No. 98-1255

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

ABEL MARTINEZ-SALAZAR

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

SETH P. WAXMAN
Solicitor General
Counsel of Record

JAMES K. ROBINSON
Assistant Attorney General

MICHAEL R. DREEBEN
Deputy Solicitor General

DAVID C. FREDERICK
Assistant to the Solicitor General

RICHARD A. FRIEDMAN
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether a defendant is entitled to automatic reversal of his conviction when he uses a peremptory challenge to remove a potential juror whom the district court erroneously failed to remove for cause, and he ultimately exhausts his remaining peremptory challenges.

TABLE OF CONTENTS

Table of Contents—Continued: Page

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 146 F.3d 653.

JURISDICTION

The judgment of the court of appeals was entered on May 28, 1998. A petition for rehearing was denied on October 7, 1998 (Pet. App. 20a-21a). On January 4, 1999, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including February 4, 1999. The petition was filed on February 4, 1999, and was granted on June 21, 1999. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTE AND RULES INVOLVED

Section 2111 of Title 28 of the United States Code and Rules 24 and 52 of the Federal Rules of Criminal Procedure are reproduced in an appendix to this brief.

STATEMENT

After a jury trial in the United States District Court for the District of Arizona, respondent Abel Martinez-Salazar was found guilty of conspiracy to possess heroin with intent to distribute it (21 U.S.C. 846), possession of heroin with intent to distribute it (21 U.S.C. 841(a)(1)), and using or carrying a firearm during and in relation to a drug trafficking offense (18 U.S.C. 924(c)(1)). J.A. 50-52; Pet. App. 2a. He was sentenced to 123 months' imprisonment. J.A. 51. Respondent appealed, and the court of appeals found an impairment of his right of peremptory challenges that, it held, "require[d] automatic reversal." Pet. App. 3a.

1. This case involves the jury selection for the joint trial of respondent and his co-defendant.[1] Jury selection took place in one day. J.A. 56. First, the jury venire of 45 potential jurors was put in random order. J.A. 66-68. The trial judge asked the venire whether any potential jurors had scheduling conflicts that might interfere with a trial that would begin on Thursday of that week and was expected to end on Monday of the following week. J.A. 68-70. Three jurors mentioned possible conflicts: No. 4, Neal Sundeen, a lawyer, advised the court that he had a trial beginning the next Monday (J.A. 70-

[1] The procedures followed by the district court may be discerned from the transcript of the jury selection, which is contained in its entirety in the Joint Appendix at pages 56-189, and the master jury list kept by the clerk and filed in the district court record, which is contained in the Joint Appendix at pages 190-192.

71); No. 14, Edward Sink, an employee of Allied Signal Aerospace, told the court that he had just returned from a two-week vacation and a four-day business trip and was having a hard time keeping up with his workload (J.A. 71-72); and No. 15, Mary Smith, an English instructor at a community college, stated that she was concerned about her ability to grade hundreds of papers at term's end (J.A. 72). The court took no immediate action on those requests.

Next, the court asked each potential juror to recite information concerning matters listed on a sheet of paper each juror was given, including his or her name, community of residence, employment, education, marital status, employment of spouse, military service, and prior jury service, including the outcome of any such cases. J.A. 72-89. The court then gave the venire a description of the jury selection process and the expected schedule. J.A. 89-92. Juror questionnaires were distributed and completed during a recess. J.A. 90-91, 92.

When court reconvened, the judge gave the potential jurors general instructions about the conduct of a criminal case, including admonitions that the indictment is not evidence, that the government bears the burden of proof beyond a reasonable doubt, that defendants are presumed innocent, and that the jury was to determine guilt or innocence based on the evidence and the law as explained to it by the court. J.A. 92-97. The court asked whether any of the potential jurors "believe[d] that for whatever reason you simply would not want to serve as a juror here, or don't think that you could serve fairly and impartially as a juror in this case * * * ?" J.A. 97. No juror indicated any such impediment to serving. *Ibid.*

The court introduced the lawyers and the parties, and asked the potential jurors whether any were acquainted with anyone involved in the case. J.A. 97-99. The court then asked the venire a series of questions, including whether any of the potential jurors spoke Spanish (translators would be used for defendants); opposed incarceration as a punishment; knew any of the other potential jurors; had, or had family members with, present or past government employment; had legal training; or had any hearing or other physical problem that might interfere with jury service. J.A. 99-110. Some jurors responded to some of these questions, but each assured the court that he or she would be able to serve fairly and impartially. *Ibid.* The court again asked the venire whether anyone did not desire to serve, and no potential juror sought to be excused. J.A. 110.

The venire then took a recess during which the lawyers were asked to review the questionnaires. The court reconvened, without the venire, for the lawyers to identify which potential jurors they wanted individually questioned. J.A. 112-113. Seventeen of the 45 potential jurors were identified for further questioning. J.A. 113-120. The court questioned each in turn and permitted the lawyers to ask any supplemental questions they wished. J.A. 119-159.

One of the potential jurors who was individually questioned, No. 31, Don Gilbert, stated on his questionnaire that he "would favor the prosecution." J.A. 131-132. When asked about that by the judge, Gilbert clarified: "I think what I'm saying is all things being equal, I would probably tend to favor the prosecution." J.A. 132. In response to a question by respondent's trial counsel, "where would you feel more comfortable erring, in favor of the prosecution or the defendant?,"

Gilbert stated: "I think, as I indicated on [the questionnaire], I would probably be more favorable to the prosecution. I suppose most people are. I mean they're predisposed. You assume that people are on trial because they did something wrong." J.A. 133. When reminded by the court of the earlier instruction on the presumption of innocence, Gilbert responded, "I understand that in theory." J.A. 134.

At the conclusion of the individualized questioning, the court consulted with counsel about those potential jurors who had asked to be excused for personal reasons. There was consensus that Sundeen (No. 4), the lawyer, could be excused, and he ultimately was. J.A. 70-71, 112, 158-159, 169-170. Likewise, there was no objection to excusing Sink (No. 14), who had returned from vacation to face a heavy workload, and he too ultimately was excused. J.A. 71-72, 159-160, 175. There also was no objection to excusing Julie Kolomitz (No. 20), a single parent who told the court during individual questioning that it would be a hardship for her to serve, and she ultimately was excused. J.A. 156-158, 161, 169-170. The government was content to excuse Smith (No. 15), the teacher who was concerned about her workload, but defense counsel objected and the court did not excuse her. J.A. 72, 160-161. Likewise, the government was content to excuse Etoy Hanserd (No. 29), who revealed during individual questioning that she recently had a death in the family, but defense counsel objected and the court did not excuse her. J.A. 134-138, 161-162.

The court considered two for-cause challenges. Defense counsel sought to exclude Gilbert (No. 31) for cause but the government opposed it. J.A. 162. The court observed that Gilbert said he could follow instructions, and the court declined to excuse him for cause. J.A. 163. Both the government and defense counsel

agreed that Darryl Bingham (No. 36) should be excused for cause because he had stated during individual questioning that he would not be able to set aside his personal opinions, and he was excused. J.A. 121-125, 163-164, 170-171.

After further discussion with counsel about additional instructions, the court reconvened with the whole venire present. J.A. 169-170. The potential jurors were instructed about the possible testimony of a government informant and asked whether any potential juror believed that the government should not use informants. J.A. 171-172. The court also told the venire that one of the charges involved firearms. The potential jurors were asked whether any owned firearms, belonged to any organization that advocated restrictions on the ownership of firearms, or harbored any opinion about guns that would affect their impartiality. J.A. 171-173.

The court then had counsel make their peremptory strikes. Pursuant to Federal Rule of Criminal Procedure 24(b) and (c), respondent and his co-defendant were jointly given ten peremptory strikes to pick the 12-person jury and one additional strike to pick the alternate. The prosecution was given six strikes to pick the jury and one to pick the alternate. Counsel were directed to exercise their strikes simultaneously, first to pick the 12-person panel, and then, once the clerk collated the jury lists and returned them to counsel, to pick the alternate. J.A. 167-168, 175-176, 180. That process allowed the possibility of both parties striking the same juror, which did not happen in picking the initial 12-person jury, but both parties did simultaneously strike the same potential alternate juror. J.A. 179-181. The record does not reflect how the co-defendants decided among themselves how they would

exercise jointly their peremptory challenges. After the principal and alternate strikes had been made, the following jurors were selected (J.A. 182-183):

No. 3, R. Johann
No. 8, M. Johnson
No. 11, J. Schotz
No. 17, M. Baker
No. 19, B. Schaller
No. 22, J. Bollinger
No. 23, R. Conn
No. 24, S. Chmielewski
No. 25, D. Finck
No. 26, M. Simmonds
No. 27, M. Welter
No. 30, C. Pelander
Alternate: No. 32, A. Riley

The defense had used one of its ten peremptory challenges to strike Gilbert (No. 31). J.A. 180. Respondent neither requested an additional challenge nor said that any other juror was objectionable as a regular juror. Both parties struck potential juror No. 34, James Allen, as an alternate juror, being content with both Arnold Riley (No. 32) and Julie Ball (No. 33). J.A. 181.

Defense counsel next raised a challenge under *Batson* v. *Kentucky*, 476 U.S. 79 (1986), to the government's peremptory strikes of the two black potential jurors, No. 15, Smith (the school teacher with a heavy workload), and No. 29, Hanserd (who had the recent death in the family and did not want to serve). J.A. 175-176. The court asked the government to provide race-neutral explanations for the strikes. J.A. 176-177; see *Batson*, 476 U.S. at 97. The government responded that Smith raised her potential work problems, and that

Hanserd appeared to be upset by the death in her family. J.A. 176-177. The court allowed the strike of Hanserd to stand, but disallowed the strike of Smith. J.A. 177-178. The court found that, although Smith asked to be excused, she was willing to serve and "I don't think that there's * * * an appropriate reason to exercise a peremptory challenge with respect to her." J.A. 178. Smith was placed on the jury. The government did not request to exercise the peremptory strike that had been disallowed, and the court did not offer that opportunity.

The inclusion of Smith on the jury had the effect of bumping Christine Pelander (No. 30) off the 12-person panel. J.A. 178. The court considered the possibility that Pelander, who had been acceptable to the parties, might become the alternate. J.A. Tr. 178-179. Instead, the court decided to give each party one additional peremptory strike to choose an alternate. The next three jurors on the list were Pelander (No. 30), Riley (No. 32), and Ball (No. 33). The government struck Pelander and the defense struck Ball, leaving Riley, once again, as the alternate juror. J.A. 181-182.

The clerk read off the following names of the selected jurors (J.A. 183):

No. 3, R. Johann
No. 8, M. Johnson
No. 11, J. Schotz
No. 15, M. Smith
No. 17, M. Baker
No. 19, B. Schaller
No. 22, J. Bollinger
No. 23, R. Conn
No. 24, S. Chmielewski

No. 25, D. Finck
No. 26, M. Simmonds
No. 27, M. Welter
Alternate: No. 32, A. Riley

Darvin Finck (No. 25), however, was not present to answer when the clerk called his name. J.A. 183-184. Defense counsel suggested that the defense and the prosecution be given an additional peremptory strike and that the next selected juror should substitute for Finck on the 12-person jury, without affecting the status of Riley as the alternate. J.A. 185-186. Defense counsel explained that this suggestion would make it possible to add an Hispanic to the jury because the next three available jurors would include Francisco Olivas (No. 35). J.A. 185-186. The court declined that suggestion. It decided to accept the jury as selected and to have the marshals attempt to locate Finck. J.A. 184-189. When trial commenced two days later, Finck was excused, so Riley became the twelfth juror and the trial proceeded without an alternate. J.A. 199-200. As a result of that process, the defense exercised 12 peremptory challenges in selecting the jury that served during the trial.

2. The court of appeals reversed respondent's convictions based on the "impairment" of respondent's right of peremptory challenge. Pet. App. 1a-19a. It first held that the district court abused its discretion by refusing to excuse potential juror Gilbert for cause. *Id.* at 7a-8a. Relying on this Court's decision in *Ross* v. *Oklahoma*, 487 U.S. 81 (1988), the court held that the error did not constitute a violation of the Sixth Amendment, because Gilbert did not actually sit on the jury. Pet. App. 9a. The court held, however, that the error amounted to a violation of respondent's right to due

process under the Fifth Amendment. The court reasoned that the defense was forced to use a peremptory challenge to remove a juror who should have been removed for cause, and that the defense was thereby effectively denied a peremptory challenge to which it was entitled by law. *Id.* at 9a-14a. The court held that, because respondent was denied the right to use his full complement of peremptory challenges as he saw fit, automatic reversal was required without any inquiry into whether the error was harmless. *Id.* at 14a-15a.

Judge Rymer dissented. Pet. App. 15a-19a. She concluded that the loss of a peremptory challenge does not amount to a constitutional violation. *Id.* at 15a. In any event, Judge Rymer explained, respondent never suggested to the district court that he wanted to strike some other juror with the peremptory challenge that was instead used to remove Gilbert. *Id.* at 16a. Judge Rymer therefore concluded that there was no indication that respondent was adversely affected by the district court's refusal to remove Gilbert for cause. *Ibid.* Judge Rymer further stated that respondent could obtain relief only if he could establish plain error, because he had not adequately preserved an objection based on the denial of his right to exercise peremptory challenges. *Id.* at 16a-17a. Finally, Judge Rymer concluded that respondent had failed to demonstrate plain error because he could show no prejudice and because it was far from clear that the use of a peremptory challenge to remove a juror who should have been excluded for cause amounts to a due process violation, or even to a denial of the right to peremptory challenges provided by Rule 24 of the Federal Rules of Criminal Procedure. Pet. App. 17a-18a.

SUMMARY OF ARGUMENT

I. The right of federal criminal defendants to exercise peremptory challenges is created by federal rule, not by the Constitution. Such challenges "are not constitutionally protected fundamental rights; rather, they are but one state-created means to the constitutional end of an impartial jury and a fair trial." *Georgia* v. *McCollum*, 505 U.S. 42, 57 (1992). In *Ross* v. *Oklahoma*, 487 U.S. 81 (1988), this Court held that a defendant who was forced to "waste" a peremptory challenge by using it to remove a juror who should have been removed for cause was neither denied an impartial jury nor any liberty interest under the Due Process Clause. The Court concluded that applicable state law required a defendant who objected to the denial of a for-cause challenge to use a peremptory strike to cure the error. Thus, the defendant in *Ross* received all to which he was entitled as a matter of state law. This Court should reach a similar conclusion about the right to exercise peremptory challenges under Rule 24 of the Federal Rules of Criminal Procedure. Recognition of a procedural requirement that a defendant must use a peremptory challenge to cure the judge's error in denying a challenge for cause is consistent with the purpose of the peremptory challenge to assist in empaneling an impartial jury and, by preventing the need for retrial, the requirement conserves judicial resources when a trial judge has made an error in assessing the impartiality of a potential juror.

Even if the rule-based right of peremptory challenge under Rule 24 is found to be impaired when a defendant "wastes" the challenge to cure an erroneous ruling on a challenge for cause, it does not amount to a constitutional violation unless the error actually results in the

seating of a biased juror. In general, the infringement of a nonconstitutional rule of procedure does not rise to the level of a due process violation. *Engle* v. *Isaac*, 456 U.S. 107, 121 n.21 (1982). Rather, such an infringement forms the predicate for a due process claim only where it "results in prejudice so great as to deny a defendant his Fifth Amendment right to a fair trial." *United States* v. *Lane*, 474 U.S. 438, 446 n.8 (1986). The district court's error in refusing to excuse a potential juror for cause simply led the defense in this case to use one of its peremptory challenges to achieve the same purpose; that consequence cannot reasonably be said to have deprived respondent of a fair trial.

II. Even if there was an impairment of respondent's rights to exercise peremptory challenges under Rule 24, and even if that impairment were viewed as implicating the Due Process Clause, the error is subject to harmless-error analysis, and, in this case, is harmless. Rule 52(a) of the Federal Rules of Criminal Procedure directs that an error in a federal criminal case shall be disregarded unless it affects "substantial rights." If the jury that decided the case was fair and impartial, the impairment of respondent's exercise of peremptory challenges did not affect substantial rights.

A small class of fundamental rights has been found "so intrinsically harmful as to require automatic reversal" without showing an effect on the outcome of the trial, but that is only because errors in that class "infect the entire trial process" and "necessarily render a trial fundamentally unfair." *Neder* v. *United States*, 119 S. Ct. 1827, 1833 (1999). The error in this case bears no resemblance to those errors. "[I]f the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other errors that may have occurred are subject to harmless-error analysis."

Rose v. *Clark*, 478 U.S. 570, 579 (1986). Respondent had counsel and was tried before an impartial jury. Any impairment of his rule-based right to make an arbitrary exclusion of a trial juror did not produce a fundamentally unfair trial.

A rule of automatic reversal for such an error in these circumstances would produce substantial injustice. Per se reversal would force the criminal justice system to bear the costs of retrial, a process that often would impose particular strains on victims of crime, witnesses attempting to recall prior events, and society's reasonable expectation in the finality of the judicial process. While the intangible values furthered by the peremptory challenge are important, in this setting the infringement of those values is not of sufficient consequence to justify the requested remedy of reversing a conviction after a fundamentally fair trial. And given the inevitability of errors that impair peremptory challenges in the hurly burly of jury selection, automatic reversal for such errors would impose burdens on the criminal justice system in a substantial number of cases.

Even if reversal without a specific showing of prejudice were warranted in some cases where a peremptory challenge is "wasted" on a juror who should have been excused for cause, the record in this case does not support that result. The defense in this case was allocated a total of ten peremptory challenges to select the original jury, and it had unimpaired use of nine. The defense thus substantially enjoyed the right to participate in jury selection through the exercise of peremptory challenges, despite any error involving one such challenge. Moreover, although respondent ultimately exhausted his peremptory challenges after having "wasted" one to remove the juror who should

have been excused for cause, respondent never objected to any juror who remained on the jury or indicated that he would have exercised an additional strike if he had one. On this record, there is no indication that the jury that ultimately decided respondent's case would have been composed differently even if his for-cause challenge had not been erroneously denied.

ARGUMENT

I. A DEFENDANT'S RULE-BASED OR DUE PROCESS RIGHTS ARE NOT VIOLATED WHEN HE EXERCISES A PEREMPTORY CHALLENGE TO REMOVE A JUROR WHO SHOULD HAVE BEEN EXCUSED FOR CAUSE

This Court has "long recognized that peremptory challenges are not of constitutional dimension." *Ross* v. *Oklahoma*, 487 U.S. 81, 88 (1988) (citing *Gray* v. *Mississippi*, 481 U.S. 648, 663 (1987)); *Georgia* v. *McCollum*, 505 U.S. 42, 57 (1992) ("This Court repeatedly has stated that the right to a peremptory challenge may be withheld altogether without impairing the constitutional guarantee of an impartial jury and a fair trial."); *Stilson* v. *United States*, 250 U.S. 583, 586 (1919) ("There is nothing in the Constitution of the United States which requires the Congress to grant peremptory challenges to defendants in criminal cases; trial by an impartial jury is all that is secured."). Because a defendant has no constitutional right to peremptory challenges in a criminal case, the existence of any such right is solely the product of statute or rule. *J.E.B.* v. *Alabama ex rel. T.B.*, 511 U.S. 127, 137 n.7 (1994); *Ross*, 487 U.S. at 89; *Frazier* v. *United States*, 335 U.S. 497, 505 n.11 (1948). In this case, Rule 24 of the Federal Rules of Criminal Procedure affords a criminal defendant the right to exercise peremptory

challenges. In light of the history and purpose of peremptory challenges to serve as "but one state-created means to the constitutional end of an impartial jury and a fair trial," *McCollum*, 505 U.S. at 57, there is no "impairment" of that right if the defendant uses a peremptory challenge to remove a juror who should have been removed for cause. And even if the Court were to conclude that there is an impairment of the defendant's rule-based rights in that situation, such an impairment does not rise to the level of a due process violation.

A. The Right To Exercise Peremptory Challenges Under Federal Rule Of Criminal Procedure 24 Is Subject To Reasonable Procedural Limitations

Because peremptory challenges are not guaranteed by the Constitution, both the existence and nature of the right to make such challenges in federal criminal cases turns on a construction of Federal Rule of Criminal Procedure 24. As applicable to this case, Rule 24 specifies that, for the selection of the 12-person jury for the trial of a non-capital felony, the government is entitled to six peremptory challenges and the defendant or defendants are jointly entitled to ten peremptory challenges. Fed. R. Crim. P. 24(b). In a multiple-defendant case, such as this one, the district court has discretion to allow defendants additional peremptory challenges and to determine whether they shall be exercised separately or jointly. *Ibid.* When one alternate juror is selected, as happened in this case, one additional peremptory challenge is granted to the government and to the defendants jointly, and it may be used only in the selection of the alternate. Rule 24(c).

Rule 24 does not specify in any other relevant way what procedures the court should employ in jury selection. In such matters, the district courts have long been

given broad discretion. See *Pointer* v. *United States*, 151 U.S. 396, 410 (1894); *Lewis* v. *United States*, 146 U.S. 370, 377 (1892). By longstanding practice, federal courts have imposed a variety of procedural restrictions on the exercise of peremptory challenges, many of which might be said to "impair" an individual defendant's effective use of those challenges. This Court has held, however, that so long as the empaneled jury is fair and impartial, a defendant's rights have not been infringed.

Although Federal Rule of Criminal Procedure 24 was promulgated in 1946, a federal statutory right to peremptory challenges in some form dates to 1790.[2] At common law, a party could exclude a potential juror, who would otherwise qualify for service, without providing a reason, and the federal statutes allowing such peremptory challenges carried forward the underlying purposes of that practice. See *Swain* v. *Alabama*, 380 U.S. 202, 214-220 (1965). The central purpose of the peremptory challenge is to provide reinforcement for the right to an "impartial jury." U.S. Const. Amend. VI. See *Frazier*, 335 U.S. at 505 ("the right is given in aid of the party's interest to secure a fair and impartial jury"); *J.E.B.*, 511 U.S. at 137 n.8 ("[The] sole purpose [of the peremptory challenge] is to permit litigants to assist the government in the selection of an impartial

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[2] See *Holland* v. *Illinois*, 493 U.S. 474, 481 n.1 (1990) (discussing Act of Apr. 30, 1790, ch. 9, § 30, 1 Stat. 119). A general right to exercise peremptory challenges in federal non-capital cases did not exist until the Act of June 8, 1872, ch. 333, 17 Stat. 282, unless a local rule of the federal court adopted a provision of state law allowing such challenges, Act of Apr. 30, 1790, ch. 9, § 30, 1 Stat. 119. See *Frazier*, 335 U.S. at 505 n.11.

trier of fact.") (quoting *Edmonson* v. *Leesville Concrete Co.*, 500 U.S. 614, 620 (1991)).[3]

Judicially imposed limitations on the exercise of peremptory challenges are a necessity. As the Court noted in *Ross*, "the concept of a peremptory challenge as a totally freewheeling right unconstrained by any procedural requirement is difficult to imagine." 487 U.S. at 90. It is therefore not surprising that the exercise of peremptory challenges has long been subject to constraints. *Ibid.* For example, this Court has held that a defendant may not complain, in a joint trial, that his co-defendants had "impaired" his tactical use of peremptory challenges to select a jury by using their

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[3] Blackstone elaborated on the purpose of the peremptory:

> [I]n criminal cases, or at least in capital ones, there is, *in favorem vitae*, allowed to the prisoner an arbitrary and capricious species of challenge to a certain number of jurors, without shewing any cause at all; which is called a *peremptory* challenge: a provision full of that tenderness and humanity to prisoners, for which our English laws are justly famous. This is grounded on two reasons. 1. As every one must be sensible, what sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another; and how necessary it is, that a prisoner (when put to defend his life) should have a good opinion of his jury, the want of which might totally disconcert him; the law wills not that he should be tried by any one man against whom he has conceived a prejudice, even without being able to assign a reason for such his dislike. 2. Because, upon challenges for cause shewn, if the reason assigned prove insufficient to set aside the juror, perhaps the bare questioning his indifference may sometimes provoke a resentment: to prevent all ill consequences from which, the prisoner is still at liberty, if he pleases, peremptorily to set him aside.

4 William Blackstone, *Commentaries* *353 (quoted in *Lewis* v. *United States*, 146 U.S. 370, 376 (1892)).

peremptory challenges to strike jurors acceptable to him, *United States* v. *Marchant*, 25 U.S. (12 Wheat.) 480, 482 (1827), or that he was forced to share his peremptory challenges with his co-defendants, thus reducing the number he could independently exercise, *Stilson* v. *United States*, *supra*. The Court has also upheld federal court practices requiring simultaneous use of peremptory challenges by the defense and the government, even though that method might cause the defendant to "waste" a peremptory challenge on a juror simultaneously excused by the prosecution. See *Pointer*, 151 U.S. at 409, 412 (acknowledging that "[i]t is true that, under the method pursued in this case, it might occur that the defendant would strike from the list the same persons stricken off by the government," but finding no impairment of the right of peremptory challenge). The Court has approved a practice under which each potential juror, in turn, must be challenged either for cause or peremptorily and, if not excused, sworn before another juror is considered, even though that process limits the defendant's ability to allocate his peremptory challenges among potential jurors. See *St. Clair* v. *United States*, 154 U.S. 134, 147-148 (1894) (finding it "not inconsistent with any settled principle of criminal law, nor does it interfere with the selection of impartial juries"). The fundamental reason why each described procedure has been endorsed, despite its alleged adverse effect on the tactical use of peremptory challenges by defendants to dictate the composition of juries, is that it did not "interfere with the selection of impartial juries." *Ibid.* That is all the Constitution requires, see *Stilson*, 250 U.S. at 586, and that is the main objective of granting peremptory challenges, see *Ross*, 487 U.S. at 88.

B. Requiring A Defendant To Use A Peremptory Challenge To Strike A Juror Who Should Have Been Removed For Cause Is A Reasonable Procedural Rule

Measured against those standards, a requirement that a defendant must use a peremptory challenge to "cure" the trial court's erroneous denial of a for-cause strike should not be found to impair the rule-based right of peremptory challenge. Rather, requiring the defendant to use the challenge to remove the partial juror is consistent with the core purpose of granting peremptory challenges—to assist in securing an impartial jury.

Although the Court has never addressed this question as a matter of federal law,[4] it has examined a similar question arising under state law. In *Ross* v. *Oklahoma*, 487 U.S. 81 (1988), the Court concluded that a defendant could not base a due process claim on the theory that having to use a peremptory challenge to cure a trial court's error in denying a for-cause challenge "arbitrarily depriv[ed] him of the full complement of * * * challenges allowed under Oklahoma law." *Id.*

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[4] The Court explicitly noted in *Ross*, 487 U.S. at 91 n.4, that it "need not decide the broader question whether, in the absence of Oklahoma's limitation on the 'right' to exercise peremptory challenges, 'a denial or impairment' of the exercise of peremptory challenges occurs if the defendant uses one or more challenges to remove jurors who should have been excused for cause." Compare *Stroud* v. *United States*, 251 U.S. 15 (1919), on denial of rehearing, 215 U.S. 380, 382 (1920) (defendant asserted that prejudicial error occurred when he had used a peremptory challenge to remove a juror who should have been struck for cause; rehearing denied because, *inter alia*, the record showed that the defendant had been allowed 21 challenges, one more than the law required, "and the record does not disclose that other than an impartial jury sat on the trial").

at 89. The Court held "[i]t is a long settled principle of Oklahoma law that a defendant who disagrees with the trial court's ruling on a for-cause challenge must, in order to preserve the claim that the ruling deprived him of a fair trial, exercise a peremptory challenge to remove the juror." *Ibid.* "Even then," the Court added, "the error is grounds for reversal only if the defendant exhausts all peremptory challenges and an incompetent juror is forced upon him." *Ibid.* Thus, the Court concluded, "[a]s required by Oklahoma law, [the defendant] exercised one of his peremptory challenges to rectify the trial court's error [in denying a challenge for cause], and consequently he retained only eight peremptory challenges to use in his unfettered discretion. But he received all that Oklahoma law allowed him, and therefore his due process challenge fails." *Id.* at 90-91.

Federal law should be construed to contain a similar procedural requirement.[5] In view of the unquestioned

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[5] While several courts of appeals have concluded that "it is error for a court to force a party to exhaust his peremptory challenges on persons who should be excused for cause, for this has the effect of abridging the right to exercise peremptory challenges," *United States* v. *Nell*, 526 F.2d 1223, 1229 (5th Cir. 1976); accord, *e.g.*, *Kirk* v. *Raymark Indus., Inc.*, 61 F.3d 147, 161 (3d Cir. 1995) (collecting cases), cert. denied, 516 U.S. 1145 (1996), the cases following that rule have been criticized for contradicting "a line of earlier cases" holding that, even where the defendant exhausted his peremptory challenges after using one to remove a juror who should have been removed for cause, the burden rests on the challenging party "to demonstrate that because he used a peremptory challenge on an incompetent venireman, an objectionable juror was allowed to serve," *United States* v. *Allsup*, 566 F.2d 68, 76 (9th Cir. 1977) (Foley, D.J., concurring). In view of the common-law heritage of the federal peremptory challenge right, the proper rule to be adopted for federal practice may be illuminated by administration of the peremptory challenge in the States. Twenty-six

legitimacy of procedural restraints on the defendant's use of peremptory challenges to influence the composition of the jury, see pp. 17-18, *supra*, there can be no claim that a defendant must have absolute freedom to use challenges in whatever way the defendant wishes. Rather, defense peremptory challenges have always been subject to court-imposed procedural limits so long as they are consistent with "settled principles of criminal law [recognized] to be essential in securing impartial juries for the trial of offences." *Pointer*, 151 U.S. at 408. As the Court acknowledged in *Ross*, peremptory challenges are "a means to achieve the end of an impartial jury." 487 U.S. at 88. It is entirely consistent with that purpose to require that defendants use their peremptory challenges to remove jurors whom the court should have removed for cause, thereby protecting the impartiality of the jury. In selecting a jury, defendants as well as the prosecution can be expected to exercise responsibility for preserving the fairness and integrity of the trial, even while pursuing their own aims. Cf. *Georgia* v. *McCollum*, 505 U.S. at 50-55, 59 (even though a criminal defendant seeks to protect private interests, participation in selection of such a "quintessential governmental body" constitutes state action for equal protection purposes, such that a criminal defendant's "purposeful discrimination on the ground of race in the exercise of peremptory chal-

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States have a rule that a defendant may not challenge on appeal a trial judge's error in denying a for-cause challenge where the defendant exercised a peremptory challenge to remove the juror, and those States do not appear to have reversed a conviction on the theory that such a use of a peremptory challenge constitutes a prejudicial "impairment" of the peremptory-challenge right. (We have collected in an appendix to this brief a summary of the positions taken by the state courts.)

lenges" is prohibited). "[T]here is nothing arbitrary or irrational about such a requirement, which subordinates the absolute freedom to use a peremptory challenge as one wishes to the goal of empaneling an impartial jury." *Ross*, 487 U.S. at 90.

C. Any Impairment In This Case Of The Right To Exercise Peremptory Challenges Does Not Violate The Due Process Clause

Even if this Court were to conclude that a federal criminal defendant's rule-based right to exercise peremptory challenges is impaired when he uses a strike to remove a juror who should have been removed for cause, that impairment would not by itself give rise to a due process violation. The question whether the impairment of the right constitutes a violation of the Due Process Clause turns on whether the violation "results in prejudice so great as to deny a defendant his Fifth Amendment right to a fair trial," *United States* v. *Lane*, 474 U.S. 438, 446 n.8 (1986); *Estelle* v. *McGuire*, 502 U.S. 62, 75 (1991) (Due Process Clause comes into play where an error "so infused the trial with unfairness as to deny due process of law") (quoting *Lisenba* v. *California*, 314 U.S. 219, 228 (1941)). An impairment of the rule-based right to excuse a juror without cause is not an error of constitutional dimension.[6]

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[6] In contrast, constitutional error does occur when a biased juror sits on the case because the defendant was improperly deprived of a peremptory challenge that would have allowed the defendant to remove him. Cf. *Irvin* v. *Dowd*, 366 U.S. 717 (1961). There is, however, no general reason to find a constitutional violation based on the impairment of peremptory challenges unless it results in the seating of a biased juror. A due process violation in this context requires a showing of prejudice to a fair trial, and if the jury that sits is impartial, no such showing can generally be made. See pp. 28-31, *infra*.

The impairment of a defendant's right to exercise peremptory challenges does not deny the defendant the right to be tried by a fair and impartial jury. In *Ross*, this Court rejected the view that a state court's erroneous denial of a for-cause challenge violated the defendant's Sixth Amendment right to an impartial jury, even though the defendant used one of his peremptory challenges to remove the juror. 487 U.S. at 87-88. "So long as the jury that sits is impartial, the fact that the defendant had to use a peremptory challenge to achieve that result does not mean the Sixth Amendment was violated." *Id.* at 88. As noted above, the Court in *Ross* also concluded that requiring the defendant to use a peremptory challenge to remove a juror who should have been excused for cause did not deprive the defendant of his rights under the Due Process Clause, because state law required the defendant to take that action in order to appeal the trial court's denial of a for-cause challenge. *Id.* at 89-91. But it is not necessary to conclude that a qualification like the one recognized by the Court in *Ross* exists in federal law to reject the claim of a due process violation. An error in forcing a defendant to "waste" a peremptory challenge would deprive him only of a rule-based right to exercise that challenge, not of any right under the Constitution.

In unusual circumstances, the Court has held that the violation of a non-constitutional rule of procedure deprived an individual of due process. For example, the Court has held that the imposition of a sentence by a jury that was not informed of its discretion to impose a lower sentence deprived the defendant of due process, and not simply "of a procedural right of exclusively state concern." *Hicks* v. *Oklahoma*, 447 U.S. 343, 346-347 (1980). The Court has also found a due process violation when a State denied a hearing to a complainant,

based solely on an official's failure to comply with a state-law deadline for initiating an adjudication. *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422 (1982). But those cases bear no resemblance to the criminal procedure right at issue here. Unlike the law at issue in *Hicks*, Rule 24 defines a process for selecting a jury, not for instructing the sentencer on the extent of its discretion.[7] And unlike the situation in *Logan*, a defendant whose peremptory challenge rights are impaired retains his right to be tried by an impartial factfinder and to exercise full due process rights before being finally deprived of a protected liberty interest.

The court of appeals' holding that an impairment of the rule-based right to exercise peremptory challenges by itself works a due process violation is inconsistent with this Court's many holdings that violations of non-constitutional procedural rights provide no basis for federal habeas corpus relief. See *Estelle* v. *McGuire*, 502 U.S. at 67 ("We have stated many times that 'federal habeas corpus relief does not lie for errors of state law.'") (quoting *Lewis* v. *Jeffers*, 497 U.S. 764, 780 (1990)); *Pulley* v. *Harris*, 465 U.S. 37, 41 (1984) ("A federal court may not issue the writ on the basis of a perceived error of state law."); *Rose* v. *Hodges*, 423 U.S. 19, 21-22 (1975) (per curiam) (same). That principle would be seriously undermined, if not altogether elimi-

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[7] The jury in *Hicks* was erroneously instructed that punishment must be assessed at 40 years' imprisonment, when state law authorized the jury to impose any sentence greater than ten years' imprisonment. 447 U.S. at 345-346. The defendant was thereby deprived of his opportunity to be heard by a factfinder that could give him "an opportunity [to be heard] at a meaningful time and in a meaningful manner." *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965). Nothing of the kind can be said here; respondent enjoyed his full right to be heard in his criminal trial.

nated, if a violation of a criminal procedure right conferred by statute or rule alone were sufficient to establish a deprivation of liberty without due process of law. Under that analysis, due process claims could be brought on habeas corpus whenever a State violated its own evidentiary rules (*Estelle*), statutory appellate process (*Pulley*), or limits on commutation authority (*Hodges*). To accord constitutional protection to procedural rights voluntarily created by the government skews the basic purpose of due process, which is to guarantee fundamental fairness. That expansive view of the Due Process Clause cannot be sustained. As the Court has explained:

> We have long recognized that a "mere error of state law" is not a denial of due process. *Gryger* v. *Burke*, 334 U.S. 728, 731 (1948). If the contrary were true, then "every erroneous decision by a state court on state law would come [to this Court] as a federal constitutional question." *Ibid.*

Engle v. *Isaac*, 456 U.S. 107, 121 n.21 (1982).

Those principles support the conclusion that impairment of respondent's rights under the federal rule governing peremptory challenges does not per se violate the Constitution. See *Lane*, 474 U.S. at 446 n.8 (noting that the violation of Federal Rule of Criminal Procedure 8, governing joinder, "would rise to the level of a constitutional violation only if it results in prejudice so great as to deny a defendant his Fifth Amendment right to a fair trial"). And, although respondent exercised one of his allotted peremptory challenges to remove a juror who should have been removed for cause, he does not contend that the jury that tried him was anything other than fair and impartial.

The range of discretion available to a judge in conducting jury selection, despite the potential for the judge's actions to affect the exercise of peremptory challenges, underscores that any impairment here did not render the trial fundamentally unfair. Legitimate limitations on voir dire may significantly affect the exercise of peremptory challenges, without raising any constitutional issue. See *Mu'min* v. *Virginia*, 500 U.S. 415, 424- 425 (1991); cf. *J.E.B.*, 511 U.S. at 143-144. Jury selection procedures necessarily constrain the exercise of peremptory challenges. See *Pointer* v. *United States*, *supra*; *St. Clair* v. *United States*, *supra*. Finally, peremptory challenges may not be used to discriminate on the basis of race, *Batson* v. *Kentucky*, 476 U.S. 79 (1986), or gender, *J.E.B.*, *supra*. See *Georgia* v. *McCollum*, *supra* (defense peremptory challenges are subject to *Batson* scrutiny).

Given these well-established limitations on the right to exercise peremptory challenges, the Due Process Clause is not violated simply because the defendant has had to exercise a peremptory challenge to remove a juror who should have been excused for cause. As Judge Rymer explained in dissent, "[t]o find a due process violation for 'effectively' denying or impairing [respondent's] 'right to the full complement of peremptory challenges to which he was entitled under federal law,' as the majority does, [at Pet. App. 9a], comes full circle by 'effectively' making the exercise of a peremptory challenge a *constitutional* right." Pet. App. 19a. Yet this Court has repeatedly held the opposite.

II. IMPAIRMENTS OF A DEFENDANT'S EXERCISE OF PEREMPTORY CHALLENGES ARE SUBJECT TO HARMLESS ERROR ANALYSIS

Rule 52(a) of the Federal Rules of Criminal Procedure provides that "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."[8] "[A] federal court may not invoke supervisory power to circumvent the harmless-error inquiry prescribed by Federal Rule of Criminal Procedure 52(a). * * * Rule 52 is, in every pertinent respect, as binding as any statute duly enacted by Congress, and federal courts have no more discretion to disregard the Rule's mandate than they do to disregard constitutional or statutory provisions." *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 254-255 (1988); *Lane*, 474 U.S. at 444-449 & n.11.

In general, to affect substantial rights, an "error must have been prejudicial: It must have affected the outcome of the district court proceedings." *United States* v. *Olano*, 507 U.S. 725, 734 (1993); see, *e.g.*, *United States* v. *Mechanik*, 475 U.S. 66, 72 (1986). Even errors that violate important constitutional rights are generally subject to analysis under that test. *Neder* v. *United States*, 119 S. Ct. 1827, 1833 (1999). Reversal for error without consideration of whether the defendant suffered case-specific prejudice is "the exception and not the rule." *Rose* v. *Clark*, 478 U.S. 570, 578 (1986). While a few errors are deemed "so intrinsically harmful as to require automatic reversal (*i.e.*, 'affect

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[8] Similarly, Section 2111 of Title 28, United States Code, provides that, "[o]n the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

substantial rights') without regard to their effect on the outcome," *Neder*, 119 S. Ct. at 1833, "if the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other errors that may have occurred are subject to harmless-error analysis." *Rose*, 478 U.S. at 579. Under those principles, even if it was error when respondent was required to use a peremptory challenge to strike the juror who should have been removed for cause, reversal is not required absent a showing of prejudice. The court of appeals' holding that the error demanded automatic reversal is incorrect and should be rejected.[9]

A. An Impairment Of Peremptory Challenges Is Harmless If An Impartial Jury Sits

Since this Court's decision in *Chapman* v. *California*, 386 U.S. 18 (1967), it has been clear that even errors that violate important constitutional rights are subject to review for harmlessness. Harmless-error analysis

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[9] Harmless-error analysis applies whether the error in question is constitutional or statutory. When the error in question is of constitutional dimension, the government bears the burden of showing beyond a reasonable doubt that the error did not affect the outcome of trial proceedings. See *Chapman* v. *California*, 386 U.S. 18, 21-24 (1967); *United States* v. *Hasting*, 461 U.S. 499, 510-511 (1983). When the error is not of constitutional dimension, the government bears the burden of demonstrating that the error did not have a "substantial and injurious effect or influence in determining the jury's verdict." *Kotteakos* v. *United States*, 328 U.S. 750, 776 (1946). Thus, the standard of harmless-error review in cases such as this one will turn on whether, assuming there is error, the Court finds a violation of statutory or constitutional rights. Our position is that no error occurred, but if the Court disagrees, it should find no more than a violation of rule-based rights, and should conduct harmless-error analysis under *Kotteakos*.

applies, for example, to improper comments on the defendant's failure to testify, *Chapman*, *supra*; to admission of a coerced confession, *Arizona* v. *Fulminante*, 499 U.S. 279, 310 (1991); and to a violation of the Sixth Amendment's jury trial right by failing to instruct the jury on an element of the offense, *Neder* v. *United States*, 119 S. Ct. at 1833-1837. In only a handful of cases has the Court found that certain fundamental constitutional errors require reversal even if they have no effect on the outcome of trial proceedings. See, *e.g.*, *United States* v. *Olano*, 507 U.S. at 735 (referring to errors that deprive defendants of the "basic protections [without which] a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair") (quoting *Rose*, 478 U.S. at 577-578). Those instances of "structural error" include *Gideon* v. *Wainwright*, 372 U.S. 335 (1963) (complete denial of trial counsel); *Tumey* v. *Ohio*, 273 U.S. 510 (1927) (biased judge); *Vasquez* v. *Hillery*, 474 U.S. 254 (1986) (racial discrimination in grand jury selection); *Waller* v. *Georgia*, 467 U.S. 39 (1984) (denial of public trial); *Gomez* v. *United States*, 490 U.S. 858, 876 (1989) (jury selection before a magistrate lacking jurisdiction); and *Sullivan* v. *Louisiana*, 508 U.S. 275 (1993) (defective reasonable doubt instruction). Similarly, the seating, over the defendant's objection, of an actually biased juror represents a form of error that is intrinsically harmful and that warrants reversal without any inquiry into case-specific prejudice. See, *e.g.*, *Rose*, 478 U.S. at 578; *Parker* v. *Gladden*, 385 U.S. 363, 366 (1966); cf. *Morgan* v. *Illinois*, 504 U.S. 719, 726-727 (1992).

The error in this case differs significantly from those errors that have been found to "infect the entire trial process" and that "necessarily render a trial funda-

mentally unfair." *Neder*, 119 S. Ct. at 1833. Where no actually biased juror is seated, errors impairing the exercise of peremptory challenges do not deprive the defendant of an "impartial jury." At most, such errors deprive the defendant of the right to exclude a juror whom the defendant believes would be less favorable to him than some other juror. Such errors do not justify the conclusion that in each and every case the error affects "substantial rights," notwithstanding the defendant's representation by counsel and receipt of a fair trial before an impartial jury. Those errors, therefore, are not within the "very limited class" of "structural" errors. *Neder*, 119 S. Ct. at 1833.

Accordingly, the usual form of harmless-error inquiry applies in this case, under which an error does not affect the defendant's "substantial rights" unless it affects the outcome of the trial.[10] The error in this case cannot reasonably be said to have had any such effect. It would be purely speculative to conclude that the substitution of one impartial juror for some other impartial juror would have changed the trial's verdict. And it is not sufficient to note that the error "may have resulted in a jury panel different from that which would otherwise have decided the case." *Ross*, 487 U.S. at 87 (rejecting claim that jury selection error warranted reversal even if "the composition of the jury panel might have changed significantly"). The jury that sat was fair and impartial, and respondent had no right to a

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[10] The government carries the burden to show harmlessness if a proper objection has been made in the district court; if the claim of error is forfeited, the defendant must show an effect on substantial rights under the plain-error standard of Rule 52(b). See generally *United States* v. *Olano*, 507 U.S. 725 (1993); *Johnson* v. *United States*, 520 U.S. 461, 465 (1997).

jury composed of particular jurors. See *Marchant*, 25 U.S. (12 Wheat.) at 482; *Taylor* v. *Louisiana*, 419 U.S. 522, 538 (1975) ("Defendants are not entitled to a jury of any particular composition.").

This Court reached a similar conclusion in determining that an impairment of the exercise of peremptory challenges does not, without more, justify granting a new trial in a civil case. See *McDonough Power Equip., Inc.* v. *Greenwood*, 464 U.S. 548, 553 (1984). In that case, a juror's failure to respond to a question on voir dire denied a party information that would have been useful in exercising a peremptory challenge. *Id.* at 549-552. Relying on Section 2111 of Title 28 and Federal Rule of Civil Procedure 61—a civil analogue to Rule 52(a)—the Court concluded that reversal would not be justified unless a correct response by the juror "would have provided a valid basis for a challenge for cause." 464 U.S. at 556. The Court recognized the importance of a full response on voir dire to the intelligent exercise of peremptory challenges: "hints of bias not sufficient to warrant challenge for cause may assist parties in exercising their peremptory challenges." *Id.* at 554. But it concluded that "[t]he harmless-error rules adopted by this Court and Congress embody the principle that courts should exercise judgment in preference to the automatic reversal for 'error' and ignore errors that do not affect the essential fairness of the trial." *Id.* at 553. Although *McDonough* is a civil case, its underlying principle is applicable here as well. Notwithstanding the importance of the right to exercise peremptory challenges, an impairment of that right does not warrant per se

reversal so long as the jury that actually sits is "impartial."[11]

B. A Rule Of Automatic Reversal Is Justified By Neither Precedent Nor Principle

In applying a rule of automatic reversal, the court of appeals relied heavily on this Court's statement in *Swain* v. *Alabama*, 380 U.S. 202, 219 (1965) that a "denial or impairment of the right [to exercise peremptory challenges] is reversible error without a showing of prejudice." See Pet. App. 9a-10a (quoting that language from *Swain*); see also *United States* v. *Annigoni*, 96 F.3d 1132, 1141 (9th Cir. 1996) (en banc) (same). The quoted language in *Swain*, however, was

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[11] Several courts of appeals have held that an erroneous ruling on a for-cause challenge is harmless error when the defendant uses a peremptory challenge to "cure" that ruling, so long as the jury that actually sat in the case was not biased. See, *e.g.*, *United States* v. *Brooks*, 161 F.3d 1240, 1245 (10th Cir. 1998) (failure to rule correctly on for-cause challenge is harmless error where defendant exercises peremptory strike on challenged juror and "has not alleged that any of the jurors actually seated were biased"); *United States* v. *Horsman*, 114 F.3d 822, 825 (8th Cir. 1997) (failure to strike for-cause not prejudicial error where defendant struck venire member with peremptory challenge and failed to meet "the burden of showing that the jury which did sit was biased"), cert. denied, 522 U.S. 1053 (1998); *United States* v. *Torres*, 960 F.2d 226, 228 (1st Cir. 1992) (Breyer, C.J.) (defendant's use of a peremptory to excuse juror who should have been excused for cause is harmless error, where defendant did not use up all peremptory challenges); but see, *e.g.*, *United States* v. *Broussard*, 987 F.2d 215, 221 (5th Cir. 1993) (erroneous denial of a peremptory challenge under *Batson* cannot be harmless error); *United States* v. *Ricks*, 776 F.2d 455, 461 (4th Cir. 1985) (right to peremptory of such significance that denial or substantial impairment of the right constitutes per se reversible error), cert. denied, 479 U.S. 1009 (1986).

unnecessary to the decision in that case.[12] As this Court has noted, "it is to the holdings of our cases, rather than their dicta, that we must attend." *Bennis* v. *Michigan*, 516 U.S. 442, 450-451 (1996) (brackets omitted); *United States Nat'l Bank of Or.* v. *Independent Ins. Agents of Am., Inc.*, 508 U.S. 439, 463 n.11 (1993) (finding that language in a prior decision "is obviously not controlling, coming as it did in an opinion that did not present the question we decide in these cases").

Not only is the statement in *Swain* dictum, but the authorities on which the Court relied do not provide controlling doctrine today. *Swain* relied on a series of early decisions from this Court reversing judgments, including criminal convictions, on the basis of errors impairing defendants' exercise of their peremptory challenges. 380 U.S. at 219 (citing *Harrison* v. *United States*, 163 U.S. 140, 142 (1896); *Gulf, Colorado & Santa Fe Ry.* v. *Shane*, 157 U.S. 348, 351 (1895); *Lewis* v. *United States*, 146 U.S. 370, 376 (1892)).[13] Those cases,

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[12] The relevant holding of *Swain* was that the Constitution does not require "an examination of the prosecutor's reasons for the exercise of his [peremptory] challenges in any given case" to determine whether the prosecutor had the impermissible purpose to remove black jurors on the basis of their race. 380 U.S. at 222. That holding was overruled by *Batson* v. *Kentucky*, 476 U.S. 79 (1986), in which the Court held that a prosecutor's purposeful discrimination on the basis of race in the exercise of peremptory challenges violates the Equal Protection Clause. See *id.* at 92-93 (rejecting *Swain* standards). Because *Swain* did not address any claim that a defendant had been denied a peremptory challenge right, the statement from *Swain* quoted in text (380 U.S. at 219) was dictum.

[13] In *Harrison*, the applicable statute required that the defendant be granted ten peremptory challenges, but he was granted only three. 163 U.S. at 141. In *Shane*, the statute required that a venire of 18 jurors qualified for cause be presented to the parties

however, were "decided long before the adoption of Federal Rule[] of Criminal Procedure * * * 52, and prior to the enactment of the harmless-error statute, 28 U.S.C. § 2111." *Lane*, 474 U.S. at 444. In *Lane*, this Court declined to follow an early case holding that misjoinder of charges requires automatic reversal. *Ibid.* (noting that per se reversal approach of *McElroy* v. *United States*, 164 U.S. 76 (1896), did not survive later statutory harmless-error provisions). Similarly in this case, judicial rules generated in an era when trial error was presumptively reversible and reviewing courts were called "citadels of technicality," *Kotteakos* v. *United States*, 328 U.S. 750, 759 (1946), are no longer authoritative.

There is no basis for retaining the automatic-reversal rule as a matter of principle. It is undoubtedly true, as the Ninth Circuit has observed, that, "unlike typical trial errors, [an error involving a peremptory challenge does] not 'occur[] during the presentation of the case to the jury'"; thus, it "may not be 'quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt.'" *United States* v. *Annigoni*, 96 F.3d at 1144 (quoting *Arizona* v. *Fulminante*, 499 U.S. at 308) (emphasis omitted). But those observations underscore the reason why errors that impair the exercise of peremptory challenges are intrinsically less threatening to a defendant's rights than, for example,

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for peremptory strikes, but the panel presented had only 12 jurors. 157 U.S. at 350-351. In *Lewis*, the trial court denied the defendant the right to be brought face-to-face with the venire before or during the exercise of peremptory challenges and thereby deprived him of information from which the challenges could be made. 146 U.S. at 375-376. In each case, the Court reversed without inquiring into whether there was any case-specific prejudice.

admission of a coerced confession, *Fulminante*, *supra*, or omission of an element from the jury instructions, *Neder*, *supra*. The impairment of a peremptory challenge restricts the defendant's "arbitrary and capricious" right to say that a juror will not sit, 4 William Blackstone, *Commentaries* *353, but it has no effect on the trial record or on the issues presented to the jury. The absence of those consequences is a reason to find a lack of prejudice to the defendant's fair trial rights, not to presume prejudice in all cases.

A defendant whose right to exercise peremptory challenges is impaired may suffer an injury to the intangible values sometimes said to be furthered by the challenge. See *Swain*, 380 U.S. at 219 (the right of peremptory challenge functions "to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise"). But a defendant's subjective belief that a particular juror, though properly qualified as impartial, may in fact be less favorable to him than another juror, is not a sufficient reason to overturn the results of an otherwise fair trial. Cf. *Rosales-Lopez* v. *United States*, 451 U.S. 182, 188, 191-192 (1981) (plurality opinion) (requiring, as a matter of supervisory authority over the federal courts, inquiry on voir dire into possible racial prejudice of jurors at the defendant's request, where the defendant and the victim are members of different racial or ethnic groups, in order to facilitate exercise of for-cause and peremptory challenges; but concluding that no reversible error occurs unless there was a "reasonable possibility" that racial or ethnic prejudice influenced the jury). Retrials are not cost-free for society, witnesses, or victims. And "[p]assage of time, erosion of memory, and dispersion of witnesses may render retrial difficult, even impossible."

Engle, 456 U.S. at 127-128. Those factors strongly counsel against upsetting the original verdict absent a denial of the fundamental elements of a fair trial or concrete prejudice to the defense. As the Court noted:

> These societal costs of reversal and retrial are an acceptable and often necessary consequence when an error in the first proceeding has deprived a defendant of a fair determination of the issue of guilt or innocence. But the balance of interest tips decidedly the other way when an error has had no effect on the outcome of the trial.

United States v. *Mechanik*, 475 U.S. 66, 72 (1986). A rule of automatic reversal thus bears a heavy burden of justification. See *United States* v. *Hasting*, 461 U.S. 499, 509 (1983). The possible discomfort to the defendant resulting from the impairment of his rule-based peremptory challenges does not meet that test. Cf. *Morris* v. *Slappy*, 461 U.S. 1, 13-14 & n.6 (1983) (constitutional right to counsel does not guarantee a defendant "rapport with his attorney" or a "'meaningful' attorney-client relationship").

The costs of a rule of automatic reversal are magnified by the inevitability of errors in jury selection that may impair a defendant's intelligent exercise of his challenges. Jury selection is often fast-paced and conducted under pressure. A trial judge has complex responsibilities: the judge must ensure that parties have an adequate basis for making challenges, that claims of error (including allegations of discrimination in the use of peremptory challenges) are adjudicated promptly and fairly, and that impartial jurors are empaneled. If the selection is conducted properly, voir dire will flush out relevant information; jurors who are unqualified, biased, or incapable of following the law will be ex-

cused; and parties will exercise their peremptory challenges for whatever non-discriminatory reasons they may have. But experience shows that, despite the diligence of trial judges, jury selection will also produce a significant number of errors that, in retrospect, impair or deny the defendant's peremptory challenges. Given that reality, a rule of automatic reversal in every case is too high a price to pay.[14]

C. The Record Does Not Demonstrate Prejudice From Any Impairment Of Respondent's Peremptory Challenge Rights

Finally, even on the assumption that some impairments of the peremptory challenge right might warrant reversal notwithstanding the empaneling of a fair and impartial jury, the record in this case demonstrates that there was no violation of respondent's "substantial rights." At most, respondent was deprived of one of the ten peremptory challenges that he and his co-defendant might have used to select the initial 12-person jury.

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[14] As noted above (note 6, *supra*), if the improper denial or impairment of a peremptory results in the seating of a juror who should have been excused for cause, sufficient prejudice is shown to justify reversal. There is no claim of that character here. In *Ross* this Court noted that "[n]o claim is made here that the trial court repeatedly and deliberately misapplied the law in order to force [the defendant] to use his peremptory challenges to correct these errors [in ruling on for-cause strikes]." 487 U.S. at 91 n.5. Similarly, no claim is made in this case that the trial judge intentionally and repeatedly erred in denying for-cause challenges to compel respondent to use peremptory challenges to cure those errors. Accordingly, no question is presented here whether such an error might constitute prejudice warranting reversal. Nor is any question presented here whether, even if reversal were not justified in that setting, interlocutory appellate relief might be available to remedy the court's error.

Fed. R. Crim. P. 24(b) and (c) (defense is entitled to ten strikes to select trial jurors in a felony case and to one strike to select one or two alternate jurors). Even if respondent's strike of the one juror who should have been excused for cause is considered to have been "wasted," the defense still had a considerable opportunity to participate in jury selection through the exercise of peremptory challenges and did not suffer a substantial impairment of that right.

Moreover, the record affords no basis for concluding that the jury that ultimately decided this case would have been different even if the court had excused Gilbert for cause. Respondent never indicated to the district court that he was dissatisfied with the 12-person jury selected through the exercise of his initial nine peremptory strikes. Nor did respondent voice an objection to any of the jurors actually selected or indicate that, if he had been granted another peremptory challenge in selecting the original 12-juror panel, he would have excused another juror.[15]

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[15] When juror Finck failed to appear as a member of the 12-person jury after the jury was selected, respondent did request that another strike be granted to each side to select a new juror who would leapfrog the alternate, Riley, and directly replace Finck on the 12-person panel. J.A. 185. Respondent offered that suggestion to permit the possibility that an Hispanic juror, Olivas, would be placed on the 12-person jury. *Ibid.* That request for a peremptory challenge, however, cannot do service for a claim that an originally selected trial juror would have been removed but for the strike "wasted" to remove juror Gilbert. Even if it could, that belated request for an additional peremptory challenge could not form the basis for a claim of prejudice. Respondent's desired use of the additional peremptory was not to remove an objectionable juror but to enhance the possibility of placing an Hispanic on the jury. Peremptory challenges, however, are not a means of selecting particular trial jurors, but of rejecting them. See *United States*

At a bare minimum, a showing of prejudice should require "some objection from the defendant after the exhaustion of his peremptory challenges." *Frank* v. *United States*, 42 F.2d 623, 631 (9th Cir. 1930). See also, *e.g.*, *id.* at 630-631 (citing numerous state cases); *Trotter* v. *State*, 576 So.2d 691, 692-693 (Fla. 1990); *Turro* v. *State*, 950 S.W.2d 390, 406 (Tex. App. 1997, pet. ref'd); *People* v. *Schafer*, 119 P. 920, 921 (Cal. 1911) ("It is entirely consistent with the record that the 12 jurors who actually tried the case were absolutely satisfactory to defendant, and that he desired all of them to serve, and would not have excused any one of them if he had been given the opportunity. After judgment, the contrary should not be presumed."). A requirement for a defendant to lodge some objection to the panel as selected is especially appropriate under Rule 24 in a case involving multiple defendants, because the district court is granted discretion by Rule 24(b) to grant additional peremptory challenges. Cf. *Lewis* v. *United States*, 146 U.S. at 378-379 ("It does not appear in the present case that the prisoner made any demand to challenge any of the jury beyond the twenty allowed by the Revised Statutes."). Accordingly, assuming that, despite the empaneling of a fair and impartial jury, an impairment of a defendant's right to exercise peremptory challenges might be found in some case to have affected his "substantial rights," a defendant

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v. *Marchant*, 25 U.S. (12 Wheat.) at 482 ("The right, therefore, of challenge, does not necessarily draw after it the right of selection, but merely of exclusion. It enables the prisoner to say who shall not try him; but not to say who shall be the particular jurors to try him."). And to the extent that respondent specifically intended to exercise his challenge against a non-Hispanic on the basis of ethnicity, the challenge would appear to violate equal protection principles. Cf. *Hernandez* v. *New York*, 500 U.S. 352 (1991).

should at least have to indicate on the record during jury selection that he would have used a peremptory challenge in a specific manner. Because the present record contains no such indication, any error in jury selection should not result in reversal of respondent's conviction.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

JAMES K. ROBINSON
Assistant Attorney General

MICHAEL R. DREEBEN
Deputy Solicitor General

DAVID C. FREDERICK
Assistant to the Solicitor General

RICHARD A. FRIEDMAN
Attorney

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APPENDIX A

1. Section 2111 of Title 28 of the United States Code provides:

§ 2111. Harmless error

On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

2. Rule 24 of the Federal Rules of Criminal Procedure provides:

Rule 24. Trial Jurors

(a) Examination. The court may permit the defendant or the defendant's attorney and the attorney for the government to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event the court shall permit the defendant or the defendant's attorney and the attorney for the government to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions by the parties or their attorneys as it deems proper.

(b) Peremptory Challenges. If the offense charged is punishable by death, each side is entitled to 20 peremptory challenges. If the offense charged is punishable by imprisonment for more than one year, the government is entitled to 6 peremptory challenges and

the defendant or defendants jointly to 10 peremptory challenges. If the offense charged is punishable by imprisonment for not more than one year or by fine or both, each side is entitled to 3 peremptory challenges. If there is more than one defendant, the court may allow the defendants additional peremptory challenges and permit them to be exercised separately or jointly.

(c) Alternate Jurors. The court may direct that not more than 6 jurors in addition to the regular jury be called and impanelled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath and shall have the same functions, powers, facilities and privileges as the regular jurors. An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict. Each side is entitled to 1 peremptory challenge in addition to those otherwise allowed by law if 1 or 2 alternate jurors are to be impanelled, 2 peremptory challenges if 3 or 4 alternate jurors are to be impanelled, and 3 peremptory challenges if 5 or 6 alternate jurors are to be impanelled. The additional peremptory challenges may be used against an alternate juror only, and the other peremptory challenges allowed by these rules may not be used against an alternate juror.

3. Rule 52 of the Federal Rules of Criminal Procedure provides:

Rule 52. Harmless Error and Plain Error

(a) Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

(b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

APPENDIX B

STATES THAT DECLINE TO TREAT AN ERRONEOUS DENIAL OF CHALLENGE FOR CAUSE AS REVERSIBLE ERROR WHEN THE CONTESTED JUROR WAS REMOVED BY DEFENDANT'S USE OF PEREMPTORY CHALLENGE

Pickens v. *State*, 783 S.W.2d 341, 345 (Ark.), cert. denied, 497 U.S. 1011 (1990)
People v. *Samayoa*, 938 P.2d 2, 20 (Cal. 1997), cert. denied, 522 U.S. 1125 (1998)
State v. *Pelletier*, 552 A.2d 805, 810 (Conn. 1989)
Dawson v. *State*, 581 A.2d 1078, 1093-1096 (Del. 1990), vacated on other grounds, 503 U.S. 159 (1992)
Sams v. *United States*, 721 A.2d 945, 951 (D.C. 1998), petition for cert. pending, No. 98-8712 (filed Mar. 10, 1999)
Trotter v. *State*, 576 So.2d 691, 693 (Fla. 1990)
State v. *Ramos*, 808 P.2d 1313, 1315 (Idaho 1991)
People v. *Robinson*, 701 N.E.2d 231, 241 (Ill. App. Ct. 1998)
Woolston v. *State*, 453 N.E.2d 965, 968 (Ind. 1983)
State v. *Neuendorf*, 509 N.W.2d 743, 747 (Iowa 1993)
State v. *Crawford*, 872 P.2d 293, 297-298 (Kan. 1994)
People v. *Lee*, 537 N.W.2d 233, 243 (Mich. Ct. App. 1995), appeal denied, 537 N.W.2d 233 (Mich. 1996)
State v. *Barlow*, 541 N.W.2d 309, 312 (Minn. 1995)
Chisolm v. *State*, 529 So.2d 635, 639 (Miss. 1988)
State v. *Deck*, No. 80821, 1999 WL 383067, at *9 (Mo. June 1, 1999) (by statutory command, see Mo. Ann. Stat. § 494.480.4 (West 1996))
Thompson v. *State*, 721 P.2d 1290, 1291 (Nev. 1986) (per curiam)

State v. *DiFrisco*, 645 A.2d 734, 751-754 (N.J. 1994), cert. denied, 516 U.S. 1129 (1996)
State v. *Tranby*, 437 N.W.2d 817, 824 (N.D.), cert. denied, 493 U.S. 841 (1989)
State v. *Broom*, 533 N.E.2d 682, 695 (Ohio 1988), cert. denied, 490 U.S. 1075 (1989)
Ross v. *Oklahoma*, 487 U.S. 81, 90 (1988)
State v. *Barone*, 969 P.2d 1013, 1018-1019 (Or. 1998), petition for cert. pending, No. 98-8406 (filed Mar. 10, 1999)
State v. *Barnville*, 445 A.2d 298, 301 (R.I. 1982)
State v. *Green*, 392 S.E.2d 157, 159-160 (S.C.), cert. denied, 498 U.S. 881 (1990)
State v. *Howell*, 868 S.W.2d 238, 248 (Tenn. 1993), cert. denied, 510 U.S. 1215 (1994)
Adanandus v. *State*, 866 S.W.2d 210, 220 (Tex. Crim. App. 1993), cert. denied, 510 U.S. 1215 (1994)
State v. *Baker*, 935 P.2d 503, 506 (Utah 1997)

STATES THAT TREAT AN ERRONEOUS DENIAL OF CHALLENGE FOR CAUSE AS REVERSIBLE ERROR EVEN THOUGH CONTESTED JUROR WAS REMOVED BY DEFENDANT'S USE OF PEREMPTORY CHALLENGE

State v. *Huerta*, 855 P.2d 776,781 (Ariz. 1993)
People v. *Macrander*, 828 P.2d 234, 244-246 (Colo. 1992)
State v. *Kauhi*, 948 P.2d 1036, 1041 (Haw. 1997)
Thomas v. *Commonwealth*, 864 S.W.2d 252, 259-260 (Ky. 1993), cert. denied, 510 U.S. 1177 (1994)
State v. *Cross*, 658 So.2d 683, 687-688 (La. 1995)
Booze v. *State*, 698 A.2d 1087, 1097 (Md. 1997)
Commonwealth v. *Auguste*, 605 N.E.2d 819, 823 (Mass. 1992)
State v. *DeVore*, 972 P.2d 816, 824 (Mont. 1998)

Fuson v. *State*, 735 P.2d 1138, 1140 (N.M. 1987)
State v. *Etzkorn*, 552 N.W.2d 824, 829 (S.D. 1996)
State v. *McQuesten*, 559 A.2d 685, 686 (Vt. 1989)
Scott v. *Commonwealth*, 339 S.E.2d 899, 900 (Va. Ct. App. 1986), aff'd, 353 S.E.2d 460 (Va. 1987)
State v. *Phillips*, 461 S.E.2d 75, 94 (W. Va. 1995)
State v. *Ramos*, 564 N.W.2d 328, 334 (Wis. 1997)
Munoz v. *State*, 849 P.2d 1299, 1302 (Wyo. 1993)