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

REPLY BRIEF FOR THE UNITED STATES

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Respondent makes three main arguments: that his use of a peremptory challenge to remove a juror who should have been excused for cause violated his rights under Rule 24 of the Federal Rules of Criminal Procedure; that the purported violation of the Rule establishes a violation of his rights under the Due Process Clause of the Fifth Amendment; and that, despite respondent's unfettered exercise of at least nine out of ten allotted peremptory challenges to select the petit jury and the ultimate empanelment of an "impartial jury" within the meaning of the Sixth Amendment, the erroneous impairment of one peremptory challenge "defies harmless-error review" and constitutes "struc-

tural error" that mandates reversal of his conviction. Resp. Br. 28. None of those contentions has merit.

A. The Use Of A Peremptory Challenge To Remove A Juror Who Should Have Been Removed For Cause Is A Proper Function Of The Challenge, Not An "Impairment" Of It

1. Respondent's use of one of his peremptory challenges to cure the district court's erroneous denial of his challenge for cause did not impair his rights under Federal Rule of Criminal Procedure 24. Respondent concedes, as he must, that a principal purpose of peremptory challenges is to help secure the constitutional guarantee of an objectively fair and impartial jury.[1] Respondent accepts that peremptory challenges are "a tool for the Sixth Amendment's guarantee of an objectively fair and impartial jury" (Br. 12) and "a vehicle that drives toward Sixth-Amendment compliance" (Br. 15). When respondent used one of the ten defense peremptory challenges to remove juror Gilbert, his action served that purpose and, therefore, constituted a use contemplated by Rule 24.

Respondent contends (Br. 13), however, that the right to exercise peremptory challenges is also designed to allow a defendant to exclude potential jurors who, despite being objectively impartial, are sub-

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[1] See *J.E.B.* v. *Alabama ex rel. T.B.*, 511 U.S. 127, 137 n.8 (1994) (purpose "is to permit litigants to assist the government in the selection of an impartial trier of fact") (quoting from *Edmonson* v. *Leesville Concrete Co.*, 500 U.S. 614, 620 (1991)); *Georgia* v. *McCollum*, 505 U.S. 42, 57 (1992) (peremptory challenges are a "means to the constitutional end of an impartial jury and a fair trial"); *Frazier* v. *United States*, 335 U.S. 497, 505 (1948) ("the right is given in aid of the party's interest to secure a fair and impartial jury").

jectively unacceptable to the defense. See *Swain* v. *Alabama*, 380 U.S. 202, 214-220 (1965); *Lewis* v. *United States*, 146 U.S. 370, 376 (1892). Respondent then characterizes the defendant's interest in a jury that he "subjectively" perceives to be "fair" (Br. 12) as an overriding value that may not be infringed by the trial court. That is not correct. Peremptory challenges are extended by legislatures as a matter of policy, not as a matter of constitutional right, and they are necessarily subject to a variety of procedural restrictions. Under no circumstances is the defendant assured of the right to exclude all jurors "whom the defendant feels harbor prejudice against him but cannot successfully challenge for cause." *Ibid.* Peremptory challenges are limited in number and variable at the legislature's will. Accordingly, the jury ultimately selected may include a number of jurors, or even an entire panel, whom the defendant subjectively distrusts.[2] And even considering only the allotted number of strikes, this Court has upheld a variety of procedures that restrict the defendant's "right" to use peremptory challenges to advance his "subjective" interests. See *Stilson* v. *United States*, 250 U.S. 583, 586 (1919) (sharing of peremptories among co-defendants); *Pointer* v. *United States*, 151 U.S. 396, 409, 412 (1894) (simultaneous defense and prosecution strikes); *St. Clair* v. *United States*, 154 U.S. 134, 147-148 (1894) (requirement to exercise or waive peremptory strike as each potential juror is selected at random and qualified); U.S. Br. 16-

[2] In addition, the Constitution prevents the defendant from removing jurors based on race, ethnicity, or gender, *Georgia* v. *McCollum*, 505 U.S. 42 (1992); see *J.E.B.* v. *Alabama ex rel. T.B.*, 511 U.S. 127 (1994); *Hernandez* v. *New York*, 500 U.S. 352 (1991), even though that restriction may result in the defendant's subjective discomfort with the jury.

18. Those cases refute respondent's contention that peremptory challenges provide absolute protection of the defendant's interest in a "subjectively fair" jury.[3]

Against that background, a defendant may properly be required to use a peremptory challenge to cure an erroneous ruling on a challenge for cause. See *Ross* v. *Oklahoma*, 487 U.S. 81, 89 (1988) (noting similar rule under state law). As a practical matter, requiring the defendant to use a peremptory challenge to cure an erroneous denial of a for-cause challenge imposes a far less onerous burden on the right than the consequences of a court's choice among various approved jury-selection procedures. And the alternative—permitting the defendant to withhold a peremptory challenge notwithstanding his disagreement with the trial court's ruling on a challenge for cause—would be to increase the risk of reversal whenever the trial court rejects a challenge for cause. Under respondent's position, a defendant who does not exercise a peremptory challenge to remove the suspect juror may apparently appeal based on the trial court's erroneous denial of the for-cause challenge, while a defendant who does remove the juror with a peremptory challenge may appeal based on the

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[3] These decisions also make plain that judicially imposed procedures restricting the unfettered opportunity to exercise peremptory challenges have long been upheld. Respondent therefore errs in arguing (Br. 20-21) that a holding that defendant must use a peremptory challenge to cure a trial court's denial of a for-cause challenge must be enacted by Congress rather than imposed through decisions of the courts. "It is not necessary to multiply illustrations of the familiar principle [that peremptory challenge procedures may be 'regulated by the common law'] which while safeguarding the essence of the constitutional requirements, permits readjustments of procedure consistent with their spirit and purpose." *United States* v. *Wood*, 299 U.S. 123, 145 (1936).

"impairment" of his right of challenge under Rule 24. Allowing the defendant both of those options undermines one of the core utilities of peremptory challenges, *i.e.*, to provide additional protection against the possibility that a court's error in seating a biased juror will invalidate the results of an otherwise fair trial.[4]

That conclusion is particularly true given the uncertainty that often surrounds a trial judge's determination of a challenge for cause. A juror who has expressed some preliminary leaning towards the prosecution or distaste for the defendant frequently will, after admonishment by the trial judge, state on the record that he will consider the evidence free from any bias. If the trial judge believes the juror's representation, the judge's denial of a challenge for cause will be virtually unassailable on appeal. See *Wainright* v. *Witt*, 469 U.S. 412, 424-426 (1985); *Irvin* v. *Dowd*, 366 U.S. 717, 723-725 (1961). But jurors do not always speak with precision, and there may be room for disagreement over whether an expressed commitment to follow the law is given too grudgingly or over the

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[4] The ability of peremptory challenges to provide that cushion in the jury selection process also may be a partial explanation for the fact that Rule 24 increases the number of peremptory challenges from three to ten to twenty as the seriousness of the offense escalates from misdemeanor to felony to capital felony. Respondent argues (Br. 15) that "the logical reason for the graduated number of peremptory challenges is the increased need for the subjective perception of fairness as criminal exposure rises." That is not necessarily so. It is equally logical to conclude that subtle influences of bias or prejudice will more likely affect jurors when the charge involves a more serious offense against the community. The uncertainty surrounding determinations of for-cause challenges becomes more significant and thus there is a greater need to have more challenges available for defendants to use in helping achieve an objectively fair and impartial jury.

juror's private reservations.[5] Thus, notwithstanding a juror's representation, a defendant nonetheless may fear that the juror's true lack of impartiality lies undetected in the juror's subconscious. When a defendant uses a peremptory challenge to remove such a juror, it is impossible to say for certain whether that strike was used to remove a juror who was actually biased or merely one whom the defendant feared was disinclined toward him. In either case, the peremptory strike would have been well and properly employed.[6]

Respondent suggests (Br. 21-22) that our position would saddle defendants with the entire burden of ensuring the correctness of the district court's for-cause rulings. That is not the case. When the government

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[5] In this case, for example, juror Gilbert's comments that he understood the presumption of innocence "in theory" (J.A. 133) may reflect little more than a particularly candid expression of what many jurors feel when they are asked to discard prior beliefs and impressions before entering the jury room. See *United States* v. *Dozier*, 672 F.2d 531, 548-549 (5th Cir. 1982) (upholding denial of a for-cause challenge notwithstanding juror's "unusually candid skepticism toward human capacity for emptying the subconscious at a moment's notice," given juror's agreement to decide the case based on the evidence and instructions; "[w]e can ask no more of those who must assume, for the duration of a trial, the almost superhuman posture of complete impartiality").

[6] If the feared bias of the "objectively" qualified juror exhibited itself during jury deliberations, the defendant would have no remedy. Federal Rule of Evidence 606(b) precludes inquiry after trial into the "effect of anything upon [a] juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith," with the exception of improper outside influences on jury deliberations. See *Tanner* v. *United States*, 483 U.S. 107, 120-121 (1987). A defendant's use of a peremptory challenge to excuse such a juror is an eminently proper function of that rule-based right.

challenges a juror for cause and the challenge is erroneously denied, the burden falls on the government to secure the Sixth Amendment requirement of an objectively impartial jury by exercising one of its peremptory challenges. There is no other remedy available to the government because the government cannot appeal an acquittal returned by a jury biased in favor of the defendant. An equal application of the law would similarly dictate that, when a defendant challenges a juror for cause and the challenge is erroneously denied, the burden falls on the defendant to secure the Sixth Amendment requirement by exercising one of his peremptory challenges. Because both the prosecution and the defense have a duty to seek an impartial jury, they both have a vested interest in exercising a peremptory challenge to remove a juror who was the subject of an erroneous for-cause challenge ruling.[7]

2. Respondent argues (Br. 16-18) that the rule of lenity requires Rule 24 to be interpreted in his favor. That canon of construction, however, has no application

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[7] Respondent also suggests that our "proposed rule invites the prosecutor to routinely oppose a defendant's for-cause challenges, knowing that the defendant will bear the burden of the trial court error." Br. 21; see also *id.* at 22 (envisioning a "continuous flow of objections to legitimate for-cause challenges"). Such a prediction of prosecutorial "gamesmanship" (*ibid.*) runs counter to this Court's consistent view that, absent clear evidence to the contrary, courts presume that federal prosecutors will "properly discharge[] their official duties," *United States* v. *Armstrong*, 517 U.S. 456, 464 (1996); *United States* v. *Mezzanatto*, 513 U.S. 196, 210 (1995) ("tradition and experience justify our belief that the great majority of prosecutors will be faithful to their duty"). Respondent's speculation also underestimates federal trial judges, who would doubtless take notice if a prosecutor were offering repeated unfounded arguments during jury selection and who have ample means to deal with such abuses.

in this context. Respondent acknowledges (Br. 16) that the rule of lenity is not applicable unless the case raises a "grievous ambiguity or uncertainty in the language and structure of" the provision under interpretation. *Ibid.* (quoting from *Chapman* v. *United States*, 500 U.S. 453, 463 (1991)). That standard is not met here. The rule we propose is not addressed in the text of Rule 24, but derives from the Court's long-recognized authority to develop sensible procedures to administer the right of peremptory challenge.[8]

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[8] Respondent does not take issue with our discussion of state cases that reach generally similar results to the rule we propose here. See U.S. Br. 20-21 n.5 & App. 4a-6a. The prevalence of such approaches in the States, despite the absence of express statutory provisions to that effect, supports the view that courts can formulate procedures that reinforce the role of peremptory challenges as a backstop for the trial judge's rulings on for-cause challenges. Amici National Association of Criminal Defense Lawyers, et al., take issue with our categorization of a few of the state cases and with our reliance on post-*Ross* state cases, which, they argue, responded to *Ross* by judicially changing the rules. See Amici Br. 13 n.11. Amici apparently have no quarrel with our characterization of the vast majority of the 26 States that decline to treat an erroneous denial of a for-cause challenge as reversible error when the contested juror was removed by defendant's use of a peremptory challenge. The important point to draw from the state cases that amici chooses to dispute is that they do not support respondent's position of automatic reversal if a peremptory challenge is used to cure an erroneous for-cause ruling. See *Sams* v. *United States*, 721 A.2d 945, 951 (D.C. 1998) (noting that "denial or impairment of the peremptory challenge right is a 'trial error' within the meaning of [*Arizona* v.] *Fulminante* [499 U.S. 279 (1991)]," and not a "'structural error'" and thus is "subject to harmless error review when it has been properly preserved"), petition for cert. pending, No. 98-8712; *State* v. *Pelletier*, 552 A.2d 805, 809 (Conn. 1989) (rejecting defendant's contention of error in use of peremptory challenges to cure erroneous for-cause rulings because defendant received more than allotted number of

In any event, the purposes underlying the rule of lenity make clear that it does not apply to the construction of rules of criminal procedure. As this Court explained in *United States* v. *Lanier*, 520 U.S. 259 (1997), the rule of lenity is a manifestation of the "fair warning requirement," which provides that "no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." *United States* v. *Harriss*, 347 U.S. 612, 617 (1954); see *Lanier*, 520 U.S. at 265. The rule of lenity also "reflects the deference due to the legislature, which possesses the power to define crimes and their punishment." *Id.* at 265 n.5. Viewed in light of those two purposes—ensuring fair warning and deferring to legislative definitions of crimes and punishment—the lenity principle applies only to criminal statutes, and not to

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peremptories, the challenge on the for-cause rulings was without merit, and the defendant never identified any biased jurors who actually served); *State* v. *Broom*, 533 N.E.2d 682, 695 (Ohio 1988) (to make out a constitutional violation, "the defendant must use all of his peremptory challenges and demonstrate that one of the jurors seated was not impartial"), cert. denied, 490 U.S. 1075 (1989); *Adanandus* v. *Texas*, 866 S.W.2d 210, 220 (Tex. Ct. Crim. App. 1993) (to present reversible error in for-cause challenge, defendant must show exhaustion of all peremptories, the trial court denied request for more, and a biased juror sat), cert. denied, 510 U.S. 1215 (1994).

Finally, amici are simply incorrect that only *Ross* adopted a "cure-or-waive" rule. See, *e.g.*, *State* v. *Baker*, 935 P.2d 503, 510 (Utah 1997); *State* v. *DiFrisco*, 645 A.2d 734, 753 (N.J. 1994) (noting that "the rule recognized by several federal circuits and at least twenty-two other states" is that, "for the forced expenditure of a peremptory challenge to constitute reversible error * * * , a defendant must demonstrate that a juror who was partial sat as a result of the defendant's exhaustion of peremptory challenges") (citing cases), cert. denied, 516 U.S. 1129 (1996).

rules of procedure. As *Lanier* emphasized, "the canon of strict construction of *criminal statutes*, or rule of lenity, ensures fair warning by so resolving ambiguity in a *criminal statute* as to apply it only to conduct clearly covered." *Id.* at 266 (emphasis added); see *United States* v. *Bass*, 404 U.S. 336, 347-348 (1971).[9]

B. A Violation Of Rule 24 Would Not Constitute An Infringement Of Respondent's Due Process Rights

Even assuming that the trial court's error in ruling on the for-cause challenge to juror Gilbert compelled respondent to use a peremptory challenge he would otherwise not have used, and thereby impaired his peremptory-challenge rights under Rule 24, any such violation would not infringe respondent's rights under the Due Process Clause. Resp. Br. 23-26. A violation of

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[9] Respondent is incorrect (Br. 16-17) that *Smith* v. *United States*, 360 U.S. 1 (1959), requires the rule of lenity to be applied to rules of procedure. In *Smith*, the Court considered whether the federal kidnapping statute, 18 U.S.C. 1201, established one offense with varying possible punishments, or two separate offenses with different maximum punishments. See 360 U.S. at 6-9. The Court's answer to that question determined when a defendant needed to be charged by formal indictment, and when (or if) he could be charged by information. The Court construed the statute as defining one offense with a range of possible punishments. *Ibid.* One of those possible punishments was the death penalty. Thus, because under the Fifth Amendment and Federal Rule of Criminal Procedure 7(a) no one may be prosecuted for a capital offense except by indictment, the Court held that all prosecutions under the statute needed to proceed by indictment. *Ibid.* That the Court's holding had consequences for the application of Rule 7(a) does not mean that the Court intended the rule of lenity to apply to all procedural rights. It did not, and none of this Court's cases since *Smith* have suggested that the lenity principle should be applied to the construction of the Federal Rules of Criminal Procedure.

a procedural rule results in a denial of due process only when 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), or "so infuse[s] the trial with unfairness as to deny due process of law," *Estelle* v. *McGuire*, 502 U.S. 62, 75 (1991) (quoting *Lisenba* v. *California*, 314 U.S. 219, 228 (1941)). The most that respondent can show is that the district court's erroneous for-cause ruling caused him to exercise his peremptory challenges against nine, rather than ten, unquestionably impartial jurors. He cannot demonstrate that the unfettered use of only nine challenges infused the trial with fundamental unfairness.

Respondent argues (Br. 24, 32-35) that this Court is foreclosed from addressing that issue because, in the court of appeals, the government conceded that a violation of Rule 24 would offend due process. The court of appeals, however, did not accept that concession, but decided the due process issue on the merits. See Pet. App. 9a. The government challenged that holding in a petition for rehearing, and then properly raised it in the petition for a writ of certiorari filed in this Court. The issue has been briefed here, and there is no barrier to its consideration on the merits. Cf. *United States* v. *Wells*, 519 U.S. 482, 487-488 (1997); *United States* v. *Williams*, 504 U.S. 36, 41-43 (1992).

In contending that there was a due process violation in this case, respondent relies principally (Br. 25) on *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422 (1982), but that case is far different from this one. Unlike in this case, where respondent concedes that the jury that convicted him was completely impartial notwithstanding the alleged procedural violation, in *Logan* the violation of the plaintiff's procedural rights had the effect of completely extinguishing his constitutionally pro-

tected property interests. See *id.* at 427-428, 431. Contrary to respondent's submission, *Logan* should not be read to transform a mistaken district court ruling under a code of criminal procedure into a constitutional due process violation. As we note in our opening brief (at 24-25), such a ruling would have a significant impact on the criminal justice system and on the federal courts' habeas corpus docket.

C. Any Error In This Case Was Harmless

Assuming that the district court's action during jury selection impaired respondent's peremptory challenge rights, giving rise to a violation either of Rule 24 or of the Due Process Clause, any such impairment of respondent's right to exercise peremptory challenges is subject to the harmless-error standard and, in this case, is harmless.[10] Respondent does not dispute that he was tried by an impartial jury, notwithstanding the trial court's error. Nor does he explain why his ability to make free use of nine (out of ten) peremptory challenges should not be regarded as a "substantial" enjoyment of his peremptory challenges rights. Instead, he contends that *any* impairment of peremptory challenge rights constitutes "structural" error that is reversible per se; that even if a showing of case-specific prejudice is appropriate, it is met here because the error affected the composition of the jury; and, finally, that his failure to object to any of the seated jurors and request an

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[10] Federal Rule of Criminal Procedure 52(a) provides that "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." To affect "substantial rights," a violation ordinarily "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 U.S. Br. 27-28.

additional challenge is irrelevant to his ability to obtain reversal. Each of those claims is incorrect.

1. *Structural error.* Errors in procedure, even those that violate important constitutional rights, are subject to case-specific harmless-error analysis unless the right affected is one 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." *United States* v. *Olano*, 507 U.S. 725, 735 (1993); see *Chapman* v. *California*, 386 U.S. 18 (1967). Respondent asserts that the error in this case is "structural" because "the harm cannot be measured in any meaningful way" (Br. 9) and because of "the essential nature of peremptory challenges in jury selection" (*id.* at 28). The impairment of peremptory challenges, however, cannot be viewed as "so intrinsically harmful as to require automatic reversal (*i.e.*, 'affect substantial rights') without regard to [its] effect on the outcome." *Neder* v. *United States*, 119 S. Ct. 1827, 1833 (1999).

The impairment of a defendant's peremptory challenges can result in case-specific reversible harm where the defendant cannot prevent a biased juror from being seated on the jury because the defendant has exhausted his peremptory challenges. See U.S. Br. 22 n.6, 37 n.14. But where that form of harm does not materialize, the impairment of peremptory challenges does not alter the basic framework of the trial. The defendant continues to enjoy counsel, an unbiased jury, and the other protections afforded by the Constitution and rules of procedure. While the defendant may have a subjective

discomfort with a particular juror,[11] the infringement of that value does not rise the level of the structural errors found by this Court, such as the total denial of counsel or the giving of a defective reasonable doubt instruction. See *Neder*, 119 S. Ct. at 1833 (listing the "very limited class of cases" finding "structural error"). It certainly does not justify a rule of per se reversal when the degree of harm is balanced against the "substantial social costs" of a reversal following a trial in which there was a "fair determination of the issue of guilt or innocence." *United States* v. *Mechanik*, 475 U.S. 66, 72 (1986); see *McDonough Power Equip., Inc.* v. *Greenwood*, 464 U.S. 548, 555-556 (1984) ("A trial represents an important investment of private and social resources, and it ill serves the important end of finality to wipe the slate clean simply to recreate the peremptory challenge process").[12]

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[11] That is not necessarily the case here, however, where respondent did not object to the seating of any of the jurors after the completion of the initial jury selection. J.A. 182; see pp. 16-18, *infra*.

[12] Respondent's reliance (Br. 9, 30) on this Court's reversal of convictions following a race-based peremptory challenge, without conducting harmless-error analysis, is misplaced. This Court has explained that "racial discrimination in the selection of jurors casts doubt on the integrity of the judicial process, and places the fairness of a criminal proceeding in doubt." *Powers* v. *Ohio*, 499 U.S. 400, 411 (1991) (internal quotation marks and citation omitted). "The overt wrong, often apparent to the entire jury panel, casts doubt over the obligation of the parties, the jury, and indeed the court to adhere to the law throughout the trial of the cause." *Id.* at 412; see also *Mechanik*, 475 U.S. at 70-71 n.1 (noting uniquely "pernicious" effects of racial discrimination on a grand jury). Nothing of the kind can be said of a trial judge's error in assessing the impartiality of one juror, followed by the removal of the juror through a peremptory challenge.

2. *Change in the composition of the jury.* Respondent further contends (Br. 34-37) that, if some form of harmless-error analysis is required, "the only possible measure in assessing harm or prejudice is to analyze whether the jury composition could have changed as a result of the error." *Id.* at 10 (citing *Gray* v. *Mississippi*, 481 U.S. 648, 665 (1987)). He asserts (*id.*, at 36) that "[i]n the context of the peremptory challenges, there can be no other way." *Ibid.* *Gray* does not support respondent's contention.[13]

In *Gray*, the trial court erroneously excluded for cause a juror who was qualified to serve in a capital case despite a general philosophical opposition to the death penalty. 481 U.S. at 653-655. The Court held that such an erroneous exclusion for cause violated the defendant's Sixth Amendment right to a jury composed of a fair cross-section of the community. *Id.* at 657-659. It reversed the conviction, viewing the exclusion of the juror there as a constitutional error that "goes to the very integrity of the legal system" to which "harmless-error analysis cannot apply." *Id.* at 668. In *Ross* v. *Oklahoma*, 487 U.S. 81 (1988), however, this Court expressly "decline[d] to extend the rule of *Gray* beyond

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[13] Nor is there merit to respondent's thesis that there is no other way to gauge prejudice. As we explained in our opening brief (at 31), the Court concluded in *McDonough Power Equipment, Inc.* v. *Greenwood*, 464 U.S. 548 (1984), that the proper question, when voir dire failed to elicit necessary information during jury selection, is whether the error "affect[ed] the essential fairness of the trial," *id.* at 553, and that such a showing could be made if proper answers on voir dire would have enabled a challenge for cause, but not if proper answers would only have influenced the exercise of peremptory challenges. *Id.* at 555-556. Other than to note in a parenthetical that *Greenwood* was a civil case (see Resp. Br. 23 n.6), respondent provides no explanation of why the approach of *Greenwood* could not apply here.

its context: the erroneous '*Witherspoon* exclusion' of a qualified juror in a capital case. We think the broad language used by the *Gray* Court is too sweeping to be applied literally, and is best understood in the context of the facts there involved." 487 U.S. at 87-88.[14] In view of the high costs to society and to victims of crimes when appellate courts reverse convictions (see U.S. Br. 35-37), this Court should not adopt a rule requiring the reversal of convictions simply because of the possibility that some other legally qualified juror might have sat on the case.

3. *Failure to request an additional challenge.* Finally, respondent argues that it is not a sufficient showing of harmlessness that the record reveals that he made no objection to the jury that sat, or any request for an additional peremptory challenge to exercise against another prospective juror.[15] Contrary to re-

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[14] The *Ross* Court cited with approval the observation in Justice Scalia's dissent in *Gray* (481 U.S. at 678) that "the statement that any error which affects the composition of the jury must result in reversal defies literal application." *Ross*, 487 U.S. at 87 n.2.

[15] At the close of the initial jury selection, the trial court read the names of the jurors and the selected alternate and asked:

> THE COURT: All right. Any objection now to any of those jurors?
>
> MR. GARCIA [respondent's counsel]: None from us.
>
> THE COURT: Any further objection to our procedures?
>
> MR. KIRBY [the prosecutor]: No, Your Honor.
>
> THE COURT: All right.

J.A. 182. If he had objected to any of the selected jurors, respondent could have asked the court for an additional peremptory challenge under Fed. R. Crim. P. 24(b) ("If there is more than one defendant, the court may allow the defendants additional per-

spondent's claim, such a request would not have asked "for something just expressly denied," Resp. Br. 38; rather, such a request would have been a concrete manifestation that respondent believed himself aggrieved by the erroneous ruling on juror Gilbert.

As we argued in our opening brief (at 37-38), at least where a defendant has the untrammeled exercise of nine of ten peremptory challenges, there can be no finding that an impairment of a single challenge, which was used to remove a biased potential juror, establishes an error that "affect[ed] substantial rights." Fed. R. Crim. P. 52(a). To the contrary, a defendant in that position has had the substantial right to participate in the selection of the jury through peremptory challenges, notwithstanding the trial court's error in denying the challenge for cause. But even if the impairment of one peremptory challenge could be shown to "affect substantial rights," there should be some indication in the record that the defendant was dissatisfied with the jury ultimately chosen. Absent that, "we are left with no idea whether [respondent] 'wasted' a peremptory, let alone wanted to strike another venireman who was not to his liking (for a legitimate reason) but couldn't do so because he was out of challenges." Pet. App. 16a (Rymer, J., dissenting). Any error, therefore, was harmless.[16]

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emptory challenges and permit them to be exercised separately or jointly.").

[16] Respondent asserts (Br. 39) that he "expressly asked for an additional peremptory challenge after the petit jury was called," thus indicating his "dissatisfaction with the panel and a desire for compositional change." Respondent's statement, however, was made only after juror Finck (an originally selected juror) failed to appear, and respondent asked the court to select a new trial juror from the next three jurors on the list, while leaving the alternate

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For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

NOVEMBER 1999

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in place. J.A. 185-186; see also J.A. 199. The court rejected that suggestion, and instead replaced Finck with the alternate juror. J.A. 186. Respondent explained that the advantage of his proposal would have been that it "gets us now into the area where we finally in this jury panel have a Hispanic." *Ibid.* But he did not ask for a peremptory challenge to strike the alternate whom the court made into a regular juror. Because "the right * * * of challenge does not necessarily draw after it the right of selection, but merely of exclusion," *United States* v. *Marchant*, 25 U.S. (12 Wheat.) 480, 482 (1827), respondent's request was insufficient to show an objection to the panel as selected.