

Supreme Court candidate supports jury nullification

John S. Adams 10:23 p.m. MDT September 27, 2014



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HELENA – Billings lawyer and one-time Libertarian U.S. House candidate W. David Herbert thinks the code books are riddled with unjust laws.

That’s one reason why he’s running for the Montana Supreme Court on Nov. 4. Herbert is taking on incumbent Justice Jim Rice, who has served on the state’s high court since 2001.

On the campaign trail, Herbert tells a story about the first time he encountered an unjust law. It happened when he was about 6 years old and he was on his family’s farm in Salinas, Calif.

“There was a big tin building, about the size of a small barn, and it had no windows,” Herbert recalled. “One day my grandpa asked me if I knew what he kept in that barn.”

It was 1943, some months after the U.S. government ordered the removal and internment of Japanese Americans in the wake of the Dec. 7, 1941, attack on Pearl Harbor.

Herbert says his grandfather told him he hid equipment, furniture and private property for a family friend named Jerry, who had been sent away to an internment camp.

“My grandfather said ‘Jerry was Japanese-American, and there was a law passed saying I would go to jail if I was found out doing this, for helping Jerry,’” Herbert said. “I wondered, ‘Why would anyone send my grandfather to jail for helping Jerry?’ I knew Jerry. Jerry was a friend.”

Herbert said that incident created a foundational understanding in him that not all laws are fair and just. Herbert said years later he read a quote from former President John Adams, one of the nation’s Founding Fathers, that drove the point home.

Adams wrote: “It is not only the juror’s right, but his duty to find the verdict according to his own best understanding, judgment and conscience, though in direct opposition to the instruction of the court.”

Herbert said juries not only have the right, but the duty, to rule against unjust laws. That’s why he’s an ardent supporter of the principle of jury nullification.

“It’s one of the central issues of my candidacy,” Herbert said.

Herbert, who has lived in Montana since 2008, is a former chairman of the Wyoming Libertarian Party and refers to himself as a “Ron Paul guy.”

Last year he read a decision written by his opponent, Justice Jim Rice, that spurred him to run against Rice.

“What inspired me to seek this position was when I read Justice Rice’s attitude toward free speech in State v. Dugan,” Herbert said.

The May 2013 Supreme Court decision centered on a case in which Randall Jay Dugan of Belgrade hurled a sexual slur at a Gallatin County Victim Assistance Program worker. Dugan was convicted by a lower court under the state’s Privacy in Communications law, but the high court overturned most of that ruling.

Rice wrote a partial dissent arguing the right of free speech should not be extended to Dugan’s individually directed, personally debasing and injurious statement to the employee and that his motion to dismiss should have been denied.

Herbert said he believes Rice’s ruling was in contrast to First Amendment protections

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of free speech.

Dugan was sentenced to 180 days in jail with all but five suspended and ordered to pay \$585 in fines and fees, but the sentence was overturned.

“Jim Rice said that was a perfect punishment for somebody who says a couple of nasty words to a state employee,” Herbert said.

Herbert said he complained about Rice’s decision so much that his wife told him he should do something about it.

“So I looked up Jim Rice and saw that he was up for re-election, so I decided to run against him,” Herbert said.

Herbert says he would bring a diverse set of personal and professional experiences to the bench if he is elected.

Herbert began his military career in the U.S. Air Force and flew F-4 Phantom jets in Vietnam. After Vietnam, Herbert was awarded a military medical scholarship. He went on to earn a degree in podiatry from Kent State University in Ohio in 1976.

Herbert earned his law from the University of the Pacific Law School in Sacramento, Calif., in 1986. After passing the California bar in 1987, he began representing inmates in the California prison system.

“I have certain ideas about the practice of law, I have certain ideas about the Constitution. And I have certain ideas about how we should instruct juries,” Herbert said. “I consider myself a constitutionalist.”

