emphasis added). While states can largely do what they want with peremptory challenges, they cannot "fritter[] away" the guarantee of an impartial jury. *Ex parte Milligan*, 71 U.S. at 123.

The State advocates "states' right to require defendants to use peremptory challenges to preserve an impartial-jury challenge." BIO 10. But Deveraux's case is not about preservation rules: Montana has no such requirement and the court below did not hold that Deveraux had failed "to preserve an impartial-jury challenge." It considered Deveraux's Sixth Amendment claim on the merits and held that even when a biased juror sits, that is not structural error. In its view, only the erroneous deprivation of a peremptory challenge, and not the seating of a biased juror, constitutes structural error. Pet.App.14a-16a.

Even beyond that, the State's position is oxymoronic. A defendant *cannot* "use [a] peremptory challenge[] to preserve" a Sixth Amendment claim. If a defendant peremptorily strikes a biased juror, he has not preserved his Sixth Amendment claim. He has mooted it because the biased juror did not sit. See

Ross v. *Oklahoma*, 487 U.S. 81, 88 (1988); see also BIO 17 (arguing that a peremptory challenge against a biased juror would "cure the trial court's error"). To be sure, the defendant may have preserved some state-law claim that he was erroneously deprived of a peremptory challenge. But that is not the same thing as preserving a *Sixth Amendment* impartial-jury claim.

The State's heads-I-win-tails-you-lose approach would make an impartial-jury claim all but unreviewable. Per the State, if a defendant uses a peremptory challenge, there is no claim because the juror was not seated; if he does not use a peremptory challenge, there is no claim because the juror was not stricken. Indeed, that is so even where, as here, the defendant exhausts his peremptory challenges removing other jurors who also seemed biased, but against whom it was too difficult to articulate a for-cause challenge. The State's approach is not what the Sixth Amendment requires or what the court below actually held.

The right to an impartial jury "need[s], and should receive, the watchful care of those intrusted with the guardianship of the Constitution and laws. In no other way can we transmit to posterity unimpaired the blessings of liberty, consecrated by the sacrifices of the Revolution." *Ex parte Milligan*, 71 U.S. at 123-124. A square holding that it is a "structural right," such that the seating of a biased juror is structural error (*Weaver* v. *Massachusetts*, 137 S. Ct. 1899, 1910 (2017)), would do great good—not only for citizens but also for states, which could then craft their procedural rules for peremptory challenges around that "square holding" (BIO 2).

Certiorari should be granted.

I. The Question Presented Is Important and Unanswered.

The right to an unbiased jury is among the most vital in the Constitution. Whether it is structural matters enormously to criminal prosecutions. The seemingly obvious thrust of hundreds of years of Sixth Amendment precedent is that the right *is* structural. See, e.g., *United States* v. *Martinez-Salazar*, 528 U.S. 304, 316 (2000); *Ross*, 487 U.S. at 85; *Skilling* v. *United States*, 561 U.S. 358, 395-396 (2010); see also Pet. 12-13, 29-32. Nevertheless, in just the past two years, Montana and Texas have squarely held that denial of the impartial-jury right is not structural error. See Pet. 15-17 (discussing *Johnson* v. *State*, 43 S.W.3d 1 (Tex. Crim. App. 2001) (en banc)). And the Fifth Circuit has implied as much. See Pet. 21-22 (discussing, e.g., *Thomas* v. *Lumpkin*, 995 F.3d 432 (5th Cir. 2021)). This conflicts with states like Colorado and Wisconsin, which have squarely held that "if a trial court error results in the seating of a juror who is actually biased against the defendant, the defendant's right to an impartial jury is violated, the error is structural, and reversal is required." *People* v. *Abu-Nantambu-El*, 454 P.3d 1044, 1046, 1050 (Colo. 2019); accord *State* v. *Gesch*, 482 N.W.2d 99, 104 (Wis. 1992). Those decisions are also in tension with other states and Circuits holding that seating a biased juror on a jury is, by itself, structural error requiring reversal. Pet. 19, 22-23 (citing authorities from Minnesota, Massachusetts, Maine, Utah, and District of Columbia, as well as the Second, Third, Sixth, and Eighth Circuits).

The State does not dispute any of this. None of its arguments contest, or respond to, the fundamental

fact that lower courts need guidance on whether the seating of a biased juror is structural error. The confusion exists because, as the State acknowledges, "this Court has never held that seating a biased juror over the erroneous denial of a for-cause challenge is structural error." BIO 19. Review is warranted to issue such a holding.

II. The Court Below Did Not Hold that Deveraux's Sixth Amendment Claim Was Forfeited.

A reader of the State's brief would come away with the misimpression that the court below deemed Deveraux's Sixth Amendment claim forfeited under some Montana procedural rule. Per the State, the petition should be denied because this Court blessed such forfeiture rules in *Ross*. BIO 15. Both premises are wrong.

1. The court below did not hold that Deveraux failed to preserve his Sixth Amendment claim and did not apply some "*Ross*-like forfeiture rule." Cf. BIO 20. The court *did* deem a *different* (jury-instruction) challenge forfeited under state-law preservation rules and applied plain-error review to that claim. Pet.App.22a. But it did *not* do so for Deveraux's Sixth Amendment claim. Rather, it reached the merits, affirming on the view that, even assuming a biased juror had been seated, Deveraux "ha[d] not satisfied the structural error standard." Pet.App.14a-16a.

2. The *Ross* Court nowhere blessed the notion that a verdict issued by a biased jury can survive Sixth Amendment scrutiny because the defendant did not use a peremptory challenge to remove the biased juror. To the contrary, in describing *Ross*, the Court noted

that "the seating of any juror who should have been dismissed for cause *** would require reversal." *Martinez-Salazar*, 528 U.S. at 316.

In *Ross*, the defendant had used one of his limited peremptory challenges to remove a juror after his for-cause challenge was denied—as he was required to do under Oklahoma law. He argued that the erroneous denial of his for-cause challenge caused him to waste a peremptory challenge, violating his Sixth Amendment and due process rights. The Court disagreed. Because the biased juror had been removed by peremptory challenge, there was no Sixth Amendment violation. *Ross*, 487 U.S. at 88. Because there was no constitutional right to peremptory challenges to begin with, and because the Oklahoma rule requiring the defendant to use his peremptory challenges was not "arbitrary or irrational," there was also no due process violation. *Id.* at 89-90. The Court did not hold—and had no occasion *to* hold—that it would be rational for Oklahoma to let stand a verdict delivered by a biased jury empaneled over a defendant's valid for-cause challenge, let alone that such a verdict would comply with the Sixth Amendment.

3. Nor do the State's remaining cases support its argument that "[n]othing in this Court's Sixth Amendment jurisprudence forbids states from requiring defendants to preserve a claim *** by using an available peremptory challenge to remove that juror." BIO 15. Two cases do not address Sixth Amendment claims—or their preservation. *Martinez-Salazar*, 528 U.S. at 307 (no Fifth Amendment due process violation where defendant "elects to cure such an error by exercising a peremptory challenge"); *Rivera* v. *Illinois*,

556 U.S. 148, 151-152 (2009) (no Fourteenth Amendment due process violation from the "erroneous denial of a defendant's peremptory challenge"). And *Mu'Min* v. *Virginia*, 500 U.S. 415, 417 (1991) addressed whether the Sixth and Fourteenth Amendments require certain questions in state court voir dire.

4. What the State advocates is not an ordinary "preservation" or "forfeiture" rule. Preservation requires a contemporaneous objection; forfeiture results from failing to make one. "[I]f the defendant has an objection, there is an obligation to call the matter to the court's attention so *the trial judge will have an opportunity to remedy the situation*." *Estelle* v. *Williams*, 425 U.S. 501, 508 n.3 (1976) (emphasis added). But when the trial court fails to remedy the situation despite an objection, the objector need not take further remedial steps to preserve his claim. See, e.g., *St. Paul Fire & Marine Ins. Co.* v. *Bachmann*, 285 U.S. 112, 118 (1932); *Boyd* v. *United States*, 142 U.S. 450, 457 (1892).

III. Juror R.G. Was Biased and the State's Dispute Over That Is Irrelevant to the Question Presented.

The court below held that even when a biased juror sat over Deveraux's for-cause challenge, the Sixth Amendment error was not structural. The validity of that legal holding is the question presented. The State now argues that the juror (R.G.) was not actually biased. The State is wrong. But in any event, its factual contentions belong before the Montana Supreme Court after this Court confirms that the denial of the Sixth Amendment impartial-jury right is structural error. They provide no reason to deny review.

1. Where state courts "proceed[] on an incorrect perception of federal law," this Court routinely corrects the "misapprehensions about the scope of federal law" and then "vacate[s] the judgment of the state court and remand[s] the case" for the state court to apply the correct federal law. See *Three Affiliated Tribes* v. *Wold Eng'g, P.C.*, 467 U.S. 138, 152 (1984); see also *California* v. *Ramos*, 463 U.S. 992, 997-998 n.7 (1983). In *Ramos*—which the State cites approvingly—the lower court failed to reach multiple state-law questions and "expressly declined to decide" one of them. 463 U.S. at 997 n.7. But this Court still reached the federal constitutional questions. *Ibid.* That it was "*possible*" the correct interpretation of federal law might not be dispositive on remand did not mean "that this Court should not reach the constitutional issues" squarely presented. *Ibid.*

So too here. The decision below turned on a legal question about the Sixth Amendment: whether the right to an impartial juror is structural. Any dispute over whether R.G. was biased is beside the point and a matter for remand.

2. But R.G. *was* biased—as was clear under two decisions cited by the court below. That is presumably why the court below did not avoid the constitutional question by resolving the case on its facts.

In *State* v. *Good*, 43 P.3d 948, 958 (Mont. 2002), the trial court refused to strike two jurors for cause. The jurors expressed "reservations about their ability to give the benefit of any doubt to the Defendant in light of their predisposition to favor the testimony of" the complaining witness—a child who had been sexually assaulted. *Ibid.* One confessed that the sexual assault of a minor "will be a very emotional issue for

me." *Ibid.* Explained the other: "[A]s a school teacher *** I guess in my mind I just don't think a girl would make this stuff up." *Id.* at 956. The court recognized that predisposition toward the victim is a "form of bias." *Id.* at 958. These statements "demonstrated a serious question about [the jurors'] ability to act impartially"—the trial court "should have excused the[] jurors for cause." *Ibid.*

R.G. displayed both disqualifying dispositions. He volunteered that the allegations were "an emotional thing" for him because his girlfriend had been repeatedly raped by her ex-husband. Pet.App.57a-58a. He acknowledged that he "may have a problem" in "overcome[ing]" his emotions to "extend to [Deveraux] the presumption of innocence" "out of sympathy" for the victim. Pet.App.57a. "I think to be fair to [Deveraux], I should not be chosen." *Ibid.* Although the State attempted to rehabilitate R.G. (Pet.App.50a-60a), "the use of leading or loaded questions" cannot cure bias. *State* v. *Johnson*, 437 P.3d 147, 175-176 (Mont. 2019); see also Pet. 25.

Tellingly, the court below (1) cited both *Good* and *Johnson*, (2) decided the constitutional question, and (3) did *not* rule that R.G. was unbiased. Pet.App.12a, 14a-15a. The State's factual arguments about R.G. supply no basis for denying certiorari or avoiding the Sixth Amendment issue that the Montana Supreme Court squarely resolved.

IV. The State Neither Denies nor Justifies the Split.

1. The State does not deny the split among state courts. Instead, it calls this the "outworking of our

federalism:" "some states *** provide greater protection than the federal constitution demands, while others provide only what it requires." BIO 20. But this begs the question presented: does the Constitution require reversal when a biased juror is seated over a valid for-cause challenge? That is for this Court to decide—not for the State to assume.

2. Nor does the State dispute that "confusion over whether seating biased jurors is structural error plagues federal jurists." BIO 20. Instead, it lays that confusion at *Weaver*'s "doorstep." See *id.* at 20-23. Yes: *Weaver* caused confusion by not including the seating of a biased juror in its catalogue of structural errors. 137 S. Ct. at 1908. Jurists noticed, and some concluded this meant that juror bias is *not* a structural error. See *Austin* v. *Davis*, 876 F.3d 757, 804-806 (5th Cir. 2017) (Owen, J., concurring). But whatever the source of the confusion, it is real. And it affects not merely habeas claims but also—as this case demonstrates—direct appeals. Certiorari exists to resolve such confusion.

3. The lack of consensus on the State's concern with "gamesmanship" (BIO 18) further underscores the need for review. In his *Martinez-Salazar* concurrence, Justice Scalia suggested that "normal principles of waiver *** disable a defendant from objecting on appeal to the seating of a juror he was entirely able to prevent," 528 U.S. at 318-319, but leading federal judges disagree on this point. Judge Posner endorsed Justice Scalia's position in *Thompson* v. *Altheimer & Gray*, 248 F.3d 621, 623 (7th Cir. 2001), but Judge Wood rejected it: "It is important to remember that no problem arises until the party has challenged a prospective juror for cause and the court has rejected

the challenge. The district court thus cannot be sandbagged into permitting a biased juror to sit." *Id.* at 627 (Wood, J. concurring); see also *United States* v. *Nelson*, 277 F.3d 164, 206 (2d Cir. 2002).

Indeed, Judge Wood understates the point. Because the denial of a for-cause challenge is reviewed only for an abuse of discretion, a defendant could "sandbag" only by gambling that a juror was so obviously biased that a deferential appellate court would nevertheless reverse. And in that event, the prosecution would have successfully opposed a for-cause challenge to the obviously biased juror. That does raise serious concerns—but with the prosecution's willful violation of the Sixth Amendment, not the defendant's "sandbagging." Indeed, the State has pointed to no such gamesmanship in the federal system in the decades since *Martinez-Salazar*, or the centuries before it.

4. Regardless, all this is downstream of the question presented here: is it structural error to seat a biased juror over a defendant's valid for-cause challenge? Once that question is answered, courts can explore and harmonize procedural questions involving preservation, forfeiture, waiver, and invited error. But the existence of downstream disagreement is not a reason to keep confusion at the headwaters.

The right to an unbiased jury is "fundamental to our system of justice." *Duncan* v. *Louisiana*, 391 U.S. 145, 153-154 (1968). Its pedigree was centuries old *before* our Constitution, and its denial helped inspire the Revolution. *Id.* at 151-154. While there may be areas of law in which uncertainty can be allowed to persist, this surely is not one of them.

CONCLUSION

Certiorari should be granted.

Respectfully submitted,

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