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Certiorari to the Colorado Court of Appeals
Case Number 2018CA464

Petitioner
CONSTANCE EILEEN CASWELL

v.

Respondent
THE PEOPLE OF THE
STATE OF COLORADO

Megan A. Ring
Colorado State Public Defender
JESSICA A. PITTS
1300 Broadway, Suite 300
Denver, CO 80203

Phone: (303) 764-1400
Fax: (303) 764-1479
Email: PDApp.Service@coloradodefenders.us
Atty. Reg. #48932

Case Number: 2021SC749

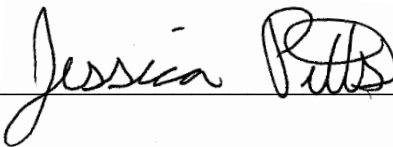
PETITION FOR WRIT OF CERTIORARI

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 32 and C.A.R. 53, including all formatting requirements set forth in these rules.

Specifically, the undersigned certifies that this petition complies with the applicable word limit and formatting requirements set forth in the above rules. It contains 3,262 words.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 32 and C.A.R. 53.



A handwritten signature in black ink, reading "Jessica Pitts", is written over a horizontal line. The signature is cursive and stylized.

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ISSUES PRESENTED FOR REVIEW

- I. Whether the prior-conviction provision of the animal cruelty statute is a sentence enhancer or an element of the offense.
- II. Whether a fact that transforms a misdemeanor into a felony must be found by a jury beyond a reasonable doubt.
- III. Whether, in determining when the denial of for-cause challenges on prospective jurors is reversible error, a defendant must show the court acted in “bad faith” or whether the defendant need only show “the absence of good faith,” as established in *Rivera v. Illinois*, 556 U.S. 148 (2009).

OPINION BELOW

A copy of the Court of Appeals’ published decision in Case No. 18CA464, *People v. Caswell*, 2021COA111, is attached pursuant to C.A.R. 53(a)(9)(A).

JURISDICTION

The Court of Appeals issued its decision on August 19, 2021. Caswell filed a petition for rehearing on September 2, 2021, which was denied on September 16, 2021. This Court granted an extension of time until November 26, 2021, to file a Petition for Writ of Certiorari. This petition is timely filed. This Court has jurisdiction under C.A.R. 49 and 51.

PENDING CASES

Undersigned counsel is unaware of any cases pending before this Court presenting similar issues to those raised below. However, upon information and belief, a petition for writ of certiorari in *People v. Dorsey*, 2021COA126, will be filed. *Dorsey* cites to *Caswell's* holding that the prior-conviction provision of the animal cruelty statute is a sentence enhancer and extends *Caswell's* reasoning to the failure to register as a sex offender statute. *Id.* at ¶¶ 17-25.

STATEMENT OF THE CASE

Constance Caswell was known in the community as the person to whom you could bring an animal needing a home. (TR (11/30/2017), p 36). However, the winter of 2015-16 was particularly cold, and she struggled to make ends meet. *Id.* at 206-07.

In March 2016, a deputy sheriff went to Caswell's property to perform a welfare check on an animal placed in her care. *Id.* at 12. He went back a few days later accompanied by a Department of Agriculture employee responding to a tip. 18, 39-41. They discovered underweight dogs and horses, and observed inadequate shelter and water for the dogs and horses, as well as for birds and cats. *See id.* at 12-24; 42-80.

Caswell was tried and convicted of 43 counts of misdemeanor animal cruelty. (CF, pp 159-201). After trial, the court found that Caswell had a prior conviction for animal cruelty and imposed 43 felony convictions under C.R.S. § 18-9-202(1)(a), (2)(b)(I) (2016) (class 6 felonies). (CF, pp 221-25). The court sentenced Caswell to eight years of probation, 43 days in jail, and 47 days of in-home detention. (TR (1/19/2018), pp 20-23).

On direct appeal, a division of the Court of Appeals affirmed Caswell's convictions in a published opinion. Caswell now appeals to this Court.

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals Erred in Holding That the Prior-Conviction Provision Was a Sentence Enhancer

A. Preservation and Standard of Review

Caswell preserved the issue prior to trial by arguing that imposing felony convictions without a jury determination violated her constitutional right to trial by jury. (TR (11/29/2017), p 4). The court held that the provision was a sentence enhancer that it could find after trial. *Id.* at 5-7.

At the sentencing hearing, defense counsel maintained Caswell's objection, but given the court's prior ruling removing the determination from the jury, conceded that Caswell had been previously convicted of animal cruelty. (TR

(1/19/2018), p 2). Based on this concession, the court imposed felony convictions. (CF, pp 221-25).

Whether the constitution was violated is reviewed *de novo*. *People v. Matheny*, 46 P.3d 453, 462 (Colo. 2002).

B. Argument

As this Court recently explained in the context of Felony DUI, the General Assembly has plenary authority to designate a provision as either an element or a sentence enhancer. *Linnebur v. People*, 2020CO79M, ¶ 9. If the General Assembly intends for a provision to be an element, then it must be proved to the jury beyond a reasonable doubt. *Id.* at ¶ 31.

Courts look to “(1) language and structure, (2) tradition, (3) risk of unfairness, (4) severity of the sentence, and (5) legislative history” to determine whether a provision is an element. *Id.* at ¶ 10.

Here, the Court of Appeals found the prior-conviction provision in the animal cruelty statute a sentence enhancer, focusing on the structure of the statute. (Opinion, ¶ 11). The court erred in finding that the provision is a sentence enhancer because it unduly focused on the structure of the statute and gave insufficient weight to the risk of unfairness and severity of the sentence.

True, the prior-conviction provision in the animal cruelty statute is separated from the definition of the substantive crime. C.R.S. § 18-9-202(2)(b)(I). However, this factor is not dispositive. *See Jones v. United States*, 526 U.S. 227, 230, 232-33 (1999) (requiring a provision separated from the rest of the elements to be charged and proved to the jury).

On the other side of the ledger, and factors considered highly persuasive to this Court in *Linnebur*, is the risk of unfairness and severity of the sentence. *See Linnebur*, 2020CO79M, ¶¶ 28-29. Transforming a misdemeanor into a felony does not merely create the possibility of a sentence to the Department of Corrections; the felony designation opens up a slew of collateral consequences. *Id.* at ¶ 28; *see also United States v. O'Brien*, 560 U.S. 218, 229 (2010) (drastic increase in sentence “strongly suggests a separate substantive crime”). It is unfair to substantially increase the severity of the sentence in the absence of a jury finding the fact of the prior conviction beyond a reasonable doubt. *See Linnebur*, 2020CO79M, ¶ 29. Thus, in creating such a substantial increase, the General Assembly must have intended the provision to be an element. *See O'Brien*, 560 U.S. at 229-31.

The Court of Appeals erred in finding that the structure of the statute outweighed the risk of unfairness in its determination of whether the prior-conviction provision is an element. Caswell respectfully requests this Court grant her petition under C.A.R. 49(b) and decide this issue of first impression.

II. The Court Violated Caswell’s Constitutional Right to Trial by Jury by Transforming Her Misdemeanor Convictions into Felonies Without a Jury Finding, Beyond a Reasonable Doubt, That She Committed a Prior Offense

A. Preservation and Standard of Review

See above, Issue I.A.

B. Argument

If this Court determines that the prior-conviction provision in the animal cruelty statute is a sentence enhancer, then this Court is confronted with a question left open by *Linnebur*: whether it violates the right to trial by jury to transform a misdemeanor into a felony based on a fact not found by a jury beyond a reasonable doubt.

In *Linnebur*, this Court held that the General Assembly intended the prior-conviction provision of Felony DUI to be an element, and thus held the trial court erred in transforming Mr. Linnebur’s misdemeanor conviction into a felony without support from the jury’s verdict. 2020CO79M, ¶ 32.

Because this Court resolved *Linnebur* based on legislative intent, it did not need to reach the constitutional question—whether it violates a defendant’s constitutional right to trial by jury for a court to transform a misdemeanor into a felony based on a finding by a preponderance of evidence. *Id.* at ¶ 31.

However, this Court expressly stated its constitutional concern: “Indeed, the unfairness that would be associated with permitting a defendant to be tried for a misdemeanor to the jury and then sentenced for a felony by the judge on the basis of a fact that had to be proved only by a preponderance of the evidence *is so significant that it risks running afoul of the Sixth Amendment.*” *Id.* at ¶ 29 (emphasis added).

While this Court could decide *Linnebur* without answering the constitutional question, this case presents that question directly.

Here, Caswell was found guilty of misdemeanor animal cruelty. The judge then transformed the misdemeanor convictions into felonies without support by the jury’s verdicts.

The Court of Appeals affirmed Caswell’s convictions, reasoning that based on the structure of the animal cruelty statute, and other differences between it and the DUI statute, the prior-conviction provision was a sentence enhancer that need

not be submitted to the jury. (Opinion, ¶¶ 11-18). The division then stated, “because we conclude that the legislature clearly intended prior convictions to constitute penalty enhancers rather than a substantive element of the offense of cruelty to animals, ‘we may leave aside the Sixth Amendment issue and simply resolve this case as a matter of statutory interpretation.’” (Opinion, ¶ 19 (quoting *Linnebur*, ¶ 31)). This was error.

A legislature may only do what is constitutional. *See Linnebur*, ¶ 31 (“[S]ubject to constitutional limitations, whether the fact of prior convictions constitutes an element of the offense or a sentence enhancer depends on legislative intent.”) (emphasis added). Thus, the division erred in failing to address whether it violates the United States and Colorado Constitutions to transform a misdemeanor into a felony without a finding by a jury beyond a reasonable doubt.

And such a procedure does violate the constitutional right to trial by jury. In *United States v. Rodriguez-Gonzales*, 358 F.3d 1156, 1158 (9th Cir. 2004), the 9th

Circuit explained that the *Almendarez-Torres*¹ exception to *Apprendi*² does not apply in cases where a prior conviction transforms a misdemeanor into a felony, rather than just merely increasing the sentencing range. In these cases, “[a] prior conviction is therefore more than a sentencing factor” because it “substantively transforms” a misdemeanor into a felony and “changes the nature of the crime.” *Id.* at 1160.

Bolstering the 9th Circuit’s conclusion were the “serious ramifications” attendant to a felony conviction as compared to a misdemeanor. *Id.* at 1160-61. A Colorado court has similarly recognized that the stakes of a felony conviction require the constitutional protection of trial by jury. In *People v. Viburg*, 2020COA8M, ¶¶ 15-28, the Court of Appeals held that the Colorado and United States Constitutions cannot tolerate the transformation of a misdemeanor into a

¹ *Almendarez-Torres v. United States*, 523 U.S. 224 (1998) (holding that a prior-conviction provision increasing the sentencing range need not be included in a charging document).

² *Apprendi v. New Jersey*, 530 U.S. 466, 489-90 (2000) (holding that “any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt,” and recognizing the constitutionality of the prior-conviction exception to the pleading requirement established in *Almendarez-Torres* was not before it (as the defendant was challenging a hate-crime enhancer) and casting doubt on whether *Almendarez-Torres* was correctly decided).

felony on less than proof beyond a reasonable doubt to a jury, noting the vast differences in procedure and consequence between the two. *See also People v. Schreiber*, 226 P.3d 1221, 1225-27 (Colo. App. 2009) (Bernard, J., concurring in part and dissenting in part).

To be sure, the right to trial by jury is one of the most jealously guarded rights afforded by the Constitution. *See Ramos v. Louisiana*, 140 S. Ct. 1390, 1395 (2020) (“Still, the promise of a jury trial surely meant *something*—otherwise, there would have been no reason to write it down.... Imagine a constitution that allowed a ‘jury trial’ to mean nothing but a single person rubberstamping convictions....”); *United States v. Haymond*, 139 S. Ct. 2369, 2375 (2019) (plurality opinion) (“Together with the right to vote, those who wrote our Constitution considered the right to trial by jury ‘the heart and lungs, the mainspring and the center wheel’ of our liberties, without which ‘the body must die; the watch must run down; the government must become arbitrary.’”) (citation omitted). Any erosion of this fundamental right must be avoided. *Haymond*, 139 S. Ct. at 2384. Indeed, the Supreme Court recently noted that its precedents “have repeatedly rejected efforts to dodge the demands of the Fifth and Sixth Amendments by the simple expedient of relabeling a criminal prosecution a ‘sentencing enhancement.’” *Id.* at 2379.

Moreover, the Colorado Constitution cannot tolerate a judge transforming a misdemeanor into a felony. The jury trial right in Colorado is more extensive than its federal counterpart. Colo. Const. art II, §§ 16, 23, 25; *People v. Rodriguez*, 112 P.3d 693, 698 (Colo. 2005) (“Colorado’s constitutional provisions are independent of, and may extend beyond, the federal constitution to offer greater protection for the people of Colorado.”). Indeed, in Colorado, “[t]he right of trial by jury shall remain inviolate....” Colo. Const. art. II, § 23. Thus, the State may not violate this right by allowing a judge to find a fact transforming a misdemeanor into a felony.

The constitutional question has broad implications, since several statutory schemes use prior convictions to transform misdemeanors into felonies. *See, e.g.*, C.R.S. § 18-7-302(4) (indecent exposure); C.R.S. § 18-6-401(7)(e) (child abuse); C.R.S. § 18-4-409(3)(b) (aggravated motor vehicle theft); C.R.S. § 18-6-801(7) (domestic violence).

In *Linnebur*, this Court expressed grave concern with, but ultimately left open, the question of whether it violates the constitutional right to trial by jury to transform a misdemeanor into a felony without a finding beyond a reasonable doubt by a jury. Caswell respectfully requests that this Court grant her petition under C.A.R. 49(b) to answer that question.

III. The Court of Appeals Erroneously Used the “Bad Faith” Standard in Determining Whether Three Denials of For-Cause Challenges Require a New Trial

A. Preservation and Standard of Review

Defense counsel preserved the issue by challenging Mr. J, Mr. F, and Mr. D for cause and by exhausting all peremptory challenges. (TR (11/29/2017), pp 97-102, 182-83, 185-87, 195); *see Ma v. People*, 121 P.3d 205, 210 (Colo. 2005).

A court’s ruling on a challenge for cause is reviewed for an abuse of discretion. *People v. Maestas*, 2014COA139M, ¶11.

B. Argument

In *Vigil v. People*, this Court held that peremptory challenges are a statutory, not constitutional, right. 2019CO105, ¶ 16. Thus, it explained, “unless the court acted in bad faith to assist [the party] in some way other than acquiring a fair and impartial jury, he has received no more than that to which the statute entitled him.” *Id.* at ¶ 21.

This Court cited *Johnson v. Schonlaw*, 2018CO73, ¶ 16, to support this requirement of the absence of “bad faith.” *Vigil*, 2019CO105, ¶ 25. However, *Johnson* cited to *Rivera v. Illinois*, 556 U.S. 148, 157 (2009), which holds that “[i]f a defendant is tried before a qualified jury composed of individuals not

challengeable for cause, the loss of a peremptory challenge due to a state court's good-faith error is not a matter of federal constitutional concern." Thus, *Rivera* only requires the absence of good faith, not bad faith.

"Bad faith" is defined as a "[d]ishonesty of belief, purpose, or motive...." *Black's Law Dictionary*, (11th ed. 2019). The absence of good faith is far less than that—a lack of good faith may be established by court's repeated or deliberate misapplications of the law, or arbitrary or irrational rulings, that violate due process. *See Rivera*, 556 U.S. at 160; *Ross v. Oklahoma*, 487 U.S. 81, 91-92 (1988) ("In this case, everyone concedes that the trial judge could not arbitrarily take away one of the defendant's peremptory challenges.") (Marshall, J., dissenting); *Chinnery v. Virgin Islands*, 55 V.I. 508, 523-24 (V.I. 2011) (holding that making the defendant choose to strike one of two prospective jurors was arbitrary and irrational, thereby violating due process).

Here, three of Caswell's for-cause challenges were erroneously denied. These prospective jurors all had outside knowledge or experiences that they said could impact their ability to fairly decide the case. Caswell used peremptory strikes to ensure that these biased jurors did not sit in determination of her guilt.

Mr. J was exposed to pre-trial publicity and said it would “influence me to some nature” and that the article upset him. (TR (11/29/2017), pp 81-83). He stated he could presume Caswell innocent. *Id.* at 85. When the court attempted rehabilitation on whether he could set aside the information and be a fair and impartial juror, Mr. J said, “I would do my best to do that but – yeah.” *Id.* at 82. When defense counsel asked him what the “but” was for, he reiterated that he was upset by the article and maintained that his outside knowledge “affects me to some nature.” *Id.* at 83-84.

Mr. F recalled a personal experience where he called the Colorado Division of Wildlife to report underfed bison. *Id.* at 90. The court asked him if he could set that experience aside and base his verdict only on the evidence presented. *Id.* at 90-91. Mr. F explained that he reported the operation because he could not let it “slide” and said, “I think I’m quite prejudiced.” *Id.* at 91. He was not rehabilitated, despite repeated attempts, and maintained that he had “reservations” regarding his ability to give Caswell the presumption of innocence. *Id.* at 91-94. He later said he “would have a hard time” following the law that charges are not evidence, and was not rehabilitated. *Id.* at 174.

Mr. D said he thought he knew where the alleged crime took place, and “[i]f it is the place that I think it probably is, I’m not sure if ... I could be fair.” *Id.* at 152. Mr. D also raised his hand to indicate the following: that he would consider a defendant’s choice not to testify as evidence of guilt and that he would consider the charges as evidence of guilt. *Id.* at 169, 172-73. Mr. D was not rehabilitated on the first two comments, and as to the third, could only say that he could try to follow the law, but “it would be difficult.” *Id.* at 176.

Assuming without deciding that the challenges for cause were erroneously denied, the Court of Appeals held that Caswell is not entitled to a new trial because “we are not persuaded the trial court acted in bad faith in failing to dismiss [the prospective jurors].” (Opinion, ¶¶ 22-23). However, Caswell need only show the absence of good faith, for instance that the rulings were arbitrary or irrational, or that there were repeated or deliberate misapplications of the law. Thus, the Court of Appeals used the wrong standard in determining whether Caswell is entitled to a new trial. *See Rivera*, 556 U.S. at 160; *Ross*, 487 U.S. at 91-92; *Chinnery*, 55 V.I. at 523-24.

And the trial court’s denials of these three challenges were arbitrary, irrational, and misapplied the law. Each prospective juror expressed serious

concerns with their ability to be fair. Because there was a substantial question of partiality raised for each prospective juror, the court erred by not resolving the doubt by granting the challenge. *See Nailor v. People*, 612 P.2d 79, 80 (Colo. 1980); *People v. Chavez*, 313 P.3d 594, 596 (Colo. App. 2011). Ultimately, it was irrational for the court to believe that prospective jurors who said “I think I’m quite prejudiced,” “I’m not sure if ... I could be fair,” and that pre-trial publicity would “influence me to some nature,” could judge the case fairly and impartially. Such arbitrary and irrational rulings constituted a denial of due process and require a new trial. *See Chinnery*, 55 V.I. at 523-24; *see also* U.S. Const. amend. XIV; Colo. Const. art. II, § 25.

Caswell respectfully requests this Court grant her petition under C.A.R. 49(b) and clarify that a defendant is entitled to a new trial where a court denies causal challenges other than in good faith and thereby deprives the defendant of due process.

CONCLUSION

Wherefore, Constance Caswell requests that this Court grant this Petition for Writ of Certiorari.

MEGAN A. RING
Colorado State Public Defender



JESSICA A. PITTS, #48932
Deputy State Public Defender
Attorneys for Constance Eileen Caswell
1300 Broadway, Suite 300
Denver, CO 80203
(303) 764-1400

CERTIFICATE OF SERVICE

I certify that, on November 26, 2021 a copy of this Petition For Writ Of Certiorari was electronically served through Colorado Courts E-Filing on Rebecca A. Adams of the Attorney General's Office.

