IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Plaintiff/Appellee,

vs.

S-1-SC-40404
A-1-CA-41075

CARLOS MIGUEL MENDEZ,

Defendant/Appellant.

APPEAL FROM THE TWELFTH JUDICIAL DISTRICT COURT
OTERO COUNTY, NEW MEXICO
THE HONORABLE STEVEN E. BLANKINSHIP PRESIDING

DEFENDANT/APPELLANT'S BRIEF IN CHIEF

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NATURE OF THE CASE

During jury selection, in Carlos Mendez's trial on a charge of Aggravated Driving While Intoxicated (DWI) (.16 or above), Prospective Juror 6 (hereafter Juror 6) made two sets of statements reflecting a genuine and consistent bias in favor of law enforcement officers and against Mr. Mendez. First, Juror 6 stated that he believed Mr. Mendez had done something, law enforcement must have had a reason to investigate Mr. Mendez, and the jury "wouldn't be here if [the State] didn't have enough evidence that's proof." Later, when asked if he would give law enforcement testimony more weight, Juror 6 indicated that he would. After defense counsel's for-cause challenge to Juror 6 was denied, the defense had to use a peremptory challenge against Juror 6 and used all of the defense's peremptory challenges before jury selection was complete though there was at least one additional juror the defense likely would have tried to strike.

Mr. Mendez was convicted and appealed based on the district court's erroneous denial of his for cause challenge to Juror 6. Although the Court of Appeals had recently considered a similar issue in *State v. Holtsoi*, 2024-NMCA-042, 547 P.3d 770, it declined to apply the same analysis in Mr. Mendez's case and affirmed his conviction. In particular, whereas the Court of Appeals had considered the totality of a challenged juror's statements in *Holtsoi*, it expressly declined to review all of Juror 6's statements for bias in this case. Then, focusing solely on Juror 6's

response to whether he would give more weight to law enforcement testimony, the Court of Appeals found that the answer alone was insufficient to establish that Juror 6 was biased.

Because the Court of Appeals failed to follow *Holtsoi*, applied an exacting and unrealistic preservation requirement when the partiality of a prospective juror was properly challenged, and erroneously determined there was no error in this case, Mr. Mendez respectfully asks this Court to reverse the Court of Appeals and district court and order that he receive a new trial.

FACTUAL AND PROCEDURAL SUMMARY

The Incident

On October 18, 2020, Tularosa Police Lieutenant Ryan Blanton encountered a silver pickup truck which had apparently been parked at a stop sign on Tularosa Avenue for some time. **[RP 11]; [12/7/2022 CD 11:42:57-43:24]** Lieutenant Blanton observed a gentleman who appeared to be asleep in the driver's seat of the running vehicle. **[RP 12]; [12/7/2022 CD 11:43:24-44:29, 11:52:28]** After circling the block and running the plates, Lieutenant Blanton approached and woke up the man in the car, who was later identified Carlos Mendez. **[12/7/2022 CD 11:44:00-45:19]** Lieutenant Blanton's lapel video captured the encounter and was admitted at Mr. Mendez's trial as State's Exhibit 1. **[12/7/2022 CD 1:29:45]**

In the video, Mr. Mendez repeatedly explained that he was tired. **[Ex. 1, 2:30-36, 2:48-3:00, 5:26-50]** According Lieutenant Blanton's trial testimony, however, Mr. Mendez showed signs of intoxication, leading Lieutenant Blanton to ask Mr. Mendez if he had anything to drink. **[Ex. 1, 3:47, 7:25-36]; [12/7/2022 CD 11:52:54-54:10]** Mr. Mendez initially denied drinking anything but water, but eventually admitted to having one drink. **[Ex. 1, 3:47-3:55, 7:25-7:41]; [12/7/2022 CD 11:53:50-54:10]** Mr. Mendez declined to participate in Standard Field Sobriety Tests (SFSTs), was arrested, and taken to the police station for a breathalyzer. **[Ex. 1, 8:03-25, 9:34-42]; [12/7/2022 CD 11:54:10-55:06]** At the station, Mr. Mendez agreed to submit to a breathalyzer test. **[Ex. 2, 0:26-1:34]** He blew .24 and .22, respectively. **[Ex. 2, 8:33-47, 10:15-29]; [Ex. 3]**

District Court Proceedings

A grand jury indicted Mr. Mendez on one count of aggravated DWI (.16 or above), contrary to NMSA 1978, Section 66-8-102(D)(1) (2016). **[RP 1, 35]**

After Mr. Mendez's case was continued a number of times and his speedy trial motion was denied, his case went to trial on December 7, 2022. During voir dire, defense counsel asked if anyone saw Mr. Mendez sitting in court and assumed "he must have done something" or the State must have a reason to have him sitting there. **[12/7/2022 CD 10:03:55-04:39]** After some back and forth, a couple jurors indicated that Mr. Mendez was there because he just wanted to get it taken care or that he was

there for a reason, but it might not involve his guilt. **[12/7/2022 CD 10:11:37-13:07]** Juror 6 then spoke up and said he disagreed. Juror 6 said that Lieutenant Blanton "obviously has a reason to pull [Mr. Mendez] over and we wouldn't be here if they didn't have enough evidence that's proof,"[1] before remarking that he believed Mr. Mendez had done something. **[12/7/2022 CD 10:13:07-50]** When asked, Juror 6 indicated that his belief was something that would weigh on him during deliberations. **[12/7/2022 CD 10:13:35-50]**

Later, defense counsel generally asked if there was "anyone out there who thinks that if law enforcement and another witness had a conflicting story, you would believe law enforcement over someone else because of their training or their experience, things like that? Anyone feel that way?" **[12/7/2022 CD 10:20:30]** Several jurors, including Juror 6, indicated that they would credit law enforcement over other witnesses based on their training. **[12/7/2022 CD 10:20:30-23:34]** When Juror 6 was then directly questioned and asked if "you think that you would give law enforcement testimony more weight than someone else?" He said "Yes," and counsel thanked him for his honesty. **[12/7/2022 CD 10:21:00-21:47]**

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[1] The last part of Juror 6's statement is difficult to hear, but the tape notes indicate Juror 6 said "to prove him guilty" at the end. **[RP 171]** Undersigned counsel could not clearly make out what he said following the word "proof" or "prove."

The defense sought to have Juror 6 excused for cause because he would give more weight to law enforcement officers than other witnesses. The State objected that the defense's question had mentioned giving law enforcement more weight because of their training and experience. The district court denied the request to strike Juror 6 for cause.[2] **[12/7/2022 CD 10:44:32-59]** Defense counsel then used a peremptory strike on Juror 6. **[12/7/2022 CD 10:56:12-19]** Because the defense also struck Jurors 4, 5, 14, and 19,[3] the defense used all of their peremptory strikes before the last couple of jurors were chosen. **[12/7/2022 CD 10:56:00-06, 10:56:06-12, 10:57:20-27, 10:57:59-58:11]** Juror 22, who had expressed views somewhat similar to Jurors 6 and 19, ended up on the jury after the defense's peremptory strikes were exhausted. **[12/7/2022 CD 10:05:48, 10:06:42-51, 10:55:38-59:57]**

At trial, the State's only witnesses were Lieutenant Blanton and Darrell Chavez who had been the key operator for the Intoxilyzer 8000. Lieutenant Blanton testified about his encounter with Mr. Mendez and the signs of intoxication he

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[2] Defense counsel sought to have Juror 28 excused on similar grounds, but this request was also denied. **[12/7/2022 10:45:26-54]** The parties did not make it to Juror 28 in selecting the jury.

[3] Presumably, Jurors 4, 5, and 14 were struck because they had close connections with individuals involved in DWI incidents, with 5 and 14 both losing family members in accidents where they were killed by drunk drivers. **[12/7/2022 CD 9:25:50-27:40, 9:27:40-29:40, 9:28:40-29:50]** Juror 4 also had relatives who were law enforcement. **[12/7/2022 CD 10:19:19]** Juror 19, in turn, stated that the parties would not be in court if there was no evidence or case against Mr. Mendez and had a relative in law enforcement. **[12/7/2022 CD 10:06:10-06:42, 10:17:19]**

observed during that time, presented his lapel video of the encounter and breath test, and verified the printout of the results from the Intoxilyzer 8000 along with certifications corresponding to its use. **[Ex. 1-5]; [12/7/2022 CD 11:37:48-2:18:10]**

Mr. Mendez did not testify on his own behalf. The jury found Mr. Mendez guilty of Aggravated DWI. **[RP 224]** Mr. Mendez appealed.

Court of Appeals Proceedings

On appeal, Mr. Mendez argued that Juror 6 should have been struck for cause because his statements reflected a consistent bias in favor of law enforcement and against Mr. Mendez and his first statement suggested he did not presume Mr. Mendez was innocent. **[BIC 12-19]; [RB 1-4]**

In a memorandum opinion, the Court of Appeals affirmed. *State v. Mendez*, No. A-1-CA-41075, mem. op. (N.M. Ct. App. Apr. 23, 2024) (non-precedential) (hereafter **[MO ¶]**). In doing so, the Court of Appeals refused to consider whether the first statement suggested bias against the presumption of innocence since that was not the precise ground of bias raised below. **[MO ¶ 21 n. 1]** The Court of Appeals also declined to consider the first statement's bearing on Juror 6's later responses about believing law enforcement officers over other witnesses because trial counsel had not specifically mentioned it when arguing that Juror 6 was biased in favor of law enforcement. **[MO ¶¶ 22-23]** In other words, according to the Court of Appeals in this case, unless trial counsel (who is not provided a transcript of voir

dire) discusses each particular statement made by a challenged juror, the Court of Appeals can only consider bias based on the statements trial counsel mentions below. Looking solely at Juror 6's response that he would credit law enforcement witnesses over others, the Court of Appeals found that Mr. Mendez had not established error or an abuse of discretion. **[MO ¶¶ 23-24]**

Mr. Mendez appealed to this Court and this Court granted review of the following questions:

I. DID THE COURT OF APPEALS ERR IN REFUSING TO CONSIDER ALL OF THE CHALLENGED JUROR'S STATEMENTS IN ASCERTAINING BIAS?

II. DID THE DISTRICT COURT COMMIT REVERSIBLE ERROR BY REFUSING TO STRIKE JUROR 6?

ARGUMENT

I. THE DISTRICT COURT ERRED IN DENYING DEFENSE COUNSEL'S FOR-CAUSE CHALLENGE TO JUROR 6.

A. Background Law and Standard of Review.

Under Article II, Section 12 of the New Mexico Constitution, the criminal defendant's "right of trial by jury as it has heretofore existed shall be secured to all and remain inviolate." N.M. Const., art. II, § 12. The right to a jury trial is accompanied, as well, by the constitutional guarantee under Article II, Section 14 of the New Mexico Constitution, providing the criminal defendant with an "impartial jury." N.M. Const., art. II, § 14; *see also* U.S. Const., amends. VI, XIV.

"An 'impartial jury[]' … means 'a jury where each and every one of the twelve members constituting the jury is totally free from any partiality whatsoever.'" *State v. Gallegos*, 1975-NMCA-125, ¶ 7, 88 N.M. 487; *State v. McFall*, 1960-NMSC-084, ¶ 6, 67 N.M. 260 ("Accordingly, the jury which one charged with crime is guaranteed, is one that does not favor one side more than another, treats all alike, is unbiased, equitable, fair and just."). The jury selection process, including the excusal of jurors for cause and the exercise of peremptory challenges, insures that a defendant is tried before an impartial jury. *State v. Rackley*, 2000-NMCA-027, ¶ 9, 128 N.M. 761; *Fuson v. State*, 1987-NMSC-034, ¶¶ 7-10, 105 N.M. 632 (discussing importance of a defendant's right to exercise peremptory challenges as ensuring a fair and impartial jury). "A prospective juror who cannot be impartial should be excused for cause." *Fuson*, 1987-NMSC-034, ¶ 5; Rule 5-606(C) NMRA (authorizing district courts to "excuse any prospective juror for good cause"); NMSA 1978, § 38-5-14 (1969) (same). "Excusable partiality on the part of a member of the venire is established by showing actual … bias," which can include "unequivocal" statements of bias or be "inferred when a juror discloses a fact that bespeaks a risk of partiality sufficiently significant to warrant granting the trial judge discretion to excuse the juror for cause." *State v. Holtsoi*, 2024-NMCA-042, ¶ 6, 547 P.3d 770.

While a trial court has discretion in dismissing a juror for cause, the court abuses its discretion "in failing to excuse a juror who could not be impartial." *State v. Johnson*, 2010-NMSC-016, ¶ 31, 148 N.M. 50. Indeed, "[t]rial courts have not only the duty to insure a fair trial, but also significant power to take precautions when prejudice threatens to deny the defendant an impartial jury." *State v. House*, 1999-NMSC-014, ¶¶ 111, 70, 127 N.M. 151 (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)). Hence, "[i]f the court has genuine doubt about the juror's ability to be impartial under the circumstances, it should resolve the doubt by sustaining the challenge." *People v. Hancock*, 220 P.3d 1015, 1016 (Colo. App. 2009); *accord State v. Holly*, 2009-NMSC-004, ¶ 21, 145 N.M. 513 ("Any question as to the existence of prejudice should be resolved in favor of the accused."). A district court also abuses its discretion "when it applies an incorrect standard, incorrect substantive law, or its discretionary decision is premised on a misapprehension of the law." *Aragon v. Brown*, 2003-NMCA-126, ¶ 9, 134 N.M. 459.

In New Mexico, prejudice from the court's failure to dismiss the juror or jurors for cause may be presumed when "a party exercises all of his or her peremptory challenges before the court completes the venire." *Fuson*, 1987-NMSC-034, ¶ 11.

B. Preservation.

The Court of Appeals expressly refused to consider all of Juror 6's statements in determining whether he was biased in favor of law enforcement as trial counsel

claimed when moving to strike him for cause. **[MO ¶¶ 21-24]** The Court of Appeals held that because trial counsel did not mention all of Juror 6's statements that were discussed on appeal, consideration of whether *all* of Juror 6's comments reflected a bias favoring law enforcement was not preserved. Looking only at Juror 6's response that he would give law enforcement testimony more weight, the Court of Appeals found no error. **[MO ¶¶ 22-24]**

Holtsoi did not indicate that trial attorneys have to mention every single comment a challenged juror says when moving to strike for cause in order to preserve the issue of a particular juror's bias for appeal. In fact, its analysis—looking at all of the juror's comments—establishes otherwise. *Holtsoi*, 2024-NMCA-042, ¶¶ 7, 9 (observing that "Juror 23 repeatedly and unequivocally indicated that he could not separate his bias regarding drug use" and "[c]onsidered collectively, however, Juror 23's statements combine to express his belief that he could not faithfully serve as an impartial juror and strongly support such an inference").

On the contrary, as recognized in *Holtsoi*, courts should consider all statements when determining whether the juror can be fair and impartial. *Id.* ¶ 11 ("a prior or subsequent unequivocal statement indicating such person's ability to remain fair and impartial is generally sufficient to uphold the trial court's exercise of discretion to deny motions to strike for cause."); *cf. State v. Sims,* 1947-NMSC-071, 51 N.M. 467 (looking at all of the statements made and the context surrounding them

to determine if the potential juror was biased). After all, the purpose of the inquiry is to determine if the juror's views would "prevent of substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *State v. Gardner*, 2003-NMCA-107, ¶ 16, 134 N.M. 294 (quoting *State v. Sutphin*, 1988-NMSC-031, ¶ 14, 107 N.M. 126). With such a purpose in mind, it would make little sense to look at a limited number of statements in isolation to determine whether a juror was in fact biased.

For instance, if a prospective juror said they could be fair and impartial in response to a general question from the court, but then later assumed the police erred in bringing charges and said they believed law enforcement less than other witnesses, the fact they said they could be fair and impartial initially would not necessarily negate their other statements showing bias. Alternatively, if a potential juror said they tended to defer to experts because of their education, but then said that they could treat such individuals as they would any other witness since experts are just people and might be biased or mistaken, then their additional statements would suggest that they are not actually biased. Thus, as *Holtsoi* suggested, a holistic analysis of the juror's comments both below and on appeal is, therefore, necessary.

Nor do our rules of preservation require the degree of precision the Court of Appeals applied in disposing of Mr. Mendez's arguments here. "The primary purposes of the preservation requirement are '(1) to alert the trial court to a claim of

error so that it has an opportunity to correct any mistake, and (2) to give the opposing party a fair opportunity to respond and show why the court should rule against the objector.'" *State v. Montoya*, 2005-NMCA-005, ¶ 7, 136 N.M. 674. "We do not apply the preservation requirement in an 'unduly technical manner.'" *In re Estate of Baca*, 1999-NMCA-082, ¶ 15, 127 N.M. 535.

In this case, the defense alerted the court to the fact that it believed Juror 6 was biased in favor of law enforcement, the State was given an opportunity to respond, and the court declined to strike Juror 6, forcing the defense to use a peremptory strike on Juror 6. **[12/7/2022 CD 10:44:32-59, 10:56:12-19]** This was sufficient to preserve the issue of Juror 6's bias for appeal. *Cf. Montoya*, 2005-NMCA-005, ¶ 9 ("Despite the ambiguity of defense counsel's objection, the district court was alerted to the question of whether Victim meets the definition of 'household member,' the State had an opportunity to respond and argue evidence relating to the issue, and the district court ruled on the issue by finding evidence to support each element of the offense beyond a reasonable doubt."). "The rules that govern the preservation of error for appellate review are not an end in themselves, rather they are instruments for doing justice." *Id.* ¶ 10 (internal citation omitted).

Finally, it would be impractical to require trial counsel, who does not have a transcript of voir dire, to have to specifically mention every statement in order to argue that a juror should be struck for cause due to bias. *State v. Gomez*, 1997-

NMSC-006, ¶ 31, 122 N.M. 777 (recognizing that "the realities separating trial and appellate practice" mean that "the arguments a trial lawyer reasonably can be expected to articulate on an issue arising in the heat of trial are far different from what an appellate lawyer may develop after reflection, research, and substantial briefing. It is impractical to require trial counsel to develop the arguments, articulate rationale, and cite authorities that may appear in an appellate brief").

Because the defense sought Juror 6's excusal based on its belief that Juror 6 was biased in favor of law enforcement, the issue of Juror 6's bias was preserved and the Court of Appeals in applying an unduly narrow analysis to the bias issue on appeal.

C. The district court abused its discretion in failing to excuse Juror 6 for cause as Juror 6's statements clearly demonstrated a bias in favor of law enforcement and against Mr. Mendez.

When the totality of Juror 6's statements are considered, as they must be, it is clear that the district court abused its discretion in failing to excuse Juror 6 for cause. On two separate occasions, Juror 6 clearly expressed bias in favor of law enforcement officials and against Mr. Mendez. First, Juror 6 offered his view that the police officer "obviously has a reason to pull [Mr. Mendez] over and we wouldn't be here if they didn't have enough evidence that's proof." **[12/7/2022 CD 10:13:07-50]** Juror 6 expressed this opinion spontaneously after other jurors suggested they were there for a reason, but did not assume Mr. Mendez was guilty. **[12/7/2022 CD**

10:11:10-13:07] In addition, Juror 6 indicated that his belief was something that would weigh on him during deliberations. **[12/7/2022 CD 10:13:35-50]**

A prospective juror's voluntary and emphatic assertions are likely to be reflective of their true views and, therefore, should carry significant weight when considering whether the person is biased. *See Sims,* 1947-NMSC-071, ¶ 5 ("It is difficult, if not impossible, to understand the reasoning which leads to the conclusion that a person stands free of bias of prejudice who *having voluntarily and emphatically asserted its existence in his mind*, in the next moment under skillful questioning declares his freedom from its influence." (emphasis added) (quoted authority omitted)); *State v. DeVore,* 972 P.2d 816, 823 (Mont. 1998) (characterizing a potential juror's spontaneous statements as being the "most reliable and honest" representations of their true beliefs), *overruled on other grounds in State v. Good,* 309 Mont. 113, 43 P.3d 948 (Mont. 2002). Hence, Juror 6's statements about believing the law enforcement investigation was sound and Mr. Mendez was properly being tried should be considered indicative of his true views.

Moreover, these statements suggested early on that Juror 6 was biased in favor of law enforcement and against Mr. Mendez since Juror 6 was already inclined to assume that law enforcement acted correctly and Mr. Mendez had done something. The fact Juror 6 further admitted these pre-trial beliefs would impact his deliberations indicated that Juror 6's bias was not easily set aside. *Cf. Fuson*, 1987-

NMSC-034, ¶¶ 3, 5 (deeming a juror's bias "manifest" where he knew several witnesses and indicated that there was a possibility that his knowledge of the witnesses would affect his decision in the case).

Finally, these statements reflected bias in Juror 6 because they expressed views contrary to the presumption of innocence. *See DeVore,* 972 P.2d at 822-25 (recognizing that statements indicating a belief the defendant had done something wrong were contrary to the presumption of innocence), *overruled on other grounds in State v. Good,* 43 P.3d 948 (Mont. 2002). Although the Court of Appeals considered this a distinct argument and therefore refused to consider it **[MO ¶ 21 n. 1]**, the fact Juror 6 had such faith in law enforcement that it impacted his ability to presume the defendant was innocent simply underscored Juror 6's probable bias in favor of law enforcement and against Mr. Mendez in this case.

In *DeVore*, for instance, the Montana Supreme Court addressed a situation in which a few potential jurors who had agreed with the defendant being presumed innocent nonetheless indicated their belief that the defendant was guilty of or involved in something or he would not be facing charges from the State. 972 P.2d at 818-22. After undertaking efforts to rehabilitate the jurors and eliciting statements from two of them that they could follow the law and be fair and impartial (the third remained unsure), the trial court refused to strike the two jurors for cause and only struck the uncertain juror. *Id.* at 821-22. In doing so, the trial court reasoned that the

jurors were simply expressing that they had "faith in the system," but had otherwise indicated they could follow the law. *Id.* The Montana Supreme Court found that the trial court abused its discretion in failing to strike the other two jurors given their stated belief that the defendant had to have done something because such a belief showed that "[t]hey did not presume him entirely innocent and, therefore, were not impartial as the law requires that that term be defined." *Id.* at 822-25.

The same is true here. Juror 6 made it clear that *because* he had faith in law enforcement's pursuit of Mr. Mendez from the outset, he "did not presume him entirely innocent" and thus was not an impartial juror.

Juror 6 then cemented his biases when he later indicated that he would give law enforcement testimony more weight than other witnesses. **[12/7/2022 CD 10:21:00-21:47]** In other words, because of Juror 6's evident faith in law enforcement officials he already believed that Mr. Mendez was properly charged with a crime based on sound evidence and then stated he would further defer to law enforcement testimony at trial.

Looking at the latter statements in isolation, the Court of Appeals concluded that Juror 6's response was not problematic because he was just agreeing with others who had indicated they would give law enforcement testimony more weight because of their training. **[MO ¶¶ 23-24]** However, while the defense initially asked prospective jurors generally if they would give more weight to law enforcement

testimony based on their training, experience, or "things like that," after Juror 6 raised his hand, the defense directly asked him if "you think that you would give law enforcement testimony more weight than someone else?" and he said "Yes." **[12/7/2022 CD 10:21:00-21:47]**

Numerous jurisdictions have found such statements to reflect bias. *See United States v. Sithithongtham*, 192 F.3d 1119 (8th Cir. 1999) (for-cause strikes warranted where jurors indicated they would find police testimony more believable); *People v. Smith*, 217 A.D.3d 1580, 1581 (N.Y. 2023) (reversing where jurors expressed bias in favor of police including that they would "most likely [believe] the officer" over the defendant); *Ries v. State*, 889 N.W.2d 308, 314 (Minn. Ct. App. 2016) (collecting cases and recognizing bias where juror indicated they would give police officer's testimony greater weight), *aff'd., Ries v. State*, 920 N.W.2d 620 (Minn. 2018); *Commonwealth v. Penn*, 132 A.3d 498, 504-05 (Pa. 2016) (reversing where a prospective juror repeatedly said she would be more likely to believe law enforcement testimony in a case that rested entirely on the testimony of two officers); *Rimes v. State*, 993 So. 2d 1132, 1134 (Fla. Dist. Ct. App. 2008) (collecting cases and reversing because "[a] juror who would tend to defer to a police witness should be excused for cause"); *State v. Hauser*, 150 P.3d 296, 303-04 (Idaho App. 2006) (for-cause strike should have been granted where juror said he'd "try to be fair" but indicated he would give more weight to officer testimony and believe officer over

other witnesses in a case that turned largely upon the testimony of a detective who interviewed the defendant); *Slater v. State*, 910 So.2d 347, 348 (Fla. Dist. Ct. App. 2005) (reversing for new trial where the "trial court erroneously denied a for cause challenge as to a juror who agreed he would probably defer to the testimony of a police officer over a lay witness"); *State v. Paul*, 738 So.2d 1128, 1130-31 (La. Ct. App. 1999) (holding that where "the state's case was based entirely on the testimony of police officers" and jurors expressed bias in favor of police officers, the court erred in failing to excuse them); *State v. Edmonson*, 827 S.W.2d 243, 246 (Mo. Ct. App. 1992) ("A venireman who expresses a bias in favor of the credibility of police officers in general, or of a police officer expected to testify for the state, is disqualified to serve as a juror"). Moreover, his response to defense counsel's question must be viewed in conjunction with Juror 6's prior comments which also established his bias in favor of law enforcement and against Mr. Mendez.

Given the totality of Juror 6's statements favoring the State and his acknowledgment that his views would impact his deliberations, there is no reason to believe Juror 6 would have been able to set aside his repeatedly stated bias. *Cf. Alvarez v. State*, 1978-NMSC-042, ¶¶ 3-5, 92 N.M. 44 (finding that jurors who had previously sat on a jury and believed the sole law enforcement witness who was testifying were biased and subject to being stricken for cause even though the jurors indicated that they would not believe that particular witness more than any other

witness at the later trial). The district court therefore erred in failing to excuse Juror 6 for cause.

D. Prejudice may be presumed in this case because Mr. Mendez used a peremptory strike on Juror 6 and used all of his peremptory strikes before the jury was selected.

Like numerous other jurisdictions, New Mexico has long followed the approach that prejudice from the court's failure to dismiss the juror or jurors for cause may be presumed when "a party exercises all of his or her peremptory challenges before the court completes the venire." *Fuson*, 1987-NMSC-034, ¶ 11; *see also Johnson*, 2010-NMSC-016, ¶ 31 ("Where the trial court clearly abused its discretion in failing to excuse a juror who could not be impartial, prejudice is presumed if the petitioner used all peremptory challenges on potential jurors who could be excused for cause before a jury was seated."). *Cf. Smith*, 217 A.D.3d at 1581 (where biased jurors not struck for cause, and "defendant exhausted all of his peremptory challenges before the completion of jury selection, reversal is required"); *Penn*, 132 A.3d at 504-05 (Pa. 2016) (same); *Forston v. State*, 587 S.E.2d 39, 42 (Ga. 2003); *Good,* 43 P.3d at 960 (Mont. 2002); *Hunter v. State*, 585 So.2d 220, 222 n. 1 (Ala. Crim. App. 1991).[4]

[4] Some jurisdictions follow variations on this approach. *See e.g.*, *State v. Jonas*, 904 N.W.2d 566, 583 (Iowa 2017) (noting a "third approach," where defendant uses peremptory on biased juror not struck for cause, he must ask for additional peremptory challenge of particular juror when he has exhausted challenges, to preserve the prejudice question); *Busby v. State*, 894 So. 2d 88, 96-97 (Fla. 2004),

Having shown that the district court abused its discretion in denying Mr. Mendez's for cause challenges and that Mr. Mendez used a peremptory strike against Juror 6 and used all of his peremptory challenges before venire was completed, prejudice is presumed in this case under New Mexico's long-standing approach.

However, even assuming some additional showing that the jury selection process was adversely impacted, there is evidence of additional prejudice here. Because the defense ran out of peremptory challenges, it was forced to accept Juror 22, who had expressed a similar sentiment to both Juror 6 and Juror 19 (against whom defense counsel also used peremptory strikes). **[12/7/2022 CD 10:05:48, 10:06:42-51, 10:55:38-59:57]** Juror 22 had also expressed confusion about what happens when the State fails to establish all of the elements of the offense. **[12/7/2022 CD 10:03:07]** Thus, the record reflects that the makeup of the jury was adversely impacted by the lack of an additional peremptory challenge here, though this is not a requirement under New Mexico law where the requirements of *Fuson* are met.

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as revised on denial of reh'g (Feb. 3, 2005) (explaining that "[i]n the State of Florida, expenditure of a peremptory challenge to cure the trial court's improper denial of a cause challenge constitutes reversible error if a defendant exhausts all remaining peremptory challenges and can show that an objectionable juror has served on the jury…. This juror must be an individual who actually sat on the jury and whom the defendant either challenged for cause or attempted to challenge peremptorily or otherwise objected to after his peremptory").

Having shown that the district court abused its discretion in denying Mr. Mendez's for cause challenges, that Mr. Mendez used a peremptory strike against Juror 6, and that he used all of his peremptory challenges before venire was completed, prejudice occurred and reversal is required.

CONCLUSION

For the reasons set forth above, Defendant-Appellant Carlos Mendez respectfully requests that this Court vacate his conviction and order that he receive a new trial on the charge at issue in this case.

Respectfully submitted,

BENNETT J. BAUR
Chief Public Defender

KIMBERLY CHAVEZ COOK
Appellate Defender

/s/ *Mary Barket*
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CERTIFICATE OF SERVICE

I hereby certify that a copy of this pleading was e-filed in the Tyler Technology/Odyssey file and serve system and thereby electronically served on Michael J. Thomas and Rose Leal at the New Mexico Department of Justice this 25th day of October.

/s/ *Mary Barket*
Law Offices of the Public Defender