No. 98-1255

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,
Petitioner

v.

ABEL MARTINEZ-SALAZAR,
Respondent

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, THE PUBLIC DEFENDER SERVICE FOR THE DISTRICT OF COLUMBIA AND THE FEDREAL DEFENDER ASSOCIATION *AMICI CURIAE* IN SUPPORT OF REDPONDENT

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The National Association of Criminal Defense Lawyers, the Public Defender Service for the District of Columbia, and the Federal Defender Association submit this brief as *amici curiae* in support of the respondent.[1]

INTERESTS OF AMICI CURIAE

Amici are organizations that are committed to the legal representation of the accused in criminal cases.

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit corporation with a membership of more than 10,000 attorneys and 28,000 affiliate members, including representatives from all fifty states. The NACDL was founded in 1958 to promote study and research in the field of criminal law; to disseminate and advance knowledge of the law in the area of criminal practice; and to encourage the integrity, independence and expertise of defense lawyers in criminal cases. NACDL seeks to defend individual liberties guaranteed by the Bill of Rights and has a keen interest in ensuring that legal proceedings are handled in a proper and fair manner.

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[1] The parties have consented to submission of this brief. In conformity with Rule 37.6, *amici* inform the Court that no party has authored this brief in whole or in part, and no person or entity, other than *amici*, has made a monetary contribution to the preparation or submission of this brief.

The Public Defender Service for the District of Columbia (PDS) was established by Congress to provide representation to indigent persons charged with crimes in the courts of the District of Columbia. PDS has filed *amicus curiae* briefs in a number of significant cases before the Court, including *Gray v. Maryland,* 118 S. Ct. 1151 (1998), *Kansas v. Hendricks*, 521 U.S. 346 (1997); *Lewis v. United States*, 518 U.S. 322 (1996); *United States v. Salerno*, 481 U.S. 739 (1987); and *Schall v. Martin*, 467 U.S. 253 (1984). PDS has a particular interest in this case because it represents Jibreel Reid, one of the appellants in *Sams v. United States*, 721 A.2d 945 (D.C. 1998), a case in which the District of Columbia Court of Appeals held that the infringement of a defendant's right of peremptory challenges was harmless.

The Federal Defender Association (FDA) was formed in 1995 to enhance the representation provided under the Criminal Justice Act, 18 U.S.C. § 3006A, and the Sixth Amendment of the United States Constitution. The Association is a nation-wide, non-profit, volunteer organization whose membership includes attorneys and support staff of Federal Defender Offices. One of the FDA's missions is to file amicus curiae briefs to ensure that the position of indigent defendants in the criminal justice system is adequately represented.

STATEMENT OF THE CASE

Jury selection in Martinez-Salazar's trial on drug distribution and firearms charges[2] commenced before District Judge Earl H. Carroll on December 7, 1993. The court empanelled 45 prospective jurors (J.A. 191-92),[3] and allotted ten peremptory challenges to Martinez-Salazar and

[2] See Indictment, J.A. 47-49,

[3] The trial judge thought 44 jurors had been called. (J.A. 64). The jury list shows a total of 45.

his co-defendant, Celso Organista-Dorantes[4] and six peremptory challenges to the prosecution (J.A. 167).[5]

As part of the jury selection process, the district court distributed a questionnaire to the prospective jurors. Venire member Don Gilbert responded to question number 8 on the questionnaire, "I would favor the prosecution."[6] In response to the court's question during individual voir dire whether he "would simply vote for a conviction because people are charged with drug crimes," Gilbert replied: "No. I think what I'm saying is all things being equal, I would probably tend to favor the prosecution." Gilbert "wouldn't disagree" with the court's statement that "all things being equal wouldn't be [proof] beyond a reasonable doubt." The court then posed an "important question . . . if you were the defendants here charged with this crime and all of the jurors on your case had your background and your opinions, do you think you'd get a fair trial?" Gilbert responded candidly: "I think that's a difficult question. I don't think I know the answer to that." (J.A. 131-33).

Defense counsel for Martinez-Salazar then inquired whether Gilbert would feel more comfortable erring in favor of the prosecution or the defendant. Gilbert answered:

> Well, again, not having heard any evidence in the case, I think that's kind of hard to say. I think, as indicated on here, 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.

[4] Organista-Dorantes was acquitted of all charges.

[5] The court allowed one additional strike to each side for the alternate juror (J.A. 167-68).

[6] The jury questionnaire is not included in the record.

(J.A. 133). The judge then reminded Gilbert that he had already instructed the prospective jurors on the presumption of innocence (*see* J.A. 93), and that the way our legal system operates "[t]he presumption is the other way." (J.A. 133). Gilbert responded, "I understand that in theory." The judge then abruptly terminated the questioning and moved on to the next juror. (Id.). Gilbert never promised to follow the court's instructions on the presumption of innocence or the standard of proof, and never reconciled his "theoretical" understanding of the court's instruction on the presumption of innocence with his continued inclination to be favorable to the prosecution and his assumption "that people are on trial because they did something wrong."

Both defense lawyers challenged Gilbert for cause. (J.A. 162-63). The prosecutor argued that, "although he did have some opinions, he did indicate to you that he would follow your instructions and apply them accordingly." (J.A. 163). The judge then began to rule:

> You know about him and you know his opinions. He did say that he could follow the instructions, and he said he - "I don't think I know what I would do," et cetera. So I think you have reasons to challenge him if you - strike him if you choose to do that, but again, I think he fits in Hanserd's [another juror challenged for cause by the prosecutor because she was "emotional" about a recent death in the family (J.A. 161-62)] parameters as well.

(J.A. 163). Martinez-Salazar's counsel added that he had challenged Gilbert for cause because "[w]hen he stated all things being equal, that to me indicated a disregard for Your Honor's instruction on the presumption of innocence." Judge Carroll denied the challenge, explaining "then he came back and said yes, again that he would follow it and so forth. Again, he's - you know - about him and you can do what you wish with him, but --." (J.A. 163).

After voir dire, the court excused three members of the venire (J.A. 170-71). A fourth prospective juror (Bingham) was "marked off the list," but not excused from the courtroom. (J.A. 175). The parties then exercised their peremptory challenges in an off-the-record proceeding. When court reconvened, Organista-Dorantes's lawyer raised a challenge to the prosecutor's strikes of the only minority jurors on the panel eligible to serve. Martinez-Salazar joined in his motion. (J.A. 176). The court disallowed one of the prosecutor's strikes and reinstated the juror. (J.A. 178). The court then granted each side an additional strike for the alternate seat. (J.A. 179-80). This would have placed Don Gilbert in line to serve on the jury as the second prospective alternate, however Gilbert had already been removed by a defense peremptory challenge. (J.A. 180). The parties exercised their final strikes, selecting twelve jurors and an alternate. (J.A. 181). Because one of the selected jurors was absent, however, Martinez-Salazar's counsel suggested giving each side an additional peremptory challenge and to select a replacement juror from among the next three venire members. (J.A. 185). Instead, the trial judge decided to require the missing juror to be present on December 9, and, if the juror did not appear, to proceed without an alternate.

When the trial resumed on December 9, Martinez-Salazar's counsel challenged the juror who had been absent for cause because the juror had wandered into another courtroom and observed defense counsel representing a client in another unrelated drug case. He also moved for a mistrial, "because of the composition of the jury," (J.A. 196), explaining that if the court had granted his previous request to select a new juror, the jury might have included a Hispanic venire member. (J.A. 198). The court agreed to

excuse the juror (Finck), but decided to go forward with a jury of twelve and no alternate rather than resume jury selection as Martinez-Salazar's counsel proposed.[7]

The jury found Martinez-Salazar guilty of all counts on December 13, 1993 (J.A. 25, D.E. 68). Judge Carroll sentenced him to an aggregate term of 123 months imprisonment on March 9, 1994 (J.A. 50-52). Martinez-Salazar timely noted an appeal of his conviction.

On appeal, the government insisted that the district court's decision not to excuse Gilbert for cause was appropriate. Appellee's Supplemental Brief at 3-9, *United States v. Martinez-Salazar*,146 F.3d 653 (9th Cir.1998)(No. 94-10158). Alternatively, the government contended that Martinez-Salazar had failed to prove a due process violation consistent with Circuit precedent, because Martinez-Salazar could not prove that *he* rather than his co-defendant had exercised the peremptory strike used to remove Gilbert. Id. at 12. The Court of Appeals reversed Martinez-Salazar's conviction in an opinion issued on May 28, 1998. (Pet. App. 1a-19a) The court denied rehearing on October 7, 1998 (Pet. App. 20a).

SUMMARY OF THE ARGUMENT

Before this Court, the government does not challenge the Court of Appeals' conclusion that the district judge erred in denying Martinez-Salazar's challenge of prospective juror Don Gilbert for cause. The question, error now conceded, is whether the error the district court committed warrants reversal when the defense sacrificed a peremptory challenge to remove the juror, reducing its

[7] As a result, Gilbert would have served as a regular juror had the defense not struck him. The government certainly would not have used a peremptory strike against him after objecting to the challenge for cause, so Gilbert would have been chosen as an alternate. When the missing juror did not appear, the alternate was placed on the jury.

allotment of strikes. The government unfairly derides the decision below as an "automatic reversal" rule, but reversal is "automatic" only when the defendant has shown an infringement of his use of peremptory challenges. This standard is the settled practice in most of the Circuits[8] and is consistent with the letter and the spirit of Rule 52(a), which requires federal courts to disregard errors only when the prosecution can show there has been no effect on a "substantial right." The statutory right to exercise peremptory challenges is a substantial one, and its infringement warrants reversal on appeal.

The current majority rule in the regional Courts of Appeals remains that an infringement of the defendant's right to use his or her allotted peremptory challenges for any reason except a discriminatory one requires reversal without showing that an actually biased juror sat on the jury or that the infringement affected the verdict. *United States v. Serino*, 163 F. 3d 91, 93 (1st Cir. 1998); *Tankleff v. Senkowski*, 135 F.3d 235, 240 (2d Cir. 1998); *United States v. Taylor*, 92 F.3d 1313, 1325 (2d Cir. 1996), *cert. denied*, 519 U.S. 1093 (1997); *Kirk v. Raymark Industries, Inc.*, 61 F.3d 147, 162 (3d Cir. 1995); *United States v. Love*, 134 F.3d 595, (4th Cir.), *cert. denied*, 118 S.Ct. 2232 (1998); *United States v. Broussard*, 987 F.2d 215, 221 (5th Cir. 1993); *United States v. McFerron*, 163 F.3d 952, 956 (6th Cir. 1998); *United States v. Underwood*, 122 F.3d 389, 392 (7th Cir. 1997), *cert. denied*, 118 S.Ct. 2341 (1998); *United States v. Annignoni*, 96 F.3d 1132 (9th Cir. 1996)

[8] Two Circuits, the 8th and 10th, appear to have recently adopted a different rule. (Pet. Br. at 32 n.11). Both courts have done so in erroneous reliance on *Ross v. Oklahoma*, 487 U.S. 81 (1988), as deciding the very question presented in this case and which the *Ross* court expressly reserved, 487 U.S. at 91 n.4. In *United States v. Torres*, 960 F.2d 226, 228 (1st Cir. 1992), the defendant did not exhaust his peremptory challenges and therefore did not suffer any infringement.

(en banc). Reversals on the basis of a failure to excuse a juror for cause have been rare, because the deferential standard of appellate review gives considerable leeway to district court judges to appraise the fairness of a prospective juror, even if an appellate panel would reach a different conclusion. Current law thus gives the defendant the protection of challenges for cause, and the ability, but not the obligation, to use a peremptory challenge to remove a prospective juror when the defendant's assessment of the juror's impartiality differs from that of the trial judge. This use of peremptory challenges reinforces the fundamental constitutional right to an impartial jury without sacrificing appellate review of challenges for cause.

In its effort to change the established rule, the government principally contends that if a defendant uses a peremptory challenge to remove a juror the district court should have excused for cause, the district court's error is unreviewable. The government charts two routes to this result. First, the government urges the Court to adopt a new requirement that a defendant must use a peremptory strike when a challenge for cause is denied, which would place the same limitation on the statutory right to peremptory challenges under Fed. R. Crim. P. 24 as existed under state law in *Ross v. Oklahoma*, 487 U.S. 81 (1988). Second, failing the adoption and application of such a new rule in this case, the government argues that so long as the jury did not include anyone who should have been excused for cause, the impairment of the defendant's use of peremptory challenges is always harmless. Alternatively, the government offers as a fallback position that reversal is unwarranted unless the defendant can prove on the record 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." (Pet. Br. 14).

The government's initial argument insulates fundamental constitutional error from review. Jury impartiality is the bedrock of all of our doctrines of deference to jury verdicts, including the harmless error rule itself. The trial court's refusal to excuse a juror who avowedly would favor the prosecution and assume the defendant's guilt undermines this foundation and with it public confidence in the criminal law. It is a "structural" error which "is intrinsically harmful and that warrants reversal without any inquiry into case-specific prejudice." (Pet. Br. 29). In hindsight, Martinez-Salazar would have been entitled to reversal if he had elected not to strike Gilbert and had appealed the district court's ruling. The result should be no different here, when Martinez-Salazar had to sacrifice a peremptory challenge to remove the juror in an effort to minimize (but not eliminate) the harm. Adoption of the state law rule discussed in *Ross* would mean that a trial judge could make as many errors in qualifying jurors as the defendant had challenges without any recourse. Deeming the use of a peremptory challenge against a biased juror per se harmless error would also eliminate or impair appellate review of challenges for cause, even if the use of a peremptory strike is not legally required, because defense counsel will have no choice but to strike the juror using a peremptory challenge as a practical matter.

The government's fallback position rightly focuses on the impact of the error on the composition of the jury rather than on the outcome of the trial, but it erroneously shifts the burden of proof to the defense. Once error has been shown, the government must prove the error did not affect substantial rights. *O'Neal v. McAninch*, 513 U.S. 432, 437-38 (1995); *United States v. Olano*, 507 U.S. 725, 741 (1993). Peremptory challenges are a historic part of our jury trial process, and remain a statutory right of the defendant under the Federal Rules of Criminal Procedure.

When a defendant does not use all of his or her available peremptory challenges, the trial court's error has no effect and the defendant loses nothing.[9] But when, as in this case, the defense exhausts the allotted peremptory challenges and even asks for more, the government cannot show that the error had no effect on the composition of the jury. The government misuses procedural default concepts to penalize Martinez-Salazar for failing to make a record of prejudice at trial. Procedural default applies to the failure to object to legal error, not the failure to point out its harm, because there is no procedural rule requiring the defendant to proffer evidence of a harm once he has duly objected to the judge's ruling.

ARGUMENT

I. FEDERAL LAW AT THE TIME OF RESPONDENT'S TRIAL DID NOT REQUIRE A DEFENDANT TO STRIKE A JUROR WHO SHOULD HAVE BEEN REMOVED FOR CAUSE; ADOPTION OF SUCH A RULE IS A LEGISLATIVE FUNCTION AND IS UNSOUND POLICY.

The government initially seeks shelter under *Ross v. Oklahoma*, 487 U.S. 81 (1988), which held that a defendant who used a peremptory challenge to strike a juror who should have been excused for cause, as he was required to do under state law, was not deprived of rights protected by

[9] *Compare United States v. Torres*, 960 F.2d 226, 228 (1st Cir. 1992) (Breyer, C.J.) (no reversible error as defendant did not exhaust challenges) *with United States v. Cambara*, 902 F.2d 144, 147-48 (1st Cir. 1990) (per se reversal required if defendant exhausts peremptory challenges).

the Fifth or Sixth Amendments.[10] *Ross* followed earlier decisions recognizing that the defendant's statutory right to

[10] There is some question whether the error in this case should be characterized as a violation of Martinez-Salazar's Sixth Amendment right to an impartial juror which is not harmless because it caused the loss of a peremptory challenge, or as an infringement of a statutory or due process right to peremptory challenges. Regardless of how the error is characterized, it affected Martinez-Salazar's substantial right to exercise his peremptory challenges and therefore cannot be disregarded under FED. R. CRIM. P. 52(a). Accordingly, this brief focuses on the harm, rather than on the nature of the error.

Nevertheless, *amicus* submits that the error here is better understood as a Sixth Amendment violation as well as a statutory or due process violation. The district court's error here was to deny Martinez-Salazar's challenge for cause, precipitating his use of a peremptory strike. In *Ross* this Court held that the "statement [in *Gray v. Mississippi* 481 U.S. 648, 665 (1987)] that 'the relevant inquiry is whether the composition of the jury panel as a whole could possibly have been affected by the trial court's error,'" 487 U.S. at 87 (internal citations omitted) was "too sweeping," and limited *Gray* to its context. 487 U.S. at 87-88. The *Ross* Court went on to say that "[s]o 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 that the Sixth Amendment was violated." 487 U.S. at 88. We believe this statement is also "best understood in the context of the facts there involved." 487 U.S. at 87-88 (referring to *Gray* in original). In *Ross*, Oklahoma law required the defendant to use a peremptory to remove a biased juror so long as one was available. In other words, state law gave the defendant a remedy other than an appeal for a Sixth Amendment violation. Because peremptory challenges are not constitutionally required, Oklahoma was entitled to prescribe the conditions for their use; requiring the use of peremptories as a trial-level remedy for trial court error was not unconstitutional, and the defendant's action cured the Sixth Amendment violation.

Ross would go too far, though, if it were read to equate a Sixth Amendment violation with a demonstrably biased jury. Defects in the process of jury selection have been held to violate the Sixth Amendment without proof of actual bias. *Taylor v. Louisiana,* 419 U.S. 522 (1975). Nor is there any principled basis on which to limit *Gray* to *Witherspoon* challenges, as opposed to other erroneous exclusions for cause, even though no biased juror actually sits on the jury. *Cf.*

peremptory challenges is subject to "the limitations placed on the manner of its exercise." *Stilson v. United States*, 250 U.S. 583, 587 (1919) (applying federal statute treating all defendants collectively for purposes of statutory right to exercise peremptory challenges). The decision in *Ross* turned on the existence of an established rule of state law that conditioned the defendant's freedom to use peremptory challenges on the obligation to use them against a juror challenged but not removed for cause. The defendant in *Ross* actually received all that he was entitled to receive under state law. 487 U.S. at 91. Because no such rule exists in federal criminal cases, the government's argument depends upon the adoption of a new rule and its retroactive application to this case.

The right codified in Federal Rule of Criminal Procedure 24 allows the defendant in a criminal case to remove a specified number of prospective jurors for any reason, provided that the defendant does not discriminate on the basis of race or sex. *See* Pet. Br. at 16 ("[a]t 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 purpose of that practice."). A duty to use these challenges to cure trial court errors would place a significant substantive limitation on the right of peremptory challenge, rather than merely establishing a procedure for exercising challenges. *See, e.g., St. Clair v. United States*, 154 U.S. 134 (1894), or *Pointer v. United States*, 151 U.S. 396 (1894). Nor is such a duty an established statutory condition on the right established by Congress, as were the restrictions arising from the rights of co-defendants in *United States v. Marchant*, 25 U.S. 480 (1827), or *Stilson v. United States*.

Batson v. Kentucky, 476 U.S. 79 (1986) (error to peremptorily strike juror on basis of race without regard to whether actual jury was biased).

In arguing for the adoption of a new rule in this case (Pet. Br. 20), the government concedes that federal law does not now contain a requirement like that long recognized in Oklahoma. Congress is, of course, free to accept the government's suggestion and to impose such a limitation on the peremptory challenge right, but it has not done so in the decade since the Court decided *Ross*.[11] It is for the legislative branch through the rules amendment

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[11] The government seeks support for a new rule requiring the use of peremptory challenges against jurors not excused for cause in the "common law heritage of the federal peremptory challenge right" as reflected in a tally of states purportedly following such a rule. *See* Pet. Br. 20-21 n.5 & Appendix B. The state cases cited do not support the proposition that the defendant should be obligated to use peremptory challenges to remove a juror who should have been excused for cause in order to preserve the error for appeal, and several of the cases do not even support the government's more general claim that the loss of peremptory challenges to remove jurors who should have been removed for cause is harmless. *Sams v. United States*, 721 A.2d 945 (D.C. 1998), did not involve the use of a peremptory challenge to remove a juror who should have been struck for cause; the D.C. Court of Appeals has never decided this issue. PDS is counsel for co-appellant Jibreel Reid, whose petition for rehearing en banc is still pending. *State v. Pelletier*, 552 A.2d 805, 810 (Conn. 1989), is not a holding because the court found no error in failing to excuse the juror for cause. *See also Adananus v. State*, 866 S.W.2d 210, 219 (Tex. Crim. App. 1993) (reversible error if defendant exhausts peremptory challenges, asks for more, and can identify a juror who he would have challenged); *State v. Broom*, 533 N.E.2d 682, 695 (Oh. 1988) (error harmless when defendant did not exhaust peremptory challenges); *People v. Samayoa*, 938 P.2d 2, 20 (Cal. 1997) (same). The government also cites a number of states that no longer apply a per se reversal rule, but does so because of this Court's decision in *Ross*, rather than any deep "common law heritage." *See United States v. DiFrisco*, 645 A. 2d 734, 752 (N.J. 1994) (adopting new rule based on *Ross*); *State v. Baker*, 935 P.2d 503, 506 (Utah 1997) (same); *State v. Neuendorf*, 509 N.W.2d 743, 747 (Iowa 1993)(same); *Dawson v. State*, 581 A.2d 1078, 1093 (De. 1990) (explicitly relying on *Ross* for holding). None of the cases cited in the government's Appendix (other than *Ross*) apply "a requirement that the defendant must use a peremptory challenge to 'cure' the trial court's erroneous denial of a for-cause strike." (Pet. Br. 19).

process to impose such a limitation on a statutory right it has created, not for the judiciary in its adjudicative capacity. *Cf. Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 734 (1980)(rulemaking is legislative, not judicial function); *Lonchar v. Thomas*, 517 U.S. 314, 328 (1996) (recognizing "the institutional inappropriateness of amending the Rule, in effect, through an ad hoc judicial exception, rather than through congressional legislation or through the formal rulemaking process."); *Business Guides v. Chromatic Comm. Enterprises*, 498 U.S. 533, 549 (1991)("Even if we were convinced that a subjective bad faith standard would more effectively promote the goals of Rule 11, we would not be free to implement this standard outside the rulemaking process. 'Our task is to apply the text, not to improve on it.'")(citation omitted).[12] Absent such a rule, Martinez-Salazar was harmed when he had to use a peremptory challenge to strike Gilbert, and therefore could not use the strike against another member of the panel.

Adopting a requirement that the defense use its peremptory challenges to remove jurors who should have been excused for cause, but were not, would undermine jury impartiality because it would largely eliminate any appellate scrutiny of for cause challenges. The record in this case illustrates the need for such review. The government objected to, and the district court denied, a challenge to a juror who would avowedly favor the prosecution and assume the defendant's guilt. The

[12] Even if such a change could be accomplished through adjudication, as opposed to quasi-legislative rulemaking subject to the approval of Congress, it would be fundamentally unfair to apply such a change retroactively to Martinez-Salazar. *See United States v. Foster*, 783 F.2d 1082, 1086 (D.C. Cir. 1985) (en banc)(Scalia, J.) (holding that change in interpretation of Fed. R. Crim. P. 29 to treat the presentation of evidence by defendant as waiver of motion for judgment of acquittal based on prosecution case would be applied prospectively only).

government's proposal would leave other serious abuses involving a large number of prospective jurors unremedied as well. A judge who applied the wrong legal standard might deny challenges against several jurors based on a response to the same question. The rule the government proposes could strip the defense of peremptory challenges, tipping the jury selection process markedly in favor of the prosecution.[13] In a federal death penalty case, for example, a misapplication of the *Witherspoon* standard could significantly affect the impartiality of the jury venire. Furthermore, the unavailability of appellate review of juror disqualification rulings would diminish the opportunity to clarify standards for juror disqualification. The standard for appellate review is highly deferential, *Patton v. Yount*, 467 U.S. 1025 (1983), and for that very reason requires the periodic refinement of general principles of juror impartiality and their application to new situations by appellate courts to guide district court judges. *Cf. Ornelas v. United States*, 517 U.S. 690, 697 (1996) ("Independent review is therefore necessary if appellate courts are to maintain control of and to clarify the legal principles."); *Miller v. Fenton*, 474 U.S. 104, 114 (1985) (requiring de novo review of voluntariness determination in part to assure appellate court control over and articulation of standard).

[13] Even assuming that intentional abuses could be challenged as a due process violation, *see Ross*, 487 U.S. at 91 n.5 (reserving question), it is hard to see why it is desirable to adopt a rule that would invite such abuses and would impose the difficult fact-finding burden an inquiry into the judge's intent entailed in such a due process challenge.

II. INFRINGEMENT OF THE RIGHT TO PEREMPTORY CHALLENGES AFFECTS A "SUBSTANTIAL" RIGHT UNDER FED R. CRIM. P. 52(a).

"The right to challenge a given number of jurors without showing cause is one of the most important of the rights secured to the accused." *Pointer v. United States*, 151 U.S. 396, 408 (1894).[14] Rule 52(a) requires federal courts to disregard errors that do "not affect substantial rights." In 1965 this Court wrote that "denial or impairment of the right [to peremptory challenges was] reversible error without a showing of prejudice." *Swain v. Alabama*, 380 U.S. 202, 219 (1965).[15] The fact that this remained a truism when *Swain* was decided, nearly two decades after the adoption of Federal Rule 52(a), and nearly fifty years after the enactment of the general federal

[14] This is so even if it is a right conferred by Congress, rather than a constitutional right. This case therefore requires the Court consider the effect of a failure to disqualify a juror on a federal statutory right, an issue not presented in *Ross*, or *Spies v. Illinois*, 123 U.S. 131 (1887).

[15] Although the government criticizes *Swain* for relying on outdated cases decided before the adoption of harmless errors statutes, it does not point to any evidence that the adoption of a general harmless error statute was intended to, or did change the practice described in *Swain*. *See, e.g., Harzell v. United States*, 72 F.2d 569, 577 (8th Cir. 1934). The government relies on *United States v. Lane*, 474 U.S. 438, 444-45 (1986), to argue that the language in *Swain* should be discounted because the opinion in *Swain* cited pre-harmless error era decisions. (Pet. Br. 33-34). But whether or not *Swain* is a dispositive holding, the fact that the adoption of harmless error principles had not called the per se reversal rule into question makes it doubtful that the framers of Rule 52(a) would have considered a denial of a peremptory challenge a minor technical error that could be ignored on appeal. The analogy between misjoinder and the denial of a peremptory challenge fails because an error in joinder is a classic kind of technical error that may have no effect on the trial at all, while the denial of a peremptory challenge does affect the composition of the fact-finder.

harmless error statute, is compelling evidence that the framers of the rule considered peremptory challenges a "substantial right," rather than a mere technical error that could be disregarded on appeal.[16]

The government argues that the district court's error was harmless, even though it cost Martinez-Salazar a peremptory challenge, because no actually biased juror served on his jury. The practical consequences of this rule on the appellate review of challenges for cause are no different from the consequences of requiring the defendant to strike the prospective juror in order to preserve the challenge for cause for appeal. Defense counsel at Martinez-Salazar's trial could not rely on the prospect of reversal on appeal, no matter how strongly they may have disagreed with the district judge's ruling. After all, the government tenaciously defended the ruling before the Court of Appeals, although it has not done so before this Court. Had defense counsel not struck Gilbert, Martinez-Salazar risked having that choice held against him on appeal as "evidence" that Gilbert's obvious bias on a cold transcript must have come across differently to the participants in the courtroom.[17] Under the government's standard the defense would be "damned if they do and

[16] The dichotomy in Rule 52(a) between "substantial rights" and mere "technical errors" predated and differs somewhat from the distinction that has evolved more recently in this Court between "structural" constitutional errors and errors that warrant reversal only if they are not harmless beyond a reasonable doubt. *See Neder v. United States*, 119 S.Ct. 1827, 1833 (1999) (distinguishing structural from harmless errors). A right need not be a "structural" constitutional error to be a "substantial right." The deprivation of peremptory challenges is, however, a structural error like other errors that involve the composition of the decisionmaker. *See, e.g., Gomez v. United States*, 490 U.S. 858 (1989).

[17] *Patton v. Yount*, 467 U.S. 1025, 1040 (1983), explained the rationale for deferring to a trial judge's decision not to excuse juror who may appear biased on a cold record.

damned if they don't" strike the juror.[18] The more egregious the trial court's error in refusing to excuse a prospective juror for cause, the more likely a conscientious lawyer will be compelled to strike the juror him or herself. Encouraging lawyers not to strike obviously biased jurors to gamble on an appellate reversal also wastes judicial resources that would not be expended if, upon striking the biased juror, the case would have resulted in a mistrial or an acquittal rather than by a conviction followed by an appeal and retrial.

The government nevertheless equates an effect on a substantial right with an effect on the outcome of the proceeding. (Pet. Br. 27, 30). But this equation is not consistent with the words of the Rule, its prior construction in this Court, or the drafting history of the Rule. Harmlessness statutes and Federal Rule 52(a) arose in response to an era in which courts became "citadels of technicality."[19] But errors affecting the selection and composition of the grand and petit jury were treated as harmful without regard to the outcome of the case even after the adoption of harmless error statutes. *See, e.g.*,

[18] *See United States v. Beasley*, 48 F.3d 262, 265 (7th Cir. 1995) (noting that the defendant used peremptory challenges to remove two of three jurors he challenged for cause and therefore these ruling are not reviewable on appeal, but did not use one of his remaining eight strikes against the only one of the three who actually served on the jury).

[19] For examples of purely theoretical injuries, see *United States v. Montalvo-Murillo*, 495 U.S. 711 (1990) (violation of statute requiring prompt detention hearing did not invalidate present custody, so violation was harmless); *United States v. Morrison*, 449 U.S. 361, 364 (1981) (unsuccessful effort to interfere with attorney-client relationship harmless); *Hill v. United States*, 368 U.S. 424 (1962) (purely formal violation of Rule 32(a)); *United States v. Timmreck*, 441 U.S. 780 (1979) (violation of Rule 11 was purely formal because defendant' sentence was within maximum range discussed in plea proceeding); *Peguero v. United States*, 119 S.Ct. 961 (1999) (failure to notify defendant of appeal was harmless because defendant would not have acted differently if advised).

Crowley v. United States, 194 U.S. 461, 474 (1904) (former harmless error statute relating to indictments "can have no bearing on the present case, for the disqualification of a grand juror is prescribed by statute, and cannot be regarded as a mere defect or imperfection in form; it is a matter of substance which cannot be disregarded without prejudice to the accused."); *Aldridge v. United States*, 283 U.S. 308, 314 (1931) (reversing for refusal to ask question concerning possible racial prejudice during voir dire over dissent by Justice McReynolds asserting that the error was harmless).

As Justice Frankfurter explained, the original federal harmless error statute:

> was intended to prevent matters concerned with the mere etiquette of trials and with the formalities and minutiae of procedure from touching the merits of a verdict. Of a very different order of importance is the right of the accused to insist on a privilege which Congress has given him.

Bruno v. United States 308 U.S. 287, 294 (1939). On this basis, the Court held in *Bruno* that the failure to give an instruction on the defendant's failure to testify, implicitly commanded by an Act of Congress, required reversal without regard to the strength of the evidence in the case. Rule 52(a) "contains the substance" of the statute applied in *Bruno*, Notes of the Advisory Committee, and should be construed consistently with this roughly contemporaneous articulation of the harmless error principle.

The plain meaning of Rule 52(a) contradicts the government position. There are two components to the Rule 52(a) analysis: (1) is there a "substantial" right involved; and (2) is *that right* affected. The careful drafting process that lead to Rule 52(a) also shows that the use of language focused on the substantiality of the right, rather than exclusively on the ultimate outcome, was not inadvertent. *See generally* 6 LESTER B. ORFIELD,

CRIMINAL PROCEDURE UNDER THE FEDERAL RULES § 52:2 AT 442-447 (1967).

The importance of the distinction between an effect on a substantial right and an effect on the outcome is further supported by the Court's decision in *Kotteakos v. United States*, 328 U.S. 750 (1946). Although *Kotteakos* is most often cited for its general description of the harmless error principle, the Court's application of that principle to the case at hand is revealing:

> We have had regard also for the fact that the Court of Appeals painstakingly examined the evidence relating to each of the petitioners; found it convincing to the point of making guilt manifest; could not find substantial harm or unfairness in the all-pervading error or in any particular phase of the trial; and concluded that reversal would be a miscarriage of justice.
>
> With all deference we disagree with that conclusion and with the ruling that the permeating error did not affect 'the substantial rights of the parties.' That right, in each instance, was the right not to be tried *en masse* for the conglomeration of distinct and separate offenses committed by others as shown by this record.
>
> It may be, as the Court of Appeals found, that the evidence concerning each petitioner was so clear that conviction would have been dictated and reversal forbidden if it had been presented in separate trials for each offense or in one more substantially similar to the Berger trial in the number of conspiracies and conspirators involved. But whether so or not is neither our problem nor that of the Court of Appeals in this case.

> That conviction would, or might probably have resulted in a properly conducted trial is not the criterion of § 269. We think it highly probable that the error had a substantial or injurious effect or influence in determining the jury's verdict.

328 U.S. at 775-76. This passage concerns a difference in methodology, not a disagreement about the weight of the evidence. Even if conviction would have been likely if the trial had been properly conducted as the Court of Appeals thought, making the error in that sense "harmless," that was not enough. The inquiry described in *Kotteakos* is, instead, a more nuanced one that better respects the frontier between the jury's role in deciding guilt or innocence on the evidence presented and that of an appellate court considering harm. In essence, the *Kotteakos* standard looks to whether the error would incline or distort the jury's decision-making process in favor of conviction, even if a jury not exposed to the error would have reached the same result. It is a standard that considers the effect of errors on the rights available to the contending parties in our adversary system, rather than one that second guesses the outcome of a hypothetical error free proceeding. This contemporaneous articulation of the harmless error principle is of obvious importance in understanding a rule that was intended to carry forward the substance of the statutes construed in *Kotteakos*.

This Court has declined to require an effect on the outcome for all errors under Rule 52(a). *See United States v. Olano*, 507 U.S. 725, 734-35 (1993) ("in most cases it means that the error must have been prejudicial: It must have affected the outcome of the district court proceeding," but expressly reserving whether "the phrase 'affecting substantial rights' is always synonymous with 'prejudicial.'"); *id.* at 737 ("[a]ssuming arguendo that

certain errors 'affec[t] substantial rights independent of prejudice.'"). Justice Kennedy's concurring opinion stated:

> it is equally evident that this violation [of Rule 24(c)] implicated "substantial rights" within the meaning of Rule 52. I cannot agree with the Court's suggestion in Part III of its opinion that Rule 24(c) errors may be deemed to "affect substantial rights" only when they have a prejudicial impact on a particular defendant. *At least some defects bearing on the jury's deliberative function are subject to reversal regardless of whether prejudice can be shown, not only because it is so difficult to measure their effects on a jury's decision, but also because such defects 'undermin[e] the structural integrity of the criminal tribunal itself."*

501 U.S. at 743-44 (Kennedy, J., concurring) (emphasis added). [20]

The standard for reversal the government proposes in a case in which the district court commits structural constitutional error, and the defendant tries to ameliorate the error by striking the juror using a peremptory challenge, is designedly impossible to satisfy. According to its brief, the district court's error "does not affect the defendant's 'substantial right' unless it affects the outcome of the trial." (Pet. Br. 30). Given the strong policies against invading the jury room,[21] no defendant could ever show that the use of a peremptory challenge against one juror rather than another actually affected the outcome of the trial. This Court has recognized that a different

[20] *See also Neder v. United States*, 119 S.Ct. 1827, 1834 (1999) (noting that the defendant was tried by a "fairly selected jury" and implying that a different standard would apply if the error involved the fairness of jury selection).

[21] *Tanner v. United States*, 483 U.S. 107 (1987).

standard must be applied when "[e]fforts to prove or disprove actual prejudice from the record before us, and guesses whether the outcome of the trial might have been different . . . would be purely speculative." *Riggins v. Nevada*, 504 U.S. 127, 137 (1992); *Waller v. Georgia*, 467 U.S. 39, 4 n.9 (1984); *Vasquez v. Hillery*, 474 U.S. 254, 263-64 (1986) (plurality opinion). Like its proposal to require the use of a peremptory challenge to remove a biased juror who is not excused for cause, the harmlessness standard proposed by the government would effectively insulate the most serious errors in the qualification of the jury panel from review.

The test that should be used to determine whether an error "affects" a right depends upon the context in which the error occurs. For example, an error that deprives a criminal defendant of a statutory right to appeal his conviction requires reversal without a showing that the defendant would have won the appeal. *Rodriquez v. United States*, 395 U.S. 327 (1969). The effect required is an effect on the defendant's exercise of the statutory right to appeal his conviction, not on the outcome of the appeal. Similarly, in *Zafiro v. United States*, 506 U.S. 534 (1993), this Court used the infringement of a "specific trial right," rather than a direct effect on the outcome to measure prejudice from a joint trial with an adversary co-defendant under Fed. R. Crim. P. 14. *See also Peguero v. United States,* 119 S.Ct. 961, 965-66 (O'Connor, J., concurring) (discussing "meaning of prejudice in th[e] context" of a failure to advise the defendant of the right to appeal); *United States v. Mechanik,* 475 U.S. 66, 76-77 (1986)(O'Connor, J., concurring in the judgment).

Peremptory challenges allow either side to remove a juror it believes will not be fair, even if the judge presiding over the trial is not persuaded that the juror should be excused for cause. They serve at least three important functions in a criminal trial. *First*, they allow the parties

to use their greater knowledge of the issues, witnesses and evidence in the case to assess the likelihood that a juror's views will lean in favor of one side or the other. The standard of review for decisions to excuse a juror for cause is highly deferential. Greater scrutiny would be required if the parties did not have the means to remove prospective jurors within the gray areas at the limits of judicial discretion. *Second*, they promote confidence in the outcome because, as Blackstone put it, "how necessary it is, that the prisoner (when put to defend his life) should have a good opinion of his jury." 4 William Blackstone, Commentaries * 353. *Third*, peremptory challenges tend to produce more impartial and representative juries, by allowing the parties to correct for statistical "sampling error" by removing jurors whose viewpoints are not reflective of the community in general.[22] The modern controversy surrounding the discriminatory use of peremptory challenges does not diminish in any way their "substantiality" under the Federal Rules as a matter of law or their practical value to the defendant. A "denial or impairment" by definition "affects" the right to peremptory challenges, without regard to whether the impairment also can be shown to have changed the outcome of the trial.

[22] "Sampling error" is defined as "the chance difference of a statistic from the corresponding population constant of which it is an estimate." WEBSTER'S 3RD NEW INTERNATIONAL DICTIONARY 2008 (1971). In practical terms, it means that proportion of randomly-selected jurors in a given jury venire having a given trait may vary from the proportion of persons having that trait in the population from which the venire is selected. Predilections and opinions that may have a significant influence in jury deliberations may therefore be significantly over or under-represented on a jury through the "luck of the draw." Peremptory challenges tend to offset the inevitable effect of sampling error, as the parties are more likely to strike prospective jurors with unusual viewpoints that may bear on the trial testimony than jurors whose views are typical of the community.

The impact of a ruling depriving the defendant of a peremptory challenge cannot be translated into terms of an effect on the outcome of a trial without invading the jury's province. This court has repeatedly distinguished sufficiency from harmlessness. The fact that a reasonable jury could be satisfied of guilt beyond a reasonable doubt, allowing all inferences in favor of the prosecution, does not mean that a jury would actually draw such inferences, or that it would credit the testimony. An actual or probable effect on the verdict as a result of the denial of a peremptory challenge (or even a challenge for cause) could never be shown without opening the actual jury's deliberations to examination or engaging in a judicial re-weighing of the evidence. Taking away a peremptory strike changes the adversary balance in jury selection, and, unless the defendant does not exhaust his challenges, affects a substantial right. Saying that the denial of peremptory challenges is reversible error only if a biased juror sits on the jury (itself grounds for reversal) is the same as saying that the denial of a peremptory challenge itself never matters. *See United States v. Annigoni*, 96 F.3d 1132, 1150 (9th Cir. 1996) (en banc) (Kozinski, J., dissenting) (either "the error is always harmless or it is never harmless. There is no practical middle ground."). Infringement of the defendant's use of peremptory challenges therefore must be "subject to reversal regardless of whether prejudice can be shown, not only because it is so difficult to measure their effects on a jury's decision, but also because such defects 'undermin[e] the structural integrity of the criminal tribunal itself.'" *United States v. Olano*, at 743-44 (Kennedy, J., concurring).

III. THE GOVERNMENT CANNOT SHOW THE ERROR DID NOT AFFECT SUBSTANTIAL RIGHTS.

The government's fallback position is that Martinez-Salazar failed to make a sufficient record at trial to show that the district court's error affected the composition of his jury. This argument elides the important difference between review for harmless error and review for plain error under Rule 52. The short answer to this portion of the government's brief is that under Rule 52(a) it is the prosecution's burden to show that an error should be disregarded because it did not affect a substantial right, not the defendant's burden to prove prejudice. Although the government faults Martinez-Salazar because he did not proffer to the district court precisely how he would have used his remaining peremptory challenge if he had not been forced to use it to remove juror Gilbert (Pet. Br. 38), he committed no procedural default because he had no duty to make such a proffer. Moreover, the record as a whole shows that Martinez-Salazar would have used the challenge had it been available.

The burden is on the prosecution to show the absence of any effect on a substantial right. *O'Neal v. McAninch*, 313 U.S. 432, 437-38 (1995); *United States v. Olano*, 507 U.S. 725, 741 (1993); *Kotteakos v. United States*, 328 U.S. 750, 764-65 (1946).. *See* Pet. Br. 30 n.10 ("The government carries the burden to show harmlessness if a proper objection is made in the district court."). As the Court recently reiterated in *O'Neal v. McAninch*, "grave doubt" about whether an error had an effect is resolved in favor of the defendant under Rule 52.

For the same reason, Martinez-Salazar committed no procedural default by failing to make a proffer about

how he would have used the peremptory challenge he employed to remove juror Gilbert, because no procedural rule required him to do so. The government urges the adoption of a new requirement, but this Court has never penalized a defendant for failing to abide by a procedural requirement that did not exist at the time of trial. *Ford v. Georgia*, 498 U.S. 411 (1991) (rejecting claim of procedural default under state law based on rule articulated after the defendant's trial). Certainly Martinez-Salazar had no obligation to object to the district court's ruling denying his challenge for cause against Gilbert on the additional ground that he would have to use a peremptory challenge to remove him, as it is clear from the record that this is precisely what the district judge anticipated he would do. Nor would proffering how he would otherwise have used the challenge have helped to persuade the district judge to change his ruling on the challenge for cause. Martinez-Salazar fully preserved his objection to the district court's action when he asked the judge to excuse Gilbert, and the district judge refused. He was not required to do more simply to rebut an anticipated prosecution claim that the error had no effect on his substantial rights.

The record shows, in any event, that the trial court's error did affect the composition of Martinez-Salazar's jury. Absent the peremptory challenge, Gilbert would have been seated on the jury, which the government acknowledges would have been grounds for reversal on appeal. Thus, the government can hardly complain that reversal on this record would hand Martinez-Salazar a windfall. The record shows that he exhausted his challenges, and that he asked for more. The government disapproves of the reason given for requesting additional challenges as a legal matter, but this does not mean that the challenge would not have been used if it had been available as a matter of fact. The most reasonable inference from the record is that the defense would have removed a prospective juror considered

unfavorable, hoping for the added benefit of placing prospective juror Olivas on the jury.[23]

CONCLUSION

The decision below should be affirmed.

Respectfully submitted,

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[23] This Court has never decided whether the non-discriminatory use of a peremptory challenge against a particular member of the venire is unconstitutional because the party was motivated in part by the hope of moving a member of a particular group into position to serve on the jury.