SUMMARY
December 14, 2017

2017COA154

No. 14CA1234, *People v. Abu-Nantambu-El* — Juries — Challenges for Cause — Peremptory Challenges — Structural Error

This case addresses whether reversal is required under *People v. Novotny*, 2014 CO 18, where the trial court erroneously denies a challenge for cause based on a statutory disqualification as to a prospective juror and that person sits on the jury. Here, the majority of a division of the court of appeals concludes that reversal is required. The special concurrence would reverse for structural error and the dissent would affirm under the outcome-determinative test. Additionally, the court rejects defendant's contention that evidence of an incident occurring three days before the charged offenses should not have been admitted as res gestae.

COLORADO COURT OF APPEALS **2017COA154**

Court of Appeals No. 14CA1234
Jefferson County District Court No. 12CR2275
Honorable Dennis J. Hall, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Abdu-Latif Kazembe Abu-Nantambu-El,

Defendant-Appellant.

JUDGMENT REVERSED AND CASE
REMANDED WITH DIRECTIONS

Division III
Opinion by JUDGE BOORAS
Freyre, J., concurs in part and dissents in part
Webb, J., dissents

Announced December 14, 2017

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¶ 1 We decide in this case whether reversal is required under *People v. Novotny*, 2014 CO 18, where the trial court erroneously denies a challenge for cause based on a statutory disqualification as to a prospective juror and that person sits on the jury. The Colorado Supreme Court in *Novotny* departed from its prior holdings that an error which impacted a substantial statutory right must result in automatic reversal as such an error could not be deemed harmless. Instead, the court held that "reversal of a criminal conviction for other than structural error, in the absence of express legislative mandate or an appropriate case specific, outcome-determinative analysis, can no longer be sustained." *Id.* at ¶ 27.

¶ 2 Arguably, outcome-determinative prejudice is absent in this case. While the majority concludes that reversal is nevertheless required under *Novotny*, based on the denial of the defense challenge for cause to a compensated employee of a public law enforcement agency, we disagree to some extent as to the analysis that should be employed. We reverse the judgment of conviction and remand for a new trial.

¶ 3 A jury convicted Abdu-Latif Kazemba Abu-Nantambu-El of multiple offenses against two victims, including first degree murder (felony murder); second degree murder; first degree burglary (assault/menace); and first degree burglary (armed with explosives/weapon). Based on the denial of the defense challenge for cause to a compensated employee of a public law enforcement agency, we reverse the judgment of conviction and remand for a new trial.

I. Background

¶ 4 According to the prosecution's evidence, defendant knocked on the door to an apartment of the decedent's friend, a woman whom defendant had met a few days earlier. When she opened the door, he forced his way in and struck the woman. The decedent and his wife were also inside the apartment.

¶ 5 Defendant then attacked the decedent. Their struggle spilled over into the kitchen, where defendant picked up a knife and repeatedly stabbed the decedent. Defendant also struck the friend several more times. The decedent and his wife eventually fled, but he died from the stab wounds during transport to a hospital.

¶ 6 When the friend attempted to flee, defendant dragged her back into the apartment by her hair. He forced her to clean up some of the decedent's blood.

II. Reversal is Necessary Because the Trial Court Erred in Denying Defendant's Challenge for Cause to Juror J

A. Additional Background

¶ 7 Juror J described her employment as being a financial grant manager for the State of Colorado. She explained:

> I am currently employed with the Colorado Division of Criminal Justice, which is housed in the Department of Public Safety. I don't feel that the division is law enforcement even though the state patrol and CBI are in our department. I see state troopers down the hall because we're in the same building, but I couldn't tell you their names. That's the kind of contact I have with them. We give department, federal, Department of Justice grants out to drug treatment and criminal history records, things like that, juvenile justice crime prevention programs and drug treatment. I don't have any close relatives or friends in the law enforcement arena. I don't have any training in law enforcement.

In response to later questioning by defense counsel, she added:

> PROSPECTIVE JUROR J: I don't think it would be a problem because I don't work directly with law enforcement. We fund a lot of law enforcement agencies and DA's offices and

things like that, but it's on different kinds of projects.

MR. CALVERT: Could you tell me a little more about the nature of the funding and who you fund and so forth. I'm not trying to put you on the spot. Is it a fair question?

PROSPECTIVE JUROR J: It is. We get federal money from the Department of Justice and we are a pastor [sic] entity and we give grants to — well, basically one of the biggest programs we receive funds [for] basic law enforcement like a police car, radios, whatnot all the way up to criminal victim. We fund a broad range of that. A lot of prevention and education and treatment for drugs and alcohol.

MR. CALVERT: Do you deal with the law enforcement agencies yourself directly?

PROSPECTIVE JUROR J: Finance people.

MR. CALVERT: You deal with their finance departments?

PROSPECTIVE JUROR J: I am a financial grant manager, so money that — grants that get awarded through the competitive — we have an advisory board and they give the grant out and they award them. I have to deal with the contracts which are — I audit the grant so I'll go out to an agency possibly and look through their accounting ledgers, make sure they're maintaining. I've got a frog —

MR. CALVERT: I'm sorry to ask you so many questions.

PROSPECTIVE JUROR J: I would audit them and make sure they're handling the federal funds through federal regulations. Since I'm in the finance end of it, I don't work — there are grant managers at the office. I work with that — work with the agencies.

MR. CALVERT: Did you say this was the division of —

PROSPECTIVE JUROR J: Division of Criminal Justice.

MR. CALVERT: This is a state entity?

PROSPECTIVE JUROR J: State agency.

MR. CALVERT: Is this division under a broader umbrella?

PROSPECTIVE JUROR J: Department of Public Safety. So in the Department of Public Safety you've got Homeland Security and emergency management. You have your FEMA [Federal Emergency Management Agency] and Homeland Security funds coming from the federal government, state controlled. You've got the Colorado Bureau of Investigation.

MR. CALVERT: Is the agency you work for a federal or state?

PROSPECTIVE JUROR J: State.

¶ 8 Defense counsel challenged Juror J because "she is a full-time employee of a Colorado law enforcement agency," thereby preserving the issue. The prosecutor argued against the challenge.

The trial court focused on Juror J's duties and denied the challenge.

¶ 9 Defense counsel used all twelve peremptory challenges, but left Juror J on the jury. So did the prosecutor. But now, the Attorney General concedes that the court should have excused the juror as a compensated employee of a law enforcement agency. Nevertheless, the Attorney General argues on appeal that reversal is not required because voir dire of the juror did not indicate that she was actually biased.

B. Standards of Review and of Reversal

¶ 10 An appellate court reviews de novo whether a prospective juror is a compensated employee of a public law enforcement agency. *Novotny*, ¶ 53 (Hood, J., concurring in part and dissenting in part); *People v. Sommerfeld*, 214 P.3d 570, 572 (Colo. App. 2009). On this much, the parties agree.

¶ 11 As for the standard of reversal, both parties appear to apply the outcome-determinative test under *Novotny*, but disagree as to whether that test was satisfied.[1] Defendant does not invoke the

[1] Where error has been preserved, the outcome-determinative test for prejudice requires that a defendant must meet the high bar of

structural error doctrine, but rather urges that an impliedly biased juror who sits on the jury violates a defendant's constitutional right to a fair and impartial jury. The Attorney General responds that, in applying the outcome-determinative test under *Novotny*, the conviction need not be reversed because the juror did not suffer from an actual bias that would have prevented her from rendering a fair and impartial decision.

¶ 12 *Novotny*, like this case, involved the erroneous denial of a challenge for cause to a prospective juror who was a compensated employee of a public law enforcement agency. But in *Novotny*, defense counsel removed the juror with a peremptory challenge. Recall, in this case, defense counsel did not.

¶ 13 Although the supreme court has applied *Novotny* in several later cases, none of them involved the scenario in which a juror who should have been excused for cause remained on the jury. Consequently, the supreme court has not clarified how the outcome-determinative test adopted in *Novotny* is to be satisfied.

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showing "a reasonable probability that the error contributed to the verdict." *Krutsinger v. People*, 219 P.3d 1054, 1063 (Colo. 2009); *see also People v. Quintana*, 665 P.2d 605, 612 (Colo. 1983) ("[T]he appropriate question is whether the error substantially influenced the verdict or affected the fairness of the trial proceedings.").

See Novotny, ¶ 30 (Hood, J., concurring in part and dissenting in part) (noting that the majority fails to explain how a defendant can ever demonstrate prejudice under this standard).

¶ 14 In cases leading up to *Novotny*, the supreme court reasoned that defense counsel's use of a peremptory challenge to cure the trial court's erroneous denial of a challenge for cause impaired a defendant's substantial statutory right to use peremptory challenges to change the composition of the jury selected to try the case and could not be deemed harmless. *See id.* at ¶ 14; *People v. Macrander*, 828 P.2d 234, 246 (Colo. 1992), *overruled by Novotny*, 2014 CO 18. Later, however, in *Novotny*, the supreme court made an about-face and departed from the position that reversal for trial error could be based "solely on the significance, or substantiality, of the affected right." *Novotny*, ¶ 26.

¶ 15 At first blush, the supreme court appears to have adopted only two categories for reversal — (1) structural error, requiring automatic reversal; or (2) trial error, requiring reversal where there is outcome-determinative prejudice. The court recognized that

> [w]ith regard to harmless error review, the jurisprudence of both this court and the United States Supreme Court distinguishing

> trial from structural error and defining 'substantial rights' has evolved to the point of sanctioning reversal for trial error *only* when that remedy is dictated by an appropriate outcome-specific analysis.

Id. at ¶ 17. The court also stated that it was now "firmly adher[ing]" to the "structural error/trial error dichotomy." *Id.* at ¶ 21.

¶ 16 In spite of this seemingly unyielding view accepting only two classes of error, the court also appears to have accepted a third class of reversible error — trial error that violates an express legislative mandate. *Id.* at ¶ 26. The court concluded its analysis stating that "[f]or these reasons, we overrule our prior holdings to the contrary and conclude that reversal of a criminal conviction for other than structural error, *in the absence of express legislative mandate* or an appropriate case specific, outcome-determinative analysis, can no longer be sustained . . . ." *Id.* at ¶ 27 (emphasis added).

C. Analysis

¶ 17 The error that occurred in this case was the failure to excuse a juror who did not appear to harbor an actual bias, but who was disqualified under a statute setting out categories of jurors deemed to be impliedly biased. § 16-10-103(1)(k), C.R.S. 2017. It is not

necessarily the case that a juror who is disqualified under this subsection as an employee of a law enforcement agency will favor the government. *See Mulberger v. People*, 2016 CO 10, ¶ 12 ("The chief concerns underlying this provision are 'that one who is employed by a law enforcement agency will favor, or will be perceived to favor, the prosecution side of a criminal case,' and, by analogy, that a compensated employee of a public defender's office will favor, or be perceived to favor, the defendant.") (citations omitted). A statute may set the implied bias bar above, equal to, or below what due process requires. The statute at issue appears to go further than due process would require. In other words, the statute does not require a showing of actual bias that would violate due process.

¶ 18 The difficulty with the view expressed in the special concurrence – that a violation of section 16-10-103(1)(k) violates due process – is that this would mean that the General Assembly could not repeal that statutory subsection without violating a defendant's right to due process. Or alternatively, if the statute were to be repealed, a challenge for cause to a prospective juror who was a compensated employee of a law enforcement agency must

necessarily be sustained as a matter of due process, even without a showing of actual bias. This result does not appear to comport with United States Supreme Court authority. *See United States v. Wood*, 299 U.S. 123, 137 (1936) (an absolute disqualification of governmental employees to serve as jurors in criminal cases cannot be treated as embedded in the Sixth Amendment).

¶ 19 Defendant argues that a sitting juror's implied bias satisfies the outcome-determinative test because under the statute "bias is conclusively presumed as a matter of law," which violates the right to an impartial jury. We need not decide, however, whether a sitting juror who is impliedly biased, but not actually biased, satisfies the *Novotny* outcome-determinative test, because, in my view, allowing such a juror to serve over objection violates an express legislative mandate. In reaching this conclusion, it is necessary to first address why a violation of section 16-10-103(1)(k) qualifies as a violation of an express legislative mandate, while the impairment of a defendant's substantial statutory right to a specific number of peremptory challenges under section 16-10-103(3) does not.

¶ 20 In acknowledging the express legislative mandate exception, the supreme court used violation of a statutory right to speedy trial as an example. *Novotny*, ¶ 26 (citing *Zedner v. United States*, 547 U.S. 489, 507 (2006)). Although a defendant might not suffer outcome-determinative prejudice from a violation of his statutory speedy trial right, the statute mandates that charges be dismissed. § 18-1-405(1), C.R.S. 2017.

¶ 21 Both the special concurrence and dissent reject the express legislative mandate, and note that the speedy trial statute, which the supreme court used as an example, expressly provides for the remedy of dismissal. Examining section 18-1-405 as a whole, however, it appears that the sanction of dismissal was specified to clarify that simple release from custody was not an adequate sanction when the speedy trial deadlines were violated. *See State in Interest of L.D.*, 139 So. 3d 679, 685 (La. Ct. App. 2014) (noting that statute governing timely juvenile adjudication did not clearly provide a remedy because it did not specify either release from

custody or dismissal of the petition).[2] Section 18-1-405 provides in pertinent part, as follows:

> [I]f a defendant is not brought to trial on the issues raised by the complaint, information, or indictment within six months from the date of the entry of a plea of not guilty, he *shall be discharged from custody if he has not been admitted to bail, and, whether in custody or on bail, the pending charges shall be dismissed* . . . .

§ 18-1-405(1) (emphasis added).

¶ 22 It does not appear that any Colorado statute provides for a specific remedy of "dismissal on appeal." Moreover, prior to *Novotny*, the remedy for the failure to excuse an impliedly biased juror was automatic reversal. *See Macrander*, 828 P.2d at 246. Therefore, there would have been no reason to specify this remedy in section 16-10-103.[3] Thus, the absence of a specific remedy in the statute's language should not be determinative.

¶ 23 Here, although section 16-10-103 does not require dismissal of charges, the statute mandates that a challenge for cause based

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[2] In contrast, some speedy trial statutes provide for release from custody rather than dismissal. *See United States v. Scaife*, 749 F.2d 338, 343 (6th Cir. 1984) (under 18 U.S.C. § 3161(b) (1982), proper sanction for violation of ninety-day time limit would be release from custody rather than dismissal).

[3] Section 16-10-103, has not been amended post-*Novotny*.

on specified grounds "shall" be granted. § 16-10-103(1). *See People v. Rhodus*, 870 P.2d 470, 474 (Colo. 1994) (noting that challenges for cause under section 16-10-103 are "mandatory").[4] In contrast, the error addressed in the *Novotny* line of cases was not a direct violation of a statutory mandate. Rather, "the effect" of an erroneous denial of a challenge for cause resulted in an adverse impact on the defendant's ability to shape the jury through peremptory challenges. *Novotny*, ¶ 14.

¶ 24 That said, not every violation of a statute constitutes the violation of an express legislative mandate that would require reversal in the absence of outcome-determinative prejudice. *See People in Interest of Clinton*, 762 P.2d 1381, 1389-99 (Colo. 1988) (non-jurisdictional statutory violation does not constitute reversible error unless the violation is of an "essential condition" of a statute so as to undermine confidence in the fairness of the proceedings).

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[4] The supreme court has held that it is "incumbent upon the challenging party to clearly state of record the particular ground on which a challenge for cause is made." *People v. Russo*, 713 P.2d 356, 361 (Colo. 1986); *see also People v. Coney*, 98 P.3d 930, 934 (Colo. App. 2004) (trial court did not err in failing to sua sponte excuse a juror where the prospective juror disclosed her employment by the sheriff's office but neither side challenged her for cause).

Certainly construing all statutory violations as reversible error per se would result in many new trials for mere technical error. In this case, however, violation of the clear mandate of section 16-10-103(1) should be considered reversible error under *Novotny*.

¶ 25 As the United States Supreme Court has recognized, the violation of a statutory right can be deemed reversible error per se as a matter of state law. *See Rivera v. Illinois*, 556 U.S. 148, 161-62 (2009) (absent a federal constitutional violation, states retain the prerogative to decide whether errors require automatic reversal or rank as harmless under state law). The General Assembly was not constitutionally required to adopt a challenge for cause requirement for compensated employees of law enforcement agencies, but it chose to do so. Requiring a showing of actual bias rather than automatic reversal would thwart the purpose of section 16-10-103. Because section 16-10-103(1)(j) already provides for challenges for cause to biased jurors, the Attorney General's analysis would in effect compress the other implied bias subsections into subsection (j). The General Assembly adopted the implied bias provisions of section 16-10-103 to operate apart from a prospective juror's actual bias. *Rhodus*, 870 P.2d at 473 ("In order to maintain the

appearance of impartiality in our justice system, the General Assembly and the courts have delineated circumstances in which bias is implied by law.").

¶ 26 Thus, requiring reversal where an impliedly biased juror has sat on a jury, even in the absence of actual bias, satisfies the intent and important purpose of the statute. We conclude that the violation of section 16-10-103(1)(k) is reversible error.

D. Waiver

¶ 27 Finally, we address and reject the Attorney General's waiver argument. Specifically, the Attorney General points to the trial court's statement that Juror J "certainly is not a police officer or anything remotely like that, and I just don't think without further authority one way or the other that I can find the Division of Criminal Justice is the kind of law enforcement agency that's contemplated by the statute." On this basis, the Attorney General asserts that "[t]he defendant never followed up with this and did not provide [the] trial court with the statutes supporting his challenge for cause." This assertion misses the mark in three ways.

¶ 28 First, counsel's voir dire established that Juror J worked for the Colorado Division of Criminal Justice, within the Department of

Public Safety, which also includes the Colorado State Patrol and the Colorado Bureau of Investigation.

¶ 29 Second, counsel challenged Juror J as being a compensated employee of a law enforcement agency and that is how the trial court understood the challenge. *See Berra v. Springer & Steinberg, P.C.*, 251 P.3d 567, 570 (Colo. App. 2010) ("[T]o preserve the issue for appeal all that was needed was that the issue be brought to the attention of the trial court and that the court be given an opportunity to rule on it.").

¶ 30 Third, "the trial court is presumed to know and follow the law." *People v. Gibbons*, 397 P.3d 1100, 1107 (Colo. App. 2011) (quoting *State v. Ramirez*, 871 P.2d 237, 249 (Ariz. 1994)), *aff'd*, 2014 CO 67.

¶ 31 Therefore, defense counsel's failure to provide the trial court with a citation to section 24-33.5-112(1)(a), C.R.S. 2017, did not waive his challenge for cause. As discussed above, absent waiver of the challenge for cause, reversal is required.

III. The Trial Court Did Not Abuse Its Discretion by Admitting Evidence of a 7-Eleven Incident Three Days Before the Charged Offenses as Res Gestae

¶ 32 Although we reverse for a new trial, we address defendant's contention that evidence of an incident at a 7-Eleven store should not have been admitted as res gestae since that issue is likely to recur on retrial.

¶ 33 The prosecution moved in limine to introduce, as res gestae, evidence of an incident that had occurred at a 7-Eleven store three days before the charged offenses. According to the prosecution, "the evidence will show that [defendant] became very angry and abuse [sic] following [the decedent's friend] leaving him at the [store]."

¶ 34 In a written order, the trial court ruled that

> evidence of the events at the convenience store on August 20 is necessary to provide the fact finder with a full and complete understanding of the events surrounding the crime and the context in which the charged crime occurred. The events at the convenience store are accordingly admissible as res gestae of the events which occurred four days later at [the friend's] apartment.

However, the court explained that the prosecution's evidence

> may include only evidence concerning the interaction of defendant and [the friend] at the store, *and the clerk's observations of defendant's emotional state following [the friend's] departure*. Evidence concerning defendant's shoplifting activity at the store, defendant's threats to the clerk following [the woman's] departure, and the fact that the clerk called for police assistance is not within the res gestae of the charged offenses and is not admissible under that theory.

(Emphasis added.)

¶ 35 Consistent with this order, the jurors heard evidence about defendant's emotional state after the friend left him at the 7-Eleven. They also viewed video footage showing defendant leaving the store and then returning.

A. Preservation

¶ 36 The Attorney General argues that defendant waived this issue because counsel "only objected to the very end of the interaction at 7-Eleven between the clerk and [defendant], which the trial court ultimately excluded." Defendant counters that counsel specifically objected to "evidence about events that occurred after [the friend] left" and "[t]his is the evidence [he] claims was improperly

admitted." We agree with defendant that he did not waive our review of this narrow portion of evidence.

¶ 37 During argument on the prosecution's motion, defense counsel conceded the admissibility of evidence that defendant and the friend "went into the 7-Eleven to get food and after they had shopped together, she left while [defendant] is standing there paying for the groceries." But counsel objected to any evidence of what occurred after the friend had left and defendant came back inside the store. The trial court clarified counsel's objection as follows:

> So you think that evidence about what happened at the 7-Eleven would be properly admissible but you think it would stop when [defendant] comes back into the 7-Eleven after [the friend] has left and the 7-Eleven clerk then observes that the defendant seems to be upset about what had happened[?]

Counsel responded "yes," and said, "[s]o I actually object to anything after [the friend] leaves."

B. Standard of Review and Law

¶ 38 We review a trial court's ruling admitting evidence as res gestae for an abuse of discretion. *People v. Reed*, 2013 COA 113, ¶ 31.

¶ 39 Res gestae evidence is "generally linked in time and circumstances with the charged crime, forms an integral and natural part of an account of a crime, or is necessary to complete the story of the crime for the jury." *People v. Greenlee*, 200 P.3d 363, 368 (Colo. 2009) (citation omitted). Such evidence "provides the fact-finder with a full and complete understanding of the events surrounding the crime and the context in which the charged crime occurred." *People v. Lucas*, 992 P.2d 619, 624 (Colo. App. 1999).

¶ 40 The procedural requirements of CRE 404(b) do not apply to res gestae evidence. *People v. Miranda*, 2014 COA 102, ¶ 50. "[I]n assessing the admissibility of this evidence on appeal, we must assume the maximum probative value of the evidence . . . and the minimum prejudice reasonably to be expected." *Id.* (citation omitted) (*cert. granted in part* Aug. 31, 2015).

C. Analysis

¶ 41 Defendant argues that the trial court erred in admitting testimony by the 7-Eleven clerk about defendant's emotional state after the friend left and permitting the jury to view surveillance video of defendant leaving the 7-Eleven and then returning a short time later. According to defendant, "[n]o connection exists between

what happened after [the friend] left the 7-Eleven and the events three days later at [the friend's] apartment."

¶ 42 But during argument on the motion, defense counsel conceded that the 7-Eleven incident "represents the last time [the friend] saw [defendant] and shows the circumstances under which they parted." Those circumstances necessarily include testimony by the store clerk that defendant "seemed very upset" after the friend left him. One fair inference would be that because the friend left, defendant became angry at her.

¶ 43 This evidence is relevant because the prosecution asserted that defendant's anger — starting at the 7-Eleven store — led to the offenses at the friend's apartment. To support this assertion, the prosecution offered evidence that defendant had called the friend seventy-five times between the 7-Eleven incident and the offenses at her apartment. Thus, we conclude that evidence about defendant's emotional state after the friend left him at the 7-Eleven provided context for the jury and a more complete understanding of events leading up to the offenses at the friend's apartment. *See People v. Rudnick*, 878 P.2d 16, 19 (Colo. App. 1993) ("When . . . the evidence showed that defendant's angry state of mind earlier in the evening

persisted up to and included the time of the shooting, evidence of defendant's behavior and statements during that time were admissible as part of the res gestae.").

¶ 44 As for the video, it merely showed what the 7-Eleven clerk had testified about — that defendant left the 7-Eleven and, when he returned a short time later, he was angry. The video does not show anything beyond that allowed by the trial court's order.

¶ 45 In sum, giving this evidence the maximum probative value and the minimum unfair prejudice to be reasonably expected, we conclude that the trial court properly admitted evidence of defendant's emotional state after the friend left him at the 7-Eleven as res gestae.

IV. Remaining Contentions

¶ 46 We do not address defendant's remaining contentions because if they arise on retrial, it is likely that they will not arise in the same evidentiary or procedural posture.

V. Conclusion

¶ 47 The judgment is reversed and the case is remanded for a new trial.

JUDGE FREYRE concurs in part and dissents in part.

JUDGE WEBB dissents.

JUDGE FREYRE, concurring in part and dissenting in part.

¶ 48 This case presents the question left unanswered by our supreme court in *Mulberger v. People*, 2016 CO 10: What is the remedy, post-*Novotny*, when a biased juror serves on the jury? The division agrees that the Division of Criminal Justice constitutes a public law enforcement agency, that Juror J was a compensated employee of that law enforcement agency, and, therefore, that the trial court erred in denying the defendant's challenge for cause to Juror J under section 16-10-103(1)(k), C.R.S. 2017. We further agree that the defendant did not waive this error by failing to cite to section 24-33.5-112(1)(a), C.R.S. 2017, the statute which identifies that division as a law enforcement agency. We part ways concerning what the analysis should be for this error. Judge Booras and I agree on the remedy (reversal), but disagree on why that remedy is required. Yet we all agree that *People v. Novotny*, 2014 CO 18, must be our starting point.

¶ 49 Judge Booras concludes, and I agree, that *Novotny* articulates three potential categories of reversal for erroneously denied challenges for cause: (1) structural error requiring automatic reversal; (2) trial error requiring reversal for outcome-determinative

prejudice; or (3) error requiring reversal for violation of an express legislative mandate.

¶ 50 Judge Booras relies on United States Supreme Court precedent finding that states can deem violations of statutory rights reversible error per se. *See Rivera v. Illinois*, 556 U.S. 148, 161-62 (2009) (absent a federal constitutional violation, states retain the prerogative to decide whether errors require automatic reversal or rank as harmless under state law). Again, I concur with Judge Booras in this regard. Judge Booras reasons that a violation of section 16-10-103(1)(k), a statutory category of prospective jurors the General Assembly has deemed presumptively biased and must be excused upon request, warrants reversal. While I agree with Judge Booras that reversal is the appropriate remedy when an impliedly biased juror sits on the deliberating jury, I cannot conclude that the fact of the statutory violation requires reversal under the terms of the statute itself in the absence of express statutory language requiring this remedy. *See Mulberger*, ¶ 16 ("[W]e must refrain from going beyond the plain meaning of the statute to 'accomplish something the plain language does not suggest.'" (quoting *Smith v. Exec. Custom Homes Inc.*, 230 P.3d

1186, 1190 (Colo. 2010))). Indeed, the statutory example of the express legislative mandate doctrine cited by *Novotny* is the speedy trial statute, § 18-1-405(1), C.R.S. 2017, where the General Assembly has expressed a mandatory remedy for its violation — "pending charges *shall be dismissed*, and the defendant *shall not again be indicted, informed against, or committed* for the same offense, or for another offense based upon the same act or series of acts arising out of the same criminal episode." (Emphasis added.) Therefore, I respectfully disagree with Judge Booras's rationale for requiring reversal and concur in the dissent's thorough analysis of the express legislative mandate doctrine.

¶ 51 However, while I agree that statutory violations are ordinarily reviewable under an outcome-determinative analysis, I disagree that this particular violation — the participation of a biased juror in deliberations — can be reviewed under such an analysis. Recognizing that "some constitutional rights [are] so basic to a fair trial that their infraction can never be treated as harmless error," and that "[t]he right to an impartial adjudicator, be it judge or jury, is such a right," *Gray v. Mississippi*, 481 U.S. 648, 668 (1987) (quoting *Chapman v. California*, 386 U.S. 18, 23 (1967)), I would

find that a violation of section 16-10-103(1)(k) that results in the seating of a biased juror falls within the third category of reversal recognized by *Novotny* — structural error. *See United States v. Martinez-Salazar*, 528 U.S. 304, 311 (2000) (recognizing that peremptory challenges, unlike the right to an impartial jury guaranteed by the Sixth Amendment, are not of federal constitutional dimension); *Gomez v. United States*, 490 U.S. 858, 876 (1989) ("Among those basic fair trial rights that 'can never be treated as harmless' is a defendant's 'right to an impartial adjudicator, be it judge or jury.'") (citations omitted); *Novotny*, ¶ 20 (recognizing that a limited class of fundamental constitutional errors, designated structural error, defy analysis by harmless error standards).

¶ 52 I discern three flaws in the dissent's outcome-determinative analysis. First, the dissent strains to distinguish implied bias from actual bias — a distinction that section 16-10-103 does not make. It draws this distinction from language in federal and state cases *where no comparable statute exists* and where those courts discuss the "exceptional" circumstances in which bias should be implied from special relationships, absent a statute like Colorado's. Our

legislature has abrogated the task of identifying these "exceptional" circumstances from the judiciary by codifying them in section 16-10-103. Nothing in this statute suggests that the presumption of bias is rebuttable. Therefore, the dissent's reliance on cases explaining actual bias versus implied bias and its attempt to graft that analysis onto section 16-10-103 is misplaced. The legislature has done the work for us and has determined that a compensated employee of a public law enforcement agency is presumptively, and irrebuttably, biased. Once bias has been established, in my view, bias is bias, whether actual or implied.

¶ 53 Second, based on this misplaced distinction between actual and implied bias, the dissent then elevates the importance of actual over implied bias by concluding that implied bias does not implicate a defendant's due process right to an impartial jury (while actual bias does), because it serves only to guard against the appearance of partiality. Again, the cases on which the dissent relies for this proposition concerned whether to imply bias based on special relationships in the first instance (a determination already made by our General Assembly in section 16-10-103), not whether an

impliedly biased juror who convicted a defendant implicated that defendant's due process right to an impartial jury.

¶ 54 Third, based on the conclusion that implied bias does not always implicate a defendant's due process right to an impartial jury, the dissent then concludes that reversing a conviction for implied bias is now done in only the most "extreme situations," and that whether reversal is required can be determined by assessing the actual bias (based on voir dire) of an impliedly biased juror. However, as the cited cases illustrate, the rarity of reversal for implied bias is solely attributable to the rarity with which courts imply bias from special relationships — a determination already made by our General Assembly in section 16-10-103 — not any reluctance by those courts to reverse a defendant's conviction when a biased juror decides a defendant's guilt. Indeed, the dissent does not cite any case in which a court has found an impliedly biased juror's conviction of a defendant to be anything other than reversible error. And, as described below, attempting to refute bias implied by law with a juror's assurances of fairness is not supported in Colorado or federal precedent. *See United States v.*

Mitchell, 690 F.3d 137, 150 (3d Cir. 2012) (recognizing "that the implied bias doctrine erects an impenetrable barrier").

¶ 55 A biased juror, whether actually biased under section 16-10-103(1)(j) or impliedly biased under section 16-10-103(1)(k), who sits on the jury over a defendant's objection violates that defendant's due process right to a fair and impartial jury.[1] Indeed, it is well-settled that a defendant's constitutional right to an impartial jury is violated, and reversal is required, when a biased juror sits on the jury. *See Martinez-Salazar*, 528 U.S. at 315-16 ("Nor did the District Court's ruling result in the seating of any juror who should have been dismissed for cause. As we have recognized, that circumstance would require reversal."); *Ross v. Oklahoma*, 487 U.S. 81, 85 (1988) ("Had [the biased juror] sat on the jury that ultimately

[1] I do not suggest that in the absence of a statute like section 16-10-103, C.R.S. 2017, the service of a law enforcement officer on a defendant's jury would always constitute a due process violation. Whether bias existed would be a judicial determination like it is in federal courts and states without a comparable statute. Where implied bias existed, then service of that juror would violate a defendant's due process rights and require reversal. Where no implied bias existed, then mere employment as a law enforcement officer would not violate due process. This is consistent with the federal cases cited in the defendant's briefs. Because the General Assembly has abrogated this task from the judiciary by finding this relationship impliedly biased as a matter of law, we must treat such a juror as biased for purposes of the due process analysis.

sentenced petitioner to death, and had petitioner properly preserved his right to challenge the trial court's failure to remove [the juror] for cause, the sentence would have to be overturned."); *United States v. Gonzalez*, 214 F.3d 1109, 1111 (9th Cir. 2000) ("The Sixth Amendment guarantees criminal defendants a verdict by an impartial jury. The bias or prejudice of even a single juror is enough to violate that guarantee. Accordingly, '[t]he presence of a biased juror cannot be harmless; the error requires a new trial without a showing of actual prejudice.'" (quoting *Dyer v. Calderon*, 151 F.3d 970, 973 (9th Cir. 1998))); *Dunlap v. People*, 173 P.3d 1054, 1081-82 (Colo. 2007) (noting a defendant's right to a fair trial is implicated when a court's erroneous denial of a challenge for cause results in the seating of a juror who should have been stricken for cause); *Morrison v. People*, 19 P.3d 668, 671 (Colo. 2000) ("[O]ur decisions establish that if the jury included a biased juror, then the defendant's right to a fair trial was violated and his convictions must therefore be reversed."); *People v. Wise*, 2014 COA 83, ¶ 28 (prejudice is established if the defendant shows that a biased juror participated in deciding his guilt); *People v. Marciano*, 2014 COA 92M-2, ¶ 10 (allowing a challenged, biased juror to sit on

the jury violates a defendant's right to impartial jury requiring reversal); *People v. Maestas*, 2014 COA 139M, ¶ 20 (same); *see also Dyer*, 151 F.3d at 985 ("No opinion in the two centuries of the Republic — except the dissent in our case — has suggested that a criminal defendant might lawfully be convicted by a jury tainted by implied bias."); *United States v. Allsup*, 566 F.2d 68, 71 (9th Cir. 1977) (holding that the presence of a biased juror cannot be harmless and that such an error requires a new trial without a showing of actual prejudice). The dissent does not cite, nor have I located, any case finding such an error harmless.

¶ 56 Implied bias is "bias conclusively presumed as a matter of law" "regardless of actual partiality." *United States v. Wood*, 299 U.S. 123, 133-34 (1936). In contrast to actual bias, where questioning a potential juror reveals that he or she is unwilling or unable to follow the applicable law, "implied bias cannot be affected by the voir dire process." *People v. Lefebre*, 5 P.3d 295, 302 (Colo. 2000), *overruled on other grounds by Novotny*, 2014 CO 18; *see People v. Ellis*, 148 P.3d 205, 208 (Colo. App. 2006) (impliedly biased juror not susceptible of rehabilitation by further questioning because once bias is established, it cannot be ameliorated by juror's assurances

of fairness); *see also Mitchell*, 690 F.3d at 143 (potential juror's assessment of her own ability to remain impartial is irrelevant when juror is impliedly biased); *United States v. Haynes*, 398 F.2d 980, 984 (2d Cir. 1968) (stating that an impliedly biased juror's voir dire statements of an ability to be impartial are "totally irrelevant"). Indeed, "it would be senseless to allow parties to question a prospective juror who is irremediably disqualified from serving once the implied bias is established by firm and clear evidence." *Lefebre*, 5 P.3d at 302.

¶ 57 In Colorado, the General Assembly determines the qualifications for jury service, consistent with a criminal defendant's constitutional right to trial before a fair and impartial jury. U.S. Const. amends. VI, XIV; Colo. Const. art. II, § 16; *Mulberger*, ¶ 9; *see also Novotny*, ¶ 7; *People v. White*, 242 P.3d 1121, 1124 (Colo. 2010) ("Within constitutional limitations, the legislature determines qualifications for jury service."). Consistent with this authority, and as relevant here, it has identified a specific subset of potential jurors — compensated employees of public law enforcement agencies and public defender's offices — whose bias is implied by law and whose challenge for cause by any party must be

sustained by the trial court. § 16-10-103(1)(k); *Mulberger*, ¶ 9; *see also* Crim. P. 24(b)(1)(XII). "The chief concerns underlying this provision are "that one who is employed by a law enforcement agency will favor, or will be perceived to favor, the prosecution side of a criminal case," *Ma v. People*, 121 P.3d 205, 210 (Colo. 2005), and, "by analogy, that a compensated employee of a public defender's office will favor or be perceived to favor, the defendant," *Mulberger*, ¶ 12. Therefore, the statute imputes bias to potential jurors who meet the statutory definitions as a matter of law and "requires the trial court to sustain challenges brought against them in an attempt to eliminate any appearance of prejudice or partiality." *People v. Bonvicini*, 2016 CO 11, ¶ 9; *Mulberger*, ¶ 13.

¶ 58 In interpreting section 16-10-103, we must ascertain and give effect to the General Assembly's intent. *Mulberger*, ¶ 11. We do this by looking at the statute's plain language and construing that language according to its common meaning. *Id.* Section 16-10-103(1) requires a court to sustain a challenge to a potential juror for one or more of eleven different reasons. These reasons are mutually exclusive, and the General Assembly has not recognized any distinction between potential jurors who are actually biased (§ 16-

10-103(1)(j)) and those who are impliedly biased (§ 16-10-103(1)(a-i), (k)).

¶ 59 In contrast to Colorado, the federal government and many states operate without a comparable statute, and the question whether bias exists is a case-by-case judicial determination. Absent a statute, courts may, in extraordinary cases, presume bias based on the circumstances. *See McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 556-57 (1984) (Blackmun, J., concurring) (accepting doctrine of implied bias in exceptional circumstances); *Smith v. Phillips*, 455 U.S. 209, 222 (1982) (O'Connor, J., concurring) (listing examples of situations where bias may be presumed from special relationships). Implied or presumed bias arises from "situations in which the circumstances point so sharply to bias in a particular juror that even his own denials must be discounted." *United States v. Nell*, 526 F.2d 1223, 1229 n.8 (5th Cir. 1976). The crux of a judicial implied bias analysis involves the examination of the similarities between the juror's experiences and the incident giving rise to the trial where the similarities would inherently create an emotional involvement affecting partiality.

Burton v. Johnson, 948 F.2d 1150, 1159 (10th Cir. 1991); *Allsup*, 566 F.2d at 71.

¶ 60 Whether a juror's bias may be implied from the circumstances of a special relationship is a question of law and not a matter for the trial court's discretion. *Mitchell*, 690 F.3d at 142. Because implied bias is determined on a case-by-case basis in the absence of a statute defining it, categories of judicially determined implied bias do not always "match" the categories set forth in section 16-10-103. *Compare State v. Benedict*, 148 A.3d 1044 (Conn. 2015) (refusing to imply bias to a compensated police officer), *with* § 16-10-103(1)(k) (finding compensated employee of public law enforcement agency impliedly biased). However, sometimes they do. *Compare Dennis v. United States*, 339 U.S. 162, 167 (1950) (jurors' employment by the federal government alone insufficient to impute bias), *and State v. Kauhi*, 948 P.2d 1036 (Haw. 1997) (employee of prosecutor's office impliedly biased under the appearance of impropriety doctrine), *with* § 16-10-103(1)(k) (no bias imputed to potential jurors employed by non-law enforcement government agencies), *and* § 16-10-103(1)(k) (finding compensated employee of public law enforcement agency impliedly biased).

¶ 61 I am not persuaded that the federal cases, *Wood*, 299 U.S. 123, and *Smith*, 455 U.S. 209, support the dissent's proposition that statutorily implied bias "does not necessarily raise a constitutional issue where due process would require reversal," *infra* ¶ 96, and thereby creates a distinction between actual and implied bias, for three reasons. First, the courts in neither of these cases found that implied bias existed in the relationships at issue, while the General Assembly has statutorily determined that implied bias existed here. Thus, whether a relationship is sufficiently close to imply bias is not a question a Colorado court would ever need to consider under the circumstances of this case — the General Assembly has done that already by declaring specifically defined relationships, including compensated employees of public law enforcement agencies and public defender's offices, to be inherently biased. Second, none of the jurors in these cases were employees of law enforcement agencies. Finally, neither of these cases involved or discussed a statute like section 16-10-103 which imputes bias to a class of prospective jurors as a matter of law. And, as Justice O'Connor noted in her concurrence, "[n]one of our previous cases preclude the use of the conclusive presumption of implied bias in

appropriate circumstances." *Smith*, 455 U.S. at 223 (O'Connor, J., concurring).

¶ 62 I am similarly unconvinced that any of the cases discussing the "exceptional nature" of the implied bias doctrine bear any relevance to statutorily implied bias in Colorado. The dissent's proclamation that section 16-10-103(1)(k) "cuts a broader swath through the field of potential jurors than due process requires [under federal law]," *infra* ¶ 98, if true, simply demonstrates that our General Assembly has defined the contours of the implied bias doctrine differently (and more protectively) than the federal courts and other states without a comparable statute. The General Assembly has the authority to make this determination, and appellate courts have no authority to change it. *See Scoggins v. Unigard Ins. Co.*, 869 P.2d 202, 205 (Colo. 1994) (A court "will not judicially legislate by reading a statute to accomplish something the plain language does not suggest, warrant or mandate."). Indeed, it would not be the first time that Colorado has provided its citizens with greater protections than federal law affords. *Compare, e.g.*, U.S. Const. amend. VI (affording criminal defendant the right "to be confronted with the witnesses against him"), *and United States v.*

Drayton, 536 U.S. 194, 206 (2002) ("The Court has rejected in specific terms the suggestion that police officers must always inform citizens of their right to refuse when seeking permission to conduct a warrantless consent search."), *and Barker v. Wingo*, 407 U.S. 514, 523 (1972) ("We find no constitutional basis for holding that the speedy trial right can be quantified into a specified number of days or months."), *with* Colo. Const. art. II, § 16 (affording criminal defendant the right to "meet the witnesses against him face to face"), *and* § 16-3-310(1)(b)(I), (II), C.R.S. 2017 (requiring a peace officer to advise a person not yet under arrest that he or she is being asked to voluntarily consent to a search and that he or she has a right to refuse the request to search), *and* § 18-1-405(1) (prescribing a defendant's right to a speedy trial as six months from the date of entry a of a plea of not guilty). Therefore, I would not view section 16-10-103 "through the prism of such cases." *Infra* ¶ 98.

¶ 63 For the same reasons, I do not find *Benedict* or *Mitchell* relevant or persuasive. In concluding there was insufficient evidence to establish implied bias, the *Benedict* court stated, "Connecticut has no common-law rule or statute prohibiting or

exempting an active police officer from service on a jury solely because of his occupation . . . ." *Benedict*, 148 A.3d at 1050 (citation omitted). Colorado does.

¶ 64 Similarly, the court in *Mitchell* refused to "fashion a new category of implied bias for coworkers of police officers." 690 F.3d at 874. However, Colorado's General Assembly has taken the opposite approach and fashioned this category of prospective jurors and declared members of it to be impliedly biased. *Mitchell* provides no authority for us to alter that legislative decision.

¶ 65 Unlike the dissent, I am persuaded by the federal cases[2] finding implied bias, because in all of those cases, the court found a due process violation and reversed the defendant's convictions. In my view, these cases demonstrate that a finding of implied bias (which has already been determined by our General Assembly) necessarily implicates a defendant's due process right to a fair trial and affirms that a defendant cannot receive a fair trial when convicted by a biased juror. This view finds support in the United States Supreme Court's repeated recognition that a violation of a defendant's right to an impartial adjudicator can never be harmless.

[2] Listed *infra* ¶ 101, n.2.

See, e.g., *Gomez*, 490 U.S. at 876. And, because the General Assembly has chosen to treat actual and implied bias equally in section 16-10-103, I am not persuaded by the dissent's suggestion that there is or should be more concern with actual rather than implied bias in the State of Colorado.

¶ 66 I find the dissent's concern with potential "sandbagging" misplaced. Federal and Colorado cases explicitly address the potential for "sandbagging." Federal law dictates that a defendant's failure to raise a claim of juror bias in the trial court amounts to a waiver of that claim on appeal. *See United States v. Costa*, 890 F.2d 480, 482 (1st Cir. 1989) (collecting cases). Indeed, as the *Costa* court reasoned, "[a]ny other rule would allow defendants to sandbag the court by remaining silent and gambling on a favorable verdict, knowing that if the verdict went against them, they could always obtain a new trial by later raising the issue of juror misconduct." *Id.*

¶ 67 Similarly, Colorado law requires a party to request excusal of a prospective juror based on bias (both actual and implied) in order to preserve that issue for appellate review. *See People v. Coney*, 98 P.3d 930, 934 (Colo. App. 2004) (rejecting the defendant's assertion

that a law enforcement employee's service on the jury requires reversal because the defendant failed to challenge the juror for cause). Thus, a defendant in Colorado could not "forego inquiry of the court, exercise [his] peremptory challenges on the most favorable interpretation of an ambiguity, and then take exception when that interpretation is not followed." *United States v. Ricks*, 776 F.2d 455, 470 (4th Cir. 1985). Nor is a Colorado trial judge required to excuse a prospective juror sua sponte in the absence of a request. *Coney*, 98 P.3d at 934.

¶ 68 Furthermore, I do not share the dissent's concern that defense counsel would purposefully leave a biased juror on the jury to take advantage of the automatic reversal rule. If the trial court's error was sufficiently obvious for the defense to make this strategic decision, then it would be equally obvious to the prosecutor, who could preclude reversal by excusing the biased juror. And, as aptly noted in *Martinez-Salazar*, "[c]hallenges for cause and rulings upon them . . . are fast paced, made on the spot and under pressure. Counsel as well as the court, in that setting, must be prepared to decide, often between shades of gray, 'by the minute,'" thereby

leaving little, if any time, for sandbagging. *Martinez-Salazar*, 528 U.S. at 316 (citations omitted).

¶ 69 Finally, I find implausible the notion that an impliedly biased juror can be "rehabilitated" through questioning and serve on a jury, over a defendant's objection, without violating the defendant's constitutional right to an impartial jury. First, this notion is contrary to the plain language of section 16-10-103, which treats implied and actual bias as distinct and separate reasons for disqualifying a potential juror without elevating the importance of one reason over another. We may not read into the statute a distinction that does not exist. *Scoggins*, 869 P.2d at 205.

¶ 70 Second, the statute *requires* a court to excuse an impliedly biased juror when requested and affords it no discretion to further consider the nature of the relationship creating the implied bias. *See Aviado v. Indus. Claim Appeals Office*, 228 P.3d 177, 182 (Colo. App. 2009) ("'[S]hall' generally indicates that a provision is mandatory . . . .").

¶ 71 Furthermore, this notion is contrary to the Colorado and federal cases cited above recognizing that implied bias cannot be affected by the voir dire process and that any rehabilitation would

be "senseless," *Lefebre*, 5 P.3d at 302, and "totally irrelevant," *Haynes*, 398 F.2d at 984. Thus, any reading, much less a "fair reading" of Juror J's responses, is irrelevant and has no bearing on the bias imputed to her by section 16-10-103(1)(k). And, as previously noted, this notion is unsupported by a single case finding that an impliedly biased juror's conviction of a defendant is harmless.

¶ 72 In sum, I would conclude that an impliedly biased juror who serves on the jury over the defendant's objection necessarily implicates the defendant's due process right to a fair and impartial jury. I would further conclude that because the harm arising from a partial adjudicator pervades and infects the entire framework of the trial, it constitutes structural error warranting automatic reversal under *Novotny*. Therefore, I agree with Judge Booras that we must reverse the defendant's conviction and remand for a new trial. I also agree with Judge Booras's resolution of the res gestae issue and with her conclusion that resolution of the other issues is unnecessary.

JUDGE WEBB, dissenting.

¶ 73 Defendant seeks reversal, primarily because, in denying his challenge for cause to Juror J, the trial court misapplied section 16-10-103(1)(k), C.R.S. 2017. This statute mandates dismissal of any prospective juror who is a "compensated employee of a public law enforcement agency." *Id.* Everyone agrees that the court erred.

¶ 74 But what next? In *People v. Novotny*, 2014 CO 18, our supreme court jettisoned a quarter century of its precedent, renounced automatic reversal, and adopted in its place outcome-determinative analysis.

¶ 75 Yet, Judge Booras writes to reverse without applying this analysis, reasoning that section 16-10-103(1)(k) triggers the "express legislative mandate" doctrine, a limited exception to outcome-determinative analysis. Defendant did not make this argument. In any event, because section 16-10-103 does not provide a remedy for seating such a juror, applying the doctrine allows the exception to swallow the rule. So, I respectfully disagree with Judge Booras.

¶ 76 Further, seating Juror J, despite the statutorily implied bias, did not infringe on any of defendant's constitutional rights, which

was the ground on which he sought reversal. For this reason, I also respectfully disagree with the special concurrence, which cites no authority breathing constitutional life into mere statutorily implied bias.

¶ 77 Following the appropriate outcome-determinative test (harmless error), I discern no basis for reversal. And after examining defendant's remaining contentions, I would affirm the judgment of conviction, but remand for correction of the mittimus.

I. Additional Background

¶ 78 For the most part, Judge Booras recites the relevant background. However, her opinion omits the following portion of Juror J's voir dire, which must be completely set forth to apply the outcome-determinative test.

¶ 79 The prosecutor asked several prospective jurors about their feelings on circumstantial evidence. Juror J answered:

> PROSPECTIVE JUROR J: I think circumstantial — I worry sometimes that circumstantial is a person's perception, you know what I'm saying? And I would like to see more. I guess I would look at the circumstantial harder to try to determine how valuable it is.

> MR. DOMINGUES: The law that the judge is going to instruct you to follow says that there's no distinction between the two types of evidence. Is that something you can follow?
>
> PROSPECTIVE JUROR J: I guess it depends on the evidence.

¶ 80 Juror J's only other answers during voir dire dealt with how intent might be proven ("I would think the evidence that you are able to gather of his actions before the crime."); how she would deal with testimony from a drug addict ("I would have to determine whether what he's saying made sense to me. But, yeah, I could listen to it."); and how she felt about victims of crimes ("I think there's a lot of factors that go into a situation and the crime that happens. And I think justice — we need justice. You need just punishment for the crime and I think you need justice for the victim. And I think it's a balancing act, if that makes sense.").

II. Although the Trial Court Erred in Denying Defendant's Challenge for Cause to Juror J, Reversal Is Not Required Under the Outcome-Determinative Test

A. Standards of Review and of Reversal

¶ 81 "We review de novo the question of law of whether a prospective juror subjected to a challenge for cause was a

compensated employee of a public law enforcement agency within the meaning of section 1610–103(1)(k) and Crim. P. 24(b)(1)(XII)." *People v. Carter*, 2015 COA 24M-2, ¶ 9; *People v. Sommerfeld*, 214 P.3d 570, 572 (Colo. App. 2009). On this much, the parties agree.

¶ 82 As for the standard of reversal, they disagree mightily. Defendant considers reversal to be automatic, but does not invoke the structural error doctrine. The Attorney General responds that, in applying the outcome-determinative test, the conviction need not be reversed. A closer look at *Novotny* illuminates this disagreement.

¶ 83 *Novotny* is like this case, but only to a point. In both cases, the trial courts erroneously denied a challenge for cause to a prospective juror who was a compensated employee of a public law enforcement agency. In *Novotny*, defense counsel removed the juror with a peremptory challenge. Recall, in this case, defense counsel did not.

¶ 84 In *Novotny*, ¶ 17, our supreme court first recognized that

> [w]ith regard to harmless error review, the jurisprudence of both this court and the United States Supreme Court distinguishing trial from structural error and defining 'substantial rights' has evolved to the point of sanctioning reversal for trial error *only* when

> that remedy is dictated by an appropriate outcome-specific analysis.

Next, the court explained,

> in fact, the structural error/trial error dichotomy, to which we now firmly adhere, has greatly narrowed the class of error to which bright-line rules of reversal, which necessarily by-pass any outcome-determinative harmless error analysis, can apply. As we have often acknowledged, this limited class of error now comprehends only those defects affecting the framework within which the trial proceeds — errors that infect the entire trial process and necessarily render a trial fundamentally unfair — rather than simply errors in the trial process itself.

Id. at ¶ 21. Then it concluded,

> [w]hile we do not imply today that every violation of our statutes and rules prescribing the use of peremptory challenges must be disregarded as harmless, we are nevertheless unwilling to conclude that such violations of state law, as distinguished from an actual Sixth Amendment violation or those committed in other than good faith, rise to the level of structural error.

Id. at ¶ 23 (citation omitted).

¶ 85 After *Novotny*, one might wonder how an appellate court would resolve a case in which a juror who should have been excused remained on the jury. Although the supreme court has applied

Novotny in several later cases, none of them involved this scenario. But it has been addressed by two divisions of this court.

¶ 86 First came *People v. Marciano*, 2014 COA 92M-2, ¶ 10 ("Even if we determine that the trial court abused its discretion in denying a defendant's challenge for cause, however, reversal is not necessarily required. That depends, in the first instance, on whether the challenged juror participated in determining the defendant's guilt."). There, during voir dire, the challenged juror "said that if she heard damaging evidence from the prosecution, she would want an explanation from the defense and that she would expect the defense to present some evidence." *Id.* at ¶ 17. The division concluded that because this juror "was ultimately seated on the jury, defendant's right to a fair trial was violated." *Id.* at ¶ 18. The division reversed.

¶ 87 Following in *Marciano*'s footsteps, the division in *People v. Maestas*, 2014 COA 139M, ¶ 8, dealt with a juror who had said, "if you've done something [wrong] or you haven't, you need to speak up. Because if you haven't, then why — I mean, are you scared to tell everyone?" Citing *Marciano*, the division explained that,

> [i]f, however, the defendant does not use a peremptory challenge to dismiss a wrongfully retained juror, and the biased juror ultimately

> serves on the jury, the defendant's constitutional right to an impartial jury, not the statutory right to a certain number of peremptory challenges, is implicated, and reversal is required.

Id. at ¶ 13. Then it concluded, "[b]ecause a biased juror ultimately served on the jury, Maestas's constitutional right to an impartial jury was violated." *Id.* at ¶ 20.

¶ 88 To no one's surprise, defendant treats *Marciano* and *Maestas* as dispositive. Yet, one division of the court of appeals is not bound by a decision of another division. *See, e.g.*, *People in Interest of S.N-V.*, 300 P.3d 911, 914 (Colo. App. 2011).

¶ 89 But defendant — as did the divisions in *Marciano* and *Maestas* — also relies on *Morrison v. People*, 19 P.3d 668, 671 (Colo. 2000), and *United States v. Martinez-Salazar*, 528 U.S. 304, 316 (2000). Unless these cases can be distinguished, they are binding. *Raile v. People*, 148 P.3d 126, 130 n.6 (Colo. 2006) (state court must follow precedent of United States Supreme Court on matters of federal law); *In re Estate of Ramstetter*, 2016 COA 81, ¶ 40 (the court of appeals must follow precedent of the Colorado Supreme Court). So, are they distinguishable?

¶ 90 True enough, in *Morrison*, 19 P.3d at 672, our supreme court recognized that "[a] defendant's right to an impartial jury is violated if the trial court fails to remove a juror biased against the defendant." But the court ultimately concluded that the trial court had acted within its discretion in denying the challenge for cause, despite statements from the prospective juror such as, "I do have to say that I think if someone is accused, to me it means there could be — I mean there is a reason that that happened in the first place I guess" and "[y]ou know it seems to me there are reasons people get accused of things like that." *Id.* at 673. So, it is not controlling.

¶ 91 *Martinez-Salazar*, 528 U.S. at 308, dealt with a prospective juror who had repeatedly said that he would favor the prosecution. When the trial court rejected challenges for cause from both defendants, one defendant exercised a peremptory challenge. After concluding that this defendant had not "lost" a peremptory challenge, the Court noted "what this case does not involve," such as a district court's "ruling result in the seating of any juror who should have been dismissed for cause. As we have recognized, that circumstance would require reversal." *Id.* at 316. But the Court

did not expand on this comment, which was in any event dictum.[1] This case too is not controlling.

¶ 92 *Marciano*, *Maestas*, *Morrison*, and *Martinez-Salazar* share one common element — prospective jurors' own statements at least suggesting, and in *Marciano* and *Maestas* showing, actual bias. In contrast, the Attorney General asserts that, in the case before us, the statutory disqualification for a "compensated employee of a public law enforcement agency" involves only implied bias. Thus, the Attorney General continues, while a for-cause challenge to such a prospective juror must be sustained, reversal can only flow from applying the *Novotny* outcome-determinative analysis.

¶ 93 Does the first premise — that the statutory disqualification involves only implied bias — survive scrutiny? In *People v. Bonvicini*, 2016 CO 11, ¶ 10, our supreme court said that "the statute implies their bias as a matter of law and requires the trial court to sustain challenges brought against them in an attempt to eliminate any appearance of prejudice or partiality." *Accord*

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[1] The Court cited to *Ross v. Oklahoma*, 487 U.S. 1250 (1988), which involved loss of a peremptory challenge, not a challenge to the seating of a biased juror, and to *Parker v. Gladden*, 385 U.S. 363 (1966), which dealt with jury bias resulting from comments by a bailiff about the defendant.

Mulberger v. People, 2016 CO 10, ¶ 13 ("[T]he statute implies a bias for potential jurors who meet those statutory definitions."); *People v. Lefebre*, 5 P.3d 295, 300 (Colo. 2000) ("[S]ection 16-10-103(1)(a)-(i), (k), 6 C.R.S. (1999), outline the factors that constitute implied bias."), *overruled by Novotny*, 2014 CO 18. Although *Novotny* overruled *Lefebre* for applying automatic reversal, still a trial court must "determine whether the juror falls within a statutorily defined category of implied bias." *Novotny*, ¶ 53 (Hood, J., concurring in part and dissenting in part). So far, so good.

¶ 94 But what about the Attorney General's second premise — that reversal can flow only from applying the *Novotny* outcome-determinative analysis? At first blush, this premise runs headlong into the principle that

> [i]mplied bias, on the one hand, arises from external factors set forth in § 16-10-103(1), C.R.S. 2005, and is not rooted in what the juror thinks about matters related to the case, but rather in his or her relationships or circumstances. An impliedly biased juror is not susceptible to rehabilitation through further questioning because implied bias, once established, cannot be ameliorated by the juror's assurances that he or she can nonetheless be fair.

People v. Ellis, 148 P.3d 205, 208 (Colo. App. 2006) (citation omitted). The special concurrence echoes this point. But the concept of rehabilitation deals with whether the juror should be allowed to serve, not whether such a juror's service mandates reversal.

¶ 95 Since our supreme court announced *Novotny*, neither that court nor a division of this court has addressed the intersection — if any — between outcome-determinative analysis and statutorily implied bias. Even so, the following five considerations favor applying outcome-determinative analysis rather than defaulting to automatic reversal.

¶ 96 First, and most importantly, service of a juror despite a statutory implication of bias — such as section 16-10-103(1)(k) — does not necessarily raise a constitutional issue where due process would require reversal. "[D]isqualification of governmental employees to serve as jurors in criminal cases . . . cannot, upon the ground of such a practice, be treated as embedded in the Sixth Amendment." *United States v. Wood*, 299 U.S. 123, 137 (1936); *see Smith v. Phillips*, 455 U.S. 209, 217 (1982) ("[D]ue process does not require a new trial every time a juror has been placed in a

potentially compromising situation."). Stated differently, a statute may set the implied bias bar above, equal to, or below what due process requires.

¶ 97 In many circumstances, the statutory bar will exceed any constitutional requirement. "Reversing a conviction, or excusing a juror for 'implied juror bias,' is now done in only the most extreme of situations." *State v. Robertson*, 122 P.3d 895, 900 n.3 (Utah Ct. App. 2005); *see also Jones v. Regency Pac., Inc.*, No. 70422-2-I, 2014 WL 7339604, at * 6 (Wash. Ct. App. Dec. 22, 2014) (unpublished opinion) ("The second implied bias doctrine is constitutional. Under the Sixth Amendment, the court can also find implied bias in 'certain exceptional circumstances.'") (citation omitted). And "the exceptional nature of this doctrine is evident when examining cases in which implied bias is not found." *United States v. Cerrato-Reyes*, 176 F.3d 1253, 1261 (10th Cir. 1999), *abrogated in part on other grounds as stated in United States v. Jones*, 468 F.3d 704, 709 (10th Cir. 2006).

¶ 98 Viewed through the prism of such cases, section 16-10-103(1)(k) — "a compensated employee of a public law enforcement agency" — cuts a broader swath through the field of

potential jurors than due process requires. *See United States v. Mitchell*, 690 F.3d 137, 150 (3d Cir. 2012) ("Were we to enlarge the categories of implied bias beyond those accepted at common law and hallowed by years of constitutional interpretation, we might unwittingly ensnare a larger swath of prospective jurors than is necessary to ensure the integrity of the jury trial."). For example, implied bias would be ascribed to a potential juror even if the employing agency had no role in either the investigation into or the prosecution of the case. *See, e.g.*, *State v. Kauhi*, 948 P.2d 1036, 1039 (Haw. 1997) (applying "the appearance of impropriety" or "implied bias" standard to hold that the trial court erred in declining to excuse for cause a prosecutor currently employed in the same office of the prosecutor trying the defendant, despite the juror's assertion of impartiality).

¶ 99 To be sure, Juror J's employing agency — the division of criminal justice — is a "[l]aw enforcement agency of the state" under section 24-33.5-112(1)(a), C.R.S. 2017. But that section deals with "provid[ing] identification cards to retired peace officers," not investigating crimes or prosecuting perpetrators. And digging deeper, the statutory duties of the division of criminal justice do not

include investigation or prosecution either. *See* § 24-33.5-503(1), C.R.S. 2017.

¶ 100 In saying this much, I do not suggest that Juror J was immune from statutory challenge. Rather, the statutory basis for that challenge goes further than due process would require.

¶ 101 Defendant cites several federal court of appeals cases that have set aside convictions based on exceptional circumstances showing implied bias. But these cases do not involve implied bias arising solely from a statutory classification, as does the case before us.[2] So, none of them guides my choice between automatic reversal and outcome-determinative analysis.

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[2] *See Dyer v. Calderon*, 151 F.3d 970, 982 (9th Cir. 1998) (Juror "chose to conceal a very major crime-the killing of her brother in a way that she knew was very similar to the way Dyer was accused of killing his victims. She also failed to disclose many other facts that would have jeopardized her chances of serving on Dyer's jury."); *Hunley v. Godinez*, 975 F.2d 316, 320 (7th Cir. 1992) (Where the jury was burglarized during deliberations and while sequestered, and "the striking similarity between the jury burglary and the prosecution's theory of the case placed the jurors directly in the victim's situation before she was murdered," court held "[t]he limited and unique circumstances of this case justify application of the presumption of bias. The combination of the following facts, as noted by the district court, constitutes an 'extreme situation.'"); *Burton v. Johnson*, 948 F.2d 1150, 1154-55 (10th Cir. 1991) ("The audiotape of this testimony in chambers reveals that even in that in camera setting the juror was struggling with fear and great

¶ 102 Second, defendant has not cited authority, nor have I found any among those jurisdictions that — like Colorado — have abandoned their versions of the automatic reversal rule, holding that service of a juror subject to challenge for purely statutory implied bias requires reversal. And after all, section 16-10-103 does not address the consequences of erroneously denying a challenge for cause.

¶ 103 Third, at least in Colorado, the class of errors governed by bright-line rules of reversal "has greatly narrowed." *Novotny*, ¶ 21. True, some jurisdictions treat service of a biased juror as structural error. *See, e.g.*, *Commonwealth v. Lacoy*, 60 N.E.3d 354, 362 (Mass. App. Ct. 2016) ("Structural error exists where it is shown that a seated juror was biased."); *State v. Brown*, 732 N.W.2d 625, 630

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emotional distress because of her own abusive situation."); *United States v. Eubanks*, 591 F.2d 513, 517 (9th Cir. 1979) ("The allegations of juror bias here were extremely serious and the facts upon which they were founded were not open to dispute. If Collins, during voir dire, had revealed that he had two sons serving prison terms for heroin-related crimes, the trial court undoubtedly would have excused him from serving on the jury."); *United States v. Allsup*, 566 F.2d 68, 71 (9th Cir. 1977) ("The potential for substantial emotional involvement, adversely affecting impartiality, is evident when the prospective jurors work for the bank that has been robbed. Persons who work in banks have good reason to fear bank robbery because violence, or the threat of violence, is a frequent concomitant of the offense.").

(Minn. 2007) ("The bias of a single juror violates the defendant's right to a fair trial" and "constitutes structural error" that requires automatic reversal.); *Rivera-Moreno v. Gov't of Virgin Islands*, 61 V.I. 279, 320-21 (2014) (collecting cases).

¶ 104 But a closer look shows the concern to be actual — not statutorily implied — bias. *See, e.g.*, *People v. Carter*, 117 P.3d 476, 518 (Cal. 2005) ("[E]mpanelling one or more jurors who are actually biased against the defense would constitute structural error."); *People v. Bowens*, 943 N.E.2d 1249, 1259 (Ill. App. Ct. 2011) (a defendant must demonstrate that a juror was actually biased in order to show structural error); *State v. Fraga*, 864 N.W.2d 615, 623 (Minn. 2015) ("Permitting a biased juror to serve is structural error requiring automatic reversal.").

¶ 105 Fourth, bright-line rules of reversal turn a blind eye toward the significant social costs of reversal and remand for retrial. The trial in this case ended with a guilty verdict in early 2014, so a retrial would be asking the trial court and the parties to revisit events now more than three years distant. After this length of time, memories dim, evidence deteriorates or gets lost, witnesses die or move away, and victims will be forced to once again confront events

that they wish to put behind them. *See United States v. Mechanik*, 475 U.S. 66, 72 (1986) (discussing the "substantial social costs" of reversing a conviction); *People v. Sepulveda*, 65 P.3d 1002, 1008 (Colo. 2003) (same).

¶ 106 Fifth, vindicating the interest in avoiding an "appearance of impartiality," *Bonvicini*, ¶ 10, does not resurrect the automatic reversal rule put to rest by *Novotny*. To be sure, implied bias may "create serious doubt about the prospective juror's impartiality, if not in fact, then at least in appearance." *People v. Macrander*, 828 P.2d 234, 238 (Colo. 1992), *overruled by Novotny*, 2014 CO 18. As a result, "to maintain the appearance of impartiality in our justice system, the General Assembly and the courts have delineated circumstances in which bias is implied by law." *People v. Rhodus*, 870 P.2d 470, 473 (Colo. 1994). In such circumstances, "[t]he trial court must dismiss the juror who falls under any of these provisions in order to maintain the appearance of impartiality in the justice system." *Lefebre*, 5 P.3d at 300.

¶ 107 But juxtaposing appearance of impartiality against outcome-determinative analysis suffers from an inherent circularity. Legislative action may recognize impermissible implied

bias in some circumstances to avoid an appearance of impartiality. But what if the record soundly dispels that inference? And outcome-determinative analysis looks to the record.

¶ 108 As well, guarding against an appearance of impropriety by granting automatic reversal to a defendant who declines to peremptorily challenge a prospective juror after a failed challenge for cause could encourage sandbagging. *See United States v. Brown*, 352 F.3d 654, 666 n.12 (2d Cir. 2003) ("[W]e do not want to encourage lawyers to 'test [their] fortunes with the first jury,' while knowing there will be a 'second round in the event of a conviction.'" (quoting *McCrory v. Henderson*, 82 F.3d 1243, 1247 (2d Cir. 1996))); *United States v. Ricks*, 776 F.2d 455, 470 (4th Cir. 1985) ("Sandbagging, whereby counsel forego inquiry of the court, exercise their peremptory challenges on the most favorable interpretation of an ambiguity, and then take exception when that interpretation is not followed, would be discouraged."); *cf. People v. Metcalfe*, 782 N.E.2d 263, 271 (Ill. 2002) ("We decline to impose a duty upon a trial court to sua sponte excuse a juror for cause in the absence of a defendant's challenge for cause or exercise of a peremptory challenge. To hold otherwise would allow a defendant 'two bites of

the apple.'"). Stated differently, once defendant's challenge for cause failed, his calculus could have been — assuming automatic reversal because Juror J would sit — leaving her on the jury and thereby assured a new trial, in the event of a guilty verdict.

¶ 109 In contrast, under the outcome-determinative approach, counsel's decision to leave such a juror on the panel does not assure a do over.[3] Nor does so-called loss of a peremptory challenge by using it to strike a juror who should have been excused for cause warrant automatic relief. *People v. Roldan*, 2014 CO 22, ¶ 2.

¶ 110 In the end, I would conclude that if Juror J's particular circumstances — as discussed below — survive Sixth Amendment scrutiny, the outcome-determinative test controls. But wait — is this discussion for naught because, in Judge Booras's view, the express statutory mandate doctrine trumps outcome-determinative analysis?

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[3] The Attorney General concedes that invited error would not apply here because defendant was tried before *Novotny* was decided. Thus we decline to address its application. *But see People v. Bonvicini*, 2016 CO 11, ¶ 31 (Gabriel, J., concurring in the judgment) ("[S]uch a strategy would arguably have failed under the invited error doctrine.").

¶ 111 Starting with *Novotny* itself shows that in espousing this view, Judge Booras has gone astray. When discussing erosion of the automatic reversal rule, the supreme court said:

> With the exception of express legislative mandate, *see, e.g., Zedner v. United States,* 547 U.S. 489, 507, 126 S.Ct. 1976, 164 L.Ed.2d 749 (2006); *see also* § 18-1-405, C.R.S. (2013), we have already made clear that reversal for trial error, based solely on the significance, or substantiality, of the affected right, can no longer be sustained.

Novotny, ¶ 26. Consider why the court cited *Zedner* and section 18-1-405 as examples of express legislative mandates that trigger automatic reversal.

¶ 112 In *Zedner*, 547 U.S. at 508, the Court declined to apply harmless error to a trial court's failure to comply with a statute that required it to make certain findings. But that statute also provided when a trial is not commenced within the prescribed period of time, "the information or indictment *shall be dismissed* on motion of the defendant." 18 U.S.C. § 3162(a)(2) (2012) (emphasis added). As the Court explained:

> [a] straightforward reading of these provisions leads to the conclusion that if a judge fails to make the requisite findings regarding the need for an ends-of-justice continuance, the delay

> resulting from the continuance must be counted, and if as a result the trial does not begin on time, the indictment or information must be dismissed.

547 U.S. at 508. Then the Court declined to apply harmless error because

> [e]xcusing the failure to make these findings as harmless error would be inconsistent with the strategy embodied in § 3161(h). Such an approach would almost always lead to a finding of harmless error because the simple failure to make a record of this sort is unlikely to affect the defendant's rights.

Id. at 509.

¶ 113 Turning to section 18-1-405(1), C.R.S. 2017, under the speedy trial statute, if a defendant is not brought to trial within six months of his not guilty plea, "he shall be discharged from custody if he has not been admitted to bail, and, whether in custody or on bail, the pending charges *shall be dismissed*." (Emphasis added.) Our supreme court has left no doubt about what these words mean. "The language of section 18-1-405(1) is mandatory and leaves no discretion for the court to make exceptions to the six-month rule beyond those delineated in section 18-1-405(6)." *People v. Gallegos*, 946 P.2d 946, 949 (Colo. 1997).

¶ 114 So, what do these two statutes have in common? Both of them show that an express legislative mandate requires automatic reversal only if the statute demands dismissal. Looking at the express legislative mandate doctrine as a separation of powers principle explains why this doctrine does not reach section 16-10-103(1)(k).

¶ 115 Of course, the General Assembly can, subject to constitutional limitations, prescribe or proscribe action in connection with criminal proceedings. But it can do so in two ways: letting the prescription or proscription stand alone, without addressing the ultimate consequence of noncompliance, or adding a consequence. Because section 16-10-103(1)(k) says nothing about dismissal of the case, i.e. automatic reversal, if a statutorily disqualified juror deliberates, it illustrates the former. And because section 18-1-405 requires dismissal, it illustrates the latter.

¶ 116 Separation of powers permits no less and requires no more. As our supreme court explained over two decades ago, "the General Assembly acknowledged its authority to adopt different processes to effectuate various policies . . . ." *People v. Juvenile Court*, 893 P.2d 81, 89 (Colo. 1995). Therefore,

> [a]bsent constitutional concerns, the General Assembly may amend or repeal prior legislation as the result of the adoption of policies that differ from those previously embraced by that governmental institution. A contrary view would subject legislative policy-making to the ultimate supervision of the judicial branch of government, in contravention of the separation of powers doctrine.

Id.

¶ 117 More recently, the division in *Bermel v. BlueRadios, Inc.*, 2017 COA 20, ¶¶ 24-26 (*cert. granted* July 3, 2017), held that a judicially created rule cannot "thwart the [General Assembly's] intended goals" by precluding a cause of action that the General Assembly has "explicitly provided" for. It explained that "the [General Assembly] has the authority to enact laws creating causes of action. If the courts limit or abrogate such legislative enactments through judicial policies, separation of powers issues are created, and that tension must be resolved in favor of the [General Assembly's] right to act in this area." *Id.* at ¶ 25 (quoting *Comptech Int'l, Inc. v. Milam Commerce Park, Ltd.*, 753 So. 2d 1219, 1222 (Fla. 1999)).

¶ 118 Applying these statements to the express legislative mandate doctrine, if a statute requires dismissal but a court dilutes that

requirement by applying plain error or outcome-determinative analysis, the General Assembly's will would be thwarted. *See, e.g.*, § 16-14-104(1), C.R.S. 2017 ("If . . . the indictment, information, or criminal complaint is not brought to trial within that period . . . the court shall dismiss it with prejudice."); *People v. Roberts*, 2013 COA 50, ¶ 15 ("The failure to try the defendant within the time allowed under [section 16-14-104] requires dismissal of the charges with prejudice.").

¶ 119 But if a statute is silent on the ultimate consequence, applying plain error or outcome-determinative analysis would not usurp the General Assembly's prerogative. For example, section 16-10-301(4)(d), C.R.S. 2017, says, "[t]he trial court shall, at the time of the reception into evidence of other acts and again in the general charge to the jury, direct the jury as to the limited purpose or purposes for which the evidence is admitted and for which the jury may consider it." In *People v. Underwood*, 53 P.3d 765, 771 (Colo. App. 2002), the division applied plain error analysis to a trial court's failure to give a limiting instruction under section 16-10-301(4)(d). Also, in cases where a trial court rules a child victim's extrajudicial statement admissible, "the court shall instruct

the jury" on its role in determining the weight and credibility given to that statement as required by section 13-25-129(2), C.R.S. 2017. Again, plain error analysis was applied by the division in *People v. Wilson*, 838 P.2d 284, 289 (Colo. 1992), to a failure to give the mandated instruction. Finally, section 18-3-408, C.R.S. 2017, requires that "the jury shall be instructed not to allow gender bias or any kind of prejudice based upon gender to influence the decision of the jury" for certain sexual assault prosecutions. Where a defendant did not tender an instruction patterned after the statutory requirements, nor did he otherwise call those requirements to the attention of the trial court, the division in *People v. Johnson*, 870 P.2d 571, 572 (Colo. App. 1993), concluded that a structural error had not occurred and then it applied the plain error standard.

¶ 120 In contrast, Judge Booras's broad application of express legislative mandate suggests that future cases involving these statutes would be resolved with automatic reversal.

B. Application

1. Waiver

¶ 121 I agree with the majority that defense counsel's failure to provide the trial court with a citation to section 24-33.5-112(1)(a) did not waive his challenge for cause.

2. Constitutional Considerations

¶ 122 The Supreme Court has rejected implied bias merely based on a juror's government employment, even where the government is a party.

> [N]o more than the trial court can we without injustice take judicial notice of a miasma of fear to which Government employees are claimed to be peculiarly vulnerable — and from which other citizens are by implication immune. Vague conjecture does not convince that Government employees are so intimidated that they cringe before their Government in fear of investigation and loss of employment if they do their duty as jurors, which duty this same Government has imposed upon them.

Dennis v. United States, 339 U.S. 162, 172 (1950); *accord Frazier v. United States*, 335 U.S. 497, 510-11 (1948) ("[A]bsent any basis for such challenge, we do not see how a right to challenge the panel as a whole can arise from the mere fact that the jury chosen by proper procedures from a properly selected panel turns out to be composed

wholly of Government employees or, a fortiori, of persons in private employment."); *see also Tinsley v. Borg*, 895 F.2d 520, 529 (9th Cir. 1990) ("We will not presume bias merely because a juror works in law enforcement or is a federal government employee."); *Rhodus*, 870 P.2d at 476 ("Even government employees who have contacts with a prosecutor or other law enforcement personnel have not been previously considered presumptively biased." (citing *Smith*, 455 U.S. at 212)).

¶ 123 More recent authority sharpens the point of these broad pronouncements.

¶ 124 In *State v. Benedict*, for example, the court recognized that "[j]ury impartiality is a core requirement of the right to trial by jury guaranteed by the . . . sixth amendment," but adopted the majority view that the "mere fact of membership on a police force is not presumptively a disqualification for service on a jury in a criminal case." 148 A.3d 1044, 1049-50 (Conn. 2016) (citations omitted) (collecting cases). Still, the court recognized that "under the circumstances of a particular case, the specific relationship between the challenged juror and the investigating authority is of so

close a nature that it is likely to produce, consciously or unconsciously, bias on the part of the juror." *Id.* at 1051.

¶ 125 Similarly, in *Mitchell*, 690 F.3d at 149, the court of appeals declined the dissenting judge's invitation to "to fashion a new category of implied bias for coworkers of police officers who testify as witnesses in a criminal trial." Responding to the suggestion that "employees of the investigating agency . . . should be presumptively excluded under the implied bias doctrine," *id.*, the majority explained,

> certain relationships between law enforcement witnesses and prospective jurors who work with those witnesses are tinged by partiality. We share those concerns. But . . . procedural safeguards built into jury selection . . . exist to protect the defendant's right to be judged by an impartial jury, consistent with the Sixth Amendment . . . .

Id. at 150.

¶ 126 Unlike the concerns of the majority in *Benedict* and the dissent in *Mitchell*, Juror J did not work directly with any law enforcement personnel, much less with the prosecutor's office. Instead, she interacted only with personnel in finance positions to distribute federal grant money to law enforcement agencies and

audit compliance with the grantors' regulations. Indeed, she had no law enforcement training.

¶ 127 By any fair reading, her voir dire answers fall far short of "a revelation that the juror is an actual employee of the prosecuting agency." *Smith*, 455 U.S. at 222 (O'Conner, J., concurring); *see, e.g.*, *Beam v. State*, 400 S.E.2d 327, 328 (Ga. 1991) (holding that it was reversible error to permit a full-time employee of the prosecuting agency's office to serve as a juror because her service "created a substantial appearance of impropriety," and the trial court should have stricken this juror "to preserve public respect for the integrity of the judicial process"); *Kauhi*, 948 P.2d at 1040 (error to allow a juror who was a prosecutor currently employed in the same office of the prosecutor trying the defendant).

¶ 128 True enough, I have not found any case applying outcome-determinative analysis to a juror who, despite challenge for a statutorily implied bias, served and deliberated. But such a case could arise only from the confluence of the outcome-determinative test — which very few jurisdictions have adopted, at least using the parlance of our supreme court — and a

purely statutorily implied bias that does not involve any extreme circumstance warranting constitutional inquiry.

¶ 129 I reject the special concurrence's premise that merely because the General Assembly identified categories of statutory implied bias, the Sixth Amendment must be considered. Certainly, the General Assembly may go beyond constitutional requirements when legislating implied bias. Perhaps this is why the special concurrence does not cite any case holding that service by a juror tainted with implied bias, arising solely from a statute which does not involve extreme circumstances, triggers the Sixth Amendment.

¶ 130 Instead, the special concurrence relies on cases — many of which are discussed in footnote 1 — recognizing that an implication of bias arising from certain facts may, in extreme circumstances, demand constitutional inquiry. I agree with the holdings in such cases, but discern no basis for applying them to Juror J's unremarkable circumstances.[4]

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[4] In saying this much, I point out a question that I do not mean to answer: What about a defendant who asserts that the record is incomplete because having established a statutory basis for disqualification, no reason existed to further question the disqualified juror about possible actual bias? After all, in this circumstance the limited time available for voir dire might well be

¶ 131 For these reasons, Juror J's service did not violate due process.

3. Outcome-Determinative Analysis

¶ 132 Having resolved the constitutional inquiry against defendant, I necessarily "apply the ordinary harmless error test. Under that test we must disregard any error that does not affect a party's substantial rights." *People v. Wise*, 2014 COA 83, ¶ 27. This test determines "the likelihood that the outcome of the proceedings in question were affected by the error." *Novotny*, ¶ 20. To succeed, a defendant must meet the high bar of showing "a reasonable probability that the error contributed to the verdict." *Krutsinger v. People*, 219 P.3d 1054, 1063 (Colo. 2009); *see also People v. Quintana*, 665 P.2d 605, 612 (Colo. 1983) ("[T]he appropriate question is whether the error substantially influenced the verdict or affected the fairness of the trial proceedings.").

¶ 133 "Courts in other jurisdictions have held that to make a showing of prejudice sufficient to require reversal in this context, the defendant ordinarily must show that a biased or incompetent

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better spent with other prospective jurors. Defendant does not make this argument, which we leave for another day.

juror participated in deciding his guilt." *Wise*, ¶ 27. I align with the *Wise* division and extend this approach to participation by a juror who should have been excused for statutorily implied bias but whose service does not violate due process.

¶ 134 Searching the record to find indicia of Juror J's actual bias or even impermissible implied bias comes up empty. For the same reasons that preclude a Sixth Amendment challenge, as discussed in the prior subsection, the record does not show anything that would even slightly tip the outcome-determinative analysis in defendant's favor.

¶ 135 Given all this, I would conclude that while the trial court erred in denying defendant's challenge for cause to Juror J, her service on the jury does not require reversal. Because of this conclusion, I must address defendant's remaining contentions of error and his request that the mittimus be corrected.

III. The Trial Court Did Not Abuse Its Discretion in Limiting Cross-Examination of Two Prosecution Witnesses

¶ 136 During cross-examination of the decedent's wife, defense counsel asked a question about her prior misdemeanor convictions.

The prosecutor objected and the parties conferred at the bench. Defense counsel did not raise the Confrontation Clause.

¶ 137 Ultimately, the trial court precluded evidence of the conviction itself: "it is not proper to go into the fact, if it is a fact, that this witness was convicted of these misdemeanors." However, the court ruled that "inquiry can be made about the [underlying] acts."

¶ 138 During cross-examination of the decedent's friend, the trial court made the same ruling — telling defense counsel she could inquire "only to the act, not to the [misdemeanor] conviction or to the filing of charges or anything else." Again, defense counsel did not raise the Confrontation Clause.

¶ 139 Consistent with the trial court's ruling, defense counsel questioned both witnesses about the underlying acts. In summation, counsel argued that these witnesses were not credible because they had been using drugs at the time.

A. Standard of Review and Law

¶ 140 The right of an accused to confront adverse witnesses is guaranteed by both our Federal and State Constitutions.[5] U.S.

[5] Defendant does not argue that the Colorado Constitution provides greater protection than the Federal Confrontation Clause.

Const. amend. VI; Colo. Const. art. II, § 16. This right encompasses the opportunity for meaningful cross-examination of witnesses. *Delaware v. Van Arsdall*, 475 U.S. 673, 678 (1986); *Krutsinger*, 219 P.3d at 1061. As relevant here, it requires courts to "allow broad cross-examination of a prosecution witness as to bias, prejudice and motivation for testifying." *People v. Bowen*, 669 P.2d 1369, 1375 (Colo. 1983); *see also Van Arsdall*, 475 U.S. at 678-79; *Kinney v. People*, 187 P.3d 548, 559 (Colo. 2008).

¶ 141 A trial court has broad authority to limit the scope of cross-examination to avoid harassment, prejudice, repetition, marginal relevance, confusion of the issues, or misleading the jury. *Van Arsdall*, 475 U.S. at 679. Still, a defendant can establish that a court's limitation of cross-examination violated the Confrontation Clause if the defendant can show that "[a] reasonable jury might have received a significantly different impression" of the witness' credibility. *Id.* at 680.

¶ 142 Because defendant did not preserve this claim at trial, we review for plain error. *People v. Chavez*, 2012 COA 61, ¶¶ 29-30.

Consequently, I do not further address the Colorado Constitution. *See People v. Leverton*, 2017 COA 34, ¶ 33 n.3.

Plain error is error that is obvious and seriously prejudicial, meaning that it "undermine[s] the fundamental fairness of the trial itself [so] as to cast serious doubt on the reliability of the conviction." *People v. Ujaama*, 2012 COA 36, ¶ 43 (quoting *People v. Taylor*, 159 P.3d 730, 738-39 (Colo. App. 2006)).

B. Analysis

¶ 143 Defendant argues that "[n]either witness was charged with any drug offenses for their admitted possession and distribution of crack cocaine [during the incident]"; and "[b]ecause both witnesses had multiple prior convictions" — i.e. the misdemeanor convictions that defendant was precluded from bringing out — they benefited from not being charged. Thus, according to defendant, he should have been allowed to cross-examine the witnesses about their misdemeanor convictions to show potential bias.

¶ 144 Certainly, denial of the right to cross-examine a witness for prosecutorial bias would be an error based on well-settled legal principles. *See Davis v. Alaska*, 415 U.S. 308, 318 (1974) (trial court prohibited defense counsel from cross-examining prosecution witness as to potential bias); *see also People v. Dinapoli*, 2015 COA

9, ¶ 30 ("Generally, an error is obvious when the action challenged on appeal contravenes . . . a well-settled legal principle.").

¶ 145 Even so, would the error defendant alleges — that this principle should have applied to allow inquiry into the witnesses' past misdemeanor convictions — be "so clear cut and so obvious that a trial judge should have been able to avoid it without benefit of the objection?" *People v. Conyac*, 2014 COA 8M, ¶ 54. Three factors suggest otherwise.

¶ 146 First, how could the trial court have known that these convictions potentially implicated prosecution bias without argument from counsel? After all, because the convictions happened long ago, any sentences would have been served. *See Kinney*, 187 P.3d at 559 ("[E]vidence of pending charges . . . is admissible to show a witness's motive, bias, prejudice, or interest in the outcome of a trial."). Indeed, the trial court was focused on the relevancy of these convictions, not bias. Consistent with this focus, the court allowed defense counsel to cross-examine the witnesses about the acts underlying the misdemeanor convictions. *See People v. Segovia*, 196 P.3d 1126, 1132 (Colo. 2008) ("[O]ur holding in no way suggests a misdemeanor conviction for shoplifting is probative

of truthfulness . . . [r]ather, only the underlying circumstances surrounding the act are admissible.").

¶ 147 Second, defendant's bias argument involves two lengthy steps. First, the trial court would have had to realize that the long past misdemeanor convictions exposed the witnesses to possible aggravated sentences if charged with and convicted of the recent drug offenses. Second, the court would have had to infer that potential bias existed because the witnesses had not been charged with the recent offenses, thereby avoiding the aggravated sentence risk from the misdemeanors. *See People v. Penn*, 2016 CO 32, ¶ 40 ("[S]uch inferences are so attenuated that any error in the admission of the officer's statements was in no way clear or obvious.").

¶ 148 Third, facts before the jury already implicated bias without the misdemeanor convictions. Both witnesses testified about drug-related activity on the night of the offenses — from which the jury could have inferred they faced prosecution — and an investigating detective testified that neither witness had been charged with illegal drug use. Thus, the jury could have inferred

that the witnesses still faced the risk of prosecution, and such a risk created a bias in favor of the prosecution.

¶ 149 Indeed, defendant presented testimony by a probation officer that the decedent's friend was on probation at the time of the offenses, and could have faced up to two years in jail for probation violations related to drugs and alcohol.

¶ 150 In sum, because I cannot say that error, if any, in precluding evidence of the misdemeanor convictions was obvious, it was not plain.

IV. The Trial Court Did Not Abuse Its Discretion in Excluding Evidence of Defendant's Post Arrest Statements Concerning Self-Defense

¶ 151 The prosecution moved in limine to exclude statements made by defendant shortly after he had been arrested. The trial court's initial bench ruling only addressed CRE 803(3), the state of mind hearsay exception. It ruled that "while Rule 803(3) would permit admission of the statement, 'my head hurts,' it does not permit admission of the statement 'my head hurts because the victim hit me.'" (Defendant does not appeal this ruling.) Otherwise, the court said,

> I think this is simply a matter of the hearsay rule. The defendant's out-of-court statements, if offered for their truth, are hearsay, and they are admissible only if they fall within an exception to the hearsay rule.

¶ 152 Later, defense counsel argued that the statements should be admissible

> not [for] the truth of the matter but rather [for] the . . . effect on the listener and specifically on the effect on the police of what they did after that, taking that information in, what sort of follow-up did they do, what sort of investigation did they do, since that's not hearsay, we can admit the entire statement including, yeah, this guy tried to stab me.

¶ 153 The court disagreed:

> I don't think that this is a proper non hearsay purpose . . . especially as [the officers] are not investigators. They're patrol officers and it doesn't really matter what effect it would have on those officers because they wouldn't investigate the case anyway.

But the court added that "there are many other ways in which the quality of the investigation can be attacked here."

A. Preservation

¶ 154 On appeal, defendant argues that his statements should have been admitted to "demonstrate[] their effect on the listener" and "under the excited-utterance hearsay exception under CRE 803(2)."

True, both arguments were raised in his written response to the motion in limine.

¶ 155 But during extensive argument to the trial court, defense counsel did not once assert that the excited utterance exception applied to the statements or ask for leave to present evidence. Nor did counsel request a ruling from the trial court on this exception. *See People v. Young,* 923 P.2d 145, 149 (Colo. App. 1995) ("[B]ecause he failed to request [from the trial court] a ruling on this issue, defendant has waived it on appeal."). Had counsel done so, the trial court could have made appropriate findings under CRE 803(2). *See People v. Martinez*, 18 P.3d 831, 835 (Colo. App. 2000) ("The trial court is in the best position to consider the effect of the startling event on the declarant.").

¶ 156 As a result, I conclude that defendant has abandoned his CRE 803(2) argument and cannot raise it on appeal. *See People v. Young*, 923 P.2d 145, 149 (Colo. App. 1995) ("[B]ecause he failed to request a ruling [from the trial court] on this issue, defendant has waived it on appeal."); *see generally People v. Fuqua*, 764 P.2d 56, 61 (Colo. 1988) ("When the sentencing court fails to act on a timely filed motion for reduction of sentence within a reasonable period of

time, it then becomes the defendant's obligation to make reasonable efforts to secure an expeditious ruling on the motion. In the absence of any reasonable effort by the defendant to obtain an expeditious ruling, the motion for reduction should be deemed abandoned.").

¶ 157 I turn to the trial court's ruling on the statement's effect on the listener, which the Attorney General agrees was preserved.

B. Standard of Review and Law

¶ 158 We review a trial court's evidentiary rulings for an abuse of discretion. *See People v. Smalley*, 2015 COA 140, ¶ 18. "A trial court abuses its discretion if its ruling is manifestly arbitrary, unreasonable, or unfair, or based on an erroneous understanding or application of the law." *Id.*

¶ 159 Hearsay is a statement, made by someone other than a witness who is testifying at trial and subject to cross-examination, offered to prove the truth of the matter asserted. CRE 801(c). Unless the statement falls within an exception to the rule, *see* CRE 803; CRE 804, hearsay is inadmissible, *see* CRE 802.

¶ 160 But a statement may not be hearsay if the proponent offers it to prove something other than its truth. One example is when the

statement is offered to show its effect on the listener or to explain the listener's later actions. *See People v. Phillips*, 2012 COA 176, ¶ 107.

C. Analysis

¶ 161 Defendant argues that his statements were "integral to the defense theory that, even after hearing [him] assert self-defense, the police failed to conduct any investigation of that."

¶ 162 True, statements made to police officers are sometimes admitted to show the reasons for the officers' later actions. *See People v. Robinson*, 226 P.3d 1145, 1152 (Colo. App. 2009) (Informant's statements "were all introduced for the nonhearsay purpose of showing their effect on the listening officers, that is, to show why [police officers] chose to go to that particular location and stop, arrest, and search defendant and the car in which he was traveling.").[6]

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[6] S*ee also United States v. Freeman*, 816 F.2d 558, 563 (10th Cir. 1987) ("[O]ut of court statements are not hearsay when offered for the limited purpose of explaining why a Government investigation was undertaken."); *United States v. Cruz-Diaz*, 550 F.3d 169, 177 (1st Cir. 2008) ("[G]overnment introduced [defendant's] confession to explain why the authorities cut short their investigation into the robbery, specifically, why they did not take fingerprints or DNA evidence from the red Mazda.").

¶ 163 But here, the trial court found that neither patrol officer was involved in the investigation — a finding defendant does not dispute. Also, defendant does not point to any later actions taken by the patrol officers to which the statements would have been relevant. *See People v. J.M.*, 22 P.3d 545, 547 (Colo. App. 2000) (finding officer's testimony about victims' statements was not hearsay because it was admitted to explain the officer's subsequent actions).

¶ 164 Instead, defendant asserts that the statements should have been admitted to show why further investigation of self-defense did not occur — because one of the patrol officers failed to include the statements in his report. But because defendant's statements to the patrol officers were recorded, this argument falls short. Detectives had access to the statements without relying on the reports.

¶ 165 Therefore, I would conclude the trial court did not abuse its discretion in excluding defendant's post-arrest statements.[7]

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[7] Based on this conclusion, I decline to address defendant's argument that the statements did not constitute self-serving hearsay. *See People v. Zubiate*, 2013 COA 69, ¶ 27 (Even if a hearsay statement is admissible under an exception it "may be

V. The Trial Court Did Not Abuse Its Discretion Admitting Evidence About a 7-Eleven Incident Three Days Before the Charged Offenses as Res Gestae

¶ 166 I agree with the majority's disposition of this issue.

VI. Correcting the Mittimus

¶ 167 The Attorney General concedes, and I agree, that the case must be remanded for correction of the mittimus.

¶ 168 During sentencing, the trial court explained:

> Now, the sentences here, as I explained, are in large part set by the legislature, and the Court will impose sentence, therefore, as follows: Count 1 was originally the charge of first-degree murder after deliberation. The jury found the defendant guilty of second-degree murder. And my understanding of the case law is that that conviction must merge with the defendant's conviction for Count 2, which was felony murder. So the Court will vacate the conviction for second-degree murder and will find that the defendant should be sentenced only on Count 2, felony murder.
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> . . . .

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excluded [as self-serving] because there is nothing to guarantee [its] trustworthiness."), *aff'd*, 2017 CO 17. And without a finding of error, I do not address defendant's argument that he was deprived of the opportunity to present a complete defense. *See People v. Conyac*, 2014 COA 8M, ¶ 93 ("An erroneous evidentiary ruling may rise to the level of constitutional error if it deprived the defendant of any meaningful opportunity to present a complete defense.").

> Counts 3 and 4 were burglary charges and those were the predicate offenses for the felony murder charge. I think the lawyers are in agreement that those convictions merge with the felony murder charge so the Court will not impose a sentence on those, finding they should be vacated and they become part of the felony murder conviction.

However, the mittimus did not accurately reflect that defendant's convictions for second degree murder and the two burglary convictions were vacated.

¶ 169 Thus, I would remand for the trial court to correct the mittimus to reflect that Counts 1, 3, and 4 are vacated. *See* Crim. P. 36 (a clerical error on a mittimus may be corrected at any time); *People v. Mintz*, 165 P.3d 829, 836 (Colo. App. 2007).

VII. Conclusion

¶ 170 I would affirm the judgment and remand to correct the mittimus.