IN THE SUPREME COURT OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. CHARLES ALEX BLACK, Defendant and Appellant.	)	Case No. S206928 Court of Appeal No. A131693 Alameda County Superior Court No. C163946

Appeal from the Superior Court of California, County of Alameda
Honorable Allan D. Hymer, Judge

APPELLANT'S OPENING BRIEF ON THE MERITS

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IN THE SUPREME COURT OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	)	Case No. S206928
	)	
Plaintiff and Respondent,	)	Court of Appeal
	)	No. A131693
	)	
v.	)	Alameda County
	)	Superior Court
	)	No. C163946
CHARLES ALEX BLACK,	)	
	)	
Defendant and Appellant.	)	
	)	
	)	

APPELLANT'S OPENING BRIEF ON THE MERITS

QUESTION PRESENTED

1. Should a conviction be reversed because of the erroneous denial of challenges for cause to prospective jurors when the defendant exhausts his peremptory challenges by removing the jurors, seeks to remove another prospective juror who could not be removed for cause, and is denied additional peremptory challenges, or must the defendant also show that an incompetent or biased juror sat on the jury?

STATEMENT OF THE CASE

By way of an information filed on April 22, 2010, appellant Charles Alex Black was charged with two counts of animal cruelty. (Pen. Code, § 597, subd. (a); 1 CT 92-93.) Appellant exercised his right to a trial by jury.

During voir dire, defense counsel unsuccessfully challenged jurors M.S.P. and A.D. for cause. (2 VDRT 153-154; 3 VDRT 263-265.)[1] Defense counsel then exercised peremptory challenges to remove these same jurors. (2 VDRT 121; 3 VDRT 266.)

Thereafter, during voir dire, defense counsel unsuccessfully challenged juror #8 for cause after learning that in 2010 that juror, a process server, may have attempted to serve appellant or at least someone having the same name with an eviction notice following an altercation with the police. (2 VDRT 215, 223-224.) The juror explained that he was under the impression that the renter was found with a handgun on his person and that he may have been involved with drugs. (3 VDRT 216-218, 220, 222-223.) He therefore requested and received a police escort when he attempted service. (3 VDRT 216-218, see also 3 RT 189-190.) By this point, defense counsel had exhausted the ten peremptory challenges allotted to him by statute. (Code Civ. Proc., § 231; 2 VDRT 121-122; 3 VDRT 172-173, 211-212, 266.)

After his challenge for cause as to juror #8 was denied, defense counsel expressed dissatisfaction with the jury and requested additional peremptory challenges. (3 VDRT 307.) The trial court denied this request. (3 VDRT 307.)

The jury subsequently convicted appellant of both counts. (1 CT 206-208; 6 RT 1025-1027.) He received a four year prison sentence. (1 CT 221, 223, 225, 241.)

On appeal, appellant argued that the trial court erred when it failed to remove M.S.P. and A.D. in response to his counsel's challenges for cause. He did not argue that

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[1] "VDRT" refers to the three volume reporter's transcript of the jury voir dire that took place on December 27-28, 2010.

the trial court erred in failing to remove juror #8, but rather contended that "his right to a fair and impartial jury was violated because the unwarranted use of two peremptory challenges to remove the other prospective jurors left him unable to use a peremptory challenge to remove" that juror. (Slip Opn., p. 4.)

Respondent elected not to defend the trial court's decision to deny the challenges for cause as to M.S.P. and A.D. (Slip Opn., p. 4.) Instead, respondent argued that any error was necessarily harmless, because appellant's "right to a fair and impartial jury was violated only if his use of peremptory challenges to remove these two jurors left him unable to prevent the seating of an 'incompetent' juror," i.e. one "who should have been excused for cause." (Slip Opn., p. 4.) Because appellant did not argue that the trial court erroneously denied his counsel's challenge for cause as to juror #8, no incompetent juror was foisted upon him, and he could not demonstrate that he was denied a fair and impartial jury. (Slip Opn, pp. 4-5.)

On appeal, the Court of Appeal assumed that error occurred. It nevertheless found that the error was harmless and held that an improper denial of a challenge for cause only leads to prejudice when a defendant is denied a peremptory challenge to remove a sitting juror who should have been removed for cause. (Slip Opn, pp. 8-10.)

On January 30, 2013, this Court granted review on the question presented.

STATEMENT OF THE FACTS[2]

A neighbor whose home had a rear view of appellant's balcony grew alarmed by appellant's abuse of a dog on the same balcony. (Slip Opn., pp. 2-3.) The mistreatment took the form of kicks to the animal as well as strikes by means of a mop handle. (Slip Opn., p. 3.) The neighbor decided to videotape appellant if he ever repeated this conduct. (Slip Opn., p. 3.)

On June 30, 2009, the neighbor was in his bedroom when he heard appellant's voice and squeals from the dog. (Slip Opn., p. 3.) The neighbor picked up his camera and began to film appellant. (Slip Opn., p. 3.) He saw appellant strike the dog across the back with the mop while the animal yelped. (Slip Opn., p. 3.) The video evidence was unclear, and the neighbor's view was obscured by vegetation. (Slip Opn, p. 3.) While the video depicted appellant holding the mop and approaching the dog, it did not establish whether the dog's cries stemmed from appellant's movements. (Slip Opn, p. 3.)

According to appellant, the dog found himself on the balcony after he chewed an electrical cord. (Slip Opn., p. 3.) Appellant went out to the balcony, and the dog began to growl at him. (Slip Opn., p. 3.) He picked up the mop to signal to the animal that he would not tolerate its defiance. (Slip Opn., p. 3.) Appellant claimed that he pushed or touched the dog with the mop and denied raising it over his head and delivering a forceful blow to the animal's body. (Slip Opn., p. 4.)

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[2] Because the factual bases for appellant's convictions have no relevance to the issue before this Court, appellant provides this Court with an abbreviated statement of facts that derives from the Court of Appeal's opinion.

A much better quality video taken in February of 2010 depicts appellant swinging a steel axe over his head and striking the dog. (Slip Opn., p. 4.) Appellant shouted at the dog, and it yelped in the same manner as it had done on the earlier video. (Slip Opn., p. 4.) An examination by a veterinarian confirmed that the blows had wounded the dog. (Slip Opn., p. 4.)

ARGUMENT

I. WHEN COUNSEL MUST EXERCISE A PEREMPTORY CHALLENGE TO EXCLUDE A PROSPECTIVE JUROR WHO SHOULD HAVE BEEN REMOVED FOR CAUSE, PREJUDICE OCCURS WHEN COUNSEL, AFTER EXHAUSTING HIS SUPPLY OF PEREMPTORY CHALLENGES, UNSUCCESSFULLY SEEKS ANOTHER TO REMOVE A MEMBER OF THE JURY WHOM HE BELIEVES IS BIASED

A. INTRODUCTION

California courts have failed to come to a consensus as to when the correction of an erroneous denial of a challenge for cause through his counsel's exercise of a peremptory challenge leads to prejudice for a criminal defendant. Appellant submits that prejudice results in such situations when the erroneous denial of a challenge for cause leaves the defendant without a peremptory challenge to remove a juror whom he believes is biased, and the trial court, aware of this belief, declines to provide him with an additional challenge. Such a rule gives due deference to the importance of peremptory challenges in our judicial system and also comports with fundamental notions of fairness.

B. HISTORICAL BACKGROUND

"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* (1894) 151 U.S. 396, 408.) It "comes from the common law with the trial by jury itself, and has always been held essential to the fairness of trial by jury." (*Lewis v. United States* (1892) 146 U.S. 370, 376.) Commentators going back to Blackstone saw two key reasons to grant a prisoner an allotment of challenges to remove a prospective juror without cause:

"[¶].....(1) as everyone 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..... 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 anyone [sic] 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 shown, 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. [citations omitted.]" (*Lewis v. United States, supra*, 146 U.S. at p. 376.) "Any system for the impaneling of a jury that prevents or embarrasses the full, unrestricted exercise by the accused of that right must be condemned....." (*Pointer v. United States* (1894) 151 U.S. 396, 408.)

More modern cases are in accord. "The jury box is a holy place. To ensure that those who enter are purged of prejudice, both challenges for cause and the full complement of peremptory challenges are crucial. Therefore, as a general rule 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. [citations omitted.] At stake is the party's right guaranteed by the Sixth Amendment to an impartial jury; the principal way this right is implemented is through the system of challenges exercised during the voir dire of prospective jurors." (*United*

States v. Nell (5th Cir. 1976) 526 F.2d 1223, 1229, but see *Ross v. Oklahoma* (1988) 487 U.S. 81, 88.)

California courts also recognize that any infringement on a criminal defendant's ability to exercise his peremptory challenges places into question the impartiality of the jury designated to determine his culpability. "Of the many rights guaranteed to a defendant in a criminal case by the Constitution and the law, none is so important as that he shall be tried by a fair and impartial jury. A defendant is deprived of substantial rights if he has been tried and convicted by a jury which is not fair or impartial. It would be a mockery of justice to submit a cause to an unfair or partial jury. The denial of the right of trial by a fair and impartial jury is, in itself, a miscarriage of justice." (*People v. Diaz* (1951) 105 Cal.App.2d 690, 696.)

The historical importance of the peremptory challenge in our judicial system suggests that the erroneous denials of appellant's challenges for cause denied him a fair trial because he could not make full use of his allotment of peremptory challenges to remove a juror whom his counsel deemed inadequate, but was immune from a challenge for cause.

C. PAST CALIFORNIA PRECEDENT PROVIDES NO USEFUL GUIDANCE ON THE STANDARD OF PREJUDICE IN THOSE INSTANCES WHERE A DEFENDANT MUST CORRECT AN ERRONEOUS DENIAL FOR CAUSE THROUGH THE USE OF A PEREMPTORY CHALLENGE

This Court has never squarely addressed the standard of prejudice when a defendant exercises one or more peremptory challenges to correct a trial court's

erroneous denial of a challenge for cause. Older cases indicate that a "defendant must show that he used a peremptory challenge to remove the juror in question, that he exhausted his peremptory challenges [citation omitted] or can justify his failure to do so [citation omitted], and that he was dissatisfied with the jury as selected. But if he can actually show that his right to an impartial jury was affected because he was deprived of a peremptory challenge which he would have used to excuse a juror who sat on his case, he is entitled to reversal; he does not have to show that the outcome of the case itself would have been different." (*People v. Bittaker* (1989) 48 Cal.3d 1046, 1087-1088.)

This Court later took a different tack and held that a defendant's exercise of a peremptory challenge following the erroneous denial of a challenge for cause only results in prejudice "if the defendant exhausts all peremptory challenges *and an incompetent juror is forced upon him.*" (*People v. Yeoman* (2003) 31 Cal.4th 93, 114, internal quotations omitted.) Then in *People v. Blair* (2005) 36 Cal.4th 686, 742, this Court held that "[t]o establish that the erroneous *inclusion* of a juror violated a defendant's right to a fair and impartial jury, the defendant must show either that a biased juror actually sat on the jury that imposed the death sentence, or that the defendant was deprived of a peremptory challenge that he or she would have used to excuse a juror who in the end participated in deciding the case."

The Court of Appeal, Second Appellate District, Division Four, took a different view and held that the erroneous denial of challenges for cause only leads to a deprivation of the right to an impartial jury if "the trial court erroneously denied a

challenge for cause to a sitting juror." (*People v. Baldwin* (2010) 189 Cal.App.4th 991, 1001.)

As a preliminary point, appellant respectfully submits that to facilitate its analysis this Court may wish to specify what exactly is meant by the phrase "incompetent juror." He refers this Court to the dichotomy proposed by the Indiana Supreme Court: "[a]n 'incompetent' juror is one who is removable for cause, while an 'objectionable' juror is one who is not removable for cause but whom the party wishes to strike." (*Whiting v. State* (Ind. 2012) 969 N.E.2d 24, 30 fn.7.)

With that said, *Baldwin*'s holding that prejudice only takes root if the erroneous denial of a challenge for cause leaves an incompetent juror on the panel as opposed to an objectionable one should not be adopted by this Court. The opinion falters because it fails to recognize that by creating peremptory challenges the Legislature has deemed them essential for the creation of an impartial jury. If no prejudice flows from the inability to use one on an objectionable juror, the whole reason for the existence of such challenges is undermined. Given that peremptory challenges are important safety valves in ensuring an impartial jury (*People v. Johnson* (1989) 47 Cal.3d 1194, 1215), the need to remove an objectionable juror is just as essential as removing an incompetent one. Put another way, if the whole purpose of a peremptory challenge is to remove an objectionable juror, i.e. a juror that a party believes is consciously or unconsciously biased against him (*People v. Jackson* (1992) 10 Cal.App.4th 13, 18), societal confidence in the jury selection process only diminishes if a defendant corrects an erroneous denial of a challenge for cause through the exercise of a peremptory challenge, but then suffers a

conviction by what he deems to be a partially biased jury even though, in the absence of the error, the law would have provided him with a remedy to correct the problem. In short, the *Baldwin* standard leads to bad law, because it is too narrowly focused and does not give due credence to the key role peremptory challenges play in the jury selection process.

As appellant explains below, other state courts have implicitly adopted this analysis and have found prejudice where the correction of an erroneous denial of a challenge for cause leaves a defendant without the opportunity to remove an objectionable juror.

D. IN OTHER JURSIDICTIONS, PREJUDICE FLOWS FROM THE ERRONEOUS DENIAL OF A CHALLENGE FOR CAUSE, WHEN THE DEFENDANT MUST EXERCISE A PEREMPTORY CHALLENGE TO CORRECT THE MISTAKE AND HIS REQUEST FOR ANOTHER FOLLOWING EXHAUSTION OF HIS ALLOTMENT MEETS WITH REJECTION

In other jurisdictions, appellate courts recognize that an erroneous denial of a challenge for cause can result in the de facto deprivation of a peremptory challenge in those instances where a peremptory challenge is exercised to correct the error. As one court put it, such error cannot be harmless because it ultimately abridges a defendant's "right to peremptory challenges by reducing the number of those challenges available to him." (*Hill v. State* (Fla. 1985) 477 So.2d 553, 556; accord *Salgado v. State* (Fla. Dist. Ct.. App. 2002) 829 So.2d 342, 345.) Consequently, other jurisdictions agree with the proposition that "it is reversible error for a trial court to force an accused to use

peremptory challenges on persons who should have been excused for cause, provided the party subsequently exhausts all of his or her peremptory challenges and an additional challenge is sought and denied." (*State v. Esposito* (Conn. 1992) 613 A.2d 242, 250, quoting *Hill v. State, supra*, 477 So.2d at p. 556.) Indeed, under Florida law, "[t]o show reversible error, a defendant must show that all peremptories had been exhausted and that an objectionable juror had to be accepted. [citation omitted.] By this we mean the following. Where a defendant seeks reversal based on a claim that he was wrongfully forced to exhaust his peremptory challenges, he initially must identify a specific juror whom he otherwise would have struck peremptorily. [footnote omitted.] This juror must be an individual who actually sat on the jury and whom the defendant either challenged for cause or attempted to challenge peremptorily or otherwise objected to after his peremptory challenges had been exhausted." (*Trotter v. State* (Fla. 1990) 576 So.2d 691, 693, internal quotations omitted; accord *Whiting v. State, supra*, 969 N.E.2d at p. 30, *Gabbard v. Commonwealth* (Ky. 2009) 297 S.W.3d 844, 854-855 ; *State v. Doleszny* (Vt. 1986) 508 A.2d 693, 694; *Saldano v. State* (Tex. Crim. App. 2007) 232 S.W.3d 77, 91; *Commonwealth v. Fletcher* (Pa. Sup. Ct. 1976) 369 A.2d 307, 309.)

Appellant submits that California should adopt the rule embraced by these jurisdictions, i.e. when a challenge for cause is erroneously denied, prejudice results when the defendant, having exhausted his allotment of peremptory challenges, expresses dissatisfaction with a sitting juror and fails in his attempt to obtain an additional peremptory challenge to ensure that person's removal from the panel. First, such a rule ensures that a trial court's error does not deprive a defendant of the full use of the

peremptory challenges allotted to him by law. Indeed, "experience has shown that one of the most effective means to free the jury box from persons unfit to be there is the exercise of the peremptory challenge. The right may not be abridged or denied. Arbitrary abridgment or denial of the right runs counter to principles vital to the integrity and maintenance of the system of a constitutional right of trial by jury." (*People v. Diaz, supra*, 105 Cal.App.2d at p. 697.)

Secondly, such a rule ensures that counsel will be able to mold the jury to the extent possible so that it is receptive to his side. Thus, for example, if defense counsel seeks to place his client on the stand in order to deny the prosecution's allegations of criminal wrongdoing, and that client has tattoos on his face and a Mohawk hair style, counsel may wish to exclude a more conservative and family oriented citizen from sitting as a juror, despite any professions of impartiality, in the hope that a more unorthodox individual, less constrained by social mores and perhaps more accustomed to body art as well as alternative hair fashions, will take that persons' place and sit in judgment of his client. In this way, counsel can assure himself to the extent possible that the focus will be on the quality of his client's testimony, rather than on the peculiarities of his appearance. But if counsel is denied a peremptory challenge to excuse that person because he needed it to exclude another prospective juror who should have been removed for cause, the error in effect serves to undermine his whole strategy in picking an impartial jury. (See *People v. Wheeler* (1978) 22 Cal.3d 258, 275 [a party will use a peremptory challenge only when he believes that the juror he removes may be consciously or unconsciously biased against him, or that his successor may be less

biased"], disapproved on another point in *Johnson v. California* (2005) 545 U.S. 162, 165.)

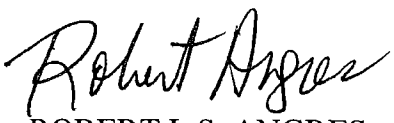
Third, a rule whereby prejudice only appears when the record establishes that the juror sought to be removed was incompetent results in a fundamental unfairness. True, the federal Constitution does not require the reversal of a conviction where a defendant is forced to use a peremptory challenge to strike a biased member of the panel, so long as the jury that heard the case was fair and impartial. (*Ross v. Oklahoma, supra,* 487 U.S. at p. 88.) Still, peremptory challenges are creatures of statute, and the loss of one or more stemming from the correction of an erroneous denial for cause, means that a defendant is denied the ability to use them as the Legislature intended. Thus, as in the case of appellant, the end result is that his counsel was denied the full panoply of peremptory challenges to correct an error that was not of his own making. To penalize a defendant under such circumstances not only fails to comport with basic notions of fairness, but also diminishes the important role that peremptory challenges play in ensuring a fair trial to a criminal defendant. The judgment of the Court of Appeal should therefore be reversed.

CONCLUSION

For the foregoing reasons, appellant respectfully requests that this Court reverse the judgment of the Court of Appeal.

Dated: April 10, 2013

Respectfully submitted,



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CERTIFICATE OF LENGTH

I, Robert L.S. Angres, counsel for appellant Charles Alex Black, certify pursuant to the California Rules of Court that the word count for this document is 3,582 words, excluding the tables, this certificate, and any attachment permitted under rule 8.520(c)(1). This document was prepared in Microsoft Word, and this is the word count generated by the program for this document. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at Fresno, California on April 10, 2013.

Robert Angres

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DECLARATION OF SERVICE

I, the undersigned, declare as follows: I am a citizen of the United States, over the age of 18 years and not a party to the within action; my business address is 4781 E. Gettysburg Avenue, Suite 14, Fresno, CA 93726. On April____, 2013, I served the attached:

APPELLANT'S OPENING BRIEF ON THE MERITS

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