SUPREME COURT NO. 101901-7

NO. 83153-4-I

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

KHALID HAYBE,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

The Honorable Kristin Richardson, Judge

PETITION FOR REVIEW

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A. PETITIONER AND COURT OF APPEALS DECISION

Petitioner Khalid Haybe seeks review of the Court of Appeals' unpublished decision in State v. Haybe, attached as Appendix A. The Court of Appeals denied a motion for reconsideration. Appendix B.

B. ISSUES PRESENTED FOR REVIEW

To protect the right to trial by an impartial jury, the trial court should excuse a prospective juror for cause if the juror's views would prevent or substantially impair the performance of their duties. The seating of a biased juror cannot be harmless. Prospective juror 16 expressed bias against persons accused of crimes involving guns, particularly where the person had a prior felony conviction. Asked if she would be concerned about the ability to be fair, the juror said probably. Later asked about her bias, the prospective juror agreed she *thought she could try* to be fair and impartial. Prospective juror 16 never gave an unequivocal assurance of impartiality following her statement of

bias. But Haybe's counsel did not exercise a peremptory challenge against the prospective juror and accepted the panel.

1. Following this Court's decision State v. Talbott, 200 Wn.2d 731, 521 P.3d 948 (2022), should Haybe's conviction be reversed based on manifest constitutional error?

2. Relatedly, did Haybe's attorney provide ineffective assistance by allowing a biased juror to serve?

C. STATEMENT OF THE CASE[1]

The State charged Haybe with first degree unlawful firearm possession after a 9-1-1 caller reported that Haybe had shown a gun when asking the caller to go away. CP 1-5, 53. Following a jury trial, Haybe was convicted and sentenced to 33 months in prison. CP 62, 76.

Haybe was born in Somalia in the late 1970s but emigrated to the United States in the early 1990s. As a child, Haybe

[1] The seven volumes of verbatim reports are consecutively paginated.

experienced the myriad horrors of war and life as a refugee. CP 67-70. Haybe has struggled with alcohol use. CP 69-70.

Haybe was prohibited from possessing a firearm due to residential burglary convictions from several years prior to the incident in this case. CP 79. In a presentence report, defense counsel surmised Haybe felt the need to carry a gun in order to feel safe considering his life experiences. CP 64.

The case was tried to a jury in mid-2021. Jury selection occurred via internet conference software in two groups of approximately 30. 3RP 322-486.

One of the first group, prospective juror 16 expressed misgivings about serving on a case involving a gun because she disliked guns and did not believe *anyone* should have a gun. 3RP 355-56. In a first prolonged exchange, she *initially* assured the prosecutor that, nevertheless, she would need to be convinced beyond a reasonable doubt before convicting a person accused of such a crime. The exchange occurred as follows:

[Prosecutor]: [I want] to ask one final question. You were asked this on your questionnaires. Is there anyone that thinks that there's a reason that they cannot be an impartial juror in this case? And I think that was similar to what Juror Number 11 and Juror Number 13 were asked. Does anyone feel after . . . hearing that that they don't feel they can be an impartial juror and fully and fairly consider the facts of the case knowing . . . what you've just seen here so far? Please raise your hand if you think that's the case. Juror Number 16 and Juror Number 9. Juror Number 16, can you go first, please?

JUROR NO. 16: . . . I also have strong feelings about, like, gun laws and really think that no one should—needs to have a gun. So I think I would find it hard to, like . . . I just don't think that anyone needs to have a gun. So when there's a law that's broken regarding having a gun, . . . I think that I—

[Prosecutor]: And—sorry to cut you off—

JUROR NO. 16: —yeah. I don't know.

[Prosecutor]: —Juror 16[, d]o you think that knowing that if someone is charged with . . . having a gun or being connected to gun in any way that your feelings would interfere with your ability to consider them to be presumed innocent throughout the course of the trial?

JUROR NO. 16: I think I would be okay. I think that I would need to really, really, really,

> really be convinced. Like, which is what a trial is, but I—yeah.
>
> [Prosecutor]: And . . . just to clarify, when you say convinced, you need to be convinced beyond a reasonable doubt to find that person guilty? Okay. [Is] that a correct statement? [I] saw you . . . nodding your head, but I just want to make sure I understood what . . . you were saying.
>
> JUROR NO. 16: Can you ask the question . . . one more time?
>
> [Prosecutor]: Okay. You said earlier that you need to be really convinced. So if you were to impartially look at the facts of the case as a juror, you'd need to be convinced beyond a reasonable doubt to change your belief that the Defendant was presumed innocent; is that correct?
>
> JUROR NO. 16: Yeah.

3RP 355-57.

Defense counsel followed up in the more specific context of a gun crime involving a felon. The defense inquiry produced different results:

> [Defense counsel]: Mr. [Prosecutor] started out by saying that he is the only person in the trial that has the burden of proof and . . . I'm . . . going to ask another juror who shared their [opinion] by raising their hand, Juror Number 16. No one raised

their hand to take issue with the fact that the State is the person with the burden of proof in the trial with respect to every element of the crime charged. *Yet, here, several jurors seem to suggest that if they have evidence of one part of the crime, [a prior conviction,] they're going to lower the burden.*[2] They're . . . going to shift the burden even, perhaps, over to the Defendant to show he's innocent. Do you agree with that?

JUROR NO. 16: I—no. I don't know. I feel like . . . a convicted felon is not supposed to have a gun period. *So the idea that that is even at play, like, makes me feel that, yeah, he would be guilty over innocent.*

[Defense counsel]: Does that mean that in a trial where the person is being accused of having a prior conviction that disqualifies them from possessing a firearm, *you would not apply the presumption of innocence . . . to the other facts that you need to decide in the case*?

JUROR NO. 16: *I would try really, really, really hard, but I . . . would say, like, it would be in the back of my head that, you know, the other details.*

[Defense counsel]: [Juror 16,] you did respond to a question that specifically addressed any concern about impartiality where the alleged crime involves firearm possession. *And I think you*

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[2] See 3RP 361-69 (voir dire discussion of effect of prior conviction on ability to presume innocence).

indicate you did have a concern even coming in, and so my question to you is: Now that you have . . . had more of an opportunity to think about it, do you remain concerned? Are you more concerned about your ability to be impartial, or . . . less concerned?

JUROR NO. 16: *I would say more concerned.*

[Defense counsel]: Okay. And so I guess I'll just put it to you differently. If you were the accused person in this case, and you also knew that a person such as yourself with the same views and predispositions was potentially going to be seated on your jury, *would you have a concern about whether you'd be able to receive a fair trial*?

JUROR NO. 16: *Probably.*

[Defense counsel]: Okay. Your Honor, I'm going to have several challenges. Do you want me to do them as I go or do—

THE COURT: No. Let's [do them at break.]

3RP 369-71 (emphasis added).

During his next round of questioning, the prosecutor attempted to rehabilitate prospective juror 16.

[Prosecutor]: [A]nyone can raise their hand and please let me know if this is untrue. Guns can provoke very strong feelings in people. Does everyone agree with that statement?

> If the Court were to instruct you that you were to—while still being the person that you are—fully and fairly consider the evidence in this case as it applies only to this case, does anyone here believe they couldn't follow that instruction? And I don't see anyone raising their hand.
>
> And Juror Number 16, you were asked . . . a few questions about this. . . . [Y]ou mentioned that you have prior experience and you have feelings about this. If the Court were to say you can only look at the evidence in this case and your duty is to be impartial and view it fairly, *do you think that you could try to do that*? And you nodded your head. Is . . . that you saying yes?
>
> JUROR NO. 16: Yeah.

3RP 386 (emphasis added).[3]

The prosecutor later moved from a related discussion with prospective juror 27 to a discussion with 16 about whether she would want herself as a juror. This exchange occurred as follows:

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[3] The verbatim report contains an additional answer attributed to prospective juror 16, but the question was addressed to juror 9. 3RP 386-87.

[Prosecutor]: And [prospective juror 27,] do you think that you could be the kind of juror you'd want [if you were a defendant]?

JUROR NO. 27: To be honest, I'm not a hundred percent sure, just based on my own experiences.

[Prosecutor]: Okay. . . . Do you think that you could try?

JUROR NO. 27: I can certainly try, but it'll be difficult.

[Prosecutor]: And Juror 16, same question for you. If you were a defendant, *do you think you could try to be the same kind of juror that you'd want if you . . . sat in the Defendant's shoes*?

JUROR NO. 16: Yeah.

[Prosecutor]: Does anyone—

JUROR NO. 16: *I think so.*

3RP 391 (emphasis added).

Defense counsel moved to excuse prospective juror 16 for cause. The court had already denied defense's for-cause challenges to three other prospective jurors who ultimately did not serve. 3RP 394-405 (defense for-cause challenges to first of

two groups of prospective jurors). Turning to number 16, the exchange occurred as follows:

> [Defense counsel]: . . . . In response to questioning, [prospective juror 16] raised her hand indicating upfront that she had a concern that her personal experience and attitude that no one . . . needs to have a gun legally or not, would affect her feelings regarding the presumption of innocence. That raised a concern for me just right off the bat that she did raise her hand expressing a concern about her ability to be impartial.
>
> THE COURT: Anything else?
>
> [Defense counsel]: No, Your Honor.
>
> THE COURT: Denied. Next one?

3RP 400-01.

Of several defense challenges, the court granted a single bias-related for-cause challenge, to prospective juror 27. See 3RP 394-405 (for-cause challenges to first group); 3RP 474-78 (for-cause challenges to second group). Inconsistent with decisional law, the trial court believed group questioning constituted adequate rehabilitation. See 3RP 395-96 (addressing a similar challenge to another prospective juror, stating that "on

rehabilitation, all the jurors indicated if instructed that they must fully and fairly consider just the evidence in this case, all answered yes. So I need something more than what you've just given me. I'm going to deny that motion for cause.").

Prospective juror 16 ultimately served and was seated in the jury's sixth position. 3RP 486-87.[4]

Following his conviction, Haybe appealed to Division One of the Court of Appeals, arguing that the trial court violated his right to an impartial jury and that even though his attorney had not removed the juror by peremptory challenge, the error was preserved based on prior decisional authority.

The Court of Appeals affirmed in a brief unpublished decision, relying on Talbott. App. A at 2.

Haybe moved for reconsideration, elaborating on—in light of Talbott—the issues raised in this petition, and the State

[4] The tenth seated juror was excused as the alternate. 6RP 771.

answered. The Court of Appeals denied the motion. App. B. Haybe now asks that this Court grant review and reverse.

D. REASONS REVIEW SHOULD BE GRANTED

1. **This Court should grant review under RAP 13.4(b)(3).**

Review is appropriate under RAP 13.4(b)(3) because the case presents an important constitutional issue.

2. **The seating of a biased juror constituted manifest constitutional error.**

This Court should grant review and hold that reversal is required based on manifest constitutional error, which this Court did not address in Talbott.

a. *Talbott* did not address a claim of manifest constitutional error, which Haybe can establish.

Talbott explicitly does not address or dispense with a claim of manifest constitutional error. Haybe can establish manifest constitutional error in this case.

This Court will consider an unpreserved error on appeal if it constitutes manifest constitutional error. RAP 2.5(a)(3); see

State v. Guevara Diaz, 11 Wn. App. 2d 843, 851, 456 P.3d 869, review denied, 195 Wn.2d 1025 (2020). A party demonstrates manifest constitutional error by showing that the issue before this Court affects that party's constitutional rights and that they suffered actual prejudice. Id.

As a preliminary matter, Haybe did not focus his appellate briefing on the manifest constitutional error doctrine. Prior to Talbott and based on previously undisturbed decisional law from Division One, Haybe believed his appellate claim was preserved by counsel's initial objection to the juror, 3RP 400-01, and that he need not need rely on manifest error to prevail.

But Haybe pointed to the doctrine in responding to the State's arguments that defense counsel waived error by not exhausting peremptory challenges. Reply Br. of Appellant at 5-10. He elaborated in a motion for reconsideration, to ensure the Court of Appeals had an opportunity to weigh in. In any event, this Court will consider an issue for first time in a petition for Supreme Court review, particularly where "the core issue is not

new." State v. Mendez, 137 Wn.2d 208, 216-17, 970 P.2d 722 (1999), abrogated on other grounds, Brendlin v. California, 551 U.S. 249, 127 S. Ct. 2400, 168 L. Ed. 2d 132 (2007).

A trial judge has an independent obligation to protect an accused person from a biased juror even in the face of inaction by the defense. State v. Irby, 187 Wn. App. 183, 193, 347 P.3d 1103 (2015). In Irby, Division One adopted the federal circuit court standard that the defense does not waive the accused's constitutional right to an impartial jury by failing to bring a for-cause challenge. Id.

Applying the decision in Hughes v. United States, 258 F.3d 453 (6th Cir. 2001), the Irby court held the seating of a juror who expressed actual bias is manifest constitutional error, reviewable for the first time on appeal. Irby, 187 Wn. App. at 192-96. The Irby court emphasized the trial court's "independent obligation" to protect the accused's right to an impartial jury, "regardless of inaction by counsel or the defendant." Id. at 193.

Hughes and Irby are consistent with the well-recognized rule that courts must indulge every reasonable presumption against waiver of a fundamental right. Defense counsel cannot waive the accused's related right to trial by jury "without the fully informed and publicly acknowledged consent of the client." Taylor v. Illinois, 484 U.S. 400, 418 & n.24, 108 S. Ct. 646, 98 L. Ed. 2d 798 (1988).

Defense counsel cannot waive a client's constitutional right to an impartial jury by failing to challenge a biased juror *for cause*. Divisions One and Two have applied this rule several times since Irby. State v. Phillips, 6 Wn. App. 2d 651, 666, 431 P.3d 1056 (2018); Guevara Diaz, 11 Wn. App. 2d at 851-54; State v. Lawler, 194 Wn. App. 275, 282, 374 P.3d 278 (2016).

The same reasoning applies with even more force to defense counsel's failure to use a *peremptory* challenge following a timely for-cause challenge. See State v. Ramsey, noted at 21 Wn. App. 2d 1034, 2022 WL 842605, review denied, 199 Wn.2d 1028 (2022) (nonbinding unpublished decision

stating that "a defendant who challenges a conviction based on a claim of juror bias established by the record raises an issue of manifest constitutional error that is not waived even where that defendant fails to exercise all his peremptory challenges").

Where counsel objects, but fails to exhaust peremptory challenges, the proper analysis becomes manifest constitutional error.

The Court of Appeals rejected Haybe's claims on appeal solely based on Talbott. Op. at 2. In Talbott, this Court held that "if a party 'accepted the jury as ultimately empaneled and did not exercise all of [their] peremptory challenges,' then they do not have the right to appeal 'based on the jury's composition.'" Talbott, 200 Wn. App. at 738 (citing State v. Clark, 143 Wn.2d 731, 762, 24 P.3d 1006 (2001)). This Court said language in State v. Fire, 145 Wn.2d 152, 34 P.3d 1218 (2001), that appeared to give alternate direction, was mere dicta. Talbott, 521 P.3d at 955.

But Talbott explicitly did not address manifest constitutional error and declined to overrule or condemn related cases, including Ramsey. This Court stated:

> [T]here are some opinions that appear to follow Fire, but their underlying reasoning is different. In several cases, the Court of Appeals has reached the merits of an alleged jury-selection error, despite the defendant's failure to exhaust their peremptory challenges, because the defendant "raise[d] an issue of manifest constitutional error." [Ramsey, 2022 WL 842605]; see also [Guevara Diaz, 11 Wn. App. 2d at 853].
>
> These cases do not resolve the tension between Fire and Clark because neither [of those cases] was based on manifest constitutional error. In addition, Talbott conceded at oral argument that manifest constitutional error is not at issue here.

Talbott, 200 Wn.2d at 741-42 (citation omitted). This Court concluded, "We therefore express no opinion on the proper application of the manifest constitutional error standard in this context." Id. This Court did not rule on manifest constitutional error. This Court should grant review and address Haybe's claim. As Haybe will demonstrate, he prevails on the merits.

b. Haybe prevails on the merits.

Haybe prevails on the merits. "Criminal defendants have a federal and state constitutional right to a fair and impartial jury." Irby, 187 Wn. App. at 192-93 (citing Taylor v. Louisiana, 419 U.S. 522, 526, 95 S. Ct. 692, 42 L. Ed. 2d 690 (1975); State v. Brett, 126 Wn.2d 136, 157, 892 P.2d 29 (1995)); accord U.S. CONST. amend. VI; CONST. art. I, §§ 21, 22. "[S]eating a biased juror violates this right." Irby, 187 Wn. App. at 193.

Put another way, a trial court must excuse a juror if they demonstrate actual bias. "Actual bias" means their state of mind is such that they "cannot try the issue impartially and without prejudice to the substantial rights of the party challenging." RCW 4.44.170(2). "If the court has only a 'statement of partiality without a subsequent assurance of impartiality,' a court should 'always' presume juror bias." Guevara Diaz, 11 Wn. App. 2d at 855 (quoting Miller v. Webb, 385 F.3d 666, 674 (6th Cir. 2004)). The trial court need not excuse a prospective juror who expresses bias, provided that the juror can set that bias aside

and decide the case based solely on the court's instructions and evidence presented at trial. Guevara Diaz, 11 Wn. App. 2d at 855-56. Thus, the central question is "'whether a juror with preconceived ideas can set them aside.'" Id. at 856 (quoting State v. Noltie, 116 Wn.2d 831, 839, 809 P.2d 190 (1991)). As the federal Supreme Court has stated, moreover, a juror is impartial "only if [they] can lay aside [their] opinion and render a verdict based on the evidence presented in court." Patton v. Yount, 467 U.S. 1026, 1037 n.12, 104 S. Ct. 2885, 81 L. Ed. 2d 847 (1984). Notably, when it comes to assuring rehabilitation of prospective jurors who have expressed bias, silence and even answers during *group* voir dire "'cannot substitute for individual questioning.'" Guevara Diaz, 11 Wn. App. 2d at 859 (quoting Irby, 187 Wn. App. at 196). Indeed, doubts about bias must be resolved against allowing the juror to serve. State v. Cho, 108 Wn. App. 315, 330, 30 P.3d 496 (2001); accord Guevara Diaz, 11 Wn. App. 2d at 855; United States v. Kechedzian, 902 F.3d 1023, 1027 (9th Cir. 2018).

In addition, the presence of a biased juror cannot be harmless. Rather, the error requires a new trial without a showing of actual prejudice. Irby, 187 Wn. App. at 193; United States v. Gonzalez, 214 F.3d 1109, 1111 (9th Cir. 2000) (quoting Dyer v. Calderon, 151 F.3d 970, 973 n.2 (9th Cir. 1998)).

Prospective juror 16 expressed bias and never unequivocally stated she would be fair, only that she would *try*. And the trial court's own statements indicate that it misunderstood the law regarding equivocal assurances of fairness as well as the effect of group rehabilitation.

Prospective juror 16 made it clear that she had strong feelings about guns. After stating that she would hold the prosecution to its burden even in a gun-related case, however, 3RP 355-57, she backtracked. Upon learning the case involved a gun-related crime by a person previously convicted of a felony, prospective juror 16 expressed bias in favor of the State. She would be predisposed to find the accused "guilty over innocent." 3RP 369. Asked if she was concerned about her ability to be fair,

the prospective juror said she was "probably" concerned. 3RP 370. Later asked about her bias by the prosecutor attempting rehabilitation, the prospective juror said she thought she could try to be fair and impartial. 3RP 386 ("[D]o you think that you could try to [be impartial]?" . . . . "Yeah."); see also 3RP 391 ("Do you think you could try to be the same kind of juror you'd want?" . . . . "Yeah[,] I think so."). Prospective juror 16's expression of bias against a felon accused of a gun crime was not resolved because under the circumstances the assurance she would "try" was, simply, insufficient.

Two cases are instructive. In Kechedzian, a prospective juror said she might have difficulty being fair and, when asked if she could fairly serve, she said, "I might be able to put that aside," "I would want to put my personal stuff aside, but I honestly don't know if I could," and "I would try to be fair." Kechedzian, 902 F.3d at 1029. The federal appellate court held "I'll try" is not an unequivocal statement of impartiality. Id. Because equivocal statements of impartiality cannot comport

with the Sixth Amendment jury trial right, the court reversed Kechedzian's convictions. Id. at 1031.

In Gonzalez, a juror's personal experiences led to a concern of bias. Gonzalez, 214 F.3d at 1110-12. In response to questions about whether she could be impartial, the juror in question answered, "I will try to," "[r]ight. I'll try," and "I'll try." Id. at 1111. The trial court's failure to excuse the juror based on bias was constitutional error: "When a juror is unable to state that she will serve fairly and impartially despite being asked repeatedly for such assurances, we can have no confidence that the juror will 'lay aside' her biases or her prejudicial personal experiences and render a fair and impartial verdict." Id. at 1114.

These cases demonstrate that this juror should not have served. Prospective juror 16 said she would harbor bias in favor of the State where the charge was a gun crime committed by a felon. As with the jurors in Kechedzian and Gonzalez who said they would try to be fair, prospective juror 16 did no more than

agree to "try" to be fair. 3RP 386, 391. Doubts about bias must be resolved against allowing the juror to serve. E.g., Guevara Diaz, 11 Wn. App. 2d at 855.

Moreover, prospective jurors' silence and even answers during group voir dire "'cannot substitute for individual questioning.'" Id. at 859 (quoting Irby, 187 Wn. App. at 196). Haybe does not believe there was any attempted group rehabilitation adequately tailored to juror 16's specific bias. Cf. Kechedzian, 902 F.3d at 1031 (rejecting government claim that group assurances indicated juror was rehabilitated).

But in any event, the trial court misapprehended the law as to the sufficiency of group rehabilitation in the face of specific expressions of bias. Shortly before the defense challenge to 16, rejecting a similar challenge, the court noted that "all the jurors" answered yes to the question of whether they could "fully and fairly consider just the evidence." 3RP 395. On this record, it appears the trial court did not grasp that where an individual juror

has expressed a specific bias, individual rehabilitation is required.

In summary, prospective juror 16 expressed a specific bias, pertinent to the facts of this case, and then never gave a subsequent assurance of impartiality. The trial court even had an opportunity to excuse her but did not understand the applicable law. This constituted manifest constitutional error, and such an error cannot be harmless. E.g., Irby, 187 Wn. App. at 193.

3. **Defense counsel's acquiescence to the seating of a biased juror also deprived Haybe of the effective assistance of counsel.**

In Talbott, this Court recognized "there are good reasons to require parties to use their available peremptory challenges to cure jury-selection errors," including "promot[ing] a defendant's right to receive a fair trial in the first instance." 200 Wn. App. at 746. "This helps to ensure that peremptory challenges are used to 'promote, rather than inhibit, the exercise of fundamental constitutional rights.'" Id. (quoting State v. Lupastean, 200 Wn.2d 26, 52, 513 P.3d 781 (2022)). Alternatively, then,

Haybe's counsel was constitutionally ineffective for failing to use a peremptory challenge to remove prospective juror 16 and "affirmatively accept[ing] the jury panel as presented," thereby allowing prospective juror 16 to deliberate on Haybe's guilt. Id. at 957; see 3RP 486.

The Sixth Amendment and article I, section 22 guarantee effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 684-85, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Estes, 188 Wn.2d 450, 457, 395 P.3d 1045 (2017). "Under Strickland, [to prevail on such a claim] the defendant must show both (1) deficient performance and (2) resulting prejudice to prevail on an ineffective assistance claim." Estes, 188 Wn.2d at 457-58.

"Performance is deficient if it falls 'below an objective standard of reasonableness based on consideration of all the circumstances.'" Id. at 458 (quoting State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995)). "Prejudice exists if there is a reasonable probability that 'but for counsel's deficient

performance, the outcome of the proceedings would have been different.'" Estes, 188 Wn.2d at 458 (quoting State v. Kyllo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009)). A "reasonable probability" is lower than the preponderance of the evidence standard; "it is a probability sufficient to undermine confidence in the outcome." Estes, 188 Wn.2d at 458.

It could never be considered reasonable for defense counsel to waive a client's right to trial by a fair and impartial jury. As the Hughes court put it, "The question of whether to seat a biased juror is not a discretionary or strategic decision. The seating of a biased juror who should have been dismissed for cause requires reversal of the conviction." 258 F.3d at 463 (citing United States v. Martinez Salazar, 528 U.S. 304, 316, 120 S. Ct. 774, 145 L. Ed. 2d 792 (2000)).

> If counsel's decision not to challenge a biased venireperson could constitute sound trial strategy, then sound trial strategy would include counsel's decision to waive, in effect, a criminal defendant's right to an impartial jury. However, if counsel cannot waive a criminal defendant's basic Sixth Amendment right to trial by jury 'without the fully

> informed and publicly acknowledged consent of the client,' [Taylor v. Illinois, 484 U.S. at 418 & n.24], then counsel cannot so waive a criminal defendant's basic Sixth Amendment right to trial by an impartial jury . . . . We find no sound trial strategy could support counsel's effective waiver of Petitioner's basic Sixth Amendment right to trial by impartial jury.

Hughes, 258 F.3d at 463.

The Hughes decision makes plain that, regardless of what decisional law indicated at the time of Haybe's trial, there can be no legitimate strategy in failing to protect a client's right to a fair trial *in the first instance* by allowing a biased juror to remain. In short, counsel cannot strategically waive a client's right to an impartial jury. Defense counsel's performance was objectively deficient in allowing prospective juror 16 to serve without exercising a peremptory challenge. The first prong of Strickland is satisfied.

The prejudice prong is also satisfied, considering the presence of a biased juror cannot be considered harmless and requires a new trial without a showing of prejudice. Irby, 187

Wn. App. at 193; Hughes, 258 F.3d at 463. "[G]iven that a biased juror was impaneled in this case, prejudice under Strickland is presumed, and a new trial is required." Hughes, 258 F.3d at 463. Thus, Strickland's second prong is also satisfied.

For these reasons, even following Talbott, this Court should grant review reverse Haybe's conviction.

E. CONCLUSION

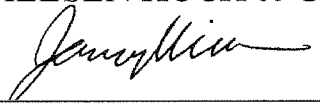
This Court should accept review under RAP 13.4(b)(3) and reverse Haybe's conviction.

I certify this document was prepared in 14-point font and contains 4,941 words excluding those portions exempt under RAP 18.17.

DATED this 14th day of April, 2023.

Respectfully submitted,

NIELSEN KOCH & GRANNIS



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APPENDIX A

FILED
1/30/2023
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent, v. KHALID MOHAMED HAYBE, Appellant.	No. 83153-4-I DIVISION ONE UNPUBLISHED OPINION

MANN, J. — Khalid Haybe appeals his conviction for unlawful possession of a firearm in the first degree. Haybe argues that the court violated his constitutional right to a fair and impartial jury by refusing to excuse a prospective juror despite unresolved bias. We affirm.

I.

The State charged Haybe with first degree unlawful firearm possession. During jury selection, prospective juror 16 expressed misgivings about serving on a case involving a gun. But she stated she would need to be convinced beyond a reasonable doubt before convicting.

At the end of questioning, Haybe challenged 9 jurors for cause, including juror 16. The court denied Haybe's motion to excuse juror 16 for cause. Neither party

exercised a peremptory challenge against juror 16. Haybe accepted the panel with juror 16, despite having 1 peremptory challenge available.

Haybe appeals.

II.

Haybe argues that the trial court erred in refusing to excuse juror 16 for cause. We decline to consider the argument given our Supreme Court's recent decision in State v. Talbott, No. 100540-7, slip op. at 1, 22 (Wash. Dec. 22, 2022), https://www.courts.wa.gov/opinions/pdf/1005407.pdf. In Talbott, the court considered whether a party who declines to remove a prospective juror with an available peremptory challenge has the right to appeal the seating of that juror. Talbott, No. 100540-7, slip op. at 1. The court held that "if a party allows a juror to be seated and does not exhaust their peremptory challenges, then they cannot appeal on the basis that the juror should have been excused for cause." Talbott, No. 100540-7, slip op. at 22.

Talbott is dispositive. Haybe accepted the panel without exhausting his peremptory challenges. Haybe is therefore not entitled to have his for-cause challenge to juror 16 considered on appeal.

We affirm.

Mann, J.

WE CONCUR:

Díaz, J.

Mann, J.

APPENDIX B

FILED
3/20/2023
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent, v. KHALID MOHAMED HAYBE, Appellant.	No. 83153-4-I DIVISION ONE ORDER DENYING MOTION FOR RECONSIDERATION

Appellant Khalid Haybe moved to reconsider the court's opinion filed on January 30, 2023. Respondent State of Washington filed a response. The panel has determined that the motion for reconsideration should be denied. Therefore, it is

ORDERED that the motion for reconsideration is denied.

FOR THE COURT:

Mann, J.

NIELSEN KOCH & GRANNIS P.L.L.C.

April 14, 2023 - 12:25 PM

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Appellate Court Case Title:	State of Washington, Respondent v. Khalid Mohamed Haybe, Appellant

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